

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-486

TITLE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF
AMERICA, LOCAL 610, AFL-CIO, ET AL., Petitioners
v. PAUL E. SCOTT, ET AL.

PLACE Washington, D. C.

DATE April 26, 1983

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(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED BROTHERHOOD OF CARPENTERS :

4 AND JOINERS OF AMERICA, LOCAL :

5 610, AFL-CIO, ET AL., :

6 Petitioners :

7 v. : No. 82-486

8 PAUL E. SCOTT, ET AL. :

9 - - - - -x

10 Washington, D.C.

11 Tuesday, April 26, 1983

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 1:09 p.m.

15 APPEARANCES:

16 LAURENCE GOLD, ESQ., Washington, D.C.;

17 on behalf of the Petitioners.

18 ROBERT Q. KEITH, ESQ., Johnson City, Texas;

19 on behalf of the Respondents.

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ROBERT Q. KEITH, ESQ., on behalf of the Respondents - - -	17

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Gold, you may
3 proceed whenever you are ready.

4 ORAL ARGUMENT OF LAURENCE GOLD, ESQ.

5 ON BEHALF OF THE PETITIONERS

6 MR. GOLD: Thank you, Mr. Chief Justice.

7 This case concerns the scope of 42 U.S.C.
8 Section 1985(3), the lineal descendant provision of
9 Section 2 of the 1871 Civil Rights Act. As the Court of
10 Appeals majority stated, this case grows out of an
11 episode of mob violence at the Alligator Bayou Pumping
12 Station construction site near Port Arthur, Texas that
13 caused both serious injuries and substantial property
14 damage.

15 That wrongdoing led to this federal court suit
16 brought by two individuals and by the general contractor
17 at that job site and to avert it in favor of the
18 plaintiffs and against three local unions which are the
19 petitioners here. The basic legal questions on which
20 the Fifth Circuit sitting en banc split 14 to nine
21 concern the meaning of the phrases "equal protection of
22 the laws" and "equal privileges and immunities under the
23 laws" as used in Section 1985(3).

24 QUESTION: Mr. Gold, why would a plaintiff or
25 group of plaintiffs file a suit under Section 1985(3)

1 instead of a state tort action? Is it because of the
2 recovery potentially of attorney's fees or what?

3 MR. GOLD: I am hard pressed to understand
4 that myself, Justice O'Connor. I take it that the hope
5 here was that this would be a more effective law suit
6 from the plaintiffs' standpoint despite the --

7 QUESTION: You think that would center around
8 the recovery of attorney's fees question?

9 MR. GOLD: That is, certainly in light of the
10 Civil Rights Act attorney's fees statute, that could
11 well be a motive, and the countervailing -- why the
12 plaintiffs were not impressed by the countervailing
13 consideration that there are very, very difficult legal
14 questions here and a straightforward tort case in the
15 state court system, I am really not privy to --

16 QUESTION: Well, I suppose in Beaumont, Port
17 Arthur you have got elected judges and there might be
18 some feeling that you do not get quite the same
19 neutrality from elected judges as you do from lifetime
20 federal judges.

21 MR. GOLD: There are also appellate judges in
22 Texas up and down the system, and I can only say that
23 there isn't a whisper in this record that the state
24 justice system was not open to and fully protective of
25 the rights and interests of plaintiff companies and

1 non-union employees in the State of Texas. Indeed,
2 there were 13 indictments growing out of this episode,
3 three convictions, two people in jail for substantial
4 terms indeed. So in all those respects this is not your
5 garden variety case for choosing a federal court as
6 opposed to a state court.

7 The en banc majority below analyzed Section
8 1985(3) as requiring a showing aside from the conspiracy
9 and acts pursuant to the conspiracy and injury are the
10 violation of some protected right and moreover
11 class-based invidiously discriminatory animus motivating
12 the invasion of that right and motivating the
13 conspiracy. The court found that the right of economic
14 association is such a protected right and, indeed,
15 analyzed the matter as comprising a protected right
16 under the First and Fourteenth Amendments.

17 That court rejected our contention that for
18 1985(3), as is generally true, to show the invasion of a
19 First and Fourteenth Amendment right as opposed to the
20 invasion of the rights guaranteed by the Thirteenth
21 Amendment or the rights guaranteed by the right of
22 travel. There has to be a showing of state action.

23 That court took the view that the contention I
24 have just outlined had been rejected in Griffin v.
25 Breckenridge, this Court's leading modern case on the

1 scope of Section 1985(3). We cannot improve upon, and
2 we have quoted at page 39 of our opening brief, the blue
3 brief, the analysis of this issue by Justice Stevens in
4 Novotny.

5 We rest on that analysis and in terms of an
6 analysis of the statute, neither the court below nor the
7 respondents challenge the accuracy of the insights
8 stated there. Rather both contend that that view of the
9 statute is precluded by Griffin. It is our view that
10 Griffin simply did not address this problem.

11 Griffin was a case involving a conspiracy
12 aimed at black Americans attempting to assert their
13 civil rights and those who would assist them. The court
14 analyzed the matter as resting on the Thirteenth
15 Amendment base and the right and power of Congress to do
16 away with the badges and incidence of slavery.

17 It is perfectly well settled that Congress in
18 no way, shape, or form is limited by a state action
19 requirement in those regards and that those
20 constitutional rights, both the rights vouchsafed by the
21 Thirteenth Amendment and the rights stated by the right
22 of travel are protected against private interferences.

23 QUESTION: Can you think of any more rights,
24 Mr. Gold, that would fall on that side of the line that
25 Justice Stevens drew?

1 MR. GOLD: From our view of the cases, Justice
2 Rehnquist, we know of no other constitutional rights
3 which are, of those stated in the Thirteenth,
4 Fourteenth, and Fifteenth Amendment, which do not have a
5 state action component to them. And it is hardly
6 surprising that Congress would be particularly concerned
7 about Thirteenth Amendment rights in terms of the 1871
8 Act because the voluminous legislative history is
9 instinct on every page with a desire to protect the
10 rights of the newly enfranchised freedmen and to ensure
11 that the wrongdoing that was taking place in the South
12 against them would have a federal remedy.

13 At the same time, Section 2, which was the
14 point of controversy in the 1871 Act, was shaped by the
15 moderate Republicans in the House who were not only
16 mindful of that major interest and concern, the one I
17 have just outlined, but also saw an important value in
18 maintaining a system of federalism at the time as they
19 understood that system. The debate in the House and the
20 strong controversy that Section 2, as originally
21 introduced, created, which has been noted by this Court
22 in numerous decisions, concerned how to advance both
23 these values.

24 If there had only been one value, the need to
25 end what was seen by every segment of the majority party

1 at that time, the Republicans, as outrages in the South,
2 there would have been no division, no compromise, no
3 internal controversy in the House.

4 But there was this understanding of the fact
5 that there were two values and a desire to put down Klan
6 violence without doing violence to the Thirteenth,
7 Fourteenth, and Fifteenth Amendments as the moderate
8 Republicans understood those amendments. The moderates
9 prevailed. The Section 2 was rewritten in response to
10 Representative Garfield's speech, which we have laid out
11 at perhaps overly great length in our brief.

12 There is no doubt when you read the debate
13 that Section 2 of the 1871 Act was redrafted to meet
14 that speech and had probably been redrafted before the
15 speech was given because it concludes with
16 Representative Garfield saying I'm confident that
17 language can be drafted which will meet these concerns,
18 concerns about the federal government intruding into the
19 proper state domain and becoming the primary guarantor
20 of property and individual rights.

21 Low and behold the next day Representative
22 Shellabarger, who was managing the bill, comes in and
23 says here is an amendment presented by friends of this
24 legislation to assure that we can go forward, and the
25 amendment, by adding the terms "equal protection of the

1 laws" and "equal privileges and immunities of the laws",
2 met precisely the lines and the concerns stated by
3 Representative Garfield.

4 If we are right in that point, since there is
5 not a hint of state action in this case, the decision
6 below must be reversed. But even if it is viewed, even
7 if the statute is viewed as protecting basic
8 constitutional rights against private conspiracy where
9 there is no state action, we think the same result
10 follows, because the court below was of the view that
11 working for a non-union employer is a First Amendment
12 right.

13 It is our understanding based on this Court's
14 cases that the particular economic relations between
15 employers and employees is not governed by the First
16 Amendment but is governed by state law and Congress'
17 power to enact legislation pursuant to the commerce
18 clause.

19 QUESTION: You do not think the right to work
20 for a union employer stands on any different footing
21 than the right to work for a non-union employer?

22 MR. GOLD: No. If Smith v. Arkansas does not
23 take away our dreams on that point, I do not know what
24 will.

25 QUESTION: Mr. Gold, I want to understand

1 you. Are you saying that, though a constitutional right
2 for an individual to decide whether he wishes to work
3 for a non-union or prefers to work for a union employer
4 -- in other words, a man is looking for employment. He
5 may choose a union shop, a closed shop, or an employer
6 with no union connections whatever. You are saying he
7 does not have that right to make that choice?

8 MR. GOLD: He may have a right in some abstract
9 sense of that term --

10 QUESTION: You think the state could forbid it?

11 MR. GOLD: Could the -- I apologize --

12 QUESTION: Could the state enact a statute
13 that said everyone who seeks employment in this state
14 must seek non-union employment?

15 MR. GOLD: I do not think that the First
16 Amendment --

17 QUESTION: Would any provision in the
18 Constitution forbid that?

19 MR. GOLD: Whether substantive due process
20 would return --

21 QUESTION: You would not like it, would you?

22 MR. GOLD: No. I think we had as much
23 substantive due process as we could stand through the
24 first third of this century, but it is our understanding
25 and our view that insofar as the state regulates whether

1 there will be a collective bargaining system or there
2 will be a system of managerial prerogative and insofar
3 as the state regulates whether individuals will work in
4 a system where terms and conditions are set one way or
5 another and insofar as the state regulates even a matter
6 such as, or the Congress in each instance, regulates
7 whether there will be a union that represents all the
8 people on a particular job, those are not First
9 Amendment questions.

10 There is no right of economic freedom of
11 association of the kind the Court of Appeals was talking
12 about any more than there is a right of free association
13 to set up certain kinds of corporations or certain kinds
14 of partnerships of the kind entrepreneurs may find
15 beneficial to their interest free and clear of state
16 regulation of the field.

17 We do not believe that the Sherman Act is
18 either required by or is to be tested against the First
19 Amendment.

20 QUESTION: But I was wondering about the right
21 of an individual to make a choice as to where he wishes
22 to work and with and for whom.

23 MR. GOLD: I do not believe that an individual
24 has such a constitutional right under the First
25 Amendment. Let me --

1 QUESTION: Under any provision of the
2 Constitution --

3 MR. GOLD: I know of no provision.

4 QUESTION: This sounds like the Soviet Union
5 to me where they tell you where you can work and where
6 you cannot.

7 QUESTION: How about the Thirteenth Amendment?

8 MR. GOLD: I was wondering about that. I do
9 not think that if, for example -- let me try to grapple
10 with the question in this way. If in a particular area
11 there are no places of employment where unions have
12 succeeded in becoming majority representatives as
13 provided for in the National Labor Relations Act, I do
14 not think an individual could sue anybody on the view
15 that he was being deprived of his right to work under
16 union conditions.

17 On the other hand, if unions succeeded in
18 organizing the places of employment in the locality, I
19 do not believe that the opposite law suit would lie,
20 either. Obviously the individual has a freedom.
21 Perhaps this is the clearest I can be in answering this.

22 I believe that the individual has a freedom to
23 move from place to place and to look for employment that
24 suits him. I do not believe that he has a
25 constitutional right to demand that certain conditions

1 obtain.

2 The second element that the Court of Appeals
3 understood to be encompassed in Section 1985(3) or at
4 least in the aspect we are discussing here, the equal
5 protection of the laws and equal privileges and
6 immunities of the laws aspect of the statute, is a
7 requirement that there be a showing of class-based
8 invidiously discriminatory animus and that court
9 segmented that requirement as follows:

10 First the court stated that such animus is
11 shown if there is animus against a class of those with
12 common characteristics of an inherent nature and
13 secondly, a particular application here, recognizing
14 that there was no such class, the Court of Appeals said
15 that the statute also encompasses conspiracies motivated
16 by an animus of the kind Congress was trying to protect
17 against in enacting the 1871 Act.

18 The Court of Appeals read the legislative
19 history of the 1871 Act to show an intent to act against
20 conspiracies motivated by an animus against exercises of
21 the right of economic association, which exercises of
22 that right ignite regional hostility. It is our view
23 that that dramatically overreads the statute and
24 Congress' intent therein.

25 We know what the core of what Congress sought

1 to do was. It was to protect the freedmen and those who
2 were seeking to assure that the freedmen secured the
3 rights provided by the Thirteenth, Fourteenth, and
4 Fifteenth Amendment. Every page of the legislative
5 history is instinct with that intention except for
6 scattered passages and in the very considerable
7 legislative history debated, I might say, at a very high
8 and intense level given the gravity of the moment, there
9 are no other references to a congressional intent.

10 In Griffin the Court left open the question of
11 whether any intent under other than racial animus or
12 bias supports a 1985(3) cause of action. It is our
13 position that given the fact that this is a statute
14 stated in general terms, one can generalize from the
15 particular concerns of Congress.

16 We would formulate the animus test as
17 class-based animus against those who have common
18 characteristics of an inherent nature who are offered
19 special protection under the Equal Protection Clauses
20 and in that sense that is the first part of what the
21 Court of Appeals understood class-based animus to be and
22 those who are aiding the former to secure that
23 protection.

24 The area, I think, of legitimate dispute is
25 what is one to make of the repeated references in the

1 legislative history to the interest in protecting not
2 only the freedmen but Republicans and Northerners and
3 others who were also the object of the Klan. In the
4 legislative materials we set out, both in our opening
5 brief and at pages 11 to 18 of our reply brief, it seems
6 to us apparent that the understanding at the time was
7 that those in addition to the freedmen who were to be
8 protected were the individuals who were seeking to
9 assure the protections to that group of Americans
10 guaranteed by the Thirteenth, Fourteenth, and Fifteenth
11 Amendments.

12 It was not Republicans as such. It was not
13 the Northerners as such. It was to those who were
14 embarked in the enterprise of making those amendments
15 real.

16 QUESTION: Mr. Gold, what if say up in Vermont
17 the natives of Vermont have the same attitude toward
18 Democrats that many Southerners at that time had towards
19 the Republicans. Do you think that if a Democrat went
20 up to Vermont and was set upon that he would have an
21 action under this section?

22 MR. GOLD: The --

23 QUESTION: Nothing to do with freedmen,
24 obviously.

25 MR. GOLD: No. We would think that the

1 comparable situations that one can envisage that the
2 statute would extend to would be those such as actions
3 against Japanese-Americans at the beginning of the
4 Second World War is a possibility, but we do not believe
5 that Congress had any intent in going beyond classes
6 that are defined by more than the fact that people are
7 doing certain things which other people do not like and
8 therefore are set upon.

9 Indeed, the broadest statement, that of
10 Senator Edmunds, which is relied on, and it is wholly
11 unique in this entire legislative history, proposes an
12 antithesis between feuds which are generated by
13 particular activities that individuals do not like and
14 class-based animus.

15 So my answer to your question would be that
16 the weight of the legislative evidence is that the
17 protection extends to classes of inherent
18 characteristics who are the objects of discrimination
19 and depravation --

20 QUESTION: Would illegitimates be such a class?

21 MR. GOLD: Under this Court's cases in the
22 development of Fourteenth Amendment law, that might be.
23 Again, while I do not think it was a subject of
24 interest, immediate interest to the 1871 Congress, women
25 could be such a class.

1 The question is is it a class marked by an
2 inherent characteristic --

3 QUESTION: Discrete, insular --

4 MR. GOLD: Right, and is the animus against
5 either the people of that class or those who were
6 assisting members of that class to enjoy the full
7 panoply of rights stated in the Thirteenth, Fourteenth,
8 and Fifteenth Amendments.

9 QUESTION: Mr. Gold, the Slaughterhouse case
10 set a law there, did it not?

11 MR. GOLD: If it --

12 QUESTION: Nobody pays any attention to it any
13 more, but that is an awful clear language in that.

14 MR. GOLD: We have pondered whether that case
15 throws light on it, and in a sense --

16 QUESTION: Do you think it is just dead?

17 MR. GOLD: We are not sure.

18 QUESTION: I might breathe some life in it.

19 CHIEF JUSTICE BURGER: Mr. Keith.

20 ORAL ARGUMENT OF ROBERT Q. KEITH, ESQ.

21 ON BEHALF OF THE RESPONDENTS

22 MR. KEITH: Mr. Chief Justice, and may it
23 please the Court.

24 At the outset of my presentation, may I revert
25 to the facts momentarily, and we might start with the

1 dissent of the Fifth Circuit who called this an
2 unprovoked and brutal attack on law-abiding citizens.

3 The trial court in his opinion which is in the
4 Joint Appendix stated that this arose out of a
5 demonstration or citizen protest where people were
6 voicing concern over outside, non-union workers in a
7 union area much like the Vermonter, the Northerner, who
8 was traveling to the South in Reconstruction times.

9 These two statements were based on fact, and
10 they were best capsulated by the attorney for defendant
11 in the opening statement to the trial court when he
12 said, and it becomes important to the legislative
13 history, what happened here -- and this is the attorney
14 for the defendant -- what happened here arises from the
15 fact that the labor organizations are strong in this
16 area when outside contractors come into the area
17 employing people from outside the state.

18 Just as Senator Edmund in 1871 was concerned
19 with the Northerner, the Vermonter, the Republican, the
20 Democrat, the Methodist, the Catholic and the recently
21 freed man, this case comes as close factually to any
22 case that has ever been before any of the courts under
23 1985(3).

24 In Griffin the Court set out four elements,
25 and if I may respectfully refer to them as the Court did

1 and gave them a separate number.

2 One, that the defendants conspired, and there
3 was a conspiracy. Secondly, that such was for the
4 purpose of depriving any person or class of persons of
5 equal protection of the laws, or equal --

6 QUESTION: Counsel, isn't Texas a
7 right-to-work state?

8 MR. KEITH: Yes, sir. It is.

9 QUESTION: I have trouble with your argument
10 about it, so well organized by labor unions.

11 MR. KEITH: The record shows, Your Honor, that
12 in this particular geographic locality, and all of the
13 evidence is that the labor movement and particularly in
14 the construction trades, is very, very pervasive. This
15 is on the Texas Gulf coast. The oil and chemical
16 industries are the dominant employers, and there is very
17 heavy union organization. It has been since the 1930s.

18 This dispute arose and this attack arose out
19 of the outsider coming in and choosing to associate with
20 other non-union workers. In Griffin, the Court spoke of
21 this equal protection concept, meaning that there must
22 be some class-based invidiously discriminatory animus.

23 The Circuit found, and I think there is clear
24 evidence, that there was pervasive animus both in extent
25 and intensity. Men were beaten with two-by-fours, with

1 iron bars. Equipment was turned over, drag lines,
2 bulldozers, big saws, offices. Men were beaten over the
3 head. They were hospitalized. Buildings were pillaged
4 and burned.

5 This was the act done in furtherance of that
6 conspiracy, and then we come respectfully to Section
7 4(a) as analyzed by Griffin and that is, whereby another
8 was injured in his person or property. Very clearly my
9 clients as plaintiffs were injured in their personal
10 property. This injury arose out of this invidiously
11 discriminatory animus.

12 QUESTION: What did it deprive them of? What
13 right?

14 MR. KEITH: Best said, it deprived us, if I
15 may code myself as a plaintiff for the moment -- it
16 deprived us of the equal enjoyment of personal security
17 which all of us enjoy under the law.

18 QUESTION: Do you think 1985(3) covers that?

19 MR. KEITH: Yes, sir, and I believe the
20 Court's decision in Griffin and the legislative history
21 will support that. Furthermore --

22 QUESTION: How does Griffin have gotten to the
23 Thirteenth Amendment case?

24 MR. KEITH: Griffin was at least a Thirteenth
25 Amendment case and a right to travel case, and Griffin

1 spoke in this instance of a class-based invidiously
2 discriminatory animus.

3 QUESTION: You always have to have that.

4 MR. KEITH: Yes, sir, but that is the right
5 that is violated. Bear in mind this, that the federal
6 statute was aimed at the conspiracy.

7 QUESTION: Tell me again, what right is it?
8 What is it in this case?

9 MR. KEITH: In this case I have, we have the
10 right to enjoy equally the security from unprovoked
11 attack. We also have under the privileges --

12 QUESTION: So 1985(3) covers any assault that
13 is performed by two people?

14 MR. KEITH: No, sir, not at all. There must
15 be a class-based --

16 QUESTION: If they just attacked red-headed
17 people?

18 MR. KEITH: If there is a class-based
19 invidiously discriminatory animus that is both pervasive
20 as in -- to extent and intensity, yes.

21 QUESTION: Class basis on both sides?

22 MR. KEITH: Not necessarily, Your Honor, but
23 there must be a conspiracy. I could not -- in abstract
24 one person cannot commit an act and thus violate
25 1985(3). There must be those acting in concert under

1 conspiracy.

2 QUESTION: So you do not think there is any
3 necessity for the conspiracy to interfere with the
4 efforts of the state to protect people?

5 MR. KEITH: That is correct. Nowhere in
6 1985(3) is that necessary. You see, at the time they
7 adopted this there were four other provisions that were
8 adopted also, and state action and interference with
9 state action are dealt with separately. So we do not
10 need to look to those as you consider 1985(3).

11 QUESTION: Eighty-five three says equal
12 protection.

13 MR. KEITH: Yes, sir, or enjoyment of equal
14 privileges and immunities.

15 QUESTION: Well, so you will claim under
16 immunities?

17 MR. KEITH: We claim in this instance, sir,
18 under --

19 QUESTION: You cannot claim equal protection.

20 MR. KEITH: Yes, sir.

21 QUESTION: Well, where is the state? The
22 state says equal protection.

23 MR. KEITH: We do not claim --

24 QUESTION: Well, where did you get equal
25 protection from if you did not get it from the

1 Fourteenth Amendment?

2 MR. KEITH: The Congress, Your Honor, did not
3 say equal protection under the Fourteenth Amendment.
4 They say --

5 QUESTION: But you say equal protection of the
6 law --

7 MR. KEITH: That is correct, yes, sir.

8 QUESTION: -- and the only place you find that
9 in the Constitution is in the Fourteenth Amendment.

10 MR. KEITH: Yes, sir.

11 QUESTION: Isn't that correct?

12 MR. KEITH: That is my understanding.

13 QUESTION: So they took it from the Fourteenth
14 Amendment.

15 MR. KEITH: They took the concept of equal --

16 QUESTION: But they left the state in the
17 Fourteenth Amendment.

18 MR. KEITH: They left the state in the
19 Fourteenth Amendment.

20 QUESTION: They just took the equal protection
21 and left the state.

22 MR. KEITH: Now, there is a view supported by
23 the legislative history that at the time Congress
24 enacted this that they thought they were enacting a
25 statute under the Fourteenth Amendment, Section Five,

1 but we do not need to reach that in this case. Bear in
2 mind this, if I may pursue it a moment more, when we
3 speak of the equal protection, we are speaking about the
4 animus.

5 We are not speaking about some violation of a
6 constitutional right. We are speaking about the animus,
7 and in this instance that animus was to deprive us of
8 equal enjoyment of the law in peace and security to our
9 person.

10 The animus also extended to equal privileges
11 and immunities in that we had the right to choose with
12 whom we associated. In the exercise of that right under
13 the First Amendment if you bring the state in, but in
14 the exercise of our right of association we then became
15 brutally and violently assaulted.

16 The animus, Your Honor, was affected in this
17 case both by equal protection and equal privileges and
18 immunities.

19 QUESTION: Well, Mr. Keith, how do you get --
20 I have the same basic question Mr. Justice Marshall
21 had. How do you get deprived of equal protection of the
22 law by private individuals? These people were not
23 deprived of any protection of the law that I can see.

24 MR. KEITH: Sir, it is not that you were
25 deprived, thus injured, thus you have a cause of

1 action. There was no depravation which in a causal
2 proximate cause sense led to this cause of action.

3 The denial, if you will, relates to the animus.

4 QUESTION: But I want to get back to the
5 Fourteenth. To what extent are you relying on the
6 Fourteenth Amendment as a basis for Congress' enactment
7 of this statute that you say gives you a claim?

8 MR. KEITH: None.

9 QUESTION: Well, then what is the authority
10 for Congress to act?

11 MR. KEITH: In this instance the commerce
12 clause.

13 QUESTION: You say Congress relied on the
14 commerce clause in passing 1985?

15 MR. KEITH: At this time --

16 QUESTION: You mean then 1983, the present --

17 MR. KEITH: Today, yes, sir. Congress clearly
18 has a constitutional authority --

19 QUESTION: I am talking about 1871.

20 MR. KEITH: At the time Congress adopted 1985,
21 their perception was that this was a wrong that needed
22 correcting and that they had the authority to do so
23 under Section 5 of the Fourteenth Amendment. This Court
24 does not need to address that question in this case.
25 That may be another day and another time.

1 The Congress has the authority under the
2 commerce clause, clearly under the facts of this case,
3 to adopt 1985(3). This was a federal project. It
4 involved --

5 QUESTION: But there is not the slightest
6 indication from the legislative debates that I have seen
7 in 1871 that Congress gave any thought to the commerce
8 clause.

9 MR. KEITH: That is correct.

10 QUESTION: And if they had given some thought
11 to it, they could not possibly have imagined that the
12 commerce clause would authorize this kind of an
13 interference with it.

14 MR. KEITH: As I understand the test today,
15 sir --

16 QUESTION: No, but as of that time.

17 MR. KEITH: The commerce clause was given a
18 more restrictive application 100 years ago, yes, but the
19 question today is the constitutionality of the Act and
20 the authority of Congress to enact it.

21 QUESTION: No, the question is construing the
22 statute they read.

23 MR. KEITH: Yes, sir.

24 QUESTION: And if they purported to act under
25 the Fourteenth Amendment, I am sure they thought they

1 were complying with, they were staying within its
2 limits. If you say the limits were so and so, those are
3 the limits of the statute, if you say that is what
4 Congress intended.

5 MR. KEITH: No, sir. The Fourteenth Amendment
6 did not limit Congress' action. Congress was
7 federalizing a particular offense.

8 QUESTION: Under what authority?

9 MR. KEITH: Under the authority of the
10 Fourteenth Amendment, Congress says --

11 QUESTION: All right. Do you think Congress,
12 purporting to act under the Fourteenth Amendment, could
13 just have passed a murder statute of general
14 applicability all over the country on the theory that
15 they were -- do you think that would be --

16 MR. KEITH: That was the type of question that
17 was subject to the debate, exactly. When Congress
18 enacted what this Court has called Section 2, that is,
19 the discriminatory animus, instead of adopting this
20 general murder statute, Congress adopted the limiting
21 amendment which requires the animus that we have spoken
22 of.

23 The animus is to deprive one under these
24 circumstances of equal protection, that is the equal
25 enjoyment of the laws or equal privilege under the

1 laws. Now --

2 QUESTION: Mr. Keith, would just any group
3 that shared common political or social beliefs qualify
4 for the class of plaintiffs that you would see covered
5 by the statute?

6 MR. KEITH: No, Justice O'Connor. Bear in
7 mind that class is really defined in the mind of the
8 defendants. It is the defendant's perception that these
9 people, whomever they may be, in this case those who
10 were associating on this job, are morally inferior. For
11 some reason they lack the same standing under the law as
12 the rest of us.

13 They are not entitled to the same protection
14 under the law. In this instance --

15 QUESTION: So to define the class we look in
16 the minds of the defendants to see --

17 MR. KEITH: As represented by their res gestae
18 statements at the time and as represented by their
19 conspiratorial actions before and in the acts done in
20 furtherance of the conspiracy, yes.

21 In this instance the res gestae statements
22 are, man, get out of here. You are crazy. This is
23 union country. Get out of Jefferson County and don't
24 set your feet back in here. Much like the Jewish people
25 at the synagogue, or the Catholics at mass, these people

1 were assaulted at a place where they congregate, where
2 they associate, as they have under state law as well as
3 federal law a right to do.

4 Hypothetically there may be some other
5 circumstance that would be more arguable as to whether
6 it is or is not a class, but clearly it is not a Rule 23
7 class such as numerosity, commonality, and definiteness.

8 QUESTION: Mr. Keith, under your view would a
9 private men's club be subject to a 1985(3) suit by women?

10 MR. KEITH: No.

11 QUESTION: If the women thought they were
12 inferior?

13 MR. KEITH: No. I could limit it in a number
14 of different ways, but there would not be class -- it
15 would not necessarily be a conspiracy, although you
16 might say the men by their charter agree to something.
17 There would not be any animus of the type, and the Fifth
18 Circuit spoke of this, of the type the framers of the
19 amendment were intending.

20 QUESTION: Well, instead of women suppose it
21 is blacks.

22 MR. KEITH: If they are beaten and assaulted
23 because of that status --

24 QUESTION: No they are just denied --

25 MR. KEITH: Excluded

1 QUESTION: -- excluded from the white male
2 club.

3 MR. KEITH: I do not perceive that as the
4 animus conceived by the --

5 QUESTION: The original purpose I gather --
6 animus initially was in part at least the freedmen, was
7 it not?

8 MR. KEITH: Yes, sir, in part the freedmen,
9 but it was basically economic in that the Northerner,
10 the Vermonter, the freedman was now taking over the
11 place or taking a place in this new economic order. The
12 Act was basically derived at those who were exercising
13 economic activity.

14 QUESTION: You keep talking about economic and
15 all. I thought the basis of these statutes were the
16 Black Codes of the south, the Black Codes.

17 MR. KEITH: Yes, sir, they were.

18 QUESTION: Don't tell me you never heard of
19 them.

20 MR. KEITH: Yes, sir. I did not understand
21 the question. The --

22 QUESTION: Is that not the reason for this
23 statute?

24 MR. KEITH: Yes, sir, but what was happening
25 was --

1 QUESTION: Your people do not qualify under
2 that, do they?

3 MR. KEITH: What was happening was that the
4 Northerner was going to the South, was being elected to
5 the legislature, was operating stores. He was being
6 beaten and pillaged and violated just as was the
7 freedman.

8 QUESTION: In '71?

9 MR. KEITH: Yes, sir, and that is exactly what
10 the legislative history spoke to was the conduct toward
11 the black man and toward these new persons in the
12 community.

13 QUESTION: How come none of the early cases
14 mentioned it? I mean, the earlier decisions of this
15 Court.

16 MR. KEITH: Well, respectfully, there are just
17 two.

18 QUESTION: Just two? There are four of them
19 in Volume 100.

20 MR. KEITH: Well --

21 QUESTION: In one volume.

22 MR. KEITH: Speaking of the --

23 QUESTION: I think either three or four.

24 MR. KEITH: Griffin since 1962 is the only
25 time that this Court has really written on this 1985(3),

1 and those men --

2 QUESTION: The whole point is you have got a
3 clear almost undefendable action in the state court.
4 Right?

5 MR. KEITH: There is an action in the state
6 court, yes, sir.

7 QUESTION: You are going to have a dual
8 recovery here?

9 MR. KEITH: No, sir.

10 QUESTION: Sir?

11 MR. KEITH: No, sir, not in any way.

12 QUESTION: Are you going to drop your state
13 one?

14 MR. KEITH: I have never brought a state court
15 suit.

16 QUESTION: Sir?

17 MR. KEITH: I never brought this as a state
18 court suit.

19 QUESTION: I thought you said there were two
20 involved in this same one. I am talking about your
21 plaintiffs.

22 MR. KEITH: My plaintiffs in this case brought
23 one law suit and that was in this Court.

24 QUESTION: Yes, but you could have brought it
25 in the state court.

1 MR. KEITH: We could have brought a law suit
2 in the state court. There is no question about that.

3 QUESTION: Now, to get back to Justice
4 O'Connor's question before, why the federal instead of
5 the state court?

6 MR. KEITH: Am I free to answer that question
7 as the lawyer who brought the case? The reason why it
8 was, at the very time I brought this suit, there were
9 two state court proceedings going on involving identical
10 issues where the parties plaintiff were getting their
11 brains beaten out, unable to get an injunction, and I
12 was first seeking an injunction for my clients to
13 protect them as they returned to work.

14 I was confident that with the difficulties
15 these other plaintiffs were having at the exact same
16 time, I could not get an injunction. So I sought a
17 remedy under the federal law where I could obtain an
18 injunction. That is why I brought the suit in the
19 federal court. It is the only law suit that we have
20 ever brought --

21 QUESTION: And it was easier.

22 MR. KEITH: Well, it has not been easy.

23 (Laughter)

24 QUESTION: It is no easier today, is it?

25 MR. KEITH: No, sir, it is no easier today.

1 But very clearly, and if I may respectfully
2 distinguish my case from Dombrowski or Novotny. In this
3 case, my clients suffered injury to person and property
4 as described by Section 4(a) very clearly.

5 In Dombrowski out of the Sixth Circuit, the
6 Seventh Circuit, or Novotny, neither of those plaintiffs
7 suffered injury to person or property. And in Griffin
8 the Court said that there was a recovery for those who
9 suffer injury to personal property or to those who are
10 denied equal privileges and immunities as citizens of
11 the national government. So I would respectfully say to
12 you that this case is legally and factually different
13 from each of those for that very reason.

14 Those two cases were what we have called, in
15 our brief, Section 4(b) cases which, Mr. Justice White,
16 would or do call for a "violation of a constitutional
17 right" which in this instance would call for either a
18 racial violation, a travel violation or a state action
19 involved.

20 If I may answer the question of Mr. Justice
21 Rehnquist, are there other constitutional rights that
22 may be involved. We can conceive of none except as a
23 person may be enjoying security or freedom or peace from
24 assault.

25 QUESTION: Do you think that is basically a

1 right protected by the federal constitution, the right
2 to security or respite or freedom from assault?

3 MR. KEITH: Equal protection under the laws --

4 QUESTION: Supposing everybody is getting
5 beaten up?

6 MR. KEITH: Then there would be no inequality
7 of protection. Certainly that is true, but in this
8 instance and in no circumstances have been presented the
9 case that you posit.

10 QUESTION: Where is the right -- where do you
11 get that right of physical security under the federal
12 constitution from assault?

13 MR. KEITH: I have --

14 QUESTION: A private person.

15 MR. KEITH: I have the right under the state
16 law to this freedom, and then I have the right as a
17 federal citizen, a national citizen, to equal
18 application of that law. When the marauder takes it in
19 his own hands and treats me differently, irrationally,
20 for no legitimate reason, then --

21 QUESTION: So you do suggest, I suppose, that
22 the federal government could have a general tort law,
23 general criminal law to pick up all the crimes around if
24 they involve some injury to person and property?

25 MR. KEITH: No, sir, indeed not --

1 QUESTION: If they were conspiracies.

2 MR. KEITH: And if they were class-based --

3 QUESTION: Yes.

4 MR. KEITH: --animus --

5 QUESTION: Then yes.

6 MR. KEITH: -- and with this invidious

7 discrimination, yes --

8 QUESTION: Then yes.

9 MR. KEITH: -- but only if there is that

10 conspiracy with that class-based discriminatory animus.

11 QUESTION: You say that the gist of the thing

12 is denying your clients the equal protection of the law

13 even though the State of Texas apparently is perfectly

14 willing to enforce the law against everybody

15 evenhandedly.

16 MR. KEITH: That is correct, but that is the

17 animus, Your Honor. That is not necessarily the cause

18 of action. That is just an element of it, and this

19 so-called violation does not need to lead to injury in a

20 proximate cause sense.

21 All this does was show that the animus arose

22 in this violation of my equal protection.

23 QUESTION: So there is really no state action

24 involved in all.

25 MR. KEITH: That is correct. There is no

1 state action here, nor is there any required if you have
2 injury to person or property as described under Section
3 4.

4 QUESTION: In this case if they had not said
5 this is union country or if they had not said anything
6 and they just beat him up, would you be here?

7 MR. KEITH: It would be a much more difficult
8 case.

9 QUESTION: Would you be here? I mean, do you
10 think so? Do you think you would have gotten a judgment
11 below?

12 MR. KEITH: Not without showing that there
13 was, in fact, this animus. I may have been able to do
14 so circumstantially. But --

15 QUESTION: Do you think this is the theory of
16 the Court of Appeals that you are pushing?

17 MR. KEITH: No, sir. I do not. The Court --

18 QUESTION: Are you defending the judgment of
19 the Court of Appeals?

20 MR. KEITH: We do not have to go that far.

21 QUESTION: So your answer is no?

22 MR. KEITH: That is basically correct. If
23 this Court should hold that Section 5 of the Fourteenth
24 Amendment grants this power to Congress, then the Court
25 of Appeals judgment is correct on that basis.

1 QUESTION: You do not say they are wrong. You
2 just do not want to defend it.

3 MR. KEITH: We do not have to go that far.
4 That is a heavier load to carry than we need to carry to
5 prevail in this particular case.

6 QUESTION: Did you present this narrower
7 ground to the Court of Appeals?

8 MR. KEITH: No, sir. We did not. We
9 submitted the larger view to the Court of Appeals.

10 QUESTION: If you do not want to defend the
11 court below, do you want us to? Well who is here
12 defending them?

13 MR. KEITH: Well, I am here defending them,
14 Your Honor, but I say that --

15 QUESTION: I thought you were.

16 MR. KEITH: We can affirm my case without
17 going as far as we ask --

18 QUESTION: I was trying to keep you from
19 pulling the rug out from under yourself.

20 MR. KEITH: Thank you, sir.

21 QUESTION: Well, you certainly are defending
22 the judgment below.

23 MR. KEITH: That is correct, yes.

24 QUESTION: A little while ago you said you
25 were not, but certainly the judgment below --

1 MR. KEITH: Indeed, and that is the only
2 difference that we have with the Court of Appeals is
3 this --

4 QUESTION: Why are you afraid of the Section 5
5 argument?

6 MR. KEITH: We did not think it was
7 necessary --

8 QUESTION: There have been opinions of the
9 Court that have addressed it, as you know.

10 MR. KEITH: We did not think it was necessary
11 to make, Your Honor.

12 QUESTION: Well, it is not necessary to make
13 it except that -- where else did Congress get the
14 authority to pass this law?

15 MR. KEITH: That is probably the answer to my
16 question, yes.

17 QUESTION: I still do not understand your
18 concern. There have been opinions that have addressed
19 that question and have concluded that, indeed, Section 5
20 was the basis upon which the 1871 Act was adopted in
21 United States v. Guest.

22 MR. KEITH: Yes, sir.

23 QUESTION: There were six of us in that case
24 that thought so.

25 MR. KEITH: Yes, sir.

1 QUESTION: May I ask you once more. I know
2 you have covered it but I keep turning it over in my
3 mind. Define for me again the class at which the
4 conspiratorial activity was directed.

5 MR. KEITH: In the minds of the defendants and
6 those whom they struck out against were a group of men
7 associated at a particular work site who had chosen to --

8 QUESTION: Is it all of the employees of this
9 particular employer?

10 MR. KEITH: Yes, sir.

11 QUESTION: That is the class.

12 MR. KEITH: As it turned out there was also a
13 subcontractor on the job who had been notified --

14 QUESTION: But you think that the employees of
15 a particular employer satisfies the class concept in the
16 class-based animus language?

17 MR. KEITH: Yes, sir, because they were
18 associated as non-union workers exercising that right,
19 not the right to work non-union but the right to
20 associate. They were at this place just as the Jewish
21 people might be at the synagogue.

22 QUESTION: Do you think they were there
23 because they wanted to be with other non-union people or
24 because they wanted a job?

25 MR. KEITH: Either way, they had the right to

1 be there and to express themselves in that manner and
2 they chose to do so.

3 QUESTION: I thought you said this group of
4 people at this site had the right not just to associate,
5 and maybe you are saying that, too, but they had the
6 right to have personal security.

7 MR. KEITH: They do. Yes, sir. One is equal
8 protection. One is privileges and immunities, yes.
9 They have both rights as federal citizens. Have I
10 answered your question?

11 Thank you, sir.

12 CHIEF JUSTICE BURGER: Do you have anything
13 further, Mr. Gold? Mr. Gold, you have two minutes.

14 MR. GOLD: I have nothing further unless there
15 are questions.

16 CHIEF JUSTICE BURGER: Thank you, gentlemen.

17 The case is submitted.

18 (Whereupon, at 2:05 p.m., the case in the
19 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of: United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO, Et Al., Petitioners v. Paul E. Scott, Et al
No. 82-486

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