

TARGETING WHITE SUPREMACY IN THE WORKPLACE

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Resurgent white supremacy is leading to segregation in some workplaces and local labor markets, long after Title VII and executive orders dismantled Jim Crow. My research conceptualizes a new way to apply the Ku Klux Klan Act of 1871. Much of the law—passed to combat a white terror campaign to deny blacks and their political supporters rights equal to those of white citizens—has been struck down by court rulings. The surviving part, codified in 42 U.S.C. § 1985(3), is limited by its narrow text and Supreme Court rulings that have largely ignored congressional intent in passing this law. Using extensive legislative history, I show that Congress heard testimony from ex-Klan members about the group’s strategy to boycott black workers and segregate them in a caste system that approximated slavery. A major floor speech by Rep. Luke Poland emphasized congressional intent to interdict this economic segregation. I show the relevance of this history by analyzing four current and recent cases involving white supremacist planning and commission of acts to drive blacks, Mexicans, a Jew, and a Navajo from their workplace or a specific labor market. I demonstrate how these cases fit the demanding textual requirements to state a claim under Section 1985(3). In response to a growing number of conspiracies in a work setting to attack minorities, this study provides victims, lawyers, and courts a new way to confront today’s resurgent and aggressive white supremacy movement.

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One who is shut up by superior or overpowering force, constantly present and threatening, from earning his living in a lawful way of his own choosing, is as much in a condition of involuntary servitude as if he were forcibly held in a condition of peonage. In each case his will is enslaved, because illegally subjected, by a combination that he cannot resist, to the will of others in respect of matters which a freeman is entitled to control in such way as to him seems best.¹

INTRODUCTION

As hate incidents increase in the workplace, individuals and employers face legal action—but not hate groups who incite and orchestrate attacks against minorities. Extreme attacks by white supremacists recreate conditions of racial segregation at work and in specific labor markets. When Congress passed the Ku Klux Klan Act in 1871,² they aimed to uproot white supremacist intimidation that forced blacks to work in a racial caste. Today, a growing number of extreme incidents show the U.S. is returning to work segregation. This study suggests a new way to apply the Ku Klux Klan Act to work-related racial conspiracies.

American workers have a dark history of insecurity over their livelihood. In the aftermath of the Civil War and decades later, some claimed racial superiority over freed slaves;³ reviled Chinese coolies for their customs and hard work;⁴ demonized Japanese who were imported for their labor;⁵ subjected Mexicans to peonage;⁶ slandered Jews;⁷ and shunned Catholics. Their hatred of otherness fueled the politics behind the Chinese Exclusion Act,⁸ Japanese exclusion provisions of the Immigration Act of 1924,⁹ and National Origins

1. *Hodges v. United States*, 203 U.S. 1, 34 (1906) (Harlan, J., dissenting).

2. *Infra* note 114.

3. *Infra* notes 186-187; *Hodges*, 203 U.S. at 34 (1906).

4. *Infra* notes 40, 45, & 50.

5. *Infra* note 53.

6. *Robertson*, *infra* note 98.

7. *Paula Shoe Co.*, 121 N.L.R.B. 83 (1958).

8. See ELMER C. SANDMEYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1939)

9. See SIDNEY ROGER DANIELS, *THE POLITICS OF PREJUDICE* 2 (1969).

Formula.¹⁰ For nearly a century, many workers warped the beneficent purposes of their labor unions,¹¹ turning fraternal work organizations into monopolies for whites. By institutionalizing racial segregation, they limited labor market competition to their advantage.¹²

Courts curbed racial segregation in unions in the 1940s.¹³ Since then, most unions have accepted racial equality. However, organized labor's connection to American workers has withered with declines in union membership.¹⁴ More voiceless and adrift than any time since the National Labor Relations Act was passed in 1935, some workers have returned to their nativist roots. Racial demagogues have inflamed their grievances against immigrants, blacks, and other non-whites.¹⁵

This study is set to a deeper magnification—not the worker who proudly wears the red Trump baseball cap, not the worker whose bumper sticker proclaims “Make America Great Again,” not the worker who attacks political correctness, nor the worker who favors broad immigration bans. Instead, I explore four types of racial conspiracies that are connected to a workplace. In each scenario, I examine where the conspiracy was formed, and where it was

10. The national origins formula was codified in the Immigration Act of 1924 (Johnson-Reed Act), Pub. L. 68-139, 43 Stat. 153 (1924). See Sherally Munshi, *Race, Geography, and Mobility*, 30 GEO. IMMIGR. L.J. 245, 277-78 (2016) (explaining that the law expanded the geographical classification of peoples, then codified in the Asiatic Barred Zone Act, to everywhere else. The resulting national origins formula was “designed to preserve a racialized ideal of U.S. homogeneity.”).

11. *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 129 (1842) (finding a worker's association may serve honorable purposes such as helping others in times of poverty or sickness, “or to raise their intellectual, moral and social condition; or to make improvement in their art”). For a broader perspective on how early American unions favored whites by pandering to racist attitudes, see Herbert Hill, *The Problem of Race in American Labor History*, 24 REVIEWS IN AM. HIST. 189-208 (1996).

12. *Infra* note 64 (detailing list of unions with racial restrictions).

13. *Infra* notes 74-76.

14. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, UNION MEMBERS—2016 (2017). In 2016, 16.3 million workers were represented by a union. In the private sector, this was 6.4 percent of the workforce. When unions were at their peak in 1954, they represented 28.3% of the private sector. GERALD MAYER, CONG. RESEARCH SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 12 (2004), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key_workplace&sei-redir=1#search=%22historical%20union%20membership%201950%22.

15. JARED TAYLOR, *WHITE IDENTITY: RACIAL CONSCIOUSNESS IN THE 21ST CENTURY* xv (2011) (“If, generation after generation, Americans tend to segregate themselves, is it possible that the expectations for integration were not reasonable? . . . If non-white groups continue to advance race-based interests, is it wise for whites to continue to act as if they have none?”). Another example comes from a popular Alt-Right online newspaper in Ronald L. Ray, *White Working Class Genocide*, AM. FREE PRESS (Mar. 29, 2016), stating: “The problems experienced by the growing millions of displaced native-born American workers do not primarily originate with themselves. They are symptoms of the gross moral decay introduced into our white European, Christian civilization by cultural communists through usury and social decadence.” He continued: “A prostrate 1930s Germany went from destitution to full, peacetime employment, freed from enslavement to Zionist usurers—the real reason for World War II.”

carried out, to see how white supremacists use the workplace to re-segregate America.

Type 1 is a racial conspiracy formed and acted on in a workplace. In a steel mill, an employee who was also a Ku Klux Klan leader showed a member-induction video to co-workers in a breakroom.¹⁶ For years, the mill was permeated with racist symbols, insults, and starkly unequal treatment of whites and blacks.¹⁷ The employer was sued for race discrimination.¹⁸ But the white employees who conspired to drive minority co-workers from the workplace were not held accountable. My study shows how Section 1985(3)¹⁹— a surviving remnant of the Ku Klux Klan Act— would hold the Klan and its agents in this mill responsible.

Type 2 is a racial conspiracy formed outside but implemented in the workplace. A real estate agent was subjected to an intense barrage of deeply insulting and vaguely threatening messages that targeted her because she is Jewish.²⁰ A writer for the Alt-Right's tabloid, *Daily Stormer*, organized this online attack.²¹ In effect, this online attack was a conspiracy among anti-Semitic followers to contact the real estate agent at work, drive off her business, and hold an armed march outside her office. She has filed a lawsuit against the *Daily Stormer*'s writer alleging a violation of Montana's anti-intimidation law.²² A Section 1985(3) action would pursue online conspirators, as well as *Daily Stormer*'s sponsors, webmaster, and agents.

Type 3 involves a non-employee victim of a racial conspiracy that formed in a workplace. Several McDonald's employees planned during their late shift to bring a mentally disabled Navajo customer home after work.²³ At the apartment, they branded his forearm with a hot wire shaped as a swastika and shaved this symbol in his hair.²⁴ The attackers made several videos of this incident on their cellphones,²⁵ suggesting the possibility that they posted the incident to an encouraging online hate group. Police recovered Nazi paraphernalia at the scene.²⁶ The workers were convicted of a federal hate crime.²⁷ The victim and the Navajo nation, however, have had no recourse. By suing these employees under Section 1985(3), the victim and Navajos would have some possibility of exploring whether the perpetrators were aided by a hate group. This lawsuit would also determine whether the hate crime caused

16. *Infra* note 229.

17. *Infra* note 230.

18. *Infra* note 225.

19. *Infra* notes 115-16.

20. *Infra* notes 239-263.

21. *Infra* note 226.

22. *Infra* note 226.

23. *Infra* note 288.

24. *Infra* note 300.

25. *Infra* note 302-03.

26. *Infra* note 304.

27. *Infra* note 304-06.

nearby Navajos to limit their movements by avoiding this restaurant or the town.

Type 4 is a racial conspiracy formed and implemented outside the employment relationship but intended to segregate a local labor market. Two white men, tattooed with Nazi symbols, lured two Mexican day laborers into work at an abandoned building.²⁸ Just as the laborers began the job, the white supremacists attacked them, inflicting life threatening injuries.²⁹ The conspiracy had a work connection; but the assailants were not employers, and the victims were not employees. The attack seemed to be intended to drive off immigrant laborers on Long Island. The assailants are serving lengthy prison terms, but the Mexican victims have had no recourse. A Section 1985(3) action would allow them to explore a connection between this racially motivated conspiracy and a hate group.

This study is not about racial harassment in the workplace. Title VII applies to these situations and involves employers.³⁰ Nor is this a study of criminal laws that are used against egregious offenders.³¹ My study targets white supremacists who act in a conspiracy. For now, these groups—whether loosely-knit, or more formally organized—benefit from a gap in enforcement of laws that forbid racial segregation. When white supremacists conspire to deprive minorities of equal rights to earn a living and move freely in a labor market, they should be held accountable.

I propose a new approach: Ku Klux Klan Act lawsuits theorizing that work-related racial conspiracies have the purpose and effect of segregating work. This law targets racially motivated private conspiracies that deprive individuals of equal rights. Since 1883, courts have weakened the law.³² However, the noticeable rise in white supremacist attacks against minorities in workplaces³³ create new and unexplored opportunities to apply the Ku Klux Klan Act. Section 1985(3) can be used to name a hate group, its leaders, website administrators, and other co-conspirators as defendants. My approach complements the nation's criminal hate crime law, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. Among the law's findings, Congress determined that "[m]embers of targeted groups are prevented from . . . obtaining or sustaining employment. . . ."³⁴ By proposing a civil law method to hold white supremacists and their groups financially responsible for imposing racial segregation in a workplace or a labor market, this Article advances congressional intent to ensure that labor markets and particular

28. *Infra* notes 315-19.

29. *Infra* note 319.

30. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2016); 42 U.S.C. § 701(j).

31. *Infra* note 297.

32. *Harris, infra* note 133.

33. *E.g., Lake, infra* note 229. *See generally* cases at *infra* note 199.

34. National Defense Authorization Act for Fiscal Year 2010, Pub. Law 111-84, § 4702(6)(b), 123 Stat. 2190 (2009) (codified as amended at 18 U.S.C. § 249).

workplaces remain free of hate-driven barriers that affect targeted groups of people.

I. AMERICAN WORKERS AND RACIAL CASTE

Part I explores the white worker's constant anxieties about immigrants and blacks who were employed in their trades.³⁵ In Part I.A, I enlarge on the theme of exclusion—anti-immigrant terror and political campaigns against Chinese and Japanese workers.³⁶ While these efforts were not connected to the Ku Klux Klan, they drew from similar views of racial hierarchy and caste.³⁷ At the same time, as white workers organized locals and entered into contracts with employers, they segregated their unions and compelled employers to exclude blacks or limit their work opportunities. Part I.B examines this record.³⁸

A. Exclusion

Following the Civil War, the nascent labor movement did not associate with the Ku Klux Klan; nor did the Klan seek out unions. However, Klansmen and sympathizers felt threatened by the abolition of slavery. In their world, slaves remained chattel rather than paid workers.³⁹ During this time, many labor unionists shared the Klan's belief that races could not mix in social situations, including work.⁴⁰ By 1869, the National Labor Union expelled all blacks.⁴¹ As a result, the Colored National Labor Union was founded.⁴² In a cruel irony, blacks who joined another union, the Knights of Labor, united with whites to oppose Chinese immigrants.⁴³

35. *Infra* notes 35-85.

36. *Infra* notes 39-55.

37. *Infra* notes 54-55.

38. *Infra* notes 56-85.

39. See DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008). In 1865, a South Carolina plantation owner offered a contract of lifetime employment for his freed slaves. When four freedmen refused the offer, two were killed and a third, a woman, was tortured. *Id.* at 27. More typically, owners offered an annual contract to freed slaves with balloon payments at the end of the term that kept black workers in a constant state of indebtedness to their former owners. These contracts also limited the right of black workers to leave the property. *Id.*

40. See DuBois, *infra* note 62.

41. JOHN R. COMMONS, *HISTORY OF LABOUR IN THE UNITED STATES*, VOL. 2 134-36 (1918). See also Tony Rondonone, *Colored National Labor Union*, in *ENCYCLOPEDIA OF AMERICAN HISTORY: CIVIL WAR AND RECONSTRUCTION, 1856 TO 1869, REVISED EDITION*, VOL. 5 (John Waugh & Gary B. Nash, eds. 2010).

42. Earl Ofari, *Black Activists and 19th Century Radicalism*, 5 *BLACK SCHOLAR* 19, 20 (1974) (explaining CNLU was founded by Isaac Meyers).

43. Sidney H. Kessler, *The Organization of Negroes in the Knights of Labor*, 37 *J. NEGRO HIST.* 248, 249 n.3 (1952).

The importation of Chinese laborers evoked labor protests and calls for legal restrictions.⁴⁴ White laborers agitated for an immigration ban.⁴⁵ Labor groups led protests against Chinese laborers,⁴⁶ and eventually institutionalized exclusion of “Orientals.”⁴⁷

The Workingmen’s Party of California did much to advance racial caste in the workplace. After gaining control of Los Angeles municipal government, they passed taxes against Chinese businesses and individuals— for example, vegetable peddlers— to drive them out of town.⁴⁸ The same labor group, after gaining control of the California constitutional convention, proposed sweeping laws to bar employment of Chinese.⁴⁹ Its president, Denis Kearny, published a racist manifesto on Chinese immigrants.⁵⁰ Hysteria peaked with violence in the 1880s. The worst attack, occurring in 1885, involved the massacre of 28 Chinese miners.⁵¹ In addition, 46 field workers were driven out of their beds and forced on a barge, to the delight of local onlookers.⁵²

After labor successfully lobbied for passage of the Chinese Exclusion Act in 1882, a shortage of agricultural labor prompted importation of Japanese workers.⁵³ One labor leader ranted that the “menace of an Asiatic influx is 100 times greater than the menace of the black race, and God knows that is bad

44. See generally MARY ROBERTS COOLIDGE, *CHINESE IMMIGRATION* (1909); SANDMEYER, *supra* note 8; LUCILLE EAVES, *A HISTORY OF CALIFORNIA LABOR LEGISLATION* (1910).

45. *Chew Heong v. United States*, 112 U.S. 536, 566 (1884), (describing the reaction of white workers to the influx of Chinese laborers, and noting that “[s]uccessful competition with them was, therefore, impossible, for our laborers are not content, and never should be, with a bare livelihood for their work.”).

46. DANIELS, *supra* note 9, at 16-18.

47. Herbert Hill, *Anti-Oriental Agitation and the Rise of Working Class*, 10 *SOC’Y* 43, 44 (1973). See also ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 68-71, 113-137 (1975).

48. William R. Locklear, *The Celestials and the Angels: A Study of the Anti-Chinese Movement in Los Angeles to 1882*, 42 *HIST. SOC. S. CAL. Q.* 239, 248-49 (1960).

49. DANIELS, *supra* note 9, at 18 (arguing that Section 2 prohibited existing and future corporations from employing any Chinese nationals). See also *In re Tiburcio Parrott*, 1 F. 481 (Cir. Ct. Cal. 1880); *Baker v. Portland*, 2 Fed. Cas. 472 (D. Ore. 1879).

50. SANDMEYER, *supra* note 8, at 65 (“Before you and the world we declare that the Chinaman must leave our shores. We declare that white men, and women, and boys, and girls, cannot live as people of the great republic should and compete with the single Chinese coolie in the labor market”).

51. DANIELS, *supra* note 9, at 8 (1969).

52. Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in 19th-Century America: The Unusual Case of Baldwin v. Franks*, 3 *LAW & HIST. REV.* 349, 356-67 (1985).

53. DANIELS, *supra* note 9, at 8; ROBERT B. RHODE, *BOOMS AND BUSTS ON BITTER CREEK: A HISTORY OF ROCK SPRINGS, WYOMING* 44-63 (1987); Clayton D. Laurie, “*The Chinese Must Go*”: *The United States Army and the Anti-Chinese Riots in Washington Territory, 1885-1886*, 81 *PAC. NW. Q.* 22, 24 (1990).

enough.”⁵⁴ This attitude carried on for more than fifty years, marked by labor leader Samuel Gompers’ ugly endorsement of the Chinese Exclusion Act.⁵⁵

B. *Segregation and Desegregation*

In this section, I trace two major periods: (1) segregation, from the early 1800s to around 1970,⁵⁶ except for a brief period of attempted desegregation marked by the Reconstruction, and (2) growing efforts at desegregation, from World War II through the late twentieth century.⁵⁷ This discussion lays a foundation for Part II, where I analyze the resurgence of the white supremacy movement and its spillover effects in the workplace.

Abraham Lincoln began the process of desegregating the American workplace. Apart from declaring freedom for slaves, the Emancipation Proclamation included this revolutionary idea: “I recommend to them that, in all cases when allowed, they labor faithfully for reasonable wages.”⁵⁸ The Reconstruction Congresses that followed after the Civil War enacted three constitutional amendments and a variety of civil rights laws to advance Lincoln’s vision of racial equality. As the following discussion shows, these forward steps ran into resistance from an entrenched American culture that was premised on the innate superiority of whites. Reconstruction laws not only failed to overcome these cultural forces, but also set into motion a chain reaction of racist institutions epitomized by Jim Crow.

White workers played a vital role in promoting racial exclusion, most notably with their political activism to exclude Asians. However, free blacks and slaves presented a different problem. As early as 1816, some whites called for repatriation of blacks to Africa.⁵⁹ In reality, blacks were not only in the U.S.

54. DANIELS, *supra* note 9, at 16.

55. Herbert Hill, *Anti-Oriental Agitation and the Rise of Working Class*, 10 SOC’Y 43, 51 (1973). This piece quotes SAMUEL GOMPERS & HERMAN GUTSTADT, *SOME REASONS FOR CHINESE EXCLUSION: MEAT VS. RICE, AMERICAN MANHOOD AGAINST ASIATIC COOLIEISM—WHICH SHALL SURVIVE?*, AM. FED’N OF LABOR (1901). The Gompers-Gutstadt pamphlet contended that “the racial differences between American whites and Asiatics would never be overcome. The superior whites had to exclude the inferior Asiatics by law, or if necessary, by force of arms” because the “Yellow Man found it natural to lie, cheat and murder.” *Id.*

56. *Infra* notes 53-73.

57. *Infra* notes 74-85.

58. The Emancipation Proclamation, 12 Stat. 1268, 1269 (1863).

59. The American Colonization Society, formed in 1816 by Robert Finley, represented an odd coalition in the Return-to-Africa movement. Some abolitionists wanted to promote a compassionate and voluntary return of slaves and free blacks to Africa. However, others—including Henry Clay—joined the society in the belief that blacks and whites could never mix:

That class of the mixt population of our country [coloured people] was peculiarly situated; they neither enjoyed the immunities of freemen, nor were they subjected to the incapacities of slaves, but partook, in some degree, of the qualities of both. From their condition, and the unconquerable prejudices resulting from their colour, they never could amalgamate with the free whites of this country. It was desirable, therefore, as it respected them, and the residue of the population of the country, to drain them off.

permanently, but the Civil War Amendments gave them citizenship, including political and legal equality. White supremacists were unable to exclude blacks. Instead, they erected legal and social barriers to segregate them. The following discussion examines the emergence and spread of racial segregation in the workplace.⁶⁰

In the century bounded by the end of the Civil War in 1865 and the 1964 Civil Rights Act, Jim Crow's racial caste system enforced legal inferiority for blacks.⁶¹ By the early twentieth century, labor organizations representing half of the unionized workforce excluded blacks from membership.⁶² Another large segment excluded them in practice.⁶³ Many unions wrote their prejudice in labor contracts and bylaws.⁶⁴

David Walker, *Article VI: Our Wretchedness in Consequence of the Colonizing Plan*, in *APPEAL TO THE COLOURED CITIZENS OF THE WORLD* (1830), <http://utc.iath.virginia.edu/abolitn/abesdwa2t.html>.

60. See Michael W. Fitzgerald, *Ex-Slaveholders and the Ku Klux Klan, Exploring the Motivations of Terrorist Violence*, in *AFTER SLAVERY: RACE, LABOR AND CITIZENSHIP IN THE RECONSTRUCTION SOUTH* 150 (Bruce E. Baker & Brian Kelly, eds. 2013) (noting that former slaveholders were furious with the idea of black equality). In the context of labor, these former owners "confronted the changes in behavior among the formerly enslaved population" that included the need "to haggle over pay disputes, which were legion, and negotiate annual contracts with people they had recently owned." *Id.* at 151.

61. HERBERT R. NORTHRUP, *ORGANIZED LABOR AND THE NEGRO* 165 (1944).

62. W.E.B. DUBOIS, *THE NEGRO AMERICAN ARTISAN* 129 (1912).

63. *Id.*

64. *Id.* at 87-95, citing these survey examples: Gardeners' Protective Union (no Negro members, and officer responded, "I have never heard of a good Negro gardener"); Machinists' Helpers and Laborers Union, Washington, Indiana (contracts with employers had language not to hire "any Negroes or foreign men for twenty years"); Order of Railway Conductors of America (membership limited to "any white man"); Cutting, Die and Cutter Makers ("Nothing doing on the Negro"); Brotherhood of Locomotive Firemen and Enginemen (bylaws and constitution deny membership to Negroes); International Brotherhood of Boiler Makers, Iron Ship Builders and Helpers of America ("There is a future for the race but it must not be forced on the white race"); American Wire Weavers' Association (admits only white males); The Paving Cutters' Union of the United States and Canada ("the white man will not, especially in the South, . . . tolerate the Negro to be on the same level as himself"); Waycross, Georgia Trade and Labor Assembly (secretary believes that "Negro workers 'are treacherous and unreliable'"); Georgia Federation of Labor (some locals "absolutely bar Negroes from membership"); Trade Assembly of Fort Worth (in skilled crafts, "Negroes have not been admitted"); Federation Labor Union of Dallas, Texas (barring all Negroes due to "ingrained prejudice toward anything that looks to the members like an approach to social equality"); Marshall, Texas Trades and Labor Council (Negroes "cannot stick as union men; will scab in spite of all that can be done"); Central Labor Union of Miami, Florida (admitting Negroes has a "tendency to lower wages and self-respect of white mechanics and casts a stigma of association"); Labor Assembly of Lawton, Oklahoma (no Negro members and reporting, "we are not troubled with them to any extent"); Temple, Texas ("Nearly all men raised south of Mason and Dixon's line do not want to give the Negro any chance to become expert mechanics"); Teachers' Union of San Antonio, Texas (barring all Negroes, reporting that such membership is "unthinkable because it means social equality which saps the foundations of race purity"); Texas State Federation of Labor ("It is generally understood that the white trade unions of Texas do not admit colored people to membership," and furthermore, that the "Negro is marked with a color that distinguishes him

These restrictions coincided with the Klan's re-emergence in the early 1900s.⁶⁵ By this time, they advocated exclusionary immigration and employment laws.⁶⁶ Blacks were only fit for agricultural labor, outside the stream of competition for wage-based industrial jobs.⁶⁷

During this time, skilled craft unions broadened discrimination by excluding Asians and Puerto Ricans.⁶⁸ Industrial unions representing low-skilled workers made militant demands to remove blacks from factories.⁶⁹ By the 1930s, the Ku Klux Klan intervened directly in union affairs to block integration of blacks and whites in organizing drives.⁷⁰ In response, blacks formed their own unions. White mobs violently attacked these unions.⁷¹

Racial discrimination aggravated a manpower shortage in World War II, pressuring the federal government to investigate segregated factories. This inquiry precipitated a fury of racist propaganda, hardening unions to resist racial equality.⁷² Even when national unions favored racial integration, Klansmen in some locals undermined these efforts.⁷³

By the 1940s, labor's segregationist practices were challenged. The Supreme Court fashioned a union's "duty of fair representation" to blacks who

from other poor men"); and Emporia, Kansas Trades and Labor Council (no Negro members, and "Negroes should be treated white but kept separate").

65. Many historians contend that President Grant's commitment of federal troops and suspension of habeas corpus crushed the Ku Klux Klan. *E.g.*, ALLEN W. TRELEASE, *WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* 361 (1971); Herbert Shapiro, *The Ku Klux Klan During Reconstruction: The South Carolina Episode*, 49 *J. NEGRO HIST.* 46 (1964). The Klan re-emerged, however, after Thomas Dixon's racist trilogy romanticized the group. *See* THOMAS DIXON, *THE LEOPARD'S SPOTS* (1902); THOMAS DIXON, *THE CLANSMAN* (1905); THOMAS DIXON, *THE TRAITOR* (1907). A movie in 1915, *The Birth of a Nation*, further popularized the Klan. Evidence of the Klan's political prominence appears in a march of 35,000 robed Klansmen in Washington D.C. in 1925. *See* Philip Bump, *The Day the Ku Klux Klan Took Over Pennsylvania Avenue*, *WASH. POST* (May 6, 2016) (embedding Washington Post coverage of the KKK's rally on August 8, 1925).

66. Rory McVeigh, *Structural Incentives for Conservative Mobilization: Power Devaluation and the Rise of the Ku Klux Klan, 1915-1925*, 77 *SOC. FORCES* 1461, 1475 (1999).

67. *Id.* at 1476.

68. SUMNER H. SLICHTER, ET AL., *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 30 (1960).

69. *See* Robert J. Norrell, *Caste in Steel: Jim Crow Careers in Birmingham, Alabama*, 73 *J. AM. HIST.* 669, 671 (1986) (recounting the 1908 organizing attempt of Tennessee Iron and Coal Co. in Birmingham, Alabama by an all-white union). The company offered to "put all of the 'niggers' on one side of the mill, and on the white men on the other side" as a means to end a strike. Rejecting the offer, the union counter-proposed that the company "discharge all the niggers." *Id.*

70. *See* George Sinclair Mitchell, *The Negro in Southern Trade Unionism*, 2 *S. ECO. J.* 26, 29-30 (1936) (describing the American Federation of Labor's organizing campaign in Birmingham, Alabama).

71. John Beecher, *Problems of Discrimination*, 7 *SCI. & SOC'Y* 36, 37 (1943).

72. Norrell, *supra* note 69, at 680.

73. *Id.* at 683.

were treated as inferiors.⁷⁴ The federal judiciary played an important role in calling out segregation.⁷⁵ Looking back, court opinions serve as a repository for documenting union rules and practices that enforced racial caste in the workplace.⁷⁶ For many blacks, their only way to break the race barrier was to

74. *Bhd. of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952) (holding white union threatened railroad with strike unless the company signed an agreement to discontinue all train porter positions); *Graham v. Bhd. of Locomotive Firemen & Enginemen*, 338 U.S. 232 (1949) (noting union of railroad firemen deprived blacks employment and seniority solely because of race); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) (finding a white union forced railroads to agree to promote only whites as engineers, set a cap on employment of blacks, and gave the union a right to further restrict employment of blacks).

75. *Bhd. of Ry. & S.S. Clerks, etc. v. United Transp. Serv. Emps. of Am.*, 137 F.2d 817, 821 (D.C. Cir. 1943) (calling the union a “white organization” that engaged in collective bargaining). The court added:

[T]he Brotherhood designated by the Board as the bargaining agent of the porters, is a white organization which does not permit membership by the colored employees of the railroads. As a result, the effect of the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right to membership, nor right to speak or be heard in its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation.

76. *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) (finding prior to 1961, company had exclusively black jobs and exclusively white jobs); *Long v. Georgia Kraft Co.*, 455 F.2d 331 (5th Cir. 1972) (noting local union segregated 190 members in an all-white local, and 80 members in an all-black local); *Local 53 of Int’l Ass’n of Heat & Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (holding mechanics unions refused to consider minorities for membership); *Local Union No. 12, United Rubber, etc. v. NLRB*, 368 F.2d 19 (5th Cir. 1966) (noting that union opposed racial desegregation of shower and toilet facilities); *Oliphant v. Bhd of Locomotive Firemen & Enginemen*, 262 F.2d 359 (6th Cir. 1958) (noting that union bylaws expressly included only white members); *Syres v. Oil Workers Int’l Union, Local No. 23*, 223 F.2d 739 (5th Cir. 1955) (finding that after an international union of oil workers combined its white and black locals unions, a bargaining committee negotiated racially segregated seniority lines); *United States v. Local 638 Enterprise Ass’n of Steam, etc.*, 360 F. Supp. 979 (S.D.N.Y. 1973) (noting that a plumbing and pipefitters union engaged in a work-referral system that discriminated against nonwhites, including admitting 156 white members and no black members in 1972); *United States v. Wood, Wire & Metal Lathers Int’l Union, Local Union 46*, 328 F. Supp. 429 (S.D.N.Y. 1971) (observing that a lathers union, with 1450-1500 members in 1968, represented only four blacks); *Hicks v. Crown Zellerbach Corp.*, 310 F. Supp. 536 (E.D. La. 1970) (finding that a paperworkers union unlawfully maintained separate locals for whites and blacks); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968) (noting that an electricians union, with history of excluding nonwhites, perpetuated effects of racial exclusion); *United States v. Clark v. Local 189, United Papermakers & Paperworkers, AFL-CIO, CLC*, 282 F. Supp. 39 (E.D. La. 1968) (finding that an employer and white local union discriminated against black employees); *Thorman v. Int’l All. of Theatrical Stage Emp., etc.*, 320 P.2d 494 (Cal. 1958) (noting that union members, confined to blacks auxiliary local, were required to pay a working fee to the white union while being denied employment security enjoyed by whites); *Williams v. Int’l Bhd. of Boilermakers, etc.*, 165 P.2d 903 (Cal. 1946) (observing that an international union admitted blacks if they consented to segregation into separate locals); *James v. Marinship*, 155 P.2d 329 (Cal. 1944) (finding that shipbuilding union required blacks to join an “auxiliary” that denied them full membership to the white local); *Haynes v. La. Teachers Ass’n*, 381 So.2d 849, 850 (1980) (observing that consolidation of predominantly black teachers’ organization and white counterpart ended “70 years of separate and racially identifiable teacher organizations in Louisiana”).

work as strikebreakers for whites.⁷⁷ Even after segregation was outlawed, unions consciously excluded blacks,⁷⁸ while others discriminated on the basis of national origin.⁷⁹

Eventually, President Roosevelt catalyzed early efforts to desegregate America. As the reluctant defender of the free world, the U.S. lacked the moral authority to confront Hitler's radical ideology of racial purity. Sensitive to the nation's paradoxical image of a "free nation"—one built on slavery and its aftermath of segregation—President Franklin Roosevelt issued Executive Order No. 8802, requiring all federal defense contractors to end racial discrimination in their workplaces.⁸⁰

Other presidents advanced desegregation by requiring federal contractors to promote "equal employment opportunity"⁸¹ and "affirmative action."⁸² By the 1970s, racial desegregation received its strongest support from the Supreme Court. *Griggs v. Duke Power Co.* applied a theory of

77. Booker T. Washington, *The Negro and Labor Unions*, 111 ATL. MONTHLY 756, 757 (June 1913).

78. *Black Musicians of Pitt. v. Local 60-471, Am. Fed'n of Musicians, AFL-CIO*, 375 F. Supp. 902 (W.D. Pa. 1974) (finding musicians maintained segregated locals, and excluded blacks from union office); *Tinney v. New Haven Firefighters Local 825*, No. CV-074029029S, 2011 WL 1734419 (Super. Ct. Conn. 2011) (noting that a white-controlled union refused to intervene for black firefighter who was required to take 19 drug tests, while union offered to defend white firefighter who reported to duty while drunk). See also Ray Marshall, *Unions and the Negro Community*, 17 INDUS. & LAB. REL. REV. 179, 180 (1964).

79. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1976) (observing Spanish-surnamed truck drivers were paid less and had less desirable jobs as local city drivers, and were thereafter discriminated against with respect to promotions and transfers); U.S. by *Mitchell v. Int'l Longshoremen's Ass'n*, 334 F. Supp. 976 (S.D. Tex. 1971) (noting some Mexican-Americans in longshore union were segregated on the basis of their national origin); and *Browne v. Musician's Protective Union*, 5 V.I. 287 (1966) (refusing membership to a British national).

80. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941). One study indicates that this executive order was intended to quell tensions between Hispanic and whites in Los Angeles. See Arnoldo Torres, *What Are the Civil Rights Goals of the 1980's?*, 37 RUTGERS L. REV. CIV. RITS. DEVS. 845, 846 (1985). Another study explains that Roosevelt issued the order due to pressure exerted by blacks who threatened to march for civil rights in the capital. See Note, *Philadelphia Plan: Remedial Racial Classification in Employment*, 58 GEO. L.J. 1187, 1195 n.41 (1970). A more conventional explanation appears in Gerald W. Heaney, *The Political Assault on Affirmative Action: Undermining Forty Years of Progress Toward Equality*, 22 WM. MITCHELL L. REV. 119, 120 (1996) (explaining that industrial manpower shortages driven by segregation motivated the executive order. None of these rationales is mutually exclusive from the others; nor is my inference that Roosevelt sought to put the American war effort on a higher moral ground).

81. President Dwight Eisenhower was the first president to issue an executive order that used the term "equal opportunity," connoting a duty not only to refrain from prohibited discrimination, but "to promote full equality of employment opportunity." Exec. Order No. 10,479, 18 Fed. Reg. 4899 (1953) (policy preamble).

82. President John Kennedy's Executive Order 10,925 continued the progression of presidential regulation of employment discrimination. For the first time, a presidential order used the term "affirmative action." Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961) (policy preamble).

disparate impact to a work setting that preserved racial segregation.⁸³ *United Steelworkers of America v. Weber* upheld an affirmative action plan that remedied past racial discrimination.⁸⁴ Today, however, the Court has all-but-abandoned affirmative action.⁸⁵

II. THE KU KLUX KLAN ACT: ORIGIN, DORMANCY, AND REBIRTH

In Part I, I explained how American workers reacted harshly to immigrants from China and Japan. Similarly, they rejected the idea that free blacks and emancipated slaves could work side-by-side with them. Their efforts coalesced around public policies, union bylaws, and labor contracts that excluded Asians from entering the U.S. and segregated blacks from working with whites. But there is little evidence that labor organizations coordinated with the Ku Klux Klan.⁸⁶ Nonetheless, to a significant degree, ordinary workers and white supremacists harbored similar prejudices and economic insecurities.

In Part II.A, I explain how the Ku Klux Klan formed as a terror organization,⁸⁷ and how Congress enacted constitutional amendments and civil rights laws to secure freedom and equality for all.⁸⁸ My research brings new light to testimony by white men, mostly former Klan members, who witnessed secret rituals and resulting mob attacks by white supremacists.⁸⁹

83. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In a workplace that expressly limited blacks to the lowest job classification, the employer implemented requirements of high school graduation and satisfactory scores on aptitude tests. Effectively, these neutral criteria froze the status quo of racial segregation, even though white employees were successful in these jobs without graduating from high school or taking the aptitude tests. The Court ruled that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” *Id.* at 431.

84. *United Steel Workers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979).

85. *Ricci v. DeStefano*, 557 U.S. 557 (2009) (finding affirmative action to redress racial disparities in occupational groups violates Title VII unless it is based on a strong-basis-in-evidence that the employer created the imbalance); *Adarand Constructors v. Peña*, 115 S. Ct. 2097, 2112 (1995) (reasoning federal affirmative action programs are subject to strict scrutiny and are constitutional only if they redress past discrimination); *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986) (finding an affirmative action program violates Equal Protection Clause when there is no strong-basis-in-evidence that the employer engaged in intentional race discrimination).

86. While unions were not formally tied to white supremacy, an important employer advocate had this connection. Vance Muse pursued a major policy initiative to end compulsory union membership and dues. Allied with the anti-Semitic Christian American Association, he mounted a national campaign after some labor unions voluntarily integrated in the 1940s—a development that would serve as a Trojan horse to force racist employers to hire blacks in order to appease a striking union. Michael Pierce, *The Racist Origins of Right to Work*, LABORNOTES (Aug. 3, 2017), <http://labornotes.org/blogs/2017/08/racist-who-pioneered-right-work-laws>.

87. *Infra* notes 106-110, 113.

88. *Infra* notes 98-112, 114, 116-121.

89. *Infra* notes 185-187.

Part II.B analyzes court rulings that kept the Klan alive by curtailing the Ku Klux Klan Act.⁹⁰ After the law laid dormant for nearly 90 years, a Supreme Court ruling in 1971 revived its civil element.⁹¹ The remainder of Part II.B explains how courts have interpreted and applied Section 1985(3) to contemporary controversies.⁹²

A. *Reconstruction: Expansion of Civil Rights*

The Reconstruction period from 1866-1875 marked the greatest expansion in American civil rights.⁹³ Congress focused primarily on the plight of emancipated slaves. Southern states imposed legal inferiority on freed slaves by enacting black codes.⁹⁴ These laws had two motivations: first, to ensure that blacks did not participate in basic civic functions such as voting⁹⁵ and court proceedings;⁹⁶ and second, to force blacks into coercive work arrangements with former or new masters.⁹⁷ Congress passed three constitutional

90. *Infra* notes 121-127.

91. *Infra* note 128.

92. *Infra* notes 129-143.

93. Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981 (2002) (revisiting Gressman's seminal work); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

94. See Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI. KENT L. REV. 49, 60 (2007) ("The framers of the Fourteenth Amendment viewed the Black Codes immediately after the Civil War as an attempt to return slavery by other methods and by another name.").

95. *E.g.*, Pres. U.S. Grant, Message to the Senate, Senate Journal (Jan. 13, 1875), 43rd Cong., 2nd Sess. Prior to the election of 1872, a shameful and undisguised conspiracy was formed to carry that election against the Republicans without regard to law or right, and to that end the most glaring frauds and forgeries were committed in the returns after many colored citizens had been denied registration, and others deterred by fear from casting their ballots. See Amasa M. Eaton, *The Suffrage Clause in the New Louisiana Constitution*, 13 HARV. L. REV. 279, 287 (1899). The Louisiana constitutional convention froze voting rights to males who were franchised before 1867—the year of enactment of the Fourteenth Amendment—and extended this closed franchise to sons and grandsons of voters. *Id.* at 287.

96. *E.g.*, *Neal v. Delaware*, 103 U.S. 370, 370 (1880) (accepting the challenge of a black man who was charged with rape to Delaware's disqualification of all blacks from juries). See also *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879) (overturning West Virginia law disqualifying "colored" men from serving on a grand jury).

97. Joe M. Richardson, *Florida Black Codes*, 47 FLA. HIST. Q. 365, 366 (1969) ("Though Floridians were forced to accept emancipation many could conceive of Negroes as little more than subordinate laborers. Many planters hoped to keep the freedmen on the plantations in some form of servitude."). States enacted several types of laws to freeze blacks into servitude. Enticement laws, such as Georgia's, forbade anyone from enticing a worker "by offering higher wages or in any other way whatever." See William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 43 J.S. HIST. 31, 35 (1976). Peonage—a form of debt labor—was widespread in the South after the Civil War. See Pete Daniel, *The Metamorphosis of Slavery, 1865-1900*, 66 J. AM. HIST. 88, 89 (1979). Vagrancy laws also aided white authorities in maintaining the debt labor system. See Jerrell H. Shofner, *The Legacy of Racial Slavery: Free Enterprise and Forced Labor in Florida in the 1940s*, 47 J.S. HIST. 411, 413 (1981).

amendments to remedy slavery: The Thirteenth Amendment, to end all forms of involuntary servitude;⁹⁸ the Fourteenth Amendment, to secure national citizenship for blacks and prohibit racially motivated violations of civil liberties;⁹⁹ and the Fifteenth Amendment, to secure suffrage for blacks.¹⁰⁰

Congress recognized that these lofty amendments lacked specificity and enforcement mechanisms.¹⁰¹ They believed that southern states would maintain the *Dred Scott* decision, declaring that slaves lacked rights of free people.¹⁰² Congress therefore enacted the Civil Rights Act of 1866.¹⁰³ The law guaranteed the right of all persons to make and enforce contracts; to buy, own and sell property; to sue, be parties and to give evidence; and to enjoy the equal benefit of the laws.¹⁰⁴ While Congress intended foremost to secure these rights for blacks, they framed this law expansively with other racial and ethnic groups in mind.¹⁰⁵

By the late 1860s the Ku Klux Klan engaged in widespread mob actions¹⁰⁶ and terror campaigns.¹⁰⁷ Blacks were targets, but so were their white supporters

98. U.S. CONST. amend. XIII. *See also* Robertson v. Baldwin, 165 U.S. 275, 282 (1897), noting that the Thirteenth Amendment was intended to deal with “the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name.”

99. U.S. CONST. amend. XIV. The citizenship debates in Congress are explored in Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 9-19 (1949). To grasp the legal rationale for slavery that preceded the Fourteenth Amendment, see Jarman v. Patterson, 7 T.B. Mon. 644, 23 Ky. 644, 645-46 (Ky. 1828) (“Slaves, although they are human beings, are by our laws placed on the same footing with living property of the brute creation. However deeply it may be regretted, and whether it be politic or impolitic, a slave by our code, is not treated as a person, but . . . a thing, as he stood in the civil code of the Roman Empire.”).

100. U.S. CONST. amend. XV. *See also* E. Irving Smith, *The Legal Aspect of the Southern Question*, 2 HARV. L. REV. 358, 366 (1889).

101. David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 405 (2008) (arguing that the Civil Rights Act of 1866 was enacted to enforce the guarantees of the Civil War amendments).

102. Michael P. Zuckert, *Congressional Power Under the Fourteenth Amendment*, 3 CONST. COMMENT. 123, 147 (1986) (“The evil with which Congress was concerned was violence and intimidation by private individuals whom the states either would not or could not control.”).

103. The Civil Rights Act of 1866, 14 Stat. 27, ch.31 (codified as amended at 42 U.S.C. § 1, 14).

104. Gressman, *supra* note 93, at 1326.

105. *See* Lee Pinzow, *Is It Really All About Race? Section 1985(3) Political Conspiracies in the Second Circuit and Beyond*, 83 FORDHAM L. REV. 1031, 1040-42 (2014) (finding the Ku Klux Klan Act of 1871 was a response to violence against Republicans); Neil H. Cogan, *Section 1985(3)’s Restructuring of Equality: An Essay on Texts, History, Progress, and Cynicism*, 39 RUTGERS L. REV. 515, 556 (1987). *See also* John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN AM. L.J. 55, 56. (1996) (noting Reconstruction-era laws reflected concern for Chinese immigrants and others who were not freed blacks and who did not possess the same rights as whites).

106. *See* Rep. Luke Poland’s account of a young white teacher from Ohio who taught in a Mississippi school for freed slaves:

and sympathizers.¹⁰⁸ Congress realized that these outrages defeated the Fourteenth Amendment's promise of basic civil liberties for all people. Its hearings called witnesses who described sheer terror by white supremacists.¹⁰⁹

As a result, Congress enacted the Civil Rights Act of 1870.¹¹⁰ The law codified the Fourteenth Amendment's protections for individual rights, and bolstered these liberties with criminal and civil enforcement provisions.¹¹¹ A specific part ensured voting rights without regard to race or color.¹¹² As Ulysses Grant embarked on his presidency, the Klan's violence escalated. The president moved swiftly by urging Congress to break this terror campaign.¹¹³ The result was the Civil Rights Act of 1871—also known as the Enforcement

While thus quietly pursuing his duties the house where he lived was one night surrounded by a large body of armed and disguised men; he was taken by them from his bed in his night-clothes, and in that condition to a swamp at some distance and terribly beaten. He succeeded in escaping with his life. I asked him what they said to him and what reason, if any, they gave for the act. His answer was, 'All they said to me was that they 'would learn me not to come to Mississippi to make niggers as good as white folks.'

CONG. GLOBE, 42nd Cong., 2nd Sess. 494 (1872).

107. See CONG. GLOBE, 42nd Cong., 2nd Sess. 493 (1872):

It was perfectly clear upon all the evidence taken by the committee that the secret organization known popularly as the Ku Klux, but having really various other names, was set up for the purpose of keeping the negroes in a state of subjection to the old southern rebel element.... The strength of numbers in which the Klans generally rode, armed to the teeth, were quite enough to excite the fears of braver and less defenseless people than the poor freedmen of the South, but probably their horrible and ghostly attire by midnight torchlight was as potent of influence as their lashes or their pistols.

108. Gen. George Thomas's report, CONG. GLOBE, 42nd Cong., 1st Sess. 284 (1871):

Violence is openly talked of. The editorials of the public press are such as to create the most intense hatred in the breasts of ex-rebels and their sympathizers. The effect of this is to cause disturbances throughout the State (Tennessee), by inciting the ruffian portion of this class of citizens to murder, rob, and maltreat white Unionists and colored people.

109. For example, the testimony of a white man, John Dunlap, describing how disguised Klansmen attacked him and a black man named James Franklin, on July 4, 1868: "They then had Franklin undress himself, and then blindfolded him, and they then whipped him with shat I supposed to be a leather thong, each one of them striking him for five strokes apiece, and then left him to return home." CONG. GLOBE, 42nd Cong., 1st Sess. 288 (1871). Dunlap was also whipped and ordered to leave town the next day. In Nashville, the Klan accosted Dunlap again, "when about sixty disguised men, armed and mounted, rode into the public square, hallooing they wanted Dunlap and fried nigger meat." *Id.*

110. Enforcement Act of 1870, ch. 114, 16 Stat. 140-46. The law conferred upon federal courts power to enforce its provisions. Substantively, the law prohibited state officials from discriminating against voters on the basis of race or color, or previous condition of servitude, and created penalties for violations of a person's right to vote.

111. Gressman, *supra* note 93, at 1333-34.

112. *Id.* at 1334.

113. A detailed account appears in Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U. L.J. 331, 332 n.10 (1966), quoting President Grant's message to Congress:

A condition of affairs now 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. The proof that such a condition of affairs exists in some localities is now before the Senate.... Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.

Act or the Ku Klux Klan Act.¹¹⁴ The statute provided criminal and civil sanctions against conspirators who deprive people of equal rights under the law.¹¹⁵ Section 1985(3), its civil element, prohibits conspiratorial violence and oppression committed by force, intimidation, or threat.¹¹⁶ It enumerates the Klan's infamous practice of going in disguise upon the public highway to deprive any person or class of people equal protection of the laws.¹¹⁷

This era ended with passage of the Civil Rights Act of 1875.¹¹⁸ This was a capstone to the Reconstruction laws that sought to secure fundamental constitutional rights of equal treatment and suffrage.¹¹⁹ The 1875 law extended to the quasi-public domains of public transportation, inns, theaters and other places of public amusement by prohibiting private actors from discriminating against patrons on account of race or color.¹²⁰

B. *Rise of Jim Crow, Fall of the Ku Klux Klan Act*

Just as Reconstruction legislation reached its end, the Supreme Court launched a judicial revolt against these civil rights laws. The Colfax massacre

114. Enforcement Act of 1871, ch. 22, 17 Stat. 13-15 (current version at 42 U.S.C. §§ 1983, 1885-1986).

115. The byzantine trail of this legislation—some of which has been overturned by courts or buried in re-enactment laws by unfriendly lawmakers—is carefully traced in Ken Gormley, *Private Conspiracies and the Constitution: A Modern Version of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 537 (1985). Gormley's important research is summarized on page 540. *Id.* at 540, n.30.

116. Act of April 20, 1871, 17 Stat. 13-14, ch. 22 § 2 (codified as amended at 42 U.S.C. § 1985(3)). Written as Section 2 of the Ku Klux Klan Act, the law began with criminal sanctions; but this part was ruled unconstitutional in *Harris*, *infra* note 133. The rest of Section 2, a civil law portion, survived. Thus, when Section 1985(3) was codified, it retained its predicate text that defined a conspiracy, omitted the criminal law language, and retained the civil enforcement part, which was divided between private and government enforcement provisions. The private enforcement language in Section 1985(3) now states:

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; . . . 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.

117. 42 U.S.C. §1985(3).

118. Civil Rights Act of 1875, 18 Stat. 335. Its preamble recognized “the equality of all men before the law,” and obligated government to provide “equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political.” Specifically, the law provided blacks equal access to public accommodations and transportation, and protection from exclusion from jury service.

119. Gressman, *supra* note 88, at 1335.

120. The main provisions of the law are quoted in full in *The Civil Rights Cases*, 109 U.S. 3, 4 (1883). Section 1 stated all persons within the jurisdiction of the U.S. were entitled “to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement” and these rights were “applicable alike to citizens of every race and color, regardless of any previous condition of servitude.”

provides the most compelling illustration. White Democrats murdered approximately 280 black men on Easter Sunday in 1873.¹²¹ The victims had assembled peacefully at the parish courthouse in a central Louisiana town to protest an election that white supremacist Democrats had stolen.¹²² The men who intimidated, attacked, and murdered these blacks protesters were prosecuted by the federal government under the Enforcement Act of 1870, also known as the first Ku Klux Klan Act. Convictions resulted from this prosecution.¹²³

But in *United States v. Cruikshank*,¹²⁴ the Supreme Court dealt this federal legislation a fatal blow. Because the Constitution did not enumerate a congressional power to prosecute criminal offenses, the Court believed that only states—exercising their reserved powers—were authorized to enforce such laws.¹²⁵ Furthermore, the Court subverted the rights of blacks to assemble by narrowing this to a right to petition only the federal government. The victims of the Colfax massacre therefore had no federal constitutional right to assemble at a local court house to protest municipal elections.¹²⁶ Because Cruikshank and other appellants did not deprive black victims of any federal right, they could not be convicted as conspirators under the Ku Klux Klan Act.¹²⁷ By striking down the criminal provision in the Enforcement Act, Cruikshank gave license to white terrorists to attack blacks and their Republican supporters.

The Court severely undermined civil enforcement of other Reconstruction laws. By 1883, blacks had brought five civil rights cases against theaters, hotels, and transit companies for refusing to admit or serve them, or by maintaining whites-only facilities.¹²⁸ Consolidating the cases, the Supreme Court declared the Civil Rights Act of 1875 unconstitutional.¹²⁹ Justice Bradley's opinion equated this nondiscrimination law to a municipal code that

121. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 437 (Henry Steele Commager et al. eds., 1st ed. 1988).

122. LeeAnna Keith, *Passion and Belief: The Story of the Untold Story of the Colfax Massacre*, 8 JUNIATA VOICES 62, 70-71 (2009).

123. *United States v. Cruikshank*, 25 F. Cas. 707, 708 (C.C.D. La. 1874).

124. *United States v. Cruikshank*, 92 U.S. 542 (1875).

125. *Id.* at 551.

126. *Id.* at 552.

127. *Id.* at 556. The opinion employed a logic that was blind to the intent of the Reconstruction Congresses to transfer enforcement of basic civil liberties and rights from states to the federal government. Instead, the Court gave this crimped reasoning:

The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The former has not been granted or secured by the Constitution of the United States, but the latter has been.

Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, &c., it does not appear that it was their intent to interfere with any right granted or secured by the Constitution or laws of the United States.

128. *The Civil Rights Cases*, 109 U.S. 3, 4 (1883). Justice Harlan's dissent was eighty years ahead of its time by articulating the civil rights movement of the 1950s and 1960s. *Id.* at 26.

129. *Id.* at 25, declaring this part of the law void.

regulated private contractual rights—an unconstitutional usurpation of state rights, by his contorted view.¹³⁰ The ruling provoked outrage and concern that the Court opened the doors to segregating Americans based on race.¹³¹ While the precise origins of Jim Crow as a segregationist institution are not defined,¹³² *The Civil Rights Cases* signify the Supreme Court’s incarnation of legalized racism.

The Civil Rights Cases was part of other rulings that struck at the heart of Reconstruction laws.¹³³ Judicial curtailment of the Ku Klux Klan Act extended into the twentieth century.¹³⁴ Curtailment of the Ku Klux Klan Act continued into the 1900s, notably in *Hodges v. United States*.¹³⁵ There, the Court overturned the federal government’s successful prosecution of white supremacists who engaged in a mob action to drive black workers from an Arkansas saw mill.¹³⁶

For nearly 90 years, the law’s remnant lay mostly dormant.¹³⁷ Section 1985(3) was revived, however, after white men stopped a car with black men

130. *Id.* at 13, reasoning: “Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society.” The opinion continued: “It would be to make Congress take the place of the State legislatures and to supersede them.” *Id.*

131. See Henry McNeal Turner, *The Barbarous Decision of the United States Supreme Court Declaring the Civil Rights Act Unconstitutional and Disrobing the Colored Race of All Civil Protection*, in ONLINE EDITION: DOCUMENTING THE SOUTH, <http://docsouth.unc.edu/church/turnerbd/turner.html>.

132. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 7 (2002) (explaining that the term Jim Crow was created in the 1832 song and dance routine by Thomas D. Rice). See also C. L., *An Old Actor’s Memories: What Mr. Edmon S. Conner Recalls About His Career*, N.Y. TIMES (June 5, 1881), <https://timesmachine.nytimes.com/timesmachine/1881/06/05/98559069.html?pageNumber=10>.

133. *E.g.*, *United States v. Harris*, 106 U.S. 629 (1883), (declaring the criminal conspiracy section of the Ku Klux Klan Act of 1871 unconstitutional); *James v. Bowman*, 190 U.S. 127 (1903).

134. For an early twentieth century case involving intimidation of black voters, see *Bowman*, 190 U.S. 127 (1903).

135. *Hodges*, *supra* note 1. This was overruled in part by *Jonas v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

136. *Id.* at 18-19, holding that the Thirteenth Amendment did not allow Congress to define a federal crime for private parties who made or enforced a contract based on race. In effect, the Court’s twisted logic meant that intimidating black workers into leaving their jobs was an offense that fell short of enslavement: “But . . . it was not the intent of the (Thirteenth) Amendment to denounce every act done to an individual which was wrong if done to a free man, and yet justified in a condition of slavery . . .” *Id.* at 19.

137. *Collins v. Hardyman*, 341 U.S. 651 (1951), marked a major setback in efforts to revive Section 1985(3). The law was revived, however, when courts were presented with evidence of congressional intent behind Section 1985(3). *E.g.*, *Byrd v. Sexton*, 277 F.2d 418, 427 (8th Cir. 1960) (“We are impressed here with the particular history and origin of these sections, with their specific original purpose and with their dormancy until recent years.”). This court also attributed resourceful plaintiffs’ lawyers for invoking “the application of the Civil Rights Act in situations far removed from those which were no doubt predominantly in the minds of the members of Congress in 1871 when they first enacted the legislation.” *Id.*

on a Mississippi road, mistaking them as civil rights activists, and severely beat them. This resulted in *Griffin v. Breckenridge*, a Supreme Court ruling that set the law's modern contours by applying its terms to private conspiracies.¹³⁸ Tracking the unclear wording of Section 1985(3), *Griffin* introduced ambiguity by stating that a conspiracy must not only intend to deprive persons of equal protection of the laws but be motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus."¹³⁹

Shortly after *Griffin*, courts showed some willingness to broaden the scope of Section 1985(3) conspiracies.¹⁴⁰ The law applies to private conspiracies that

See also Koch v. Zuieback, 194 F. Supp. 651, 657 (S.D. Cal. 1961), ("the fact that they were initially designed for a particular purpose, coupled with the fact of slipshod draftsmanship, has resulted in a deep suspicion of these laws and a judicial reluctance to apply them in any but the most limited situations").

138. 403 U.S. 88 (1971). Eugene Griffin and other victims sued their white attackers under Section 1985(3) for damages, alleging a private conspiracy to prevent the plaintiffs and other blacks from exercising their rights, privileges and immunities as U.S. citizens. Reading the law's text, examining its legislative history, and comparing it to related provisions in the Ku Klux Klan Act, Griffin concluded that Congress intended this statute to reach private conspiracies. *Id.* at 101. Griffin also concluded that "the varieties of private conduct that [Congress] may make criminally punishable or civilly remediable [under Section Two of the Thirteenth Amendment] extend far beyond the actual imposition of slavery or involuntary servitude." *Id.* at 105.

139. *Id.* at 102. The Court was persuaded by a critical amendment offered by Rep. Shellabarger's explanation: "The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section." *Id.* at 100 (quoting CONG. GLOBE, 42d Cong., 1st Sess., App. 478 (1871)).

140. *E.g.*, Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975) (supporters of a political candidate); Weise v. Syracuse University, 522 F.2d 397 (2d Cir. 1975) (female faculty members); Means v. Wilson, 522 F.2d 833 (8th Cir. 1975) (Indian supporters of a political candidate); Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973) (Jewish employees); Smith v. Cherry, 489 F.2d 1098 (7th Cir. 1973) (voters who were deceived as to the effect of their vote); Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973) (supporters of a political candidate); Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972) (middle class white family); Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (members of a predominantly white Catholic parish); Harrison v. Brooks, 446 F.2d 404 (1st Cir. 1971) (married couple); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971) (persons who advocated racial equality in employment opportunities). District court rulings include Thompson v. State of New York, 487 F. Supp. 212 (N.D.N.Y. 1979) (Native Americans, their relatives, and residents of reservations); Lapin v. Taylor, 475 F. Supp. 446 (D. Haw. 1979) (federal employees who act as whistleblowers); Curran v. Portland Superintending School Comm., 435 F. Supp. 1063 (D. Me. 1977) (female public schools employees); Local No. 1 (ACA) v. Int'l Bhd. of Teamsters, 419 F. Supp. 263 (E.D. Pa. 1976), (class expressing views contrary to union leadership); Milner v. Nat'l School of Health Tech., 409 F. Supp. 1389 (E.D. Pa. 1976) (female employees); Bradley v. Clegg, 403 F. Supp. 830 (E.D. Wis. 1975) (class of striking teachers); Pendrell v. Chatham Coll., 370 F. Supp. 494 (W.D. Pa. 1974) (female faculty members); Stern v. Mass. Indemnity & Life Ins. Co., 365 F. Supp. 433 (E.D. Pa. 1973) (female insurance purchasers).

are motivated by racial animus.¹⁴¹ The largest obstacle for courts is the unfortunately vague “perhaps otherwise class-based” expression.¹⁴² In the 1980s, the Court addressed this problem by narrowly construing the meaning of class-based animus.¹⁴³ Since then, many courts believe that Section 1985(3) should only extend beyond racial animus to a suspect or quasi-suspect classification, or when Congress indicates through legislation that a particular class needs special protection.¹⁴⁴ In other words, Section 1985(3) is limited to animus against an identifiable class that experiences prejudice.¹⁴⁵ This limitation has caused many courts to turn away plaintiffs who allege a class injury.¹⁴⁶

141. See *Crumsey v. Justice Knights of the Ku Klux Klan*, No. 1-80-287, slip op. (E.D. Tenn. 1982) (finding the shooting of five black women by Klansmen, and applying a judgment of \$535,000 under Section 1985(3) as well as an injunction prohibiting the Klan from engaging in violence and entering the black community). This case was reported in Charles H. Jones, *An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. § 241 and the Thirteenth Amendment*, HARV. C.R.-C.L. L. REV. 689, 690 (1986). See also *Vietnamese Fishermen’s Ass’n v. Knights of Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981) (applying a Section 1985(3) injunction following cross burning and shooting a cannon directed at Vietnamese fishermen).

142. *Trautz v. Weisman*, 819 F. Supp. 282, 291 (S.D.N.Y.1993) (explaining the lack of precision around “class,” observing: “The best that can be said of § 1985(3) jurisprudence thus far is that it has been marred by fits and starts, plagued by inconsistencies, and left in flux by the Supreme Court.”). See also Note, Matthew C. Hans, *Lake v. Arnold: The Disabled and the Confused Jurisprudence of 42 U.S.C. § 1985(3)*, 15 J. CONTEMP. HEALTH L. & POL’Y 673, 696 (1999).

143. *United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825 (1983) (holding class-based animus does not extend to group of nonunion workers). Union members allegedly conspired to assault nonunion workers at a construction site. Rejecting the Section 1985(3) claims of injured nonunion workers, the Court concluded that Griffin limited Section 1985(3) “to combat the prevalent animus against Negroes and their supporters. The latter included Republicans generally, as well as others, such as Northerners who came South with sympathetic views towards the Negro.” *Id.* at 836.

144. *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985); *Marino v. Bowers*, 657 F.2d 1363 (3d Cir. 1981) (affirming lower court dismissal of a claim by members of a rival political party in connection with patronage practices because Congress did not recognize this as invidious discrimination).

145. See *Kagy v. Sterling Hills Golf Course*, 211 F. App’x. 563, 564 (9th Cir. 2006) (holding racially motivated harassment to drive a family from a golf community is not among the “badges and incidents of slavery” contemplated by the Thirteenth Amendment); *Lewis v. McCracken*, 782 F. Supp. 2d 702 (S.D. Ind. 2011) (finding no evidence of religious animus against pastor who was threatened with arrest for seeking to protest against a casino).

146. *Warner v. Greenebaum, Doll & McDonald*, 104 F. App’x. 493 (6th Cir. 2004) (finding environmentalists not to be a class); *Johnson v. Hettleman*, 812 F.2d 1401 (4th Cir. 1987) (“Section 1985(3) does not encompass conspiracies motivated by economic, political or commercial animus”); *Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir. 1981) (reasoning employees who file workers compensation claims are not a racial or political class); *Browder v. Tipton*, 630 F.2d 1149 (6th Cir. 1980) (finding picket-line crossers who were falsely accused of criminal conduct in a labor dispute were not a class protected); *McLellan v. Miss. Power & Light Co.*, 545 F.2d 919, 925-26 (5th Cir. 1977) (holding bankrupt persons not a class); *Lopez v. Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1975) (explaining that citizens have no fundamental right to a job); *O’Neill v. Grayson Co. Hosp.*, 472 F.2d 1140 (6th Cir. 1973) (finding a county hospital’s refusal to grant admitting

However, courts have applied Section 1985(3) to conspiracies motivated by discriminatory intent against Republicans and other political groups,¹⁴⁷ advocates of equal rights for blacks,¹⁴⁸ and religious groups.¹⁴⁹ Even Ku Klux Klan members have attempted to invoke protection under Section 1985(3), usually without success.¹⁵⁰

Claims by handicapped plaintiffs highlight this vague boundary.¹⁵¹ Gender discrimination is a similarly perplexing context for this law. *Bray v. Alexandria Women's Health Clinic* ruled that abortion providers who seek to enjoin protesters from blocking access to their clinics lack Section 1985(3)'s requirement of invidious animus because protesters oppose abortion but not women as a group.¹⁵² Nonetheless, Section 1985(3) applies to women where gender discrimination is class-wide.¹⁵³

privileges to a physician is not a form of invidious discrimination); *Hughes v. Ranger Fuel Corp.*, 467 F.2d 6 (4th Cir. 1972) (holding environmentalists are not a class); *Place v. Shepard*, 446 F.2d 1239, 1246 (6th Cir. 1971) (arguing that hostile treatment of a nurse who criticized hospital care did not allege racial or class-based discrimination). *Cf. Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975) (noting environmentalist may be part of a class where there is a murder conspiracy claim).

More recently, federal district court rulings include *Ruff-El v. Nicholas Fin. Inc.*, No. 2111-cv-618, 2012 WL 252134 (S.D. Ohio 2012) (finding a failure to state class-based animus in a claim against seizure of personal property); *Friedrich v. S.E. Christian Church of Jefferson Cty.*, 3:04-cv-741-5 2005 WL 2333638 (W.D. Ky. 2005) (holding that animal rights activists arrested for protesting are not a class).

147. *Keating v. Carey*, 706 F.2d 377, 387 (2d Cir. 1983) ("In our view, Congress did not seek to protect only Republicans, but to prohibit political discrimination in general."). *See also Means*, *supra* note 140; *Glasson*, *supra* note 140.

148. *E.g.*, *Keating v. Carey*, 706 F.2d 377, 386-88 (2d Cir.1983).

149. Religious animus cases include *Ward v. Connor*, 657 F.2d 45, 48 (4th Cir. 1981) ("religious discrimination, being akin to invidious racial bias, falls within the ambit of 1985(c)"); *Marlowe*, *supra* note 140; *Gannon*, *supra* note 140; *Rankin v. Howard*, 457 F. Supp. 70 (D. Ariz. 1978); *Baer v. Baer*, 450 F. Supp. 481 (N.D. Cal. 1978).

150. In *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025, 1028 (E.D. Va. 1973), the plaintiff contended that his termination from employment due to his affiliation with the United Klans of America, and therefore violated his First Amendment rights. Rejecting this view, the court concluded that Section 1985(3) does not recognize a right of freedom of association against a private actor. *See also Savina v. Gebhart*, 497 F. Supp. 65, 66 (D. Md. 1980) (finding Section 1985 does not protect the speech of Klan member). *But see Waller v. Butkovich*, 605 F. Supp. 1137 (M.D.N.C. 1985) (holding Section 1985(3) applies to Klansmen who protest supporters of Communism).

151. *D'Amato v. Wis. Gas Co.*, 760 F.2d 1474 (7th Cir. 1985), and *Wilhelm v. Continental Title Co.*, 720 F.2d 1173 (10th Cir.1983), held that disabled individuals do not fall within the purview of Section 1985(3). For cases holding that disabled people may state a claim under Section 1985(3), see *Lake v. Arnold*, 112 F.3d 682 (3d Cir. 1997); *Abrams v. 11 Cornwell Co.*, 695 F.2d 34 (2d Cir. 1982), *vacated on other grounds*, 718 F.2d 22 (2d Cir.1983).

152. 506 U.S. 263 (1993).

153. *See Nat'l Org. for Women v. Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990); *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989); *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988); *Stathos v. Bowden*, 728 F.2d 15, 20 (1st Cir. 1984); *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979); *Novotny v. Great Am. Fed. Sav. Loan Ass'n*, 584 F.2d 1235, 1243-44 (3d Cir. 1978) (*en*

These ambiguities do not pertain to racial conspiracies by white supremacists. Interesting to note, victims of white supremacist attacks generally eschew Ku Klux Klan claims—a situation this study aims to change. Instead, they assert tort and statutory claims that are easier to prove, thereby avoiding the demanding hurdles for a Section 1985(3) claim. This approach improves the odds of prevailing by focusing on the person or people who commit an assault, for example; but it gives cover to white supremacist groups that may operate as part of a conspiracy. This study offers a specific theory, premised on the idea of segregation, to improve this proof.

As I demonstrate in Part II, the white supremacy movement has undergone renewal since the early 1970s—paradoxically, when *Griffin* was decided. The overwhelming majority of coordinated activities by white supremacists are protected by the Constitution and state counterparts. But no law gives license to conspire to assault minorities because of their race, or brand them with badges of slavery, or act in concert to drive them from a labor market due to their race, ethnicity, or religion. The time is ripe to apply Section 1985(3) to more extreme racially-motivated attacks, and hold hate groups—loosely formed, or more organized—liable.

III. SEGREGATION AND THE KU KLUX KLAN ACT

At the end of this section, in Part III.C, I propose a new theory for applying the Ku Klux Klan Act to current work-related hate incidents. To ensure that my analysis is clearly understood, I begin by summarizing it. Part III.A and Part III.B, which provide essential foundations for my theory, are better understood with my theoretical destination in mind.

The extreme racial conspiracies in Part III.C have the purpose and effect of segregating a specific workplace or labor market. In one case, Ku Klux Klan activities transformed a steel mill in Pennsylvania into a de facto segregated workplace.¹⁵⁴ In a different case, a Jewish real estate broker and her attorney husband were subjected to a torrent of hate emails, letters, and voice messages, many with the clearly stated intent to drive them out of their work in Whitefish, Montana.¹⁵⁵ This conspiracy intended to drive Jews from a local labor market. A third case involved a mentally disabled Navajo who was branded with a swastika by three McDonald's workers.¹⁵⁶ The apparent intent was to intimidate Navajos from coming to town—again, a form of segregation. A fourth case involved a severe beating of Mexican day laborers, with the apparent intent of driving all unlawful aliens from this local labor market.¹⁵⁷ In

banc), vacated on other grounds, 442 U.S. 366 (1979); *Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978).

154. *Infra* notes 214-245.

155. *Infra* notes 239-263.

156. *Infra* notes 271-296.

157. *Infra* notes 316-327.

sum, the general impetus for these attacks is an aggressive white supremacy movement that, in these extreme cases, intended and caused a workplace or a labor market to be so racially hostile that blacks and other minorities were subjected to unequal conditions of work.

Turning to Part III.A,¹⁵⁸ I examine the growth of the white supremacy movement. It uses social media to integrate politics, ideology, music, and language. This social connectivity allows more possibilities to prove racial conspiracies.

In Part III.B,¹⁵⁹ I explore workplace manifestations of white supremacy, for example, the use of racially intimidating symbols. My research explores public and private workplaces. The growing volume of decisions in Part III.B shows that white supremacists act in a continuum, ranging from displaying a confederate flag on a lunch box to hanging nooses above a black employee's work area. These cases stop short of violence; but their worst forms show how white supremacy has the intent and effect of segregating a workplace by using racial intimidation.

Part III.C is the heart of my theory. In Part III.C.1,¹⁶⁰ I bring to light unpublished legislative history of former Ku Klux Klan members who testified about the Klan's intent to keep black workers in a racial caste. In Part III.C.2,¹⁶¹ I present a typology of the four extreme cases of work-related racial conspiracies. My point is that these extreme cases are similar to boycotting and segregationist practices, enforced by intimidation and assaults, organized by the Klan in the 1860s and 1870s.

A. *Resurgence of White Supremacy*

White supremacy has been gradually normalized over the past forty years.¹⁶² Compared to the past, when the KKK marched in white robes, this renaissance is insidious.¹⁶³ Supremacists prefer access-controlled internet sites

158. *Infra* notes 162-185.

159. *Infra* notes 186-199.

160. *Infra* notes 200-216.

161. *Infra* notes 217-350.

162. See Paul M. Sniderman, et al., *The New Racism*, 35 AM POL. SCI. REV. 423 (1991) (discussing laid-off worker experiment at 432-442). See generally AMY ELIZABETH ANSELL, *NEW RIGHT, NEW RACISM: RACE AND REACTION IN THE UNITED STATES AND BRITAIN* (1997); Judy H. Katz & Allen Ivey, *White Awareness: The Frontier of Racism Awareness Training*, 55 PERSONNEL AND GUIDANCE J. 485 (1977); Teun A. van Dijk, *Discourse and Denial of Racism*, 3 DISCOURSE & SOC'Y 87 (1992).

163. *E.g.*, *State of Tex. v. Knights of Ku Klux Klan*, 853 F. Supp. 958, 960 (E.D. Tex. 1994) (finding the Ku Klux Klan has no First Amendment right to participate in adopt-a-highway program). *But see Ark. State Highway*, *infra* note 326; *Hungerbeeler*, *infra* note 351; *Int'l Keystone*, *infra* note 351.

to cross burnings. The movement also benefits from white supremacy writers, journals, and organizational websites.¹⁶⁴

Some white supremacists are reentering politics.¹⁶⁵ They advocate white racial interests,¹⁶⁶ sounding like bigots from a century ago.¹⁶⁷

164. For a scholarly overview of the ideological roots of modern white racialism, see Betty A. Dobratz, *The Role of Religion in the Collective Identity of the White Racist Movement*, 40 J. SCI. STUDY RELIGION 287 (2001) (exploring Christian Identity, Church of the Creator, and Odinism). Current and recent pseudo-intellectual leaders of white supremacy include Richard Spencer (head of National Policy Institute and leading spokesperson for Alt-Right movement); Jared Taylor (founder and editor of American Renaissance), Frank Weltner (publisher of Jew Watch, a defunct website); Andrew Anglin (founder and editor of the neo-Nazi *Daily Stormer* website), Jeff Schoep (leader of the National Socialist American Workers Freedom Movement, who renamed the group the National Socialist Movement); William Daniel Johnson (chairman of the American Freedom Party); Kevin B. MacDonald (editor of *The Occidental Quarterly*, a racist and anti-Semitic journal); Kevin Alfred Strom (Founder and Managing Director of National Vanguard); and James Edwards (creator and host of “The Political Cesspool,” a pro-white radio show).

165. *Green Party of Tenn. v. Hargett*, 953 F. Supp. 2d 816, 837 (M.D. Tenn. 2013) (noting that in 2004 a Republican nominee for Tennessee’s 8th District, James L. Hart, was “a proponent of eugenics and other racist ideas”). Hart won more than 25% of the vote in the general election that year. *Id.* More notably, David Duke, ran in 2016 for the Republican nomination to the U.S. Senate in Louisiana. See Alan Blinder, *David Duke, Ex-K.K.K. Leader, to Seek Senate Seat in Louisiana*, N.Y. TIMES (July 22, 2016), https://www.nytimes.com/2016/07/23/us/david-duke-senate-louisiana.html?_r=0 (Duke said, “. . . what makes me different is I also demand respect for the rights and the heritage of European-Americans”).

166. Current examples include a rally at a state capitol (*Scuffles Break out between the KKK and African-American Activists*, N.Y. TIMES (July 18, 2015), <https://www.nytimes.com/video/multimedia/10000003808741/scuffles-break-out-between-the-kkk-and-african-american-activist.html>), political recruitment of college students (Gabriel Thompson, *Golden State of Hate: Extremism’s Long History in California*, NEWSWEEK (Feb. 28, 2017), <http://europe.newsweek.com/golden-state-hate-extremism-history-california-561843>), and white-preference policy ideas, such as immigration (David Weigel, *Alt-Right Leaders Praise Sessions as Attorney General Pick*, WASH. POST (Nov. 19, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/11/19/alt-right-leaders-praise-sessions-as-attorney-general-pick/?utm_term=.e1a49ce4a2af).

Litigation related to political rights of white identity groups and members includes *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) (allowing wearing Nazi uniforms in a Jewish community); *Knights of the Ku Klux Klan v. E. Baton Rouge Parish Sch. Bd.*, 578 F.2d 1122 (5th Cir. 1977) (enjoining school’s exclusion of KKK); *Invisible Empire Knights of the Ku Klux Klan v. City of West Haven*, 600 F. Supp. 1427, 1432-33 (D. Conn.1985) (finding a bond unconstitutional due, in part, to vague standards); *Knights of the Ku Klux Klan v. Martin Luther King, Jr. Worshippers*, 735 F. Supp. 745 (M.D. Tenn. 1990) (holding a denial of parade permit violated constitutional rights of KKK); *State v. Miller*, 398 S.E.2d 547 (Ga. 1990) (upholding the constitutionality of Georgia’s Anti-Mask Act as applied to a KKK member who was arrested for wearing a hood); *B.W. Robinson v. State*, 393 So. 2d 1076 (Fla. 1980) (upholding conviction under Florida’s anti-mask law).

167. Carlton J.H. Hayes, *The Ku Klux Klan: A Study of the American Mind*, 39 POL. SCI. Q. 502, 503 (1924) (reviewing JOHN MOFFATT MECKLIN, *THE KU KLUX KLAN: A STUDY OF THE AMERICAN MIND* (1924)) (“Any group that does not look Nordic or espouse Evangelical Protestantism is to be feared and fought, and thus it falls out that such strange fellows as negroes, Jews and Catholics are bundled by the Klan into the same Procrustean bed.”).

There is no census of white supremacists. Their pervasiveness can be extrapolated, however, by mapping hate groups. There are 130 active Ku Klux Klan groups in the U.S. but white supremacists are skinheads, Aryans, neo-Nazis, and the like.¹⁶⁸ Many supremacy groups operate openly. Even the Klan is more public than decades ago when they preferred isolation.¹⁶⁹

White supremacists find attachment, meaning, and purpose in racial power. They enjoy racial music,¹⁷⁰ speak in coded vocabularies,¹⁷¹ and mingle on the internet.¹⁷² Outsiders can miss “dog whistles,” a term for sublimated racist cues.¹⁷³

168. *E.g.*, American Freedom Party (political party promotes white supremacy); American Nazi Party (neo-Nazi organization patterned after the Third Reich); Aryan Brotherhood of Texas (violent white supremacist prison gang); Aryan Nations (white supremacist neo-Nazi group); Creativity Alliance (group promotes a racialist religion and white supremacism known as RAHOWA); Hammerskins (white supremacist group promotes racial music); Ku Klux Klan (including National Alliance, National Association for the Advancement of White People, and National Policy Institute, a media-savvy advocacy group for people of European descent); National Vanguard (group promotes European race); Nationalist Movement (white supremacist organization); The Order (white supremacist group); Phineas Priesthood (Christian-based group opposes mixing of races); Volksfront (skinhead group for people of European descent); and White Aryan Resistance (neo-Nazi group). The list was composed from *Hate Groups*, S. POVERTY L. CTR., <https://www.splcenter.org/hate-map> (visited Feb. 17, 2017). Although these groups restrict membership, some welcome women. CHESTER L. QUARLES, *THE KU KLUX KLAN AND RELATED AMERICAN RACIALIST AND ANTISEMITIC ORGANIZATIONS: A HISTORY AND ANALYSIS 4* (1999) (discussing the beliefs of a typical “Klanswoman”). *See also* KATHLEEN M. BLEE, *WOMEN OF THE KLAN: RACISM AND GENDER IN THE 1920S* (2008).

169. Matthew Delmont, *Hairspray, Revealing Portrayal of Racism in America*, ATLANTIC (Dec. 7, 2016), <https://www.theatlantic.com/entertainment/archive/2016/12/hairsprays-revealing-portrayal-of-racism-in-america/509741>.

170. Popular groups are Bound for Glory, Aggravated Assault, Bully Boys, Max Resist, The Hooligans, and Skrewdriver. Common music genres include National Socialist black metal, Nazi punk, hatecore, and Rock Against Communism. Robert Futrell, et al., *Understanding Music in Movements: The White Power Music Scene*, 47 SOCIOLOGICAL Q. 275, 282 (2016) (analyzing how the Aryan music scene fosters a sense of purpose and belonging to people who practice racial exclusion). WPM (White Power Music) draws participants from the KKK, Christian Identity sects, neo-Nazis, and Aryan skinheads. *See* BETTY A. DOBRATZ & STEPHANIE L. SHANKS-MEILE, *WHITE POWER, WHITE PRIDE!: THE WHITE SEPARATIST MOVEMENT IN THE UNITED STATES* (1997).

171. *Infra* note 174.

172. *See* Working Class Skin Heads, FACEBOOK (June 6, 2016), at https://www.facebook.com/WCSHSodaCity/?hc_ref=PAGES_TIMELINE&fref=nf (“This community is based on those who earn their living. Those of us who scrape by to take home our slice of the dream. We are not slaves, we are not robots we are hard-working people who know that something earned is something to be proud of.”).

173. Robert E. Goodin & Michael Seward, *Dog Whistles and Democratic Mandates*, 76 POL. Q. 471, 471 (2005) (first observing that “[d]og whistle politics” is a way of sending a message to certain potential supporters in such a way as to make it inaudible to others whom it might alienate or deniable for still others who would find any explicit appeal along those lines offensive.”). More recently, the origin of “dog whistle politics” is explained in Bethany L. Albertson, *Dog-Whistle Politics: Multivocal Communication and Religious Appeals*, 37 POL. BEHAVIOR 3, 4 n.2 (2015) (noting that such cues were first used by the Conservative Party in the U.K. with the anti-immigration cue, “Are you thinking what we’re

Supremacists often mask their bigotry.¹⁷⁴ Some legitimize their ideology by linking to Christianity.¹⁷⁵ Others promote racial separation around odd medieval themes such as ancestral blood,¹⁷⁶ and kith and kin.¹⁷⁷ Others advocate “living space,”¹⁷⁸ white culture,¹⁷⁹ and comprehensive racialism.¹⁸⁰ Cruder supremacists espouse separatism.¹⁸¹

thinking?”). See also IAN HANEY LOPEZ, *DOG WHISTLE POLITICS* ix (2014) (defining “dog whistle politics” as “coded racial appeals that carefully manipulate hostility toward nonwhites.”).

174. See *Ku Klux Klan, Klan Glossary*, S. POVERTY L. CTR. (last visited on Jan. 1, 2018), <https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan>. The hidden nature of Klan-speak is demonstrated by terms such as SAN BOG (a password meaning, “Strangers Are Near, Be On Guard”), and KIGY! (a password meaning, “Klansman, I greet you!”). Courts have been presented with expert testimony on this coded communication. *E.g.*, *State v. Tankovich*, No. 38801, 2012 WL 9500497 (Idaho Ct. App. Dec. 21, 2012) (noting expert testimony established that the defendant’s three-leaf clover tattoo was a common symbol worn by Aryan white supremacists).

175. Loyal White Knights Ku Klux Klan, *Racial Greetings from the Loyal White Knights of the Ku Klux Klan!*, <http://www.kkkknights.com>:

Our goal is to help restore America to a White Christian nation, founded on God’s word. This does not mean that we want to see anything bad happen to the darker races ... we simply want to live separate from them ... As GOD intended. (Lev.20:24-25) It is a simple fact that whenever these races try to integrate themselves into White society, that society is damaged immensely ... perhaps even destroyed altogether. Everything that we do as Klan members is in furtherance of our ultimate goal.

176. Wotan’s Reich, *Why We Blood Oath*, POSITIVE THOUGHT PROJECT BLOG (Aug. 29, 2015), <https://positivethoughtproject.blogspot.com/2015/08/why-we-blood-oath.html>, explaining:

Through our blood we carry the integrity of our ancestors. It is up to us to honor this integrity by our actions and deeds...and yes to an extent our words. When we swear an oath upon our blood we are affecting our hamingja, that “Guardian” and “Luck” that gets passed on through the generations of our Folk. What we swear an oath too is equally important, because you can swear to something that isn’t worthy of you.

177. Matthew Heimbach, “*I Hate Freedom*,” *Traditionalist Youth Network*, S. POVERTY L. CTR., (July 7, 2013), <https://www.splcenter.org/fighting-hate/extremist-files/individual/matthew-heimbach> (“This is our home and our kith and kin.”).

178. National Alliance, *What Is the National Alliance, White Living Space*, <https://natall.com/about/what-is-the-national-alliance/> (“We must have White schools, White residential neighborhoods and recreation areas, White workplaces, White farms and countryside. We must have no non-Whites in our living space, and we must have open space around us for expansion.”).

179. Washington Summit Publishers, describing THE GREAT ERASURE (Richard B. Spencer, ed., 2012), available at <http://www.washsummit.com/shop/the-great-erasure> (“The White man lives in a world his race once dominated and in which Black and Brown are now colonizers, in which European heritage is being taken away piece by piece: cultural heroes, literature, popular icons, identity ultimately, everything.”).

180. See *Wilmur*, *infra* note 188.

181. *E.g.*, Oven the Libturd @Pagan Shitlord, TWITTER (Jan. 31, 2017), <https://twitter.com/okakkkk?lang=en> (“RACIAL NATIONALISM ...#racematters Because ALL races should have the right to a homeland they can call their own”); Stormfront.org, Anonymous Post (June 3, 2011, 6:08 p.m.), <https://www.stormfront.org/forum/t806344/> (“The Asians are in the process of bettering themselves, while we are lowering ourselves to the Negroes, mestizos etc. Our bloodline is being watered down”); Redneck Nation Clothing, FACEBOOK (Feb. 28, 2017, at 7:23 p.m.),

Organized supremacy groups are widely scattered and often operate on a small scale.¹⁸² Their unique names suggest that their movement is fragmented and localized.¹⁸³ Nonetheless, these groups are numerous, especially in rural states. Idaho, though sparsely populated, has The Order, Aryan Nations Church, Posse Comitatus, and White American Bastion.¹⁸⁴ Some white groups prefer rural areas where they can live in “free space.”¹⁸⁵

B. *White Supremacy in the Workplace*

Racial organizations are concerned with economic issues.¹⁸⁶ They propose anti-immigration employment policies.¹⁸⁷ At the grass roots level, supremacist themes are seeping into the workplace.¹⁸⁸ Members and sympathizers

<https://www.facebook.com/RedneckNationCo/?nr>, (“March Is National Stop Blaming White People Month! . . . Hug a white person.”).

182. Thomas C. Frohlich, et al., *10 States With the Most Hate Groups*, 24/7 WALL ST. (July 9, 2015). The data relied on a report of active hate groups in all states, according to the Southern Poverty Law Center, and then normed against U.S. Census figures for 2013 (Louisiana [ranked tenth] has 3.2 hate groups per million residents; Mississippi [ranked first] has 7.4 hate groups per million residents).

183. *Id.*, reporting that Tennessee’s 29 active hate groups are comprised of several KKK branches (Southern Mountain Knights, the Original Knight Riders Knights, and the Loyal White Knights), neo-Nazi groups (Creativity Alliance and Aryan Nations), and anti-Muslim groups (Citizen Warrior and Political Islam).

184. JAMES A. AHO, *THE POLITICS OF RIGHTEOUSNESS: IDAHO CHRISTIAN PATRIOTISM 19* (1990) (examining this matter in Table 1.2).

185. PETE SIMI & ROBERT FUTRELL, *AMERICAN SWASTIKA: INSIDE THE WHITE POWER MOVEMENT’S HIDDEN SPACES OF HATE 4* (2d ed. 2015) (defining Aryan free spaces as a “setting where marginalized groups feel some degree of freedom to express oppositional identities and beliefs that challenge mainstream ideas.”).

186. Phyllis B. Gerstenfeld et al., *Hate Online: A Content Analysis of Extremist Internet Sites*, 3 ANALYSES SOC. ISSUES & PUB. POL’Y 29, 35 (2003) (reporting that 79 sites (50.3% of sample) discussed economic issues).

187. The Federation for American Immigration Reform, known by its Orwellian acronym, FAIR, bridges white extremism and the mainstream political tide against immigration. In its early history, FAIR received approximately \$1.2 million in grants from the Pioneer Fund, a group fashioned on the eugenic principles of Nazi Germany. *See Federation for American Immigration Reform*, S. POVERTY L. CENT., <https://www.splcenter.org/fighting-hate/extremist-files/group/federation-american-immigration-reform>. FAIR’s founder, John Tanton, deceptively characterized FAIR and two other groups he promoted— Numbers USA, and the Center for Immigration Studies— by emphasizing that FAIR is a “centrist group.” Jason DeParle, *The Anti-Immigration Crusader*, N.Y. TIMES (Apr. 17, 2001), <http://www.nytimes.com/2011/04/17/us/17immig.html?page-wanted=all#>. Until his death in 2003, Prof. Garrett Hardin, a prominent white racist on the board of FAIR, promoted eugenic views. At one point, he argued that “certain racial groups have ‘adopt[ed] overbreeding as a policy to secure [their] own aggrandizement,’ and as a result, ‘the freedom to breed is intolerable.’” *Garrett Hardin*, S. POVERTY L. CENT., <https://www.splcenter.org/fighting-hate/extremist-files/individual/garrett-hardin>.

188. *See Peterson v. Wilmur Commc’ns, Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002). The court ruled that Peterson’s demotion violated Title VII’s prohibition against religious discrimination, noting that there was no evidence that Peterson acted in a racially motivated manner while he was employed as a supervisor. This ruling conflicts with cases that find that

occasionally communicate bigoted views at work. The modern connection between work and white supremacy traces to the English skinheads of the 1960s, ethnocentric working-class slum dwellers.¹⁸⁹ More recently, some people have fused working class identity and supremacy.¹⁹⁰ They express racial identity in work symbols.¹⁹¹

The public sector offers the clearest picture for observing white supremacy in the workplace because this employment enjoys First Amendment protections. Employees assert constitutional speech and associational rights.¹⁹² The most common cases of employees expressing white supremacist beliefs involve police¹⁹³ and corrections officers.¹⁹⁴ Other public employees promote supremacist views at work too.¹⁹⁵

the Klu Klux Klan and Nazi groups are not a religion under Title VII. *E.g.*, *Swartzentruber v. Gunitte Corp.*, 99 F. Supp. 2d 976 (N.D. Ind. 2000) (denying religious discrimination complaint of a member of the Church of American Knights of the Ku Klux Klan who was ordered to cover his forearm tattoo of a hooded figure standing in front of a burning cross); *Slater v. King Soopers, Inc.*, 809 F. Supp. 809 (D. Colo. 1992); *Augustine v. Anti-Defamation League of B'nai-B'rith*, 249 N.W.2d 547 (Wis. 1977); *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973). Similarly, see *Storey v. Burns Int'l. Sec. Servs.*, 390 F.3d 760 (3d Cir. 2004) (denying complaint of employee who claimed religious discrimination after he was terminated for failing to remove Confederate flag stickers on his lunch box).

189. Mike Brake, *The Skinheads: An English Working Class Subculture*, 6 YOUTH & SOC'Y 179 (1974).

190. *United States v. Allen*, 341 F.3d 870 (9th Cir. 2003) (finding white supremacist members of the Montana Front Working Class Skinheads convicted of patrolling a public park to intimidate minorities); *Rose v. Santoro*, No. 2:13-cv-02416, 2015 WL 8665968 (E.D. Cal. Dec. 14, 2015) (noting white supremacy groups include working class skinheads).

191. See *Working Class Skinhead*, NO GODS NO MASTERS, https://www.no-gods-no-masters.com/tshirts_bands/working_class_skinhead (last visited Feb. 25, 2017) (showing a white man dressed in work attire and carrying tools in casual wear merchandise). A more general guide appears in *Catalog of Racist Symbols and Numbers*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/references/hate-symbols>. See also A.J. Willingham, *New Symbols of Hate*, CNN (Feb. 21, 2017), <http://www.cnn.com/2017/02/21/us/hate-symbols-changing-trnd/index.html>.

192. *Pappas v. Giuliani*, 290 F.3d 143 (2d. Cir. 2002) (holding police officer circulated anti-black and anti-Semitic materials); *Essex Cty. Sheriff's Dep't. v. Essex Cty. Correctional Officers Ass'n*, No. 10-00590, 2010 WL 5135895 (Mass. Sup. Ct. Dec. 1, 2010) (corrections employees condoned and encouraged racially harassing posts to union's website); and *Cutler v. Dorn*, 955 A.2d 917 (N.J. 2008) (Jewish police officer was subjected to supervisor comments about "dirty Jews" and other anti-Semitic communications). See also *Carpenter v. City of Tampa*, No. 18-CV-451, 2005 WL 1463206 (M.D. Fla. June 21, 2005) (finding a public employee displayed Confederate flag on his car).

193. *McMullen v. Carson*, 754 F.2d 936, 937 (11th Cir. 1985) (sheriff department clerical employee also served as recruiter for a local Ku Klux Klan group); *State v. Henderson*, 762 N.W.2d 1 (Neb. 2009) (noting a state trooper joined a Ku Klux Klan affiliate, the Knights Party).

194. *Allen v. Mich. Dep't of Corrections*, 165 F.3d 405 (6th Cir. 1999) (workplace included racial epithets, slurs, and intimidating symbols, including nooses); *Weicherding v. Riegel*, 160 F.3d 1139 (7th Cir. 1998) (prison sergeant terminated for engaging in white supremacist activities and involvement with the Ku Klux Klan); *Lawrenz v. James*, 852 F. Supp. 986 (M.D. Fla. 1994) (corrections officer terminated for wearing a t-shirt with a

Private sector cases are less common because these jobs lack the same constitutional protections. However, racial intolerance causes significant workplace disruptions in the private sector.¹⁹⁶ In this arena, white supremacists have argued that their views are religious, and therefore protected from discrimination.¹⁹⁷ However, courts have generally upheld an employer's right

swastika and the words "White Power"); Harvey Randall, *Free Speech: Council 82 v State of New York*, App. Div., No. 82571, 4/29/99, 5 PUB. EMP'T L. NOTES 109 (1999) (corrections officer flew Nazi flag at his home in violation of employment rule); *Hawkins v. Dep't of Pub. Safety and Correctional Servs.*, 602 A.2d 712 (Md. 1992) (corrections officer discharged for off-duty anti-Semitic outburst at bank).

195. *Smith v. Town of Hempstead Dep't of Sanitation Sanitary Dist. No. 2*, 798 F. Supp. 2d 443 (E.D.N.Y. 2011) (sanitation department employees alleged that noose was displayed); *Wilson v. N.Y. City Dep't of Transp.*, No. 01-CV-7398, 2005 WL 2385866 (S.D.N.Y. Sep. 28, 2005) (workplace permeated with offensive nicknames and noose); *Williams v. N.Y. City Hous. Auth.*, 154 F. Supp. 2d 820 (S.D.N.Y. 2001) (supervisor of black employees in public housing department openly displayed a noose behind his desk); and *Savina v. Gebhart*, 497 F. Supp. 65 (D.Md. 1980) (school security monitor distributed Ku Klux Klan information, and broadcasted racially derogatory remarks over a school's public-address system).

196. *See Tademy v. Union Pac. Corp.*, 520 F.3d 1149 (10th Cir. 2008) (black employee's workplace contained noose, racist graffiti, and racial intimidation); *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 906 (8th Cir. 2006) (black employees called "monkey," "black monkey," "porch monkeys," and "chimpanzee"); *Webb v. Worldwide Flight Serv., Inc.* 407 F.3d 1192, 1193 (11th Cir. 2005) (black employee called "nigger" everyday by manager); *White v. BFI Waste Servs. LLC*, 375 F.3d 288, 298 (4th Cir. 2004) (employee subjected to racially-oriented degradation); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 182 (4th Cir. 2001) (plaintiff was called "dumb monkey"); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 182 (4th Cir. 2001) (manager habitually used terms "monkey," "dumb monkey," and "nigger"); *Hollins v. Delta Airlines*, 238 F.3d 1255 (10th Cir 2001) (several hangman's nooses coupled with racist jokes); *Walker v. Thompson*, 214 F.3d 615, 626 (5th Cir. 2000) (supervisors compared African American employees to "monkeys," "slaves", and "nigger"); *Jackson v. Quanex Corp.*, 191 F.3d 647, 652 (6th Cir. 1999) (workplace filled with racial epithets and racially offensive graffiti); *Jeffries v. Metro-Mark, Inc.*, 45 F.3d 258, 260 (8th Cir. 1995) (plaintiff was called a "monkey"); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 671 (7th Cir. 1993) (female employee called a "nigger"); *Daniels v. Pipefitters' Ass'n Local Union No. 597*, 945 F.2d 906, 910 (7th Cir. 1991) (plaintiffs were called "porch monkeys" and "baboons"); *Vance v. S. Bell Tel. & Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989) (noose displayed near the work station of a black employee); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421 (7th Cir. 1986) (racial graffiti and a noose placed near black employee's workplace); *EEOC v. Rock-Tenn Servs. Co., Inc.*, 901 F. Supp. 2d 810 (N.D. Tex. 2012) (racist graffiti and noose on employer's premises); *Lake, infra* note 229 (workplace was pervaded with racial slurs, epithets and graffiti, including swastikas, Ku Klux Klan video, and display of a noose); *Walker v. SBC Services, Inc.*, 375 F. Supp. 2d 524, 532 (N.D. Tex. 2005) (warehouse workers were called "monkeys"); *Colbert v. Infiniti Broad. Corp.*, 423 F. Supp. 2d 575, 585 (N.D. Tex. 2005) (manager used term "monkey" in derogatory manner); *Sykes v. Franciscan Skemp Healthcare*, 2000 WL 34235984 (W.D. Wis. Aug. 21, 2000) (black employee had writings such as "nigger" and "nigger go home" in work area); *Tillmon v. Garnett Corp.*, No. 97-C-8212, 1999 WL 592119 (N.D. Ill. Aug. 2, 1999) (black employee subjected to recurring racist name-calling, noose from co-workers, and swastika etched on his tool box).

197. *See supra* note 164. *See also* EEOC Decision No. 79-6, 1978 WL 5828, at *3 ("Viewing the Klan's history, its goals and purposes, it is apparent that the Klan's beliefs are

to discharge an employee for racially inflammatory speech.¹⁹⁸ At times, white prejudice has been costly for employers.¹⁹⁹

C. *Segregation and the Ku Klux Klan Act*

In Parts II.A and II.B, I demonstrated that a broadly based white supremacy movement has taken root in the U.S. Its adherents rarely if ever use the term segregation, or advocate for it. But the current movement is multi-layered. It has digestible pseudo-intellectuals and violent counterparts. The former realizes that a *de jure* return to segregation is implausible; the latter is impulsive and seeks to achieve its aims of racial purity by terrorizing minorities. Nonetheless, people in both layers use symbols, language, and policy concepts that stand for segregation. Obvious illustrations include white space and land, music for the white race, and love for white people. In effect, these are calls to re-segregate America.

In Part II.C.1, I look back at the Ku Klux Klan Act and specifically focus on congressional testimony that revealed the Klan's aim and effect in segregating the labor of blacks. I conclude that when Congress passed the Ku Klux Klan Act in 1871, their conception of racial equality also included the right of blacks to labor side-by-side with whites, free of intimidation and other badges of slavery. Indeed, that was the obvious implication of emancipating slaves. In Part II.C.2, I present a typology of four contemporary cases where

more political, social or economic than theistic and they do not involve a relation to a superior being involving duties superior to those arising from any human relation.”)

198. *Webber v. First Student, Inc.*, 928 F. Supp. 2d 1244 (D. Ore. 2013) (finding no violation of bus driver's First Amendment rights when he was terminated for insubordination after he refused to remove a 3-by-5 foot Confederate flag from his pickup truck that was parked on the school district's property); *Vanderhoff v. John Deere Consumer Prods., Inc.*, C.A. 3:02-0685-22, 2003 WL 23691107 (D.S.C. Mar. 13, 2003) (finding no wrongful discharge of employee who displayed a Confederate flag decal on his toolbox because it is not a political opinion under state law); *Powell v. Media Gen. Operations, Inc.*, No. 7:10-3170, 2011 WL 4501836 (D.S.C. Apr. 26, 2011) (discharging employee's speech, equating Muslims with terrorism, not protected in private workplace).

199. *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140 (2d Cir. 2014) (upholding compensatory damages of \$1.32 million for racially abusive environment that included noose and derogatory racial terms); *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261 (11th Cir. 2008) (finding employer toleration of recurring racial hostility results in \$500,000 punitive damages award); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004) (affirming \$1.2 million award to employee whose workplace had nooses, a black doll hung by a noose, and invitations for black employees to attend Ku Klux Klan hunting parties where they would be the prey); *Lin v. Dane Constr. Co.*, 2014 WL 8131876 (N.J. Super. Ct. App. Div. Mar. 17, 2015) (affirming award of \$25,000 in pain and humiliation damages to employee who was subjected to repeated racial slurs); and *Boone v. City of Lavergne*, 2011 WL 553757 (Tenn. Ct. App. Feb. 16, 2011) (affirming jury awards of \$350,000 and \$300,000 to two employees who were subjected to racial harassment). *See also Albertsons Agrees to Pay \$8.9 Million for Job Bias Based on Race, Color, National Origin, Retaliation*, EEOC (Dec. 15, 2009), <https://www.eeoc.gov/eeoc/newsroom/release/12-15-09.cfm> (holding employer settled discrimination claims for \$8.9 million after ignoring a pattern of graffiti and comments calling “Blacks n-----s and Hispanics . . . s---s”).

white supremacists formed a racially-motivated conspiracy in connection to workplace. In all four cases, I demonstrate the possibility—and in some cases, likelihood—that these conspiracies deprived minorities of freedom to work with white citizens due their race or ethnicity.

1. *The Legislative History of the Ku Klux Klan Act: Segregating Labor*

The foremost aim of the Ku Klux Klan Act was to stop terrorism that drove blacks and their white supporters from voting.²⁰⁰ But the law had more than one purpose, and also sought to neutralize terror to enforce labor inequality among blacks and whites.²⁰¹ The Klan sought to segregate blacks and whites in their work. This can be seen in the oath and induction ritual for the Knights of the White Camelia, the Klan's founding group, which Rep. Stevenson included in the Congressional Globe.²⁰² The oath was segregationist by its terms.²⁰³ In conjunction with this oath, initiates pledged “in all circumstances (to) defend and protect persons of the white or Caucasian race in their lives, property, and dominion, against all encroachments or invasions from any inferior race, especially the African race.”²⁰⁴

The following legislative history shows that Klan members expressly rejected the idea of whites working with blacks.²⁰⁵ The colloquy between Rep.

200. There are numerous accounts of the Klan's political terrorism. One example is the testimony of Iredell Jones, a 28 year-old resident of Rockhill, South Carolina:

Question. Did the Ku Klux Klan travel over the county disguised, men and horses?

Answer. They did.

Question. What was the object of the Ku Klux Klan?

Answer. Their object was reported to be to intimidate Republican voters.

CONG. GLOBE, 42nd Cong., 1st Sess. 291 (1871), <http://www.memory.loc.gov:8081/cgi-bin/ampage?collId=llcg&fileName=100/llcg100.db&recNum=644>.

201. *See* S. 1223, 41st Cong. (emphasis added):

Whereas large numbers of lawless and evil-disposed persons, . . . have formed secret organizations, commonly known as the Ku-Klux Klan, having for their main object to deny to certain classes of citizens of the United States the liberty, rights, and equal protection of the laws guaranteed by the Constitution; and whereas, by the use of disguises worn upon their persons, by perjury, violence, threats, overawing the local authorities, . . . have denied and still do deny to them the equal protection of the laws, *by which means such colored freedmen and others have been made to render involuntary service*, as their only means of escape from death or other great bodily harm at the hands of such lawless persons and organizations . . .

202. CONG. GLOBE, 42nd Cong., 1st Sess. 297 (1871), <http://www.memory.loc.gov:8081/cgi-bin/ampage?collId=llcg&fileName=100/llcg100.db&recNum=650>.

203. *Id.* (stating, in part, “I swear to maintain and defend the social and political superiority of the white race on this continent; always and in all places to observe a marked distinction between the white and African races.”).

204. *Id.*

205. *Infra* notes 206-216. Research confirms that much of the South could not transition from its slave-holding economy to a wage-based economy where blacks and whites participated as equals. For example, South Carolina codified the work regimen of former slaves by requiring agricultural employees—in other words, freed blacks—to “rise at the dawn in the morning, feed, water and care for the animals on the farm, do the usual and

Nye and Thomas Willeford, a North Carolina carpenter and former Klan member, revealed how the terror group segregated labor:

Question: Was there any arrangement in this Ku Klux Klan by which the wages of colored men were fixed?

Answer: Yes, sir; the man was to give a certain price and no more.

Question: If anyone gave more—

Answer: Why he was to have something done with him, dealt with just whatever the camp said.²⁰⁶

The Ku Klux Klan created an integrated terror system, using economic segregation and exclusion to achieve its political objectives. Seven more witnesses came before the House of Representatives to testify about the Klan's labor segregation practices:

- William L. Rogers, a South Carolina merchant, explained that he left the Democratic Party, because “they passed resolutions declaring that they would give no work to any man, white or black, who voted the Republican ticket, nor permit him to live upon their lands, nor sell him provisions, but would starve him out.”²⁰⁷
- A South Carolina Confederate veteran, John R. Cochran, repeated this theme: “Democratic clubs were organized throughout the county, and it was generally understood, and I was so told by many members of the clubs, that resolutions were passed in the clubs that no man should employ colored men who voted the Republican ticket, and there was a general system of intimidation and violence in many portions of the county.”²⁰⁸
- Thomas C. Scott explained how the Klan tied its campaign of political terror to employment for freed blacks: “I heard Gabriel Cannon, State canvasser, say, in addressing the colored people, that if they voted the Radical ticket they would lose their friends and wander about like Indians; get their length, two by six, and their bones would whiten the hills, as they were dependent upon us for everything— bread, employment, and sustenance.”²⁰⁹

needful work about the premises, prepare their meals for the day, if required by the master, and begin the farm work or other work by sunrise.” David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African Americans*, 76 TEX. L. REV. 781, 787 n.26 (1998). More generally, Bernstein observes that the “attempts by Southern states to prevent the emergence of a free labor market led to the passage of the 1866 Civil Rights Act.” *Id.* at 788. This supports my study's labor segregation theory for the Ku Klux Klan Act.

206. CONG. GLOBE, 42nd Cong., 1st Sess. 289 (1871), <http://www.memory.loc.gov/8081/cgi-bin/ampage?collId=llcg&fileName=100/llcg100.db&recNum=642>.

207. CONG. GLOBE, 42nd Cong., 1st Sess. 291 (1871), <http://www.memory.loc.gov/8081/cgi-bin/ampage?collId=llcg&fileName=100/llcg100.db&recNum=644>.

208. CONG. GLOBE, 42nd Cong., 1st Sess. 293 (1871), <http://www.memory.loc.gov/8081/cgi-bin/ampage?collId=llcg&fileName=100/llcg100.db&recNum=646>.

209. CONG. GLOBE, 42nd Cong., 1st Sess. 293 (1871).

- Thomas Hill, whose residence was not disclosed, testified to being economically coerced to join a Klan-supported Democratic club: “Being a poor man, and in order to save my life, I was compelled to sail under false colors.”²¹⁰
- Jed P. Porter, of Union County, South Carolina, testified about a threat made to a former slave:

A short time before the election a freedman who lived in my neighborhood informed me that a coffin had been left in the shop where he worked, with a notice that if he did not leave the country at once he would be killed for being a Radical. I am satisfied it was true, and the freedman left at once for Columbia.²¹¹
- Wilson Cook, resident of Greenville County, South Carolina for more than thirty years, elaborated on his observation of political intimidation: there were “[t]hreats that if they voted the Republican ticket they would be turned away from the homes which they occupied as employés.”²¹²
- The testimony of Johnson Wright, a 38-year-old carpenter, demonstrated that the white supremacist toolkit of threats included a complete banishment from all economic relationships—in effect, a racial boycott: “There were threats made against persons of Republicans, and also against threats that every man who voted the Republican ticket would be turned off and left to starve.”²¹³

This testimony made a keen impression on lawmakers. In a lengthy floor speech advocating passage of the Ku Klux Klan Act, Rep. Luke Poland’s (R.-Vt.) voiced his concern that the Klan had reimposed a new type of slavery:

Laws were passed in many if not all the late rebel States whereby the negroes were hampered and shackled in every possible way. In the ownership of land, in the making of contracts, and a thousand ways, they were forbidden the free exercise of all rights which are supposed to belong to all free men in all free Governments.”²¹⁴

Rep. Poland went further, however, in explaining why the free labor of blacks was a threat to a large segment of poor whites in the South:

A large number of men had lived in idleness, and the fruits of idleness had ripened. The country was full of dissipated horse-racing, cock-fighting, roystering fellows, many of whom by the war had become desperate and dangerous men. The liberation of the slaves had deprived them of their means of living, and they were reduced to the desperate and disagreeable duty of

210. CONG. GLOBE, 42nd Cong., 1st Sess. 292 (1871), <http://www.memory.loc.gov/8081/cgi-bin/ampage?collId=llcg&fileName=100/lcg100.db&recNum=645>.

211. CONG. GLOBE, 42nd Cong., 1st Sess. 294 (1871), <http://www.memory.loc.gov/8081/cgi-bin/ampage?collId=llcg&fileName=100/lcg100.db&recNum=647>.

212. CONG. GLOBE, 42nd Cong., 1st Sess. 295 (1871), <http://www.memory.loc.gov/8081/cgi-bin/ampage?collId=llcg&fileName=100/lcg100.db&recNum=648>.

213. CONG. GLOBE, 42nd Cong., 1st Sess. 294.

214. CONG. GLOBE, 42nd Cong., 2d. Sess. 493 (1871), <https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=106/lcg106.db&recNum=548>.

earning it for themselves. That this class, under the circumstances, could tolerate equal rights, civil and political, in a negro could hardly be expected.²¹⁵

Connecting this wave of white terrorism to a broad effort to re-impose some semblance of a master-slave relationship, Rep. Poland also explained that a previous civil rights law was “utterly insufficient against their more intelligent and powerful oppressors, and the colored people were likely to continue [sic] ‘hewers of wood and drawers of water’ to their old owners and taskmasters.”²¹⁶

This is clear evidence that Congress heard repetitive testimony about the intent of the Ku Klux Klan to use terror to enforce a racial boycott against blacks in their work. The Ku Klux Klan would not accept blacks in shops where white people worked. The Klan also coerced blacks into voting for the Democratic Party or they would face terror and boycotts. The Klan enforced price-fixing for labor by threatening terror.

2. *A Typology of Cases Involving Racial Conspiracies in the Workplace*

Courts usually reject efforts to apply Section 1985(3) to alleged conspiracies in the workplace. Some courts find that employment complaints do not state a claim.²¹⁷ Other courts dismiss these cases on the grounds that an employer cannot conspire with itself.²¹⁸ These cases point to the narrow text of Section 1985(3) and elements of proof that most courts require— namely, requirements of (1) racial animus, (2) two or more people in a conspiracy, (3) injury to an individual or “class of persons,” and (4) deprivation of the equal protection of the laws.

Cases in the following typology involve extreme actions that are more common with the return of white supremacy. These exceptional fact patterns also are reminiscent of the racial terror that Congress had in mind in 1871. As I now explain, these cases offer improved possibilities to satisfy the interrelated

215. *Id.*

216. *Id.*

217. See *McLellan*, *supra* note 146 (noting a plaintiff who alleged a conspiracy by his employer and union because he filed for personal bankruptcy failed to state a claim under Section 1985(3)); *D’Amato*, *supra* note 151 (finding a work-related disability claim does not state a cause of action); *Wilhelm*, *supra* note 151 (employment discrimination action involving disability claims is not cognizable); *Marino*, *supra* note 144 (reasoning an employee who was discharged from his public sector job because he was a Democrat failed to state a cause of action); *Kimble*, *supra* note 146 (noting an employee who claims that he was fired for filing a workers’ compensation claim fails to state a claim).

218. See *Jones v. Giant Foods, Inc.*, No. Civ. 00-3469, 2000 WL 1835393 (D. Md. Nov. 27, 2000), where the plaintiff alleged a racial conspiracy that led to her termination. The court explained that Jones failed to state a conspiracy to deny equal protection of the laws under 42 U.S.C. § 1985(3), and further explained that “under the intra-corporate conspiracy doctrine, a corporation cannot conspire with itself.” *Id.* at *1 n.1.

hurdles of Section 1985(3): they involve racial animus, two or more people in a racially-motivated conspiracy, injury to a person or class of persons, and deprivation of equal protection of the laws.

I propose a theory of segregation to explain how these plots deprived minority victims of working conditions equal to whites. My theory aligns with the legislative history of the Ku Klux Klan Act. The drafters did more than hear about white terror attacks—they also understood that white supremacists conspired to create a racial caste system with blacks laboring at the bottom. My typology, therefore, connects contemporary and past outrages in a way that is theoretically consistent with the intent of the Ku Klux Klan Act.

It is important, too, to understand why a theory of work segregation is not a broad application of the Ku Klux Klan Act. The following cases involve much more than isolated epithets—and also much more than a pattern of racial harassment. Criminal law has already been utilized in two cases.²¹⁹ Title VII has been applied in another case,²²⁰ and the fourth case involves pending tort and statutory claims.²²¹ In three cases, white supremacists are defendants,²²² and in one case, so is an employer.²²³ The point is that individual perpetrators have been, or are being, held accountable. But no case holds a hate group, or a racial conspiracy beyond the perpetrators, accountable for these severe deprivations of rights. This typology and its related theory of work segregation aims to hold those conspiracies accountable, with possible damages and injunctions.

The following analysis tracks the burden of proof that courts require in Section 1985(3) actions.²²⁴ In *Lake v. AK Steel Corp.*,²²⁵ the Type 1 case, the most critical evidence is a meeting in a breakroom with several employees, shown by a co-worker who also was the state leader of a Ku Klux Klan organization. This is strong evidence of racial animus and suggestive proof of a workplace conspiracy aimed to drive black co-workers out of their jobs.

In *Gersh v. Anglin*,²²⁶ the Type 2 case, the most critical evidence is the orchestration of an online attack directed against a Jewish realtor because of her

219. *Hatch*, *infra* note 309; *Slavin*, *infra* note 315; and *Wagner*, *infra* note 315.

220. *Lake*, *infra* note 229.

221. *Gersh*, *infra* note 264.

222. *See supra* note 208.

223. *See supra* note 209.

224. My analysis uses a common burden of proof. *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996), explains that a plaintiff who states a claim under Section 1985(3) must allege: (1) the existence of a conspiracy; (2) a conspiratorial purpose to deprive a person or class of persons, directly or indirectly, of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) the commission of an overt act in furtherance of the conspiracy; and (4) either that the plaintiff suffered an injury to her person or property, or a deprivation of a constitutionally protected right or privilege.

225. No. 2:03-CV-517 2006 WL 1158610 (W.D. Pa. May 1, 2006). This was an employment discrimination case under Title VII of the 1964 Civil Rights Act.

226. Complaint, *Gersh v. Anglin*, No. 9:17-00050 (D. Mont. Apr. 18, 2017), alleging a violation of the Montana Anti-Intimidation, Mont. Code Ann. § 27-1-1503(2), in Count III

religion. There is clear proof of the type of group-animus that Section 1985(3) requires; however, the most questionable part of this proof is whether the online antagonists had formed a conspiracy. The evidence on this point is, nevertheless, suggestive because the attacks against Gersh occurred almost immediately after the online leader called on his followers with specific directions to intimidate her.

In *United States v. Hatch*,²²⁷ the Type 3 case, the best evidence to support a Section 1985(3) claim is the hot-branding of a swastika on the victim's arm. The fact that the victim was a disabled Navajo man, whose reservation adjoined the white community, clearly evinces racial and disability animus. The three men who harmed this victim acted in a coordinated way. The main obstacle in proving a Section 1985(3) action is whether the men meant for the attack to isolate the victim, or intimidate the Navajo community, to the point of avoiding travel and work in this community.

In *People v. Slavin*,²²⁸ the Type 4 case, a criminal court inferred from extensive tattoos on the perpetrators that the attack against two Mexican men was racially motivated. The main ambiguity in the evidence is whether malice behind the attack against the day laborers was limited to these men or more broadly intended to frighten other unlawful immigrants from working in this labor market. The fact that day-labor work was the pretext for picking up the victims supports my view that the crime had a motivation to drive immigrants from a local labor market.

of the complaint. The text is available in Avalon Zoppo, *Woman Sues Founder of Neo-Nazi Website After Anti-Semitic 'Troll Storm'*, NBC NEWS (Apr. 18, 2017), https://www.splcenter.org/sites/default/files/whitefish_complaint_finalstamped.pdf.

227. *Infra* note 309.

228. *Infra* note 315.

TABLE 1: Racial Conspiracy Connected to the Workplace

	<i>Racial Conspiracy: Formed and Acted on in the Workplace</i>	<i>Racial Conspiracy: Formed Outside But Carried Out in the Workplace</i>
<i>Victim: Employee Injured in the Workplace</i>	TYPE 1 Lake v. AK Steel Corp., No. 2:03-CV-517, 2006 WL 1158610 (W.D. Pa. 2006)	TYPE 2 Gersh v. Anglin (Complaint), 9:17-cv-00050-DLC-JCL, (D. Mont. 2017)
<i>Victim: Non-employee, Injured in Work-Related Conspiracy</i>	TYPE 3 U.S. v. Hatch, 722 F.3d 1193 (10th Cir. 2013)	TYPE 4 People v. Slavin, 807 N.E.2d 259 (N.Y. App. 2004)

TYPE 1 CASE: RACIAL CONSPIRACY FORMED AND ACTED ON IN THE WORKPLACE— EMPLOYEE VICTIM: The workplace in *Lake v. AK Steel Corp.*²²⁹ was permeated for years with racial graffiti, insults, and jokes.²³⁰ Management condoned these conditions.²³¹

(1) *Existence of a conspiracy.* White employees in this steel mill likely had a meeting of minds to subject black co-workers to a condition of racial subordination. A black employee observed several white co-workers huddled in a breakroom watching a Ku Klux Klan induction video of a young woman.²³² This witness learned that the woman was the daughter of an employee who was also the grand dragon of the Pennsylvania Klavern of the Klan.²³³ The employee complained that the incident intimidated and frightened him, but a supervisor told him nothing could be done unless he brought the tape to management.²³⁴ Meanwhile, the Ku Klux Klan leader worked in the mill several more years before retiring.²³⁵ The grand dragon's purpose in showing the induction video was never explained; but a plausible inference is that the

229. No. 2:03-CV-517, 2006 WL 1158610 (W.D. Pa. May 1, 2006). This was an employment discrimination case under Title VII of the 1964 Civil Rights Act.

230. *Id.* at *9 (black employee said that racial graffiti was present during 26 years of his employment).

231. *Id.* at *25.

232. *Id.* at *14.

233. *Id.* at *14.

234. *Id.* at *14.

235. *Id.*

Ku Klux Klan was openly recruiting members among the white employees in the steel mill.

(2) *Conspiratorial purpose to deprive a person or class of persons, directly or indirectly, of the equal protection of the laws, or of equal privileges and immunities under the laws.* For years, management failed to address complaints of racial harassment and intimidation.²³⁶ The day before an EEOC site visit, management had a massive effort to eliminate graffiti and written derogatory statements.²³⁷ One example, among many, involved a black crane operator who was disciplined for having untied boot laces.²³⁸ The next day, the employee was handed a paper showing a Klansman on a cross engulfed in flames with the statement, “Tie your boots!!!”²³⁹ Management took no effective action to find the perpetrator or denounce his intimidation.²⁴⁰ These coordinated activities, including disparate punishment of black employees for violating work rules,²⁴¹ were intended to deprive black employees of equal treatment in working conditions.

(3) *Commission of an overt act in furtherance of the conspiracy.* Co-workers and supervisors engaged in numerous acts to further their conspiracy of racial intimidation. In the cold mill, employees witnessed phrases such as “KKK for Dave Clark”²⁴² and “nigger”²⁴³ near the work locations of black employees. One employee was frequently called “nigger Edwards” or “nigger Ron” by white co-workers.²⁴⁴ This behavior was not only notable for its personal degradation; but since numerous white employees used the same racial vulgarity, this indicated a mutual understanding to maintain the mill’s de facto segregation. Large, racial graffiti depicted three black employees as penises with their names nearby, and displayed in a restroom used by hourly workers and management.²⁴⁵ Complaints to remove the graffiti were ignored.²⁴⁶ Near a urinal, graffiti stated, “Nathan Vanderzee is a half breed nigger.”²⁴⁷ The personal identification of an employee was clearly intended to impose unequal conditions of work on him. On a bulletin board, an announcement stated: “Wanted: Truck Drive. Want two short niggers for mudflaps, preferably with chrome tennis shoes.”²⁴⁸ In the melt shop, graffiti was gouged into a main

236. *Id.* at *45.

237. *Id.* at *11, *15.

238. *Id.* at *12.

239. *Id.*

240. *Id.*

241. *Id.* at *43.

242. *Id.* at *15.

243. *Id.*

244. *Id.* at *9.

245. *Id.* at *10.

246. *Id.*

247. *Id.*

248. *Id.*

doorway, stating “get rid of all the niggers here.”²⁴⁹ The conspicuous location was intended to frighten black workers when they came to work. Employees also observed numerous swastikas in restroom stalls, locker rooms, walking tunnels, and walls near bathroom entrances.²⁵⁰ A locker room featured an image of a Klansman.²⁵¹ A noose was hung for at least three years near a lunchroom.²⁵² This conveyed the idea that blacks and whites should not eat together—a hallmark of segregation. In sum, this record presented substantial evidence of commission of a racially motivated conspiracy to drive black employees out of the workplace, or in the alternative, to segregate them in their relationship to white co-workers and managers.

(4) *Plaintiff suffered an injury to his person or property, or a deprivation of a constitutionally protected right or privilege.* One employee felt intimidated and frightened by the KKK induction video.²⁵³ Another employee reported that graffiti was directed at him due to his race.²⁵⁴ Other minority employees were suspended for lengthy periods based upon false or incorrect information.²⁵⁵ The manager who fired the lead plaintiff, Jeffrey Lake, subjected him to a higher standard of conduct than she applied to white workers,²⁵⁶ and based her conclusions on demeaning stereotypes of blacks rather than any evidence.²⁵⁷

(5) Black employees were also subjected to offensive touching and verbal abuse due to their race.²⁵⁸ They were denied equal opportunity to train and advance compared to white co-workers.²⁵⁹ Supervisors enforced rules differently for whites and blacks.²⁶⁰ In a two year period, over thirty percent of black employees were discharged, while the termination rate for whites was less than one percent.²⁶¹ An employee who complained of racial harassment was subjected to retaliatory isolation.²⁶² This evidence shows that black employees at this steel mill were deprived the right to work under conditions of equality with their white co-workers.

TYPE 2 CASE: CONSPIRACY FORMED OUTSIDE THE WORKPLACE—
EMPLOYEE VICTIM: *Gersh v. Anglin*, a pending lawsuit in federal district court in Montana, alleges that Andrew Anglin, publisher of a white supremacist

249. *Id.*

250. *Id.* at *11.

251. *Id.*

252. *Id.* at *13.

253. *Id.* at *14.

254. *Id.* at *11.

255. *Id.* at *1.

256. *Id.* at *31.

257. *Id.* at *29.

258. *Id.* at *14.

259. *Id.* at *15.

260. *Id.* at *2, *5, *6, & *9.

261. *Id.* at *34 n.18.

262. *Id.* at *14.

website called the *Daily Stormer*, orchestrated an online barrage of intimidation against a Jewish real estate agent.²⁶³ The campaign against Tanya Gersh arose from false information that she pressured the mother of an Alt-Right leader, Richard Spencer, to sell her property in Whitefish, Montana after Spencer gained notoriety for a Nazi-style gathering in Washington D.C.²⁶⁴

Anglin posted an article calling for readers to “TAKE ACTION” by contacting Gersh and her family, and instructing readers to coordinate their messaging by stating that “you are sickened by their Jew agenda.”²⁶⁵ The post provided Gersh’s contact information and included pictures of her family with a yellow Star of David, labelled “Jude.”²⁶⁶ Anglin followed up with another post: “Let’s Hit Em Up. Are y’all ready for an old fashioned Troll Storm? Because AYO – it’s that time, fam.”²⁶⁷ Typical of the torrent of e-mails, phone calls, voicemails, texts, letters and postcards that bombarded Gersh and her family, one said: “Thanks for demonstrating why your race needs to be collectively ovened (sic). You have no idea what you are doing, six million are only the beginning. We are going to keep track of you for the rest of your life. You will be driven to the brink of suicide”²⁶⁸

(1) *Existence of a conspiracy.* Anglin’s online communication network reached a meeting of the minds to violate Gersh’s constitutional rights.²⁶⁹ Anglin’s posts orchestrated a campaign of terror and enlisted followers to intimidate Gersh and her family because they are Jewish. Anglin’s followers used various communication platforms to send death threats, and more generally, anti-Semitic, hateful, and harassing messages.²⁷⁰

(2) *Conspiratorial purpose to deprive a person or class of persons, directly or indirectly, of the equal protection of the laws, or of equal privileges and immunities under the laws.* Numerous e-mails revealed invidious animus to harm Gersh financially because she is Jewish. One stated, “We are going to ruin you, you Kike PoS. The same way you do anyone else. You motherfuckers are going taste your own medicine, as we harass you & yours in your public & professional lives. You will loose (sic) money.”²⁷¹ Another e-mail threatened: “Gersh, you slimy jewess (sic), do you honestly believe you can force a woman to sell her property for ‘the lowest commission you can

263. See Complaint, *Gersh*, *supra* note 226.

264. *Id.* at ¶ 15 & ¶ 77.

265. *Id.* at ¶ 81 & ¶ 91.

266. *Id.* at ¶ 87, ¶ 88, & ¶ 90.

267. *Id.* at ¶ 5 & ¶ 91.

268. *Id.* at ¶ 12, ¶ 94, ¶ 95, & ¶ 108.

269. *Id.* at ¶ 93. The timing and coordinated nature of the troll storm indicates a conspiracy to deny Gersh her equal right to live and work in Whitefish, Montana. Her complaints states that as soon as Anglin posted his call for a troll storm, Gersh received more than 700 harassing messages via e-mail, texts, phone calls, voice messages, U.S. mail, and other platforms.

270. *Id.* at ¶¶ 94-117.

271. *Id.* at ¶ 94(g).

manage’ by threatening to call in your local kike ‘tolerance’ groups? In the age of social media?”²⁷² The message added, “You’d better lawyer up, kike—we’re going to have your real-estate license over this.”²⁷³ Similarly, another e-mail said, “Do you think Tanya Gersh and that disgusting pack of Talmudic freaks who work at PureWest Real Estate are going to get away with terrorizing Americans? . . . We shall see what will become of ‘PureWest’ Real Estate in the coming years.”²⁷⁴

(3) *Commission of an overt act in furtherance of the conspiracy*: Anglin’s co-conspirators organized a boycott against Gersh because she is Jewish. They sent threatening messages to Gersh on her work e-mail, and copied her co-workers.²⁷⁵ Some of these e-mails intended to cause Ms. Gersh to lose her job; for example: “You should fire and disavow Tanya Gersh for her unprofessional, illegal, and anti-white conduct. Do the rest of your agents engage in extortion and intimidation as well?”²⁷⁶ Another said:

“I’m just writing to let you know I will never do business with your company and I will also tell everyone I know not to do business with you until such time as you fire your employee, Tanya Girsh (sic) a vile woman who has taken part in an extortion and harassment campaign against a resident of Whitefish. Get rid of her or get boycotted.”²⁷⁷

An e-mail purporting to be sent by Richard Spencer, said: “Please inquire diligently as to why Ms. Gersh feels she is so omnipotent that she can bully my mother into selling a property using threats of gangs of violent protestors to lower her property values?”²⁷⁸ Callously referring to the Holocaust the message added, “Six million thanks for your cooperation.”²⁷⁹ Another work e-mail said: “Tanya Gersh is an extortionist that should have her real estate license stripped from her,”²⁸⁰ while a similar message said, “You should fire and disavow Tanya Gersh for her unprofessional, illegal, and anti-white conduct.”²⁸¹

(4) *Plaintiff suffered an injury to her person or property, or a deprivation of a constitutionally protected right or privilege*. Gersh alleged psychological and physical injuries as a result of this anti-Semitic conspiracy. In a Section 1985(3) action, some aspects of her complaint can allege a deprivation of a constitutionally protected activity related to her work. Gersh experienced numerous password reset requests at work.²⁸² This is evidence that others were

272. *Id.* at ¶ 94(k).

273. *Id.*

274. *Id.* at ¶ 95.

275. *Id.* at ¶ 96.

276. *Id.* at ¶ 96(b).

277. *Id.* at ¶ 96(c).

278. *Id.* at ¶ 96(e).

279. *Id.*

280. *Id.* at ¶ 95(f).

281. *Id.* at ¶ 96(b).

282. *Id.* at ¶ 116.

trying to sabotage her labor.²⁸³ Although these attempts to hack her e-mail failed, they may have intended to deny her equal protection to commercial speech and association, and earning a living, by communicating through a secure internet account. Gersh's real estate website received slanderous comments during the conspiratorial troll storm, and were clearly intended to deny Gersh her freedom to do business in Whitefish, Montana. Anglin escalated this conspiracy by mounting an online campaign to organize an armed protest in Whitefish, stating "For the next phase of our plan against Jew Gersh and Jew Love Lives Here, we are planning an armed protest in Whitefish."²⁸⁴ Notably, his message referred to "our," "we," "next phase," "our plan." He linked that conspiratorial group to an "armed protest" in her small town.²⁸⁵ In short, this conspiracy aimed to drive Gersh from the labor market in her community,²⁸⁶ and deny her equal protection to move freely in her hometown.²⁸⁷

TYPE 3: CONSPIRACY FORMED IN THE WORKPLACE— NONEMPLOYEE VICTIM: In *United States v. Hatch*, three McDonald's employees appealed their convictions for a federal hate crime after they carried out a plot that likely was formed while they were at work in rural New Mexico.²⁸⁸ There is no indication that the victim, a mentally disabled Navajo man who was targeted due to his race, pursued a Section 1985(3) action.²⁸⁹ As I explain, the Ku Klux Klan Act would offer an opportunity to hold liable one or more hate groups that may have conspired to carry out this heinous incident.

283. *Id.* at ¶ 117 (Gersh received hateful comments through her realtor profiles).

284. *Id.* at ¶ 141 & ¶ 159.

285. *Id.* at ¶ 160 (Anglin's publication of his application for a permit for an armed protest in Whitefish).

286. *Id.* at ¶ 119(b) (voicemail to Gersh's husband): "Judah, yeah, this is a fellow Montanan here. We're not far away from you. And I would suggest that you actually hold out the reins on your wife, Tanya. You and your kike fucking mentality. Seriously bro, like pull back. You know, go back to Philadelphia. Or better yet, go back to Israel. You're gonna go back, bro, go back."

287. Courts recognize a fundamental right to travel, even within a state's borders. *See Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990) ("We conclude that the right to move freely about one's own neighborhood or town, even by automobile, is indeed [embedded in the Constitution].") *See also Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002) (concluding that "the right to travel locally through public spaces and roadways enjoys a unique and protected place in our national heritage."); *Molko v. Holy Spirit Ass'n.*, 762 P.2d 46, 66 (Cal. 1988) ("[S]ection 1985(3) does reach purely private conspiracies aimed at depriving persons of the constitutionally guaranteed right to travel") (*quoting Carpenters v. Scott*, 463 U.S. 825, 832-33 (1983)).

288. 722 F.3d 1193 (10th Cir. 2013) (convictions for violating the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, codified in relevant part at 18 U.S.C. § 249). The factual account of the three McDonald's employees is related in *United States v. Beebe*, 807 F. Supp. 2d 1045 (D.N.M. 2011). The government's brief adds to the composite of this case. *See Brief for the United States v. Hatch*, *infra* note 296.

289. *Beebe*, 807 F.2d at 1047.

(1) *Existence of a conspiracy*: Vincent Kee, while away from his home on a Navajo reservation, spent time in a McDonald's restaurant in Farmington.²⁹⁰ He met Paul Beebe while Beebe was working.²⁹¹ Beebe talked Kee into coming to his apartment.²⁹² Beebe's co-defendants, Jesse Sanford and William Hatch, also were employed at this restaurant.²⁹³ When their shifts ended, they arrived at Beebe's apartment.²⁹⁴ While the three co-workers were together with Kee, they carried out racially motivated assaults.²⁹⁵ These facts support an inference that the co-workers devised and coordinated a plan, while at work, to harm this vulnerable Navajo man. In addition, the workers literally created an agreement with their victim to brand him in the apparent belief that their victim could legally consent to being burned and permanently scarred in an assault.²⁹⁶

There is little evidence of a wider conspiracy, though this limitation may be due to the criminal nature of the litigation involving the attack on Kee. The apartment contained Nazi paraphernalia that was purchased from an unidentified source.²⁹⁷ The government introduced these objects into evidence to show motive in a hate crime. A Section 1985(3) lawsuit would use discovery to examine any links between Beebe, Sanford, and Hatch to six known hate groups that operated in New Mexico around the time of the crime.²⁹⁸ Two groups were affiliated with the Ku Klux Klan, two others were anti-Muslim, one was a skinhead group and the other anti-Semitic.²⁹⁹ In addition, it is significant that the three conspirators videotaped their victim several times. Implausibly, they told authorities they made the videos to prove Kee's consent to be branded and scarred with a swastika.³⁰⁰ A more plausible explanation is that these conspirators uploaded the video for sharing in an online hate community.³⁰¹

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. Brief for the United States as Appellee, *United States v. Hatch*, 722 F.3d 1193 (10th Cir. 2013) (No. 12-2040), 2012 WL 3886568, at *5-6.

297. *Id.* at *5.

298. *Report: 6 Hate Groups Operating in New Mexico*, IMDIVERSITY (2013), <http://imdiversity.com/diversity-news/report-6-hate-groups-operating-new-mexico>. See also Dave Maass, *Birther of a Nation: New Mexico's White Supremacists Keep the Hate Alive*, SANTA FE REPORTER (August 12, 2009), <http://www.sfreporter.com/news/2009/08/12/birther-of-a-nation/> (reporting that a group called Frontline Aryans was formed in 2007 by a white supremacist in Albuquerque).

299. See *Report*, *supra* note 298.

300. Brief for the United States, *Hatch*, *supra* note 296, at *5.

301. Rob Polansky & Matt Campbell, *'KKK' Video Possibly Shot in East Windsor Creates Controversy*, EYEWITNESS NEWS 3 (Nov. 14, 2016), <http://www.wfsb.com/story/33701729/kkk-video-possibly-shot-in-east-windsor-creates-controversy> (describing an example of online posting of videos by hate group supporters, showing 30 to 50 people in white Ku Klux Klan-like costumes).

(2) *Conspiratorial purpose to deprive a person or class of persons, directly or indirectly, of the equal protection of the laws, or of equal privileges and immunities under the laws.* Racial animus is plainly evidenced by the assaults on Kee. Prior to these attacks, the three men made a video labelled “The Agreement,” where the mentally-disabled Kee parroted what the three men said with regard to branding him.³⁰² Another video, labeled “The Results” and recorded on his cell phone, showed a swastika that the men branded on Kee’s arm.³⁰³ Police seized racist objects including a large swastika flag, several objects with a “white power” inscription, and a dreamcatcher with a swastika.³⁰⁴ The dream catcher evidence symbolizes Nazi supremacy superimposed on a revered, native symbol.³⁰⁵ This suggests premeditation to attack a Native American victim.

(3) *Commission of an overt act in furtherance of the conspiracy.* While Kee was sleeping, Sanford, Beebe, and Hatch used markers to write on him.³⁰⁶ They shaved a swastika into Kee’s hair, and also wrote “White Power” and “KKK” in black marker within the lines of the swastika.³⁰⁷ They also branded a swastika on Kee’s arm, causing his flesh to burn and scar.³⁰⁸ These acts were committed in furtherance of a racial conspiracy.

(4) *Plaintiff suffered an injury to his person or property, or a deprivation of a constitutionally protected right or privilege.* An appeals court concluded that Kee’s assailants intentionally used “badges of slavery,”³⁰⁹ reasoning that just as “master-on-slave violence was intended to enforce the social and racial superiority of the attacker and . . . powerlessness of the victim, Congress could conceive that modern racially motivated violence communicates to the victim that he or she must remain in a subservient position, unworthy of the decency afforded to other races.”³¹⁰ As a concept, badges of slavery appeared in the *Civil Rights Cases*, but its roots trace to antebellum courts.³¹¹ It applies when symbols or vestiges of racial superiority deny minorities equal or other fundamental rights.³¹² Branding a swastika on the forearm of a disabled Navajo

302. Brief for the United States, *Hatch*, *supra* note 296, at *5.

303. *Id.* at *6.

304. *Id.* at *5.

305. Barbara Erwin et al., *Integrating Art and Literature through Multicultural Studies: Focusing on Native American Sioux Culture*, 33 *READING HORIZONS* 419, 433 (1996) (portraying dreamcatcher).

306. Brief for the United States, *Hatch*, *supra* note 296, at *5.

307. *Id.* at *5.

308. *Id.* at *5 (relating Hatch’s admission to this fact).

309. *United States v. Hatch*, 722 F.3d 1193, 1198-1200 (10th Cir. 2013).

310. *Id.* at 1206.

311. Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 *J. CONST. L.* 561, 570-573 (2012).

312. See *Alfred H. Mayer*, *supra* note 2, at 441 (“the badges and incidents of slavery—its burdens and disabilities—included restraints upon those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens”) (internal quotation omitted).

man could limit his freedom to travel to Farmington, or move about freely in the expanse of the Navajo reservation, or go elsewhere.³¹³ To this point, it must be noted that there is no record of Beebe, Sanford, and Hatch being branded with swastikas on their forearms—even though they embraced white supremacy—and little speculation is needed to conclude that McDonald’s would be unlikely to hire anyone with such an open and shocking display of hate.

TYPE 4 CASE: CONSPIRACY FORMED OUTSIDE THE WORKPLACE—NON-EMPLOYEE VICTIM: Christopher Slavin and Ryan Wagner, two white men with Nazi and white power tattoos, lured two Mexican men who were in the U.S. illegally into accepting day labor work.³¹⁴ As the assailants drove their victims to an abandoned building on Long Island, they asked if the men were Mexicans.³¹⁵ The men said yes.³¹⁶ Both men entered the U.S. illegally several months earlier.³¹⁷ After arriving at the building and dispensing work tools, Slavin and Wagner brutally attacked the men, hitting one in the head with a metal post-hole digger, and stabbing the other.³¹⁸ The victims, one of whom bled profusely and suffered life-threatening injuries, escaped and were rescued by a motorist.³¹⁹ Slavin was sentenced under New York’s criminal code to twenty-five years to life.³²⁰ Wagner was convicted on similar charges.³²¹ Slavin’s defense argued that his racist tattoos could not be admitted as evidence.³²² The trial court admitted the photographs into evidence, and also expert testimony that linked Slavin’s racist motive to the attack.³²³ The facts indicate that Slavin and Wagner premeditated this attack on illegal immigrants. By planning to carry out their dangerous attack in a basement of an abandoned building, they intended to deny the Mexicans life and liberty to avoid bodily harm.

(1) *Existence of a Conspiracy*: Slavin and Wagner encountered one of the victims while they drove in Wagner’s car. They told the man they were looking for two workers, and pointed to two shovels in the car—a clear indication of a

313. Courts view travel as a fundamental right. See *Lutz*, *supra* note 287.

314. Facts from this attack are compiled from Brief for Appellant, *Slavin v. Artus*, 2010 WL 5265845 (2d Cir. 2010) (Appellate Brief for Respondent-Appellee); *People v. Slavin*, 807 N.E.2d 259 (N.Y. App. 2004); *People v. Wagner*, 811 N.Y.S.2d 125 (N.Y. 2006).

315. *Slavin*, *supra* note 288, at 260-61.

316. *Id.* at 261.

317. Brief for Appellant, *Slavin*, *supra* note 315, at *5-6.

318. *Slavin*, *supra* note 290, at 261.

319. *Id.*

320. Brief for Appellant, *Slavin*, *supra* note 315, at *2.

321. *Wagner*, *supra* note 315, at 671.

322. Brief for Appellant, *Slavin*, *supra* note 315, at *14.

323. *Id.* at *23-27.

plan.³²⁴ Slavin advanced the conspiracy by suggesting that the victim get in their car and show them to his house. This victim recruited another illegal immigrant to work.³²⁵ In short, Slavin and Wagner conspired to use an offer of day labor to induce workers they perceived as illegal immigrants to enter an abandoned building, where their plan would be furthered by concealment.³²⁶

(2) *Conspiratorial purpose to deprive a person or class of persons, directly or indirectly, of the equal protection of the laws, or of equal privileges and immunities under the laws.* As the two Mexican men were in the car, Slavin and Wagner took away their liberty to flee an imminent attack.³²⁷ They attacked the men with the work tools that Slavin and Wagner used to dupe their victims to enter the car.³²⁸ Slavin's white supremacist tattoos revealed his racist motive to commit a felony.³²⁹ These markings included a Nazi swastika with a white fist.³³⁰ Another depicted a kneeling person with a large nose, a beanie cap, and coat with money sticking out, indicating a Jew; and also showed an approaching skinhead aiming to kick him.³³¹ Another tattoo featured red and black letters, "FTW" (Fuck the World), indicating a Nazi association with colors and expression.³³² Another image combined the American flag, the Nazi swastika, a bald eagle, and two lightning bolts that symbolized the rune for a Nazi elite military group.³³³ Slavin also had a tattoo of a Nazi swastika in a cloud, an American bald eagle, SS lightning bolts, and a skinhead holding a club.³³⁴

Additionally, the conspirators advanced the racial motive of their attack by asking the intended victims for their driver's license. When one man denied having a license, this confirmed Slavin and Wagner in the belief that their intended victim was an illegal immigrant.³³⁵

(3) *Commission of an overt act of the conspiracy:* As the two immigrants began to work in a basement,³³⁶ Slavin and Wagner approached them from behind.³³⁷ Slavin suddenly hit one victim with a post-hole digger in the back of

324. *Id.* at *4.

325. *Id.* at *5.

326. *Id.* at *7.

327. *Id.* As Slavin led the men to the rear of the building, one man told the other that he was fearful of the situation. As this was happening, Wagner parked the car nearby but away from the men, removing a means of escape.

328. *Id.* at *4-5.

329. *Id.* at *34 (summarizing pre-trial ruling to admit tattoos as evidence of racist intent).

330. *Id.* at *25. The expert witness explained that this a symbol of white power.

331. *Id.*

332. *Id.* at *26-27.

333. *Id.* at *27.

334. *Id.*

335. *Id.* at *6.

336. *Id.* at *7.

337. *Id.*

the head, causing his victim to fall.³³⁸ Wagner approached the other worker with a folding knife, cutting him on the hand.³³⁹ As this victim escaped, he observed Slavin beating the other Mexican man.³⁴⁰

(4) *Plaintiff suffered an injury to his person or property, or a deprivation of a constitutionally protected right or privilege.* One victim's wrist laceration was so severe that it was life-threatening, according to a medical professional.³⁴¹ His other injuries included a slashed forearm, a slash to his right ear, and two cuts on his left shoulder.³⁴² He suffered tendon and muscle damage five centimeters deep to the bone, and cuts to the medial nerve.³⁴³ The other victim suffered a blow to the head that was life-threatening.³⁴⁴ This wound was two centimeters long, and caused pain to his back, neck and shoulder.³⁴⁵ Weakness in his right hand prevented him from working for three months.³⁴⁶

The attacks, planned to isolate and confine the victims, indicated a conspiracy to deny Mexican victims freedom of movement.³⁴⁷ When Slavin and Wagner initially asked one of the victims to find a second worker, they suspected that the first man would lead them to other illegal immigrants.³⁴⁸ Thus, their intent to have multiple victims may have been to create a ripple effect in the immigrant community to drive away illegal immigrants from Long Island's day labor market.

In sum: Taking stock of these four cases, they illustrate how Section 1985(3) can be used to pursue hate groups, and less formalized racial conspiracies, that segregate a particular workplace or a local labor market. Even though these impacts are highly localized, the threats made by the Ku Klux Klan, and credibly retold by congressional witnesses in 1871, also aimed at a particular shop or a small, rural community.³⁴⁹ Only in the aggregate did the Klan's racial conspiracies create a national problem that led to congressional investigation and action. This typology poses facts that are far more serious than run-of-the-mill employment discrimination or harassment.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* at *8.

342. *Id.*

343. *Id.* at *9.

344. *Id.*

345. *Id.*

346. *Id.*

347. See Lutz, *supra* note 287.

348. Brief for Appellant, *Slavin*, *supra* note 315, at *4-5. Slavin and Wagner initially stopped at a 7-Eleven store, where an immigrant day laborer was waiting to be picked up for work. That led to a conversation that resulted in Slavin and Wagner driving to a house where more immigrants were staying.

349. Testimony of Porter, *supra* note 211.

The criminal cases illustrate, too, a way to hold a hate group accountable for racially motivated crimes that netted long prison terms for individuals.

These cases suggest new uses of Section 1985(3)— not against an employer, and not only against the perpetrators— but a broader hate community that is tied together by technology such as videos, Internet sites, emails, and similar. It is far from clear that all four cases meet the threshold to state a claim for Section 1985(3); but I also note that these criminal investigations and civil depositions did not seek information that would be germane in a Section 1985(3) lawsuit. Finally, it is important to recognize that none of the typology cases involves a former Confederate state. These cases occurred all over the U.S. map—New York, Pennsylvania, Montana, and New Mexico. The clear implication is that the Ku Klux Klan Act has national relevance today.

CONCLUSION

Today, as in the Reconstruction Era, white supremacists aim to segregate or exclude racial minorities. Part of today's movement is cloaked, while other elements participate openly in civic activities.³⁵⁰ Bolstered by pseudo-intellectuals who claim that whites and racial minorities cannot co-exist under conditions of equality, white supremacists cannot be dismissed as a fringe element.³⁵¹

This study focuses on localized, racially motivated incidents that show white supremacists attempting to segregate a specific workplace or small labor market. It calls attention to the re-segregation of work. Originally, the Ku Klux Klan enforced a racial caste system to keep blacks in perpetual servitude. Even after President Grant neutralized the Klan, Jim Crow carried on by expanding racial segregation in every facet of life, including work.³⁵² The study's typology shows extreme cases of white supremacists reintroducing Jim Crow in connection to a workplace.

350. See *Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (finding the Ku Klux Klan not barred by Establishment Clause from erecting its cross in holiday display at state capitol, where its application for a permit said its cross is a religious symbol); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992) (finding city's bias law unconstitutional as applied to teenager convicted of burning a cross in a black's family's yard); *Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004) (holding Missouri's denial of Klan group's petition to participate in Adopt-a-Highway Program violates First Amendment); *Knights of Ku Klux Klan v. Ark. State Highway and Transp. Dept.*, 807 F. Supp. 1427 (W.D. Ark. 1992) (reasoning a Klan group had a constitutional right to participate in the state's Adopt-A-Highway Program); *Murray v. Jamison*, 333 F. Supp. 1379 (W.D.N.C. 1971) (finding Charlotte, North Carolina wrongfully discharged its employee in violation of the First and Fourteenth Amendments for being Grand Dragon of the Ku Klux Klan); *State v. Int'l Keystone Knights of the Ku Klux Klan, Inc.*, 788 S.E.2d 455 (Ga. 2016) (holding a state highway department improperly denied Klan group's permit to participate in Adopt-a-Highway program).

351. TAYLOR, *supra* note 15.

352. *Supra* notes 186-197.

The time is ripe for a new theory that targets racial conspiracies under the Ku Klux Klan Act. This law was a dead letter for almost a century following *Cruikshank* (1875) and the *Civil Rights Cases* (1883). In 1971, *Griffin* breathed new life in Section 1985(3), the civil enforcement provision; however, its textualist ruling was narrow. This may explain why lawyers overlook the law when combatting hate incidents.³⁵³ While the law's text has not changed, the exponential rise in white supremacy since *Griffin*— the movement's openness,³⁵⁴ its claims to moral legitimacy,³⁵⁵ and its ability to disguise itself on the internet highway³⁵⁶— has plowed the soil for new uses of Section 1985(3).

My theoretical argument for broadening the scope of Section 1985(3) to include work-related racial conspiracies is bolstered by federal legislation that re-creates much of the overruled criminal law provisions of the Ku Klux Klan Act. This restoration began with the 1968 Civil Rights Act,³⁵⁷ which embodies similar conceptions of racial intimidation in the Ku Klux Klan Act.³⁵⁸ This includes interference with employment as a criminal offense.³⁵⁹ In 2009, Congress passed the Matthew Shepard and James Byrd Jr. Hate Crimes

353. Civil actions against hate groups often involve tort claims. For example, Jordan Gruver, of Panamanian descent, alleged that he was assaulted by members of the Imperial Klans of America (IKA) at a Kentucky county fair, leaving him with a broken jaw, broken teeth, and other injuries. IKA, its leaders, and the men who assaulted and battered Gruver were joined as defendants in a tort lawsuit. *Gruver v. Edwards*, No. 07-CI-00082, 2008 WL 4888276 (Ky. Cir. Ct.) (trial pleading). The trial produced a verdict that awarded Gruver \$2,501,686.71. See Ann O'Neill, *Lawsuit Seeks to Bankrupt Klan Group*, CNN (Nov. 12, 2008), <http://www.cnn.com/2008/CRIME/11/12/klan.sued>.

In *Person v. Miller*, 854 F.2d 656 (4th Cir. 1988), the Carolina Knights of the Ku Klux Klan and its leader, Glenn Miller, were held in criminal contempt of court for violating a consent decree that involved all black citizens in North Carolina who would exercise their state and federal rights to be free from interference by the defendants. Miller and his Klan subordinates were using paramilitary tactics to install a white supremacist government.

Beulah Mae McDonald, whose son was murdered and hung from a tree by members of United Klans of America, was awarded \$7 million in damages in a civil lawsuit. See Jesse Kornbluth, *The Woman Who Beat the Klan*, N.Y. TIMES (Nov. 1, 1987), <http://www.nytimes.com/1987/11/01/magazine/the-woman-who-beat-the-klan.html?page-wanted=4>. The lawsuit was based on "agency theory," not Section 1985(3). *Id.* at <http://www.nytimes.com/1987/11/01/magazine/the-woman-who-beat-the-klan.html?page-wanted=2>.

354. *Supra* notes 148-149.

355. TAYLOR, *supra* note 15; see also *supra* notes 149 & 161.

356. Gerstenfeld et al., *supra* note 186.

357. Civil Rights Act of 1968, 18 U.S.C. § 245.

358. 18 U.S.C. § 245(b)(1)(A) and (b)(5) (prohibiting the willful use of force, intimidation, or interference against a person who is voting and engaged in related election activities because of that individual's race, color, religion or national origin).

359. 18 U.S.C. § 245(b)(1)(C) (prohibiting interference with "applying for or enjoying employment, or any prerequisite thereof, by any agency of the United States") and (b)(2)(C) (prohibiting interference with "for or enjoying employment, or any prerequisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency").

Prevention Act of 2009 (Shepard-Byrd Act).³⁶⁰ Like Reconstruction Era civil rights laws, this statute redresses civil rights violations that are based on the badges and incidents of slavery.³⁶¹ It protects blacks as well as religious and national origin groups that were part of Reconstruction laws.³⁶² Consistent with my argument for broadening civil actions under the Ku Klux Klan Act to workplaces, the Shepard-Byrd Act is concerned with racially motivated interference with employment.³⁶³

These developments add force to my argument for theorizing civil actions under the Ku Klux Klan Act in terms of legislative intent. Adding to the weight of my argument, one of the four workplace typology cases—*U.S. v. Hatch*—was prosecuted under the current version of federal hate crime law.³⁶⁴ The attack in *Hatch* demonstrates that hate crimes are not committed in a commercial vacuum but are connected to basic activities in interstate commerce—in that case, work at a national fast-food chain.

My study shows, however, that white supremacy groups fall in the cracks with regard to the nation’s policies that forbid race discrimination. The

360. 18 U.S.C. § 249, enacted as Division E of the National Defense Authorization Act for Fiscal Year 2010, and codified as Pub. L. No. 111-84, H.R. 12647, Div. E, §§ 4707(a), 4711, Oct. 28, 2009, National Defense Authorization Act for Fiscal Year 2010 (The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009), codified at 18 U.S.C.A. § 249. The law expands the earlier statute by including hate crimes committed on the basis of gender, sexual orientation, gender identity, or disability. 18 U.S.C.A. § 249(a)(2)(A).

361. 18 U.S.C.A. § 249, § 4702(7):

For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.

362. 18 U.S.C.A. § 249, § 4702(8):

Both at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct “races.” Thus, in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States.

363. 18 U.S.C.A. § 249, § 4702(b)(B) (expressing a congressional finding to apply the hate crime law when “(m)embers of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity”).

364. The indictment is detailed in *U.S. v. Beebe*, 807 F. Supp. 2d 1045, 1047 (D.N.M. 2011), alleging that three men, including Hatch, willfully caused bodily harm on account of the victim’s “perceived race.” The fact that the hate crime appears to have been plotted in a workplace was immaterial to the criminal prosecution, but in a civil action, the possible link between a workplace and a conspiracy to mark a Navajo man with an incident or badge of slavery could be a material factor.

typology in this Article is not limited to the South, nor blacks as victims; it reflects the ubiquity and expanse of white extremism today.³⁶⁵ I propose a more robust theory for pursuing claims under Section 1985(3): the Ku Klux Klan Act applies to racial conspiracies that have the purpose and effect of segregating work.

Today's white supremacists smugly defend their hate campaigns as falling within legal bounds.³⁶⁶ Emboldened, they now operate crowd-sourcing websites to promote hate, violence, racial intolerance.³⁶⁷ The constitutional freedoms of white supremacists do not give license, however, to racial conspiracies that deny persons equal protection of the laws. As these hate mongers resegregate America through violence and intimidation, it is time to use Section 1985(3) of the Ku Klux Klan Act to remind courts: "The past is never dead. It's not even past."³⁶⁸

365. Those hate incidents were not in the South. They took place in Pennsylvania, New York, Montana, and New Mexico. The victims were diverse—blacks, Mexican aliens, a Jewish woman, and a mentally disabled Navajo man—speaking to the stunning breadth of this intolerance.

366. Mallory Simon & Sara Sidner, *An Avalanche of Hate: How a Montana Mom Became the Target of a Neo-Nazi Troll Storm*, CNN (July 10, 2017) (writing that *Daily Stormer*'s Anglin hired a First Amendment lawyer to fight the lawsuit).

367. William Hicks, *Meet Hateon, the New Favorite Website of the Alt-Right*, NEWSWEEK (Aug. 4, 2017), <http://www.newsweek.com/hateon-alt-right-richard-spencer-andrew-anglin-white-nationalism-white-644546>.

368. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1st ed. 1951).