Section 1985(2) Clause One and Its Scope

Brian J. Gaj
SECTION 1985(2) CLAUSE ONE AND ITS SCOPE

INTRODUCTION

Section 1985(2) clause one proscribes conspiracies by two or more persons to deter by force, intimidation, or threat any party or witness from attending or testifying in federal court and conspiracies to injure the party or witness for having attended or testified. The section was enacted in 1871 as part of the Ku Klux Klan Act, which sought to control Klan violence in the post-Civil War South, but it was never in fact used against the post-Civil War Klan and lay

---

1 42 U.S.C. § 1985(2) (1982). Section 1985(2) provides:

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

The language preceding the first semicolon is “clause one.” See Kelly v. Foreman, 384 F. Supp. 1352, 1354 (S.D. Tex. 1974) (suggesting such partition of § 1985(2)). Because clause one does not speak in terms of equal protection of the laws, it protects specific activities vital to the functioning of United States courts without requiring any allegation or proof of invidious discrimination. See id. at 1355. The language after the semicolon is “clause two” which proscribes conspiracies interfering with the administration of justice in state courts. The next subsection provides the remedy: “[T]he party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.” 42 U.S.C. § 1985(3) (1982).

2 Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. The official title of the act was “An Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes.” The acts also have been referred to as the Civil Rights Act of 1871 and the Force Act of 1871.

3 See infra notes 10-19 and accompanying text; see also D. Chalmers, Hooded Americanism 10 (1965) (“[The Klan] threatened, exiled, flogged, mutilated, shot, stabbed, and hanged.”); A. McLaughlin, A Constitutional History of the United States 686 (1935) (“[The Klan] stopped at nothing in its determination to crush the ‘scallawags’ and the ‘carpetbaggers’, and to put the negro ‘in his place.’”).

4 The Ku Klux Klan Act was enacted in 1871, a full year after the height of the Ku Klux Klan movement. By 1869, the Klan had started to lose the support of some of its educated members and those who were officers in the Civil War. The Imperial Wizard ordered the dissolution of the Klan in 1869 because it had fallen into “low and violent hands.” D. Chalmers, supra note 3, at 19. Those who remained in the Klan were disbanded by federal troops under direction of the President pursuant to authority granted
dormant until 1974. In 1971, the Supreme Court interpreted section 1985(3) of the Ku Klux Klan Act to reach conspiracies not involving state action. The broad interpretation of a related section to cover private conspiracies dramatically increased the number of cases brought under section 1985(2) clause one as well.

Concerned that section 1985(3) was being applied to areas beyond those intended by the 1871 Congress, the Supreme Court subsequently narrowed its scope. Because section 1985(2) clause one, like section 1985(3), is broadly worded, it also applies literally to many situations beyond those intended by the 1871 Congress. Lower courts have taken different approaches toward narrowing the scope of section 1985(2) clause one. This Note asserts that the best narrowing approach is to require the presence or threat of physical force or other malevolent acts for a section 1985(2) clause one action. To reach this conclusion, the Note examines the legislative history of the Ku Klux Klan Act, the practical considerations of recent judicial holdings, and the purposes of section 1985(2) clause one.

I LEGISLATIVE HISTORY OF THE KU KLUX KLAN ACT

A. Ku Klux Klan Violence

In 1871, Congress enacted the Ku Klux Klan Act to combat outrageous and violent behavior in the South by an organization known as the Ku Klux Klan. During debate on the bill, Republican members of Congress attributed whippings, murders, and other acts of

by the Ku Klux Klan Act. By 1872, the Klan was greatly subdued. See D. Chalmers, supra note 3, at 18-20; A. McLaughlin, supra note 3, at 689-70.

5 Kelly v. Foreman, 384 F. Supp. 1352 (S.D. Tex. 1974), was the first case brought under § 1985(2) clause one. The Supreme Court's narrow construction of other civil rights statutes led to the dormancy of this section. In United States v. Harris, 106 U.S. 629, 641-42 (1882), for example, the Court declared the criminal counterpart to § 1985(3) unconstitutional.

6 Griffin v. Breckenridge, 403 U.S. 88 (1971) (§ 1985(3) does not require state action but reaches private conspiracies); see infra notes 43-51 and accompanying text.

7 In United Bhd. of Carpenters & Joiners v. Scott, 103 S. Ct. 3352 (1983), the Court held that § 1985(3) "provides no substantial rights itself" and thus requires the independent illegality of the defendant's actions. 103 S. Ct. at 3358 (quoting Great Am. Fed. Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979)). See infra notes 56-69 and accompanying text.

8 See infra notes 131-38 and accompanying text.

9 See Kimble v. D.J. McDuffy, Inc., 648 F.2d 340 (5th Cir.) (en banc), cert. denied, 454 U.S. 1110 (1981) (physical presence in court required); Keating v. Carey, 706 F.2d 377 (2d Cir. 1983) (Meskill, J., dissenting) (evidence of physical force, threats of violence or similarly malevolent acts required); see infra notes 97-110 and accompanying text.

10 See A. McLaughlin, supra note 3, at 688 ("[The Ku Klux Klan Act's] purpose was to subdue the disorder in the south and to protect the freedom from violence and intimidation.").
violence in the South to the Klan.\textsuperscript{11} Although the Democrats denied the extent and character of the lawlessness,\textsuperscript{12} the Republicans insisted that through intimidation and murder the Klan sought political control in the South.\textsuperscript{13} According to the Republicans, the Klan controlled elections by murdering leading Republicans and by intimidating Republican supporters.\textsuperscript{14} The Republicans contended that through such Klan control, the Democrats would reestablish themselves in the South and would overthrow the reconstruction policy, including the recent amendments to the Constitution.\textsuperscript{15}

Emphasizing that none of the perpetrators of the many outrageous crimes had been convicted,\textsuperscript{16} the Republicans charged that state authorities were unable or unwilling to control Klan crimes\textsuperscript{17} and that many Klan members escaped punishment through perjury by witnesses and intimidation of jurors.\textsuperscript{18} On March 23, 1871, Pres-

\textsuperscript{11} See CONG. GLOBE, 42d Cong., 1st Sess. 369, col. 3 (1871) (statement of Rep. Monroe) ("[T]he plain fact remains that members of [the Klan], with its approval, by means of murder, burning, and scourging, have established in many neighborhoods a reign of terror."); id. at 320, col. 1 (statement of Rep. Stoughton) ("The evidence taken before the Senate committee . . . establishes . . . [t]hat this organization has sought to carry out its purposes by murders, whippings, intimidation, and violence against its opponents."). Historians confirm the Republicans' charges of Klan violence and disorder in the post-Civil War South. See D. CHALMERS, supra note 3, at 10-21; A. McLAUGHLIN, supra note 3, at 685-89.

\textsuperscript{12} See CONG. GLOBE, supra note 11, at 330, col. 1 (statement of Rep. Morgan) ("That crimes are committed is true . . . . But the number and character of offenses are willfully exaggerated."); id. app. at 139, col. 3 (statement of Rep. Vaughan) ("And yet have we passed through the oppressive years since 1865, and have had but few, if any, outrages of political significance. Mr. Speaker, my people are peaceable and quiet.").

\textsuperscript{13} See id. at 484, col. 2 (statement of Rep. Wilson) (Klan's purpose is "to get rid of either the State governments or those who hold offices under them"); id. app. at 196, col. 2 (statement of Rep. Snyder) ("object [of the Klan is] the defeat of Republicanism, the overthrow of the whole system of reconstruction, and the ultimate possession of the Government"); see also Comment, A Construction of Section 1985(c) in the Light of its Original Purpose, 46 U. Chi. L. Rev. 402, 408-09 (1979).

\textsuperscript{14} See CONG. GLOBE, supra note 11, at 654, col. 1 (statement of Sen. Osborn) (assassination of Republicans led to election of Democrat in county having 800 person Republican majority; one elected Republican "resigned for fear of assassination should he work for the Republicans in the Legislature"); see also Comment, supra note 13, at 408-10.

\textsuperscript{15} See CONG. GLOBE, supra note 11, app. at 201, col. 1 (statement of Rep. Snyder); id. app. at 195, col. 1 (statement of Rep. Buckley) "[Kukluxism] originates in a fiendish conspiracy to deprive the colored race of the ballot."). See also Comment, supra note 13, at 411.

\textsuperscript{16} See CONG. GLOBE, supra note 11, at 320, col. 1 (statement of Rep. Stoughton) ("That of all the offenders in this order, which has established a reign of terrorism and bloodshed throughout the State not one has yet been convicted.").

\textsuperscript{17} See id. at 321, col. 3 (statement of Rep. Stoughton) ("The State authorities and local courts are unable or unwilling to check the evil or punish the criminals."); id. at 655, col. 3 (statement of Sen. Osborn) ("The State courts, mainly under the influence of this oath [of Klan members to perjure themselves to protect other members], are utterly powerless . . . .").

\textsuperscript{18} See id. at 653, col. 3 (statement of Sen. Osborn) ("What can we do when such
ident Grant asked Congress for legislation giving him additional authority to control "[a] condition of affairs [that] . . . exists in some of the States of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous." Representative Shellabarger of Ohio introduced a bill in response to the President's request.

B. Constitutional Concern About the Original Bill

Shellabarger's bill authorized the President to use the armed forces to suppress insurrection and violence and to protect those rights secured by the Act that the states were unwilling or unable to protect. In addition, the President could suspend the writ of habeas corpus and enforce the laws subject to the rules and articles of war if the unlawful combinations became sufficiently powerful to represent a violent threat to state authority. The bill also provided a private cause of action for deprivation of constitutional rights by any person under the color of state law. Finally, the bill provided for criminal penalties for conspiracies to commit any act violating constitutional rights that would "under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal, [sic] process or resistance of officers in discharge of official duty, arson, or larceny."

Many representatives from both parties opposed the criminal
provisions of the bill. Representative Arthur of Kentucky claimed that the Act "absorbs the entire jurisdiction of the States over their local and domestic affairs" by a "sweeping usurpation of universal criminal jurisdiction in the States." The Act, he claimed, would punish as a felony the lowest grade assault and battery. Furthermore, some representatives felt the Act was an invalid exercise of congressional authority over private conspiracies. Representative Poland of Vermont argued that Congress could pass legislation to punish "offenses against person and property" within the authority of the state only if the state denied someone equal protection of the laws or if the state were prevented from applying equal protection of the laws. Representative Shellabarger denied that the bill reached ordinary crimes. Nonetheless, the bill was amended to meet these constitutional concerns, the amended version providing for a private cause of action in addition to the criminal sanctions.

25 The Democrats uniformly opposed the bill claiming that it would transgress into the sovereignty of the states. "[The bill] overrides the reserved powers of the States. It reaches out and draws within the despotic circle of central power all the domestic, internal, and local institutions . . . of the States." Id. at 365, col. 3 (statement of Rep. Arthur). According to the Democrats, the loss of state sovereignty would contribute to the end of "Southern civilization." See D. CHALMERS, supra note 3, at 19-21. Some Republicans opposed the bill because they believed Congress lacked authority to pass it. These Republicans nevertheless believed that the federal government should intervene to quell the disorder in the South. See CONG. GLOBE, supra note 11, at 485, col. 2 (statement of Rep. Cook) ("I do not believe . . . that Congress has a right to punish an assault and battery when committed by two or more persons within a State"); see also Comment, supra note 13, at 414-17.

26 CONG. GLOBE, supra note 11, at 366, cols. I & 2.

27 Id.

28 See, e.g., id. app. at 313, col. 2 (statement of Rep. Burchard) ("If [the bill] intends and must be construed to give the Federal courts jurisdiction to punish combinations or conspiracies to commit murder, mayhem, assault and battery within a State, I can find in the Constitution no warrant for the exercise of such authority."); see also Comment, supra note 13, at 412-16.


30 Id. at 382, col. 3 (statement of Rep. Shellabarger).

31 Id. at 477-78. It is unclear which power of Congress the representatives believed would be exceeded without the amendment. Id. app. at 220-22 (statement of Sen. Thurman). Because the Act was designed to facilitate enforcement of the fourteenth amendment, the representatives presumably were interpreting that law. But see Griffin v. Breckenridge, 403 U.S. 88, 104-07 (1970) (upholding constitutionality of § 1985(3) under thirteenth amendment and right of interstate travel grounds but failing to consider fourteenth amendment grounds). The Supreme Court summarily upheld the constitutionality of § 1985(2) clause one in Kush v. Rutledge, 460 U.S. 719 (1983), stating that "[n]either proponents nor opponents of the bill had any doubt that the Constitution gave Congress the power to prohibit intimidation of parties, witnesses, and jurors in federal courts." Id. at 727.

32 There was no legislative debate indicating the private cause of action's precise purpose.
The private cause of action, codified at 42 U.S.C. § 1985, proscribes conspiracies that interfere with the administration of justice in federal and state courts, as well as those interfering with private enjoyment of "equal protection of the laws" and "equal privileges and immunities under the laws." Specifically, a claim arises under section 1985(2) clause one when two or more persons conspire to deter by force, intimidation or threat, any party or witness from attending or testifying in federal court. A claim arises under section 1985(3) when two or more persons conspire to deprive any person, or class of persons, of the equal protection of the laws or equal privileges and immunities under the laws. Any person injured or deprived may bring an action against one or more of the conspirators and recover damages caused by the injury or deprivation.

II
JUDICIAL INTERPRETATION

A. Supreme Court: Section 1985(3)

Even though Congress enacted section 1985(2) clause one in 1871, no claims were brought under this section until 1974. Few claims were brought under section 1985(3) until the 1970s, but these claims did reach the Supreme Court. Because of the common legislative history and similar language of the sections, the courts have looked to the Supreme Court interpretations of section 1985(3) for guidance when interpreting section 1985(2). The influ-

---

33 42 U.S.C. § 1985 (1982). In 1874, Congress ordered Secretary of State Fish to prepare the revised statutes of the United States. Secretary Fish reorganized § 2 of the Ku Klux Klan Act into its current three subsections, making minor grammatical changes; substantive meaning of the Act remained unaltered. See Kush v. Rutledge, 460 U.S. at 724 n.6.


36 42 U.S.C. § 1985(3) (1982). The section provides:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws

Id. Section 1985 also proscribes conspiracies that interfere with the official duties of federal officers, and conspiracies that interfere with the right to support candidates in federal elections.


38 Kelly v. Foreman, 384 F. Supp. 1352 (S.D. Tex. 1974), included the first citation of § 1985(2) clause one.
ence of section 1985(3) interpretation on subsequent interpretation of section 1985(2), therefore, makes subsection three an appropriate beginning point for analysis of subsection two.

In 1951, the Supreme Court interpreted section 1985(3) in Collins v. Hardyman.\(^{39}\) Collins involved a nonracially motivated political brawl between two groups of citizens.\(^{40}\) The complaint alleged that the defendants conspired to deprive the plaintiffs of their right to assemble.\(^{41}\) The Supreme Court held, in effect, that section 1985(3) reached only conspiracies under the color of state law and, therefore, did not cover the conspiracy in question.\(^{42}\)

Twenty years later, in Griffin v. Breckenridge,\(^{43}\) the Supreme Court rejected the narrow construction of section 1985(3) announced in Collins and extended section 1985(3) to reach private conspiracies.\(^{44}\) In Griffin, the white defendants encountered the plaintiffs, several black men, traveling on a public highway in Mississippi. They mistook one of the group for a civil rights worker, stopped the car and clubbed the plaintiffs.\(^{45}\) The Court relied on the text of the statute,\(^{46}\) companion provisions,\(^{47}\) and legislative history\(^{48}\) to hold that section 1985(3) was meant to reach private conspiracies.

The Court was reluctant, however, to extend the section to

\(^{39}\) 341 U.S. 651 (1951).

\(^{40}\) Id. at 653-54, 662. The plaintiffs, members of a political club, scheduled a meeting to adopt a resolution opposing the Marshall Plan. Wearing American Legion caps, the defendants broke up the meeting.

\(^{41}\) Id. at 654. The plaintiffs alleged that this conduct violated § 1985(3). See supra note 36 for the text of § 1985(3).

\(^{42}\) 341 U.S. at 661-62. There was no action by any state officials and no claim that defendants acted under color of state law. The Court stated that private discrimination would not constitute inequality before the law unless that discrimination involved some manipulation of the law or its agencies. The Court implied that only a private conspiracy of the magnitude and effect of the post-Civil War South Ku Klux Klan might constitute such a manipulation. Because a private conspiracy of the Klan magnitude is unlikely, the statute effectively required action under color of state law.

\(^{43}\) 403 U.S. 88 (1971).

\(^{44}\) Id. at 95-96, 101.

\(^{45}\) Id. at 89-91.

\(^{46}\) Id. at 96-98. "On their face, the words of the statute fully encompass the conduct of private persons . . . . [S]ince the 'going in disguise' aspect must include private action, it is hard to see how . . . [the section] could be read to require the involvement of state officers." Id. at 96.

\(^{47}\) Id. at 97-99. "The approach of this Court to other Reconstruction civil rights statutes . . . has been to 'accord [them] a sweep as broad as [their] language.' " Id. at 97 (citations omitted). A state action requirement would deprive § 1985(3) of all independent effect from 42 U.S.C. § 1983. Id. at 99.

\(^{48}\) Id. at 99-102. "The explanations [for the 'equal protection of the laws'] language centered entirely on the animus or motivation that would be required, and there was no suggestion whatever that liability would not be imposed for purely private conspiracies." Id. at 100. See supra notes 24-32 and accompanying text for the legislative history reflecting the addition of the above language to § 1985(3).
cover all private conspiracies that interfere with the rights of others. Justice Stewart, writing for the majority, avoided the "constitutional shoals . . . of interpreting § 1985(3) as a general federal tort law . . . by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment." For a private conspiracy to be actionable under section 1985(3), in the majority's view, the conspiracy must be motivated by a racial or class-based invidiously discriminatory animus.

The Griffin Court did not decide whether a conspiracy motivated by invidiously discriminatory animus other than racial bias would be actionable under section 1985(3). The lower courts, however, have extended section 1985(3) to cover many classes of bias in addition to race. The Griffin extension of section 1985(3) to cover private conspiracies and the extension by lower courts of the classes protected by section 1985(3) resulted in a dramatic increase in the number of cases brought under the section.

The Supreme Court subsequently narrowed section 1985(3). First, in Great American Federal Savings & Loan Association v. Novotny, the Court held that section 1985(3) itself confers no substantive rights; it merely offers a remedy for violation of the rights it designates. The Court went on to hold that plaintiffs may not assert title VII rights under section 1985(3) because to do so would impair the effectiveness of title VII.

---

49 Id. at 101.
50 Id. at 102.
52 See Note, supra note 51, at 642-44, 646-52, 657-65 and cases cited therein.
53 442 U.S. 366 (1979). The association terminated Novotny after he expressed support for equal employment opportunity. Novotny sought relief under § 1985(3), claiming that he was injured and deprived of the equal protection of the laws by a conspiracy motivated by an invidious animus against women.
54 Id. at 372. The textual basis for the Court's holding was the "equal protection of the laws" and "equal privileges and immunities under the laws" language of § 1985(3).
55 Id. at 378. "If a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of these detailed and specific provisions of [title VII] . . . . The plaintiff or defendant might demand a jury trial. The . . . time limitations of Title VII would be grossly altered. . . . [T]he complainant could completely bypass the administrative process . . . ." Id. at 375-76.
In *United Brotherhood of Carpenters and Joiners v. Scott*, the Supreme Court followed the Novotny holding that section 1985(3) itself provides only a remedy for the violation of substantive rights otherwise conferred. In *Scott*, members of local unions drove onto a contractor's construction site, beat the contractor's employees, and destroyed construction equipment because the contractor hired nonunion workers. Plaintiff employees claimed the defendants conspired to deprive them of their first amendment right to associate with their fellow nonunion employees. The Court held that an alleged conspiracy to infringe first amendment rights is not a violation of section 1985(3) unless the state is involved in the conspiracy or the conspiracy's goal is to influence the activity of the state.

From the premise that section 1985(3) is only remedial, the Court concluded that the rights, privileges and immunities that section 1985(3) vindicates must be found elsewhere. In *Scott*, the plaintiffs invoked their first amendment rights. Because state action is required to violate the first amendment, state action is also necessary for a first amendment claim under section 1985(3). Section 1985(3) thus requires independent illegality of the defendant's actions.

Furthermore, in *Scott* the Supreme Court narrowed the classes protected by section 1985(3). The lower courts had both held that section 1985(3) reaches conspiracies against workers who refuse to join a union. The Supreme Court held the section does not reach these conspiracies and intimated that the section reaches only conspiracies motivated by racial bias. The Court first looked to the legislative history supporting the protection of classes on account of political views or activities, but flatly rejected the proposition "that

---

57 Id. at 3358.
58 Id. at 3355.
59 Id. at 3355-56.
60 Id. at 3356-57.
61 Id. at 3358.
62 Id.
63 Id.
64 Scott v. Moore, 461 F. Supp. 224, 230 (E.D. Tex. 1978) ("Plaintiffs . . . are members of a discernible class, to wit: non-union laborers and employers of non-union laborers."), aff'd in part, 680 F.2d 979, 992-95 (5th Cir. 1982), rev'd sub nom. *United Bhd. of Carpenters and Joiners v. Scott*, 103 S. Ct. 3352 (1983). The court of appeals stated, [A]n animus directed against nonunion association is closely akin to animus directed against political association. . . . [T]he position of these nonunion employees . . . is markedly similar to that of the Republicans in the [1871] South. . . . [T]he same hostility toward nonunion employees classifies them as the kind of persons Congress intended the Ku Klux Klan Act to protect.
65 103 S. Ct. at 3360.
the provision was intended to reach conspiracies motivated by bias towards others on account of their economic views, status, or activities."\textsuperscript{66} Such a construction, the Court argued, would extend section 1985(3) into the economic life of the country in a way not intended by the 1871 Congress.\textsuperscript{67} The Court suggested that such "[e]conomic and commercial conflicts . . . are best dealt with by statutes, federal or state, specifically addressed to such problems, as well as by the general law proscribing injuries to persons and property."\textsuperscript{68} The Court noted that Congress could pass a new statute if its interpretation misconstrued the intent of the 1871 Congress.\textsuperscript{69}

With the \textit{Scott} decision, the Supreme Court has come almost full circle in its interpretation of section 1985(3). The Court, in \textit{Collins}, required action under the color of state law.\textsuperscript{70} In \textit{Griffin}, the Court rejected the \textit{Collins} interpretation and extended section 1985(3) to reach private conspiracies motivated by class-based animus.\textsuperscript{71} In \textit{Scott}, the Court curbed the scope of section 1985(3) by requiring independent illegality of the private conspiracy and by limiting the types of classes that meet the class-based animus requirement.\textsuperscript{72}

\section*{B. Supreme Court: Section 1985(2) Clause One}

The \textit{Griffin} opinion fueled a dramatic increase in the number of section 1985(2) cases. The Supreme Court first interpreted section 1985(2) in \textit{Kush v. Rutledge.}\textsuperscript{73} In \textit{Kush}, the sole issue before the Court was whether the section 1985(3) class-based animus requirement outlined in \textit{Griffin} applied to section 1985(2) clause one. Rutledge, a white football player, sued Arizona State University and its officials for incidents that occurred while he was a member of the college football squad. Rutledge claimed, in part, that Arizona State's athletic director, head football coach, and assistant football coach engaged in a conspiracy to intimidate and threaten various potential witnesses in order to prevent them from testifying at Rutledge's lawsuit in federal court.\textsuperscript{74} The district court dismissed the suit on grounds that Rutledge failed to state a claim under section 1985(2) because he did not show that he was a member of an identifiable class.\textsuperscript{75} The court of appeals reversed, concluding that class-

\begin{itemize}
  \item \textsuperscript{66} \textit{Id.}
  \item \textsuperscript{67} \textit{Id.}
  \item \textsuperscript{68} \textit{Id.} at 3361.
  \item \textsuperscript{69} \textit{Id.}
  \item \textsuperscript{70} \textit{See supra} note 39-42 and accompanying text.
  \item \textsuperscript{71} \textit{See supra} notes 43-50 and accompanying text.
  \item \textsuperscript{72} \textit{See supra} notes 56-67 and accompanying text.
  \item \textsuperscript{73} 103 S. Ct. 1483 (1983).
  \item \textsuperscript{74} \textit{Id.} at 1485.
  \item \textsuperscript{75} \textit{Id.} The district court opinion is not published.
\end{itemize}
based animus was not required under section 1985(2) clause one.\textsuperscript{76} The Supreme Court granted certiorari on the issue of statutory construction.\textsuperscript{77}

In \textit{Kush}, the Supreme Court held that Congress did not intend to impose a requirement of class-based animus on persons seeking to prove a violation of their rights under section 1985(2) clause one.\textsuperscript{78} The Court first looked to the statute's language. The statutory provisions relating to the institutions and processes of the federal government did not contain any language requiring that the conspirators act with intent to deprive their victims of the "equal protection of the laws."\textsuperscript{79} Instead, this "equal protection of the laws" language was the textual basis for the class-based animus requirement promulgated in \textit{Griffin}.\textsuperscript{80}

The Court also found support for its holding in the legislative history behind section 1985(3). The "equal protection" language arose in response to objections that the "enormous sweep of the original language" vastly extended federal authority and displaced state control over private conduct.\textsuperscript{81} This legislative background, the Court argued, did not apply to section 1985(2) clause one because there was no doubt that the Constitution gave Congress the power to prohibit intimidation of parties, witnesses, and jurors in federal courts.\textsuperscript{82} The Court concluded that "[p]rotection of the processes of the federal courts was an essential component of Congress' solution to disorder and anarchy in the southern States."\textsuperscript{83}

C. Lower Courts: Section 1985(2) Clause One

The Supreme Court in \textit{Kush} answered only the narrow question of whether a section 1985(2) clause one action requires a showing of class-based animus. The Court did not otherwise discuss the scope of section 1985(2) clause one. The lower courts have taken three approaches in narrowing the scope of section 1985(2) clause one.

\textsuperscript{76} Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1354-55 (9th Cir. 1981) ("[W]e are guided by the plain language of the first part of section 1985(2) and the legislative history which indicates clearly that the constitutional concerns that led to restricting the second [clause] of section 1985(2) [and § 1985(3)] to deprivations of equal protection of the laws were not applicable to [the first clause of § 1985(2)]."), aff'd, 460 U.S. 719 (1983).

\textsuperscript{77} 458 U.S. 1120 (1982).

\textsuperscript{78} \textit{Id.} at 1485.

\textsuperscript{79} See \textit{supra} note 1 for the text of the section. The provisions relating to the institutions and processes of the federal government were § 1985(1), § 1985(2) clause 1, and § 1985(3) clause 2. 103 S. Ct. at 1487.

\textsuperscript{80} See \textit{supra} notes 46-48 and accompanying text. The "equal protection of the laws language" relates to § 1985(2) clause 2 and § 1985(3) clause 1. 103 S. Ct. at 1487.

\textsuperscript{81} See \textit{supra} notes 24-32 and accompanying text.

\textsuperscript{82} 103 S. Ct. at 1488.

\textsuperscript{83} \textit{Id.}
First, the courts have required a connection between the proscribed activities and a specific federal proceeding and a connection between the conspiratorial conduct and the witness, party, or juror. Second, the Fifth Circuit in *Kimble v. D.J. McDuffy, Inc.* held that the retaliation part of clause one requires actual physical presence in the courtroom. Finally, courts have held that the section requires evidence of physical force, threats of violence or similarly malevolent acts. The courts have required a nexus between the conspiracy and a court proceeding. In *In re Jackson Lockdown/MCO Cases,* the district court dismissed the plaintiff's section 1985(2) claim for failing "to allege a specific state or federal proceeding related to the alleged conspiracy." In *Jackson,* the plaintiff, an inmate in a state penitentiary, alleged a violation of section 1985(2) clause one arising from a prison lockdown and rioting following the lockdown. Specifically, the plaintiff claimed that the defendants' lockdown was "for the purpose of punishing plaintiff and obstructing and hindering his suing the state." The court held that the plaintiff failed to show a
nexus between the alleged conspiracy and a court proceeding. The plaintiff’s allegations that he had “... used both administrative and judicial forums’ and that in some of these actions ‘the defendants were parties or otherwise involved’... fail[ed] to state the requisite nexus.” Likewise, if the connection between the conspiratorial conduct and the parties or witnesses is too tenuous or remote, the section 1985(2) clause one claim will be dismissed.

The Fifth Circuit in Kimble v. D.J. McDuffy, Inc. focused on the “attended or testified” requirement in the retaliation part of section 1985(2) clause one. The plaintiff sued D.J. McDuffy and other employers who belonged to the Industrial Foundation of the South, for conspiring to deny him and others employment because they had filed personal injury suits or workers’ compensation claims against employers in the oil drilling industry. The Industrial Foundation of the South, a trade association, collects and distributes to member employers the names of those employees who have filed work-related personal injury claims. Shortly after joining the trade association, D.J. McDuffy fired Kimble. Kimble, unsuccessful in obtaining new employment in the industry, filed suit alleging that he was fired and blacklisted because he had sued two former employers for job related injuries. Kimble charged that the employers had violated section 1985(2) by retaliating against him for pursuing his rightful remedies.

The district court dismissed Kimble’s section 1985(2) clause one claim because the filing of lawsuits or workers’ compensation claims did not constitute attending or testifying in court as required by the statute. The Fifth Circuit initially reversed, holding that for purposes of section 1985(2) a person is deemed to have attended court from the time a complaint is filed. The court rejected the narrow reading of the phrase “attended or testified” that required actual physical presence in a courtroom. According to the Court, Congress enacted section 1985(2) clause one “in order to

---

94 Id. at 886.
95 Id. at 886 (quoting plaintiff’s First Amended Complaint ¶ 18).
96 Id. at 886.
98 The Industrial Foundation of the South is a nonprofit corporation organized to assist members in hiring personnel. 648 F.2d at 342.
99 Id.
100 Id. at 342-43.
101 Id.
102 Id. at 343 nn.2 & 4.
SECTION 1985(2) AND ITS SCOPE

protect the sanctity of federal court proceedings and prevent miscarriages of justice.”

The court concluded that “Congress undoubtedly intended to protect the whole course of justice” beginning with the moment a party files.

The Fifth Circuit reheard the case en banc, vacated its earlier opinion, and affirmed the district court’s holding that the filing of lawsuits or workers’ compensation claims did not fulfill the statute’s attending or testifying requirement. The court supported its conclusion by examining the plain meaning of the word “attend,” which means “to be present at,” and the legislative history of section 1985(2). According to the court, passage of the Ku Klux Klan Act was motivated by a desire to prevent and punish acts of terror and intimidation in the post-Civil War South. The court concluded that in light of the acts of violence that threatened the sanctity of the federal courts, Congress intended section 1985(2) clause one to protect those parties who were physically present to attend or testify in a federal court. The court added that section 1985(2) clause one was not intended to create a federal tort remedy for economic retaliation against those who pursue work-related injury claims.

Other courts have used the “force, intimidation, or threat” language of the statute to limit section 1985(2) clause one. Justice Meskill forcefully stated this position in his dissent in *Keating v. Carey*. In that case Keating alleged that the defendants dismissed him from his government job because of his affiliations with the Re-

105 Id.
106 Id.
107 648 F.2d at 342.
108 Id.
109 Id. at 348 (“[Section 1985(2) clause one] was intended to protect against direct violations of a party or witness’s right to attend or testify in federal court.”).
110 Id.
111 See, e.g., *Williams v. St. Joseph Hosp.*, 629 F.2d 448, 451 (7th Cir. 1980) (alleged conspiracy among doctors to withhold services to any person who instituted malpractice suit dismissed because no force, intimidation or threat shown); *Brown v. Chaffee*, 612 F.2d 497, 502 (10th Cir. 1979) (plaintiff claimed he was “intimidated” from testifying freely and fully because the content of his testimony was determined by his attorney’s questions,” court found no cause of action because plaintiff was not deterred directly from testifying); *Toteff v. Village of Oxford*, 562 F. Supp. 989, 998-99 (E.D. Mich. 1983) (no § 1985(2) claim because plaintiff’s failure to attend not due to “force, intimidation or threat” but to lack of notice). But see *McCord v. Bailey*, 636 F.2d 606, 614 (D.C. Cir. 1980) (allegation that own former attorney conspired to dissuade plaintiff from testifying in his own behalf remanded on issue of intimidation because claim not “frivolous”); *Hoopes v. Nacrelli*, 512 F. Supp. 363, 368 (E.D. Pa. 1981) (if city council’s and mayor’s requests for information about pending federal investigation, threats of sanctions for refusing to answer, and suggestions plaintiff was not performing his job as police chief were intended to deter plaintiff from testifying at trial, then § 1985(2) violated).
112 706 F.2d 377, 392 (2d Cir. 1983) (Meskill, J., dissenting).
publican party.\textsuperscript{113} He also claimed that the defendants, by threatening to trump up charges against him, conspired to deter him from bringing suit in federal court to contest his termination.\textsuperscript{114} The majority remanded on the issue of "whether the defendants' conduct constitutes the use of 'force, threat or intimidation' within the meaning of the statute."\textsuperscript{115} In his dissent, however, Justice Meskill argued that the section 1985(2) cause of action should be dismissed because "a veiled threat of political recrimination against a white New York Republican in the 1970s [is not] sufficient to satisfy the 'force, intimidation or threat' component of section 1985(2)."\textsuperscript{116} Meskill concluded that a cause of action under section 1985(2) clause one should "require evidence of physical force, threats of violence or similarly malevolent acts."\textsuperscript{117} He asserted that "the limited purpose and historical origin of this statute" justified this evidentiary requirement.\textsuperscript{118} According to Meskill, the statute's primary purpose was to protect "those citizens who were being victimized by brutal and senseless acts of violence during the Reconstruction Era."\textsuperscript{119} A mere threat of political recrimination is qualitatively different from the acts of violence that Congress intended the statute to reach.\textsuperscript{120}

III

ANALYSIS OF THE SUPREME COURT OPINIONS

Section 1985(2) clause one lay dormant for over 100 years. The Supreme Court's narrow construction of other civil rights statutes probably led to this dormancy.\textsuperscript{121} In the 1960s, however, the Supreme Court's attitude toward interpretation of the civil rights statutes broadened significantly. The statutes were given a sweep as

\textsuperscript{113} Id. at 379.
\textsuperscript{114} Id. at 380.
\textsuperscript{115} Id. at 386 n.13 ("We must leave it to the district court to decide what sorts of threatening or coercive acts the plaintiff may prove and whether such acts are prohibited by the statute, in light of its history and purpose.").
\textsuperscript{116} Id. at 392 (Meskill, J., dissenting).
\textsuperscript{117} Id.
\textsuperscript{118} Id. Meskill cited DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 333 (9th Cir. 1979), which states: "[W]e may not uproot § 1985(3) from the principle underlying its adoption: the Governmental determination that some groups require and warrant special federal assistance in protecting their civil rights." Contra Keating v. Carey, 706 F.2d 377, 385-86 (2d Cir. 1983) ("[N]othing in the legislative history suggests that Congress was interested in protecting the federal judicial process only from those assaults motivated by discriminatory animus.").
\textsuperscript{119} 706 F.2d at 392.
\textsuperscript{120} Id.
\textsuperscript{121} See, e.g., United States v. Harris, 106 U.S. 629, 641-42 (1882) (criminal counterpart to § 1985(3) declared unconstitutional); Collins v. Hardyman, 341 U.S. 651 (1951) (§ 1985(3) requires action under color of state law).
broad as their language.\textsuperscript{122}

In \textit{Griffin v. Breckenridge}, the Court rejected its earlier construction that section 1985(3) reached only conspiracies under color of state law, extending it to reach private conspiracies.\textsuperscript{123} The \textit{Griffin} facts presented a compelling case for the extension of section 1985(3). The defendants’ attack upon persons whom they mistakenly believed to be black civil rights workers was similar to the violent acts of the post-Civil War Ku Klux Klan.\textsuperscript{124} Concerned about extending section 1985(3) too far, however, the Court expressed its reluctance to create a general federal tort law without explicit authority from Congress. Consequently, the Court limited section 1985(3) to conspiracies motivated by class-based animus.\textsuperscript{125}

Worried that the \textit{Griffin} Court’s interpretation of section 1985(3) went beyond the intentions of the 1871 Congress and that it might create a general federal tort law, the Supreme Court further narrowed section 1985(3).\textsuperscript{126} In \textit{United Brotherhood of Carpenters and Joiners v. Scott},\textsuperscript{127} the Supreme Court limited the classes protected by section 1985(3) in order to prevent the use of section 1985(3) in economic or commercial contexts.\textsuperscript{128} Economic or commercial conflicts, the Court stated, could be dealt with by specific federal or state statutes or by the general law proscribing injuries to persons and property.\textsuperscript{129}

The \textit{Griffin} holding that section 1985(3) reached private conspiracies provided the impetus behind the current interpretation of section 1985(2) clause one. Additionally, like section 1985(3), the broad language of section 1985(2) could be interpreted to create a federal tort law. The limitation in \textit{Griffin} preventing section 1985(3) from becoming a general federal tort law does not apply to section 1985(2) clause one. In \textit{Kush v. Rutledge}, the Supreme Court held that Congress did not intend to impose a requirement of class-based animus on persons seeking to prove a violation of their rights under section 1985(2) clause one.\textsuperscript{130} As such, the section 1985(3) limita-

\textsuperscript{122} See \textit{Griffin v. Breckenridge}, 403 U.S. 88, 97 (1971) ("The approach of this Court to other Reconstruction civil rights statutes in the years since \textit{Collins} has been to 'accord [them] a sweep as a broad as [their] language.'") (quoting United States v. Price, 383 U.S. 787, 801 (1965)).

\textsuperscript{123} For an analysis of \textit{Griffin}, see supra notes 43-51 and accompanying text.

\textsuperscript{124} See supra notes 44-45 and accompanying text.

\textsuperscript{125} See supra notes 49-50 and accompanying text.

\textsuperscript{126} The subsequent narrowing of § 1985(3), however, may not merely reflect attempts to limit the parameters of the \textit{Griffin} decision but may indicate a conservative shift in the Court’s attitude toward the civil rights statutes.

\textsuperscript{127} 103 S. Ct. 3352 (1983).

\textsuperscript{128} See supra notes 51-69 and accompanying text.

\textsuperscript{129} 103 S. Ct. at 3361.

\textsuperscript{130} See supra notes 73-83 and accompanying text.
tions cannot be used to narrow the scope of section 1985(2) clause one. Because the Court in Kush faced only the issue of whether the class-based animus requirement of section 1985(3) applied and did not otherwise interpret section 1985(2), the lower courts are still faced with the task of narrowing the scope of the section.

IV
FACTORS TO CONSIDER IN INTERPRETING SECTION 1985(2)
CLAUSE ONE

A. Federal Tort Law

Read broadly, section 1985(2) clause one proscribes any type of retaliation against someone for having attended or testified in federal court. Such a broad reading, however, could significantly affect contractual relations between private parties who often prefer to enter into contracts terminable at will by the other party. If one party were sued by the other, the party sued might try to terminate the contract. A broad reading of section 1985(2) clause one would view this termination as retaliation for attending federal court and, thus, would create a new substantive right. A court should be wary of creating such a right, however, because it could undermine significantly the value of contracts, particularly employment contracts.131

B. Legislative History

Notwithstanding the propriety of this new substantive right, the legislative history does not support such a broad reading of section 1985(2) clause one. Section 1985(2) clause one was enacted as part of the post-Civil War Ku Klux Klan Act.132 The legislative history fails to indicate that the 1871 Congress intended the act to address social, commercial, or economic influences; the act was aimed solely at protecting society from the Klan’s violence.133

The Ku Klux Klan Act also addressed the proper degree of federal intervention in local affairs of the states.134 Many representatives claimed that the original version of the act would usurp state

---

131 For example, an employer should be able to dismiss a disloyal employee. In addition, future interaction between the employee and employer will be strained because it would be difficult for the employer to work with the employee without impairing its ability to defend itself in an action brought by the employee. The personal relationship between the employer and employee requires a substantial degree of mutual trust to enhance an open exchange of information and ideas. A broad interpretation of § 1985(2) clause one prevents the employer from terminating its employee in accordance with their contract.

132 See supra notes 10-20 and accompanying text.

133 See supra note 10.

134 See supra notes 21-32 and accompanying text.
jurisdiction over local concerns.135 Other representatives felt that Congress possessed no constitutional power to punish section 1985(3) private conspiracies.136 These constitutional concerns did not apply to section 1985(2) clause one. Nonetheless, the legislative history shows Congress favored preserving state autonomy in local affairs.137 The extension of section 1985(2) clause one to reach private conspiracies in social, economic or commercial contexts, especially when the conspiracies are not prohibited by state law, is inconsistent with Congress’s desire to limit intervention in the states’ local affairs.138

C. Practical Considerations

Practical considerations also shape the scope of section 1985(2) clause one. A broad construction would increase the workload of the federal courts. First, many more suits would be filed under a more broadly construed section 1985(2) clause one. If section 1985(2) clause one creates substantive federal rights, these rights would be available only to parties suing in federal court,139 thus creating an incentive to sue in federal court. Second, pendent state claims would increase the federal court workload.140 Although state claims are more appropriately handled by state courts,141 many

---

135 See supra notes 26-27 and accompanying text.
136 See supra notes 28-31 and accompanying text.
137 See supra notes 25-31 and accompanying text.
138 The Ku Klux Klan Act contained criminal provisions in addition to the private cause of action that are not codified at 42 U.S.C. § 1985 (1982). The criminal provisions contain the same language as the private causes of action. It would be hard to attribute to the 1871 Congress an intention to create criminal penalties for economic or social pressures.

Recent legislation suggests a narrower reading by later Congresses. See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified at 18 U.S.C.A. § 1513 (1984)). In that Act, anyone who “causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for . . . any testimony given” commits a crime. The legislation limits this retaliation to bodily injury and damages to tangible property, see id., an equivalent standard to the one suggested by this Note for § 1985(2). Congress also authorized a civil action to restrain harassment of a victim or witness, but did not create a private cause of action for damages. See 18 U.S.C.A. § 1514 (1984).

139 Section 1985(2) clause 2 governs the judicial administration in state courts. This section contains “equal protection of the laws” language, thereby requiring class-based animus. See 19 U.S.C. § 1985(2) (1982). Thus, plaintiffs who are not among an identifiable class must sue in federal court to obtain relief under § 1985(2).

140 Pendent jurisdiction allows a federal court to hear both a state claim for which no independent federal jurisdiction exists and a recognized federal claim between the same parties, provided that both claims “derive from a common nucleus of operative fact” and are such that a plaintiff “would ordinarily be expected to try them all in one judicial proceeding.” See United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

141 State courts have greater expertise and familiarity with state law. Also, state sovereignty favors state courts handling state claims. As such, federal courts traditionally
plaintiffs prefer to bring state claims in federal court.\footnote{142}{Plaintiffs often find the federal rules of civil procedure more favorable in a particular cause than corresponding state rules.}

A broad reading of section 1985(2) clause one may also allow plaintiffs to circumvent other federal and state statutes.\footnote{143}{See, e.g., Williams v. St. Joseph Hosp., 629 F.2d 448, 452 (7th Cir. 1980) (antitrust laws, not § 1984, are more plausible basis for action against doctors that conspired to refuse to treat persons instituting malpractice suit).}

A plaintiff could use section 1985(2) clause one to avoid the carefully defined standards of a specific statute. Congress sometimes supplants specific state law when there are countervailing federal interests.\footnote{144}{Congress often enacts statutes to achieve uniformity. In 1871, the states were unwilling or unable to control the lawlessness of the Ku Klux Klan, a state of affairs justifying federal legislation.}

When Congress does not expressly address a problem, a court should not construe a general statute to destroy important state statutory objectives. Similarly, when Congress has addressed a problem, a court should not interfere with the specific statute's solution to the problem.\footnote{145}{See, e.g., United Bhd. of Carpenters and Joiners v. Scott, 103 S. Ct. 3352, 3361 (1983) (rejecting plaintiffs' § 1985 claim stating that such "[e]conomic and commercial conflicts [between union and nonunion workers] are best dealt with by statutes, federal or state, specifically addressed to such problems, as well as by the general law proscribing injuries").}

V
PROPOSED CONSTRUCTIONS OF SECTION 1985(2) CLAUSE ONE

Different approaches have been suggested to narrow section 1985(2) clause one. Any construction, however, must consider the legislative history, practical considerations and purpose of the section. Section 1985(2) clause one must preserve the integrity of the federal judicial process without overburdening the federal courts with cases reaching beyond the intention of the 1871 Congress.

A. The Kimble Approach

In Kimble, the court narrowed section 1985(2) by construing the "attended or testified" language in section 1985(2) clause one narrowly to require actual physical presence in the courtroom.\footnote{146}{See supra notes 97-110 and accompanying text.}

The Kimble approach limits the scope of section 1985(2) clause one, thereby reducing the workload of the federal courts. This approach, however, does not comport with the legislative purpose behind section 1985(2) clause one,\footnote{147}{See supra notes 10-29 and accompanying text.} because it fails to protect an individual...
maimed for filing a suit in federal court. The approach also neglects to address specifically whether section 1985(2) clause one applies to social, commercial or economic influences.\textsuperscript{148} Although \textit{Kimble} requires actual physical presence in the courtroom, such presence does not necessarily imply physical retaliation. Thus, the \textit{Kimble} construction of section 1985(2) clause one should be rejected because it does not protect the entire judicial process and possesses many of the same shortcomings as a broad reading of the section.

B. The \textit{Novotny} Independent Illegality Approach

One note,\textsuperscript{149} while rejecting the narrow holding of \textit{Kimble}, would require the defendant's conduct to be independently illegal.\textsuperscript{150} Under this approach, section 1985(2) clause one provides no substantive rights. Rather, the section merely remedies violations of other rights, privileges and immunities. Thus, on the facts of \textit{Kimble}, a section 1985(2) clause one claim arises only if state law prohibits retaliation against an employee filing personal injury claims.\textsuperscript{151}

The independent illegality requirement avoids many of the problems of a broad reading of section 1985(2) clause one. By definition, the independent illegality construction will not create new substantive rights. The construction thus preserves the policies in other statutes because those statutes' standards must be met to receive relief. The construction will limit the scope of section 1985(2) clause one "to those unambiguous interferences with access to federal courts that the subsection was designed to prevent."\textsuperscript{152}

Although the independent illegality requirement limits the scope of section 1985(2) clause one and thereby avoids the practical problems of a broad reading of the section, the construction nevertheless should be rejected because it extends section 1985(2) clause one beyond its intended reach. The 1871 Congress intended to eradicate Klan violence and vigilantism in the post-Civil War South.\textsuperscript{153} There is nothing in the legislative history indicating that

\textsuperscript{148} See supra notes 130-32 and accompanying text.
\textsuperscript{150} \textit{Id.} at 196-202. The student commentator suggests that the injury be legally cognizable, i.e., actionable other than under a theory that § 1985(2) clause one creates substantive rights. See supra notes 53-55 and accompanying text.
\textsuperscript{152} Note, supra note 149, at 198 (footnote omitted).
\textsuperscript{153} See supra notes 10-20 and accompanying text.
the 1871 Congress intended the section to be used in commercial or economic contexts. The independent illegality approach, however, will extend the section into any context in which state or federal law provides relief for retaliation, including commercial contexts. For instance, a claim will arise under the section if state law prohibits retaliation against an employee filing worker's compensation claims.

Furthermore, there is no authority for applying the independent illegality requirement to section 1985(2) clause one. In Novotny, the Supreme Court held that section 1985(3) requires the independent illegality of the defendant's conduct. The textual basis for this requirement is the "equal protection of the laws" language in section 1985(3). Section 1985(2) clause one does not contain language requiring that the conspirators act with intent to deprive their victims of the "equal protection of the laws." Moreover, the "equal protection" language arose in response to constitutional concerns inapplicable to section 1985(2) clause one. The holding in Kush, that the class-based animus requirement of section 1985(3) does not apply to section 1985(2) clause one, supports the conclusion that the independent illegality requirement of section 1985(3) does not apply to section 1985(2) clause one. Accordingly, the independent illegality construction of section 1985(2) clause one should be rejected.

C. Presence or Threat of Physical Force or Similarly Malevolent Act Requirement

Judge Meskill's opinion in Keating offers the most promising approach to narrowing section 1985(2) clause one. According to that approach, section 1985(1) clause one requires physical force, threats of violence, or similarly malevolent acts. This requirement derives from language in the section requiring deterrence "by force, intimidation or threat." The retaliation part of the clause does not contain this language; however, the section read as a whole

154 See supra notes 10-20 and accompanying text.
155 See supra note 151 and accompanying text.
156 See Kimble v. D.J. McDuffy, Inc., 623 F.2d 1060, 1069 (5th Cir. 1980) (independent illegality requirement not applicable to § 1985(2) clause 1), vacated, 648 F.2d 340 (5th Cir.) (en banc), cert. denied, 454 U.S. 1110 (1981).
157 See supra notes 53-55 and accompanying text.
159 See supra notes 24-32, 48, 78-82 and accompanying text.
160 See supra note 78 and accompanying text.
162 See supra notes 112-20 and accompanying text.
163 See supra notes 1, 112-20 and accompanying text.
indicates that the same requirement should apply. Because the first
part prohibits the use of force or violence to deter a witness's partic-
ipation, it follows that the second part refers only to injury resulting
from force or violence in retaliation for such participation. For ex-
ample, recovery should be allowed under section 1985(2) clause one
if a defendant threatens to or actually does break a witness's leg. If
the defendant, however, threatens to or does trump up charges
against the plaintiff if he testifies, no recovery should be allowed.164

The "presence or threat of physical force or similarly malevo-
lent act" requirement properly accommodates the legislative history
and purposes of section 1985(2) clause one. Section 1985(2) clause
one was enacted as part of the Ku Klux Klan Act to control the
group's violence.165 Nothing in the legislative history indicates that
Congress's sole intent was to rectify Klan violence.166 The proposed
requirement allows recovery in situations contemplated by the 1871
Congress—a party or witness threatened by acts of violence for pur-
suing his rights in federal court. The proposed requirement, how-
ever, will not extend the use of section 1985(2) clause one into
unintended areas.

The proposed construction protects the integrity of the federal
judicial process. The construction provides a remedy for those who
are threatened by violence for using the judicial process. The lan-
guage of section 1985(2) clause one is ill-equipped to distinguish
between proper and improper social, commercial, or economic in-
fluences. Because Congress did not focus on these improper influ-
ences, there is no guidance for a court to draw the line. Congress
should address these concerns. Even if Congress fails to enact new
legislation, however, plaintiffs continue to enjoy access to all the
remedies available before the 1974 revitalization of section 1985(2)
clause one.

The proposed construction does not create a federal cause of
action for retaliation and maintains the right to terminate a contract
at will.167 The proposed construction also avoids the problems
posed by a broad reading of section 1985(2) clause one. The con-
struction will reduce the federal workload by limiting the section's
availability to those cases in which violence impedes the federal judi-
cial process. The construction also reduces the number of state
claims that can be brought in federal court via pendent jurisdiction
by limiting the area of overlap between the section and state law.
The proposed construction thus prevents the overburdening of the

164 This is the fact pattern of Keating.
165 See supra notes 10-29 and accompanying text.
166 See supra note 138.
167 See supra notes 130-32 and accompanying text.
federal courts with cases that reach beyond the intention of the 1871 Congress while it protects the integrity of the federal judicial process.

**Conclusion**

Recent Supreme Court interpretations have narrowed the scope of section 1985(3) to bring the section into harmony with the intent of the 1871 Congress. The same considerations suggest a similar narrowing of section 1985(2) clause one. The lower courts have taken different approaches toward this issue. The best approach takes into account the legislative history, practical considerations, and purposes of section 1985(2) and requires the presence or threat of physical force or similarly malevolent acts.

*Brian J. Gaj*