Masthead Logo

DePaul Law Review

Volume 26
Issue 3 *Spring 1977*

Article 11

Defining the Scope of the Enforcement Clause of the Fourteenth Amendment - Murphy v. Mount Carmel High School

Jeanne Beers

DEFINING THE SCOPE OF THE ENFORCEMENT CLAUSE OF THE FOURTEENTH AMENDMENT— *MURPHY V. MOUNT CARMEL HIGH SCHOOL*

The Fourteenth Amendment[1] guarantees the rights of due process and equal protection, the privileges and immunities of federal citizenship, and those fundamental rights incorporated into the amendment. Traditionally, this amendment applied only when state or local governments participated in a deprivation of these rights. However, some courts have allowed Fourteenth Amendment claims against purely private action by relying on civil and criminal remedies enacted by Congress. This was possible because Congress omitted the state action element[2] in drafting some of these statutes. This omission raises a serious constitutional question: may Congress enforce Fourteenth Amendment guarantees against private conduct?

In 42 U.S.C. §1985(3),[3] Congress provided a civil remedy for depriva-

---

1. U.S. CONST. amend. XIV, §1 provides:

> Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, §5 provides:

> Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

This Note is concerned solely with Sections 1 and 5, which refer to rights of national citizenship and Congress' authority to enforce the amendment.

2. Originating in the Civil Rights Cases, 109 U.S. 3 (1883) the state action concept highlights "the essential dichotomy set forth in the Fourteenth Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory and wrongful,' against which the . . . amendment offers no shield." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974). Nevertheless, seemingly private conduct has been deemed state action, and hence subjected to equal protection, due process and other restrictions incorporated into the amendment under the following circumstances: (a) when private action performs public functions; Marsh v. Alabama, 326 U.S. 501 (1946) (company town could not restrict free speech); (b) where state nexus with private conduct constitutes authorization or encouragement; Shelley v. Kraemer, 334 U.S.1 (1948) (state court enforcement of restrictive racial covenant in property deed). *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 915-96 (9th ed. 1975); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

3. 42 U.S.C. §1985(3) (1970) provides:

> If two or more persons in any State or Territory conspire or go in disguise on

tions of rights by private conspirators. In the most recent Supreme Court interpretation of this statute, *Griffin v. Breckenridge*,[4] the Court held that Congress intended §1985(3) to reach private conduct.[5] In so doing, however, the Court declined to reach the argument that private action that infringes Fourteenth Amendment rights may be attacked under §1985(3). Instead, the Court held that the rights infringed were protected by the Thirteenth Amendment and the federal right to travel interstate.[6] Significantly, these constitutional sources authorize Con-

---

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; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the 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.

4. 403 U.S. 88 (1971).

5. *Id.* at 104. In *Griffin*, a suit was brought by black plaintiffs who were assaulted on a Mississippi highway. Their white assailants were charged with conspiring to deny plaintiffs' civil rights. The court outlined four essential allegations in upholding the plaintiffs' §1985(3) complaint. These included: (1) a conspiracy (2) for the purpose of depriving a person or class of persons of equal protection or equal privileges and immunities; (3) an act in furtherance of the conspiracy which results in (4) an injury to person or property or a deprivation of any right or privilege of federal citizenship. *Id.* at 102-03. The second element above could be satisfied by requiring the plaintiff to show that "racial . . . or . . . otherwise class-based . . . animus . . . motivated the conspiracy." *Id.* at 102. *See, e.g.*, Arnold v. Tiffany, 487 F.2d 216 (9th Cir. 1973) (dismissing a §1985(3) action between two newspaper chains for lack of a class-based animus or deprivation of any civil rights); Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973) (finding a class-based animus between supporters of political candidates); Hughes v. Ranger Fuel Corp., 467 F.2d 6, 10 (4th Cir. 1972) (assault on pollution informers not motivated by a class-based animus); Furumoto v. Lyman, 362 F. Supp. 1267, 1286-87 (N.D. Cal. 1973) (no animus shown against Asian students).

6. "We can only conclude that Congress was wholly within its powers under §2 of the Thirteenth Amendment." *Id.* at 105. "The 'right to pass freely from state to state' has been explicitly recognized as 'among the privileges of national citizenship.' [citation omitted] That right . . . is within the power of Congress to protect by appropriate legislation." *Id.* at 106.

gress to regulate private as well as state activity.[7] The *Griffin* court avoided the question whether Congress could grant statutory protection against private discrimination as a Fourteenth Amendment violation.[8] The Supreme Court seemingly invited lower courts to supply a rationale for allowing or denying the regulation of purely private action through the Fourteenth Amendment.

Since the *Griffin* decision, a number of lower federal courts have examined §1985(3) actions based on the Fourteenth Amendment.[9] The

---

7. The Supreme Court held in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), that the Thirteenth Amendment ban on racial discrimination could be enforced by Congress against private conduct. Last term, in McDonald v. Santa Fe Transp. Co., 96 S. Ct. 2574 (1976), the Court held that statutes enforcing that amendment may prohibit racial discrimination per se, whether white against black, black against white, or in any other invidious form. *Id.* at 2585.

The federal right to travel interstate, at various times, has been based on the Privileges and Immunities and the Commerce Clause. Shapiro v. Thompson, 394 U.S. 618 (1969). In Griffin v. Breckenridge, 403 U.S. 88, 105-06 (1971), it was protected against private interference.

8. "More specifically, the allegations of the complaint have not required consideration of the scope of the power of Congress under §5 of the Fourteenth Amendment." *Id.* at 107.

9. The principal circuit court decisions based on the Fourteenth Amendment claims evaluate the §1985(3) remedy in terms of whether a cause of action against private conduct can be sustained under the enforcement power of that amendment. For cases sustaining such causes of action, see Richardson v. Miller, 446 F.2d 1247, 1249 (3d Cir. 1971) (upholding a First Amendment claim by citing *Griffin*); Action v. Gannon, 450 F.2d 1227, 1235 (8th Cir. 1971) (en banc) (enforcement power could reach private conduct); Weise v. Syracuse Univ., 522 F.2d 397, 408 (2d Cir. 1975) (enforcing a sex discrimination claim through §1985(3), remanding issue whether a Title VII violation could be redressed under §1985(3)); Westberry v. Gilman Paper Co., 507 F.2d 206, 211-12 (5th Cir. 1975), *withdrawn as moot*, 507 F.2d 216 (1975); McLellan v. Mississippi Power & Light Co., 526 F.2d 870 (5th Cir. 1975), *vacated*, 45 U.S.L.W. 2378 (Feb. 15, 1977) (en banc) (sustaining §1985(3) under the commerce and bankruptcy power). *Contra*, Bellamy v. Mason's Stores, Inc., 508 F.2d 504, 507 (4th Cir. 1974); Doski v. M. Goldseker Co., 539 F.2d 1326, 1333-34 (4th Cir. 1976); Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972); Murphy v. Mt. Carmel High School, 543 F.2d 1189 (7th Cir. 1976).

For a sample of district court decisions which have resolved the issue by adopting rationale similar to the circuit decisions cited above, see Commonwealth v. Local Union No. 542, IUOE, 347 F. Supp. 268, 294 (E.D. Pa. 1972) (enforcement power can reach discriminatory private acts); Pendrell v. Chatham College, 370 F. Supp. 494, 501 (W.D. Pa. 1972) (sustaining First Amendment claims against a private employer); Brown v. Villanova Univ., 378 F. Supp. 342 (E.D. Pa. 1974) (sustaining First Amendment claims against private employer); Reichardt v. Payne, 396 F. Supp. 1010, 1017 (N.D. Cal. 1975) (sustaining equal protection claims against insurance company); Stern v. Massachusetts Indem. & Life Ins. Co., 365 F. Supp. 433, 442-43 (E.D. Pa. 1973) (sustaining equal protection claim against insurance company). *Contra*, El Mundo, Inc. v. Puerto Rico Newspaper Guild, Local No. 225, 346 F. Supp. 106, 113-15 (D.P.R. 1972); Dreyer v. Jalet, 349 F. Supp. 452, 464 (S.D. Tex. 1972) (quoting Dombrowski v. Dowling, *supra*, with approval).

majority[10] of these courts enforce equal protection and free speech and association claims against private interference. These courts[11] identify a separate constitutional source of congressional power in the enforcement clause[12] which states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[13] Interpreting the clause broadly, the majority finds that it grants Congress power to expand Fourteenth Amendment protection to private as well as state action. Therefore, these courts hold that when Congress omitted the state action requirement in §1985(3), it defined one circumstance wherein purely private conduct violates the Fourteenth Amendment.

The minority view,[14] on the other hand, is exemplified in several Seventh Circuit decisions which hold that a state action allegation must be present in the plaintiff's §1985(3) complaint if the suit is based on Fourteenth Amendment claims.[15] The Seventh Circuit contends that

10. The Second, Third, Eighth and possibly Fifth Circuits have given a broad construction to the enforcement power. The First and Ninth Circuits have noted the conflict and avoided ruling on the issue. *See* note 9 *supra*. Lopez v. Arrowhead Ranches, 523 F.2d 924, 927 n.3 (9th Cir. 1975); Hahn v. Sargent, 523 F.2d 461 (1st Cir. 1975) (finding no class-based animus).

11. Few of the courts actually construe the enforcement clause, either because they have been able to come within the *Griffin* rule or do not perceive the constitutional issue. For the best discussions of the enforcement clause issue, see Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971); Commonwealth v. Local Union No. 542, IUOE, 347 F. Supp. 268 (E.D. Pa. 1972); Reichardt v. Payne, 396 F. Supp. 1010 (N.D. Cal. 1975).

12. In the remainder of this Note, section 5 of the Fourteenth Amendment will be referred to as the enforcement clause. The power which is therein granted to Congress will be referred to as the enforcement power.

13. U.S. CONST. amend. XIV, §5.

14. The Fourth and Seventh Circuits are in the minority. For a discussion of the Fourth Circuit's analysis, see note 76 *infra*.

15. Murphy v. Mt. Carmel High School, 543 F.2d 1189 (7th Cir. 1976); Cohen v. Illinois Inst. of Tech., 524 F.2d 818 (7th Cir. 1975); Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972).

Dombrowski was the first case in which the Seventh Circuit held that state action is essential to Fourteenth Amendment claims. In that case, the plaintiff was an attorney who had sought commercial office space from the defendant Arthur Rubloff, Inc. A rental agent, Jack Dowling, showed Dombrowski a space in the Brunswick Building. When informed that the plaintiff was a criminal defense lawyer, the agent refused to lease, due to the potential "security risk" posed by plaintiff's primarily black and Latino clientele. Dombrowski sued for injunctive relief under §1985(3) and the public accommodation statute, 42 U.S.C. §2000(a) (1970). In an unpublished decision, the district court enjoined the defendant from leasing to anyone else.

On appeal, the Seventh Circuit dismissed the §1985(3) counts and remanded the public accommodation issue to the district court for additional determinations of facts. Judge Stevens, writing for the court, reasoned that there were two possible state action requirements in Fourteenth Amendment suits. First, the statute providing a civil rights action

the majority rule with respect to this statute is incorrect,[16] because the enforcement clause does not contain "the necessary power"[17] to apply Fourteenth Amendment restrictions to private conduct. In *Murphy v. Mount Carmel High School,*[18] the Seventh Circuit explicated its reasoning for finding a limited enforcement power.

This Note will explain how the *Murphy* court justified its interpretation of the Fourteenth Amendment and will review the strengths and weaknesses of the *Murphy* rationale. Second, because the legal arguments offered by both the minority and majority jurisdictions are inadequate, it will point out several policy reasons that support the Seventh Circuit's position. Finally, this Note will explain what consequences could follow if the Supreme Court resolves the constitutional question by adopting the *Murphy* rationale.

FACTS AND PROCEDURAL HISTORY

In *Murphy v. Mount Carmel High School,*[19] the Seventh Circuit consolidated two §1985(3) cases brought by plaintiffs against private conspirators. In the first case, Daniel Murphy sought injunctive relief to prevent being fired from the faculty of Mount Carmel High School, a private secondary school. He alleged that the school's administration sought his dismissal because he vociferously criticized the school's minority enrollment policy and the underrepresentation of blacks and women on the school faculty. Hence, he claimed that sex-based and racially motivated private action had conspired to interfere with his free

---

enacted under the amendment may contain a "color of state law" requirement, as in 42 U.S.C. §1983. The court noted that *Griffin* made it clear that §1985(3) does not contain this element. However, another state action requirement appears in § 1 of the amendment itself. Therefore, when pleading a denial of Fourteenth Amendment rights or rights incorporated against the states, the plaintiff must allege state action in such civil rights suits.

The *Dombrowski* decision relies on an unexpressed but crucial assumption. The Seventh Circuit viewed the Fourteenth Amendment as requiring state action in every instance, despite the enforcement power. Thus, the court impliedly disapproved the theory that Congress can regulate purely private conduct through the amendment. Nevertheless, by failing to consider the enforcement power, the *Dombrowski* court engaged in an incomplete analysis. As a consequence, the court of appeals was forced to re-examine the *Dombrowski* rule in *Murphy* v. *Mt. Carmel High School.* The *Murphy* decision is significant because it supplies a rationale for the approach begun, but left incomplete, in *Dombrowski.* For a discussion of the *Dombrowski* rationale, see Note, *Private Interference with an Individual's Civil Rights: A Redressable Wrong Under §5 of the Fourteenth Amendment?*, 51 NOTRE DAME LAW. 120 (1975).

16. Murphy v. Mt. Carmel High School, 543 F.2d 1189, 1194 (1976).

17. *Id.*

18. 543 F.2d 1189 (1976).

19. *Id.*

speech right that is incorporated in the Fourteenth Amendment.[20] In response, the district court issued a preliminary injunction for one year. The following year, the same court dissolved the injunction and dismissed Murphy's complaint for failure to allege state action.[21]

The second case was brought by Gerald Senese, an employee of a privately operated hospital. He alleged that his right to associate with non-union employees was abridged when union picketers conspired to prevent him from working.[22] The district court also dismissed his complaint because of the absence of a state action allegation in his Fourteenth Amendment claim.

On appeal, the Seventh Circuit affirmed both district court decisions, holding that a state action requirement must be read into §1985(3) whenever the claim being asserted is based on the Fourteenth Amendment.[23] The court supported its decision on two grounds.[24] It first pointed out that no prior Supreme Court decision supports an interpretation of the enforcement clause that grants Congress the power to regulate private conduct.[25] Second, the court found that the legislative history of the amendment does not supply conclusive evidence of so expansive an enforcement power.[26] Therefore, the Seventh Circuit held that the enforcement clause of the Fourteenth Amendment reaches only state action and does not give Congress authority to enforce the amendment against purely private conduct.[27]

ANALYSIS OF THE *Murphy* RATIONALE

Supreme Court Decisions

The *Murphy* court supported its reasoning by extracting statements

20. Murphy is a white male. Ostensibly he was fired because he did not comply with a faculty dress code which required him to wear a tie. The dress code was enacted just one week prior to his dismissal. He asserted that the code was a "sham" for the real reason he was fired. At the same time, the only black and women teachers at the school also were fired. Brief for Appellant at 3, Murphy v. Mt. Carmel High School, 543 F.2d 1189 (7th Cir. 1976). The Seventh Circuit did not resolve the issue whether Murphy had standing to assert a discrimination claim as an advocate for these classes. *Id.* at 1192.

21. The district court's decision is unpublished.

22. This decision also is unpublished. The trial court noted that Senese did not meet the *Griffin* requirement of alleging a "class-based animus." 543 F.2d at 1191. The Seventh Circuit resolved the state action issue against Senese. *Id.* at 1195 n.8. Therefore the "animus" issue was left unresolved.

23. *Id.* at 1193.

24. *Id.* at 1194.

25. *Id.*

26. *Id.*

27. *Id.*

from several Supreme Court decisions that reviewed civil rights statutes similar to the §1985(3) remedy. Particular emphasis was placed on the assertion in *United States v. Harris*,[28] an 1882 decision, that a law "directed exclusively against the action of private persons is not warranted by any clause in the Fourteenth Amendment."[29] In *Harris*, the Supreme Court dismissed an indictment which charged a white lynch mob with assaulting, murdering, and thereby depriving blacks in the custody of a deputy sheriff of equal protection of the laws.[30] In so doing, the Court held unconstitutional the statute authorizing a criminal indictment against the private conspirators.[31] The *Harris* Court decided that although Congress could enforce the Fourteenth Amendment, the remedial legislation it might adopt could reach only state action. Significantly, the statute struck down in *Harris* was the exact criminal counterpart to the §1985(3) civil remedy.[32]

In addition to *Harris*, the *Murphy* court relied on Justice Stewart's comment in *United States v. Guest*[33] that the "Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals."[34] This comment appeared in connection with his discussion of the necessity of state action in a Fourteenth Amendment claim, which he supported by citing the *Harris* decision.[35] The Seventh Circuit used this statement to support its determination that the enforcement power could not be used to increase Fourteenth Amendment protection by providing remedies against private action.[36] Nevertheless, the *Murphy* court's reliance on Justice Stewart's views in *Guest* can be criticized because, taken as a whole, the *Guest* decision does not support a narrow interpretation of the Fourteenth Amendment enforcement power.

In *Guest*, the Supreme Court reviewed 18 U.S.C. §241[37] and an indict-

28. 106 U.S. 629 (1882).

29. *Id.* at 640.

30. *Id.* at 629-32.

31. *Id.* at 638-39.

32. Act of April 20, 1871, ch. 22, 17 Stat. 13, 14 (codified at Rev. Stat. §5519 (1875)) (The statute was repealed in 1909 at 35 Stat. 1154).

33. 383 U.S. 745 (1966).

34. *Id.* at 755, *quoting* United States v. Williams, 341 U.S. 70, 92 (1951) (Douglas, J., dissenting).

35. *Id.*

36. 543 F.2d at 1194.

37. The statute derives from §6 of the 1870 Enforcement Act, 18 U.S.C. §51 (1946). As amended, it states:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him

ment charging the defendant conspirators with harassing blacks and depriving them of their civil rights.[38] The Court found that the indictment raised an equal protection claim in alleging the racially motivated denial of equal access to public facilities.[39] The Court also specifically held that the indictment had alleged state action.[40] Hence, because the state action requirement was deemed satisfied, the focal statement quoted by the *Murphy* court was, strictly speaking, dicta.

Moreover, in two concurring opinions, six justices objected to Justice Stewart's comments on the scope of Fourteenth Amendment protection.[41] Although concurring in the result, the justices offered their view that Congress could go beyond state action in the Fourteenth Amendment to penalize private action.[42] Justices Clark, Black, and Fortas stated that the enforcement clause "empowers the Congress to enact laws punishing all conspiracies—with or without state action."[43] Justice Brennan, with whom Justice Douglas and Chief Justice Warren concurred, defined the clause as "authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens."[44] These pronouncements by a majority of the *Guest* Court may indicate that *Murphy's* narrow interpretation is incorrect, insofar as it relies on the *Guest* decision.

The position of the majority of those circuits which have held that private action may be regulated under the Fourteenth Amendment is based largely on the *Guest* concurring opinions.[45] The *Murphy* court reached an opposite result by citing *Harris* and Justice Stewart's opinion in *Guest*. Hence, the conflict between the circuits can be attributed

---

by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right so secured—

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

38. 383 U.S. at 747.

39. *Id.* at 753-57.

40. *Id.* at 756.

41. *Id.* at 761-62, 774-81.

42. *Id.* at 782.

43. *Id.* at 762.

44. *Id.* at 784.

45. The *Guest* concurring opinions are used to support a broad interpretation of the enforcement power. *See, e.g.*, Westberry v. Gilman Paper Co., 507 F.2d 206, 211 (5th Cir. 1975); Action v. Gannon, 450 F.2d 1227, 1235 (8th Cir. 1971). *See also* Frantz, *Federal Power to Protect Civil Rights, The Price and Guest Cases*, 4 LAW TRANS. Q. 63, 71 (1967).

partially to the irreconcilable positions expressed in those two Supreme Court decisions.[46] The continued viability of the *Harris* precedent is questionable because the *Guest* concurring opinions ignored this clear precedent in defining a broad enforcement power.[47] However, the relevant portions of the *Guest* decision are dicta appearing in concurring opinions. As a consequence, both the minority and majority positions are undermined by the lack of dispositive precedent from the Supreme Court concerning the constitutional scope of Congress' enforcement power.[48] Perhaps for this reason, the Seventh Circuit offered a second, stronger basis for its ruling in *Murphy*.

Legislative History of the Fourteenth Amendment.

Some theorists contend that the enforcement clause of the Fourteenth Amendment granted Congress authority to penalize discrimination by private individuals.[49] Attaching special importance to the framers' intent,[50] these commentators reach this conclusion by analyzing the debates surrounding the amendment's adoption.[51] The majority of courts

46. The *Harris* decision is possibly no longer viable on its own facts, in light of Justice Stewart's analysis of the *Guest* conspiracy. Both cases involved private groups that used the presence of the state's law enforcement mechanism for their own illegal purposes. The *Harris* mob assaulted and murdered the state's prisoners. The *Guest* conspirators caused the arrest of civil rights workers by swearing out complaints. Unwitting participation of state officers in such wrongful private conduct has been deemed state action by omission. United States v. Guest, 383 U.S. 745, 756 (1966), *citing* Bell v. Maryland, 378 U.S. 226 (1964). *See also* 1 C. ANTINEAU, MODERN CONSTITUTIONAL LAW 574 (1969).

47. Other courts also have considered *Harris* a clear precedent in defining the scope of the §1985(3) remedy. *See* McLellan v. Mississippi Power & Light Co., 45 U.S.L.W. 2378 (5th Cir. Feb. 15, 1977) (en banc), *vacating* 526 F.2d 870 (5th Cir. 1975).

48. Other broad pronouncements on Congress' enforcement power appear in inapposite contexts. For example, in Katzenbach v. Morgan, 384 U.S. 641 (1966) the Court stated:

> Correctly viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

Id. at 651. The Court upheld federal legislation that superseded discriminatory state voting requirements. Nevertheless, the scope of Congress' power to enforce the amendment against private conduct is not necessarily the same as the power to correct state legislation.

49. *See* H.E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 277 (1908); J. TENBROECK, ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 3 (1957) (titled changed to EQUAL UNDER LAW); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950); Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964); Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L.REV. 1323 (1952).

50. *See, e.g.*, Frank & Munro, *supra* note 49, at 162-66; Gressman, *supra* note 49, at 1323-36.

51. For an excellent condensation of these debates, see B. SWARTZ, STATUTORY HISTORY

which construe the enforcement power liberally support their reasoning with this evidence.[52] Thus, by finding a broad enforcement power, the majority view applies a §1985(3) remedy in situations in which private groups act because of racial prejudice or other invidiously discriminatory motives.

The Seventh Circuit also reviewed this legislative history. Characterizing this evidence as unpersuasive and inconclusive,[53] the court refused to give a broad construction to the enforcement clause. In so doing, the *Murphy* court determined that existing legislative history is inadequate support for a broad construction of the enforcement clause. It therefore limited the enforcement power to creating remedies against state action.

The *Murphy* court's reasoning is supported by an implication arising from the first reported draft of the amendment.[54] Instead of being a limitation on the states, the draft would have granted Congress a broad power, comparable to the commerce power,[55] to regulate discrimination by individuals. The proposal read:

> Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property.[56]

Clearly, had the amendment been adopted in this form there would be little question concerning congressional power to reach private conduct. Therefore, the wording of the ratified amendment may reflect a choice, forced by compromise, of an enforcement power limited to regulating state action.[57]

Additional support for the Seventh Circuit's reasoning is found in *Brown v. Board of Education.*[58] In deciding *Brown,* the Supreme Court solicited studies of the framers' intent in enacting the Fourteenth

---

OF THE UNITED STATES (1970). The original resource material begins to appear in CONG. GLOBE, 39th Cong., 1st Sess. 265 (1865) (first discussion of proposals to amend the Constitution in light of the Civil War experience).

52. *See, e.g.,* Action v. Gannon, 450 F.2d 1227, 1236 (8th Cir. 1971) (en banc); Commonwealth v. Local Union No. 542, 347 F. Supp. 268, 292 n.36 (1972).

53. 543 F.2d at 1193-94.

54. *See* Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment,* 11 ST. LOUIS L.J. 331, 380-81 (1967).

55. U.S. CONST. art. I, §8.

56. CONG. GLOBE, 39th Cong., 1st Sess. 813 (1866).

57. Rep. Bingham offered an explanation of the change in the amendment's wording that has given rise to the controversy whether the Fourteenth Amendment incorporates the first eight amendments. *See* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?,* 2 STAN. L. REV. 5, 20-21 (1949).

58. 347 U.S. 483 (1954).

Amendment.[59] After reviewing this information and the studies of some of the authors subsequently relied on by the majority of lower courts opposing *Murphy*,[60] Chief Justice Warren stated that the framers' intent could not be determined conclusively from legislative history.[61] Because the *Brown* decision indicates the unreliability of historical analysis in interpreting the Fourteenth Amendment, the *Murphy* court properly refused to liberally construe the enforcement clause in reliance on this evidence.

POLICY JUDGMENTS SUPPORTING THE MURPHY DECISION

The preceding discussion centered on the legal arguments courts have used to construe the enforcement clause while defining the scope of the §1985(3) remedy. Two analytical tools, legal precedent and legislative history, are primary to both the minority and majority positions. Underlying the courts' legal analysis, however, is a vigorous debate concerning the policy goals of the federal judiciary in addressing private discrimination.[62] By examining the kinds of claims that courts have addressed under §1985(3), the policy choices made by the Seventh Circuit emerge. This analysis reveals that the *Murphy* decision is sound for three reasons: first, it underscores the policy of federalism; second, it prevents §1985(3) from becoming a "general federal tort law," with its accompanying burdens; finally, the approach taken in *Murphy* affords due deference to congressional and state legislative schemes that regulate

---

59. There are three general views on the legislative history of the Fourteenth Amendment. First, the authors whose studies support the majority approach contend that the framers' intent was to regulate private actions through the Fourteenth Amendment. *See* note 49 *supra*. The second, opposing view is represented by Professor Avins, who feels that the debates conclusively indicate that the regulation of private conduct was beyond the reach of the enforcement power of the Fourteenth Amendment. *See* note 54 *supra*. The intermediate position, which finds the legislative history inconclusive as to the framers' intent in enacting the amendment, is advocated by the *Brown* court and Professor Cox. Cox, *Foreward, Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 110-11 (1966). For a review of the research methodology used in these legal and historical interpretations, see Kaczorowski, *Searching for the Intent of the Framers of the Fourteenth Amendment*, 5 CONN. L. REV. 368 (suggesting that all previous attempts are deficient in one way or another and calling for another analysis by historians).

60. 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 507, 863 (P. Kurland & G. Casper eds. 1975).

61. 347 U.S. at 489.

62. *See, e.g.*, Action v. Gannon, 450 F.2d 1227, 1235 (8th Cir. 1971); Commonwealth v. Local Union No. 542, IUOE, 347 F. Supp. 268, 302 (E.D. Pa. 1972) (statute used to broaden relief against labor violence). *But see*, El Mundo, Inc. v. Puerto Rico Newspaper Guild, Local 225, 436 F. Supp. 106, 113-15 (D. P.R. 1972).

private discrimination.

Three categories of discrimination claims have been the basis of §1985(3) actions. The first category includes racial violence, similar to that before the Supreme Court in *Griffin*.[63] In these suits, groups of whites were charged with assaulting or murdering blacks. The federal forum was chosen despite the availability of tort claims in state court. By upholding these claims under the enforcement clause of the Fourteenth Amendment, the majority approach permits non-racial class-based minority groups to pursue actions against conspiracies in federal court.[64] On the other hand, the Seventh Circuit view limits the use of §1985(3), in this category, to address only racially motivated violence, by sustaining the federal cause of action under the Thirteenth Amendment. The reasoning behind the Seventh Circuit's approach is that only the strong federal policy against racial violence compels a shift of some tort claims based upon violations of state criminal law to federal court. This approach permits the "federalization" of only a narrow scope of criminal acts, preserving state law as the basic means of redressing criminal violence.[65] This position is in harmony with a basic tenet of federalism that the regulation of conduct between individual citizens is a reserved power of the states.[66]

The second category of claims involves private deprivations of First Amendment rights.[67] By allowing redress of these rights which are incorporated into the Fourteenth Amendment, the majority approach enlarges the number of permissible §1985(3) claims. For example, if an

---

63. *See, e.g.*, Commonwealth v. Local Union No. 542, IUOE, 347 F. Supp. 268 (E.D. Pa. 1972).

64. *See, e.g.*, Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975) (sex).

65. The following hypothetical was offered by a draftsman of §1985(3):

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Vermonter, . . . then this section could reach it.

CONG. GLOBE, 42d Cong. 1st Sess. 567 (1871). The hypothetical demonstrates that the federal system could be unbalanced if a substantial number of these state court claims were shifted to federal court.

66. U.S. CONST. amend. X. *See* Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 519-20 (1974).

67. *See, e.g.*, Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (freedom of religion); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971) (free speech); Brown v. Villanova University, 378 F.Supp. 342 (E.D. Pa. 1974) (free speech); Pendrell v. Chatham College, 370 F. Supp. 494 (W.D. Pa. 1972) (free speech).

employee is fired for criticizing his employer's discriminatory policies, the employee potentially has a tort claim in federal court under §1985(3).[68] The deprivation of his free speech right could be redressed if the employee demonstrates that the dismissal resulted from a conspiracy motivated by a discriminatory animus. If claims of this nature can be pursued, then new substantive rights based on the First Amendment would be created. The Seventh Circuit approach recognizes that a substantial burden would be imposed on the federal judiciary, if these claims could be addressed under §1985(3). The Seventh Circuit decided that in order to prevent the creation of a "general federal tort law,"[69] based on private infringements of free speech, association, or religious rights, the enforcement power in the Fourteenth Amendment must be limited.[70]

The third category of claims is comprised of employment discrimination actions. In 1972, Congress amended Title VII of the Civil Rights Act by eliminating several exemptions from the Act's coverage.[71] This enlarged the potential number of private suits for employment discrimination. The majority circuits also have allowed §1985(3) to be pleaded as an additional federal right of action.[72] In contrast, the Seventh Circuit

68. These are precisely the facts in *Murphy*. *See* notes 19 & 20 and accompanying text *supra*. *See* Pendrell v. Chatham College, 370 F. Supp. 494 (W.D. Pa. 1972).

69. The fear that §1985(3) would become a "general federal tort law" was expressed in Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). *See also* Dombrowski v. Dowling, 459 F.2d 190, 194-95 (7th Cir. 1972); Murphy v. Mt. Carmel High School, 543 F.2d 1189, 1194-95 n.7 (7th Cir. 1976) (Swygert, J., dissenting).

70. The Seventh Circuit reached the constitutional issue and construed the enforcement power in the Fourteenth Amendment, in order to prevent continued expansion of the §1985(3) remedy. Such expansion is inevitable because the statute was badly drafted, vague and infinitely broad in its reach. Other courts, however, have been able to confine the statute by requiring strict adherence to the elements set out in the *Griffin* decision. *See, e.g.*, Girard v. 94th Street & Fifth Ave. Corp., 530 F.2d 66 (2d Cir. 1976) (citing *Dombrowski v. Dowling* in finding a failure to meet the conspiracy requirement); Hahn v. Sargent, 523 F.2d 461 (1st Cir. 1975); Arnold v. Tiffany, 487 F.2d 216 (9th Cir. 1973).

The Fourth Circuit reaches the same result in §1985(3) actions as the Seventh Circuit, but refuses to interpret the enforcement clause. It rules that regardless of what power Congress may have as a result of the clause, §1985(3) was not clearly intended to exercise that power. Hence, its position leaves the constitutional question for the Supreme Court to decide. Doski v. M. Goldseker Co., 539 F.2d 1326, 1333-34 (4th Cir. 1976). *But cf.* Griffin v. Breckenridge, 403 U.S. 88, 97-99 (1966) (holding that §1985(3) was intended to reach private action).

71. Civil Rights Act of 1964, 42 U.S.C. §2000e-5 (1964), *as amended by* §2000e-5(f)(1) (Supp. II, 1972). For a summary of the changes, see 1972 U.S. CODE CONG. & AD. NEWS 2152-55. Governmental units and institutions of higher education are now subject to suit.

72. *See, e.g.*, Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975); Milner v. National School of Health Tech., 409 F. Supp. 1389 (E.D.Pa. 1976); Brown v. Villanova Univ., 378 F. Supp. 342 (E.D. Pa. 1974); Pendrell v. Chatham College, 370 F. Supp. 494 (W.D. Pa. 1972).

refuses to utilize the §1985(3) statute to redress discrimination in the employment setting.[73] If, for example, an employer is exempt from Title VII coverage, then the Seventh Circuit does not permit an employee to seek similar relief under the broadly worded, general remedy in §1985(3). Because state and federal legislatures continue to enlarge statutory protection and grant specific relief, the Seventh Circuit wisely declines to cover the same ground in a case-by-case fashion. The effect is to prevent the creation of a federal common law of employment discrimination.[74]

CONCLUSION

In *Murphy v. Mount Carmel High School*,[75] the Seventh Circuit ruled that the power to enforce the Fourteenth Amendment does not authorize Congress to regulate private conduct. Thus, under §1985(3), the plaintiff has a federal cause of action only if state action deprives him of his rights of equal protection, due process, or privileges and immunities. The *Murphy* court recognized that its decision was in direct conflict with that of a majority of circuits that have addressed the issue.[76] Ultimately, the Supreme Court will resolve the conflict and may affirm the *Murphy* rationale if the Court is persuaded that the legal arguments and policy choices offered by the Seventh Circuit are correct. Such a decision would have two primary consequences. First, if Congress ever decided to permit individuals to sue for discriminatory acts, it would have to exercise a source of legislative authority other than the enforcement power of the Fourteenth Amendment. Second, by limiting the federal power to regulate private discrimination, the Court would invite the states to share responsibility for achieving the anti-discrimination goals of the Fourteenth Amendment. In fact, many states have moved to end discrimination in housing, employment, and by private associations in tandem with the federal government.[77] This demonstrates that the federal system can continue to provide flexible solutions to human problems if permitted to do so.

Jeanne Beers

---

73. *See* Cohen v. Illinois Inst. of Tech., 524 F.2d 818 (7th Cir. 1975). *Accord,* Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976).

74. However, the same result was permitted by the Supreme Court with respect to another statute from the Reconstruction Era, 42 U.S.C. §1981 (1970). *See* McDonald v. Santa Fe Trail Transp. Co., 96 S. Ct. 2574, 2585 (1976) (section sustained under Thirteenth Amendment). *Accord,* Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973).

75. 543 F.2d 1189 (7th Cir. 1976).

76. *Id.* at 1194.

77. An example is the administrative and judicial remedies afforded by state employment discrimination legislation. *See, e.g.,* Illinois Fair Employment Practices Act, ILL. REV. STAT. ch. 48, §§851-67 (1975).