THE KU KLUX KLAN ACT AND THE PROPER PERSPECTIVE ON THE SCOPE OF 42 U.S.C. § 1985(3)

The reconstruction period following the Civil War was fraught with racial turmoil. Although the black slaves had been emancipated by the Thirteenth Amendment, their rights as United States citizens were constantly violated by whites. This was particularly true in the South. Much of the turbulence between races resulted from the violent and gruesome efforts of an organization commonly known as the Ku Klux Klan. In March of 1871, President Ulysses S. Grant sent a special message to the Forty-Second Congress urging it to enact legislation to deal with the turmoil in the South.[1] In the midst of this violence against blacks and their supporters, Congress met to debate the passage of "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes," also known as the Ku Klux Klan Act.[2] The relevant section of that Act is now codified as 42 U.S.C. § 1985(3).

Section 1985(3) is essentially a prohibition against conspiracies. It provides a federal cause of action for any person injured by an act, when the act is committed in furtherance of a conspiracy designed to deprive the victim of the equal protection of the laws or equal privileges and immunities under the laws of the United States. In substance, it allows conspiracies which fall within the requirements of § 1985(3) to be litigated in federal court rather than in the state court which originally had jurisdiction.[3]

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1. BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, PART ONE 591 (1970).

2. Collins v. Hardyman, 341 U.S. 651, 656 (1951).

3. 42 U.S.C. § 1985(3) provides:

(3) Depriving persons of rights or privileges

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

The Ku Klux Klan Act was introduced in the House of Representatives, and a limiting amendment was added in the Senate. The controversial nature and significance of the issues presented by the Act are evidenced by the long and heated character of the debates in both houses. Mr. Justice Jackson noted some of these issues in a 1951 decision.[4] Although, in context, he was writing about what would occur if the circumstances of the case met the requisite elements necessary in order to maintain an action under the Act, his words expressed the exact fears of the members of Congress who were critical of the Act in 1871:

> [I]t raises constitutional problems of the first magnitude that, in the light of history, are not without difficulty. These would include issues as to congressional power under and apart from the Fourteenth Amendment, the reserved power of the States, the content of rights derived from national as distinguished from state citizenship, and the question of separability of the Act in its application to those two classes of rights.[5]

Perhaps the gravest concern expressed in the legislative and judicial history is the avoidance of a general federal tort law. As Justice Stewart wrote, "[t]hat the [S]tatute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others."[6] Citing to Representative Cook, Stewart noted that the members of Congress did not believe "that Congress has a right to punish an assault and battery when committed by two or more persons within a State."[7] Congress did not intend to

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

4. Collins v. Hardyman, 341 U.S. 651, 659 (1951).
5. *Id.* at 659.
6. Griffin v. Breckenridge, 403 U.S. 88, 101 (1971).
7. *Id.* at 101-02.

institute a general federal tort law which would interfere with state sovereignty and create a federal cause of action for every offense. To the contrary, the members of Congress made every effort to prevent this problem.

This note aspires to ascertain the intended scope of 42 U.S.C. § 1985(3) without superimposing present day notions of the nature of law onto a Statute enacted in 1871. It does so because present notions of the nature of law often obscure the original object of the Statute. Section I will outline the historical and factual circumstances surrounding the enactment of the Ku Klux Klan Act, including the concerns of the members of both houses of Congress. It will also chart the basic judicial history of § 1985(3), emphasizing the ever-increasing scope of the Statute. Section II will focus on the state action requirement. It will establish the source of the requirement and reveal how the Court has superimposed its understanding of the definition of "equal protection of the laws" onto the language of the Statute in order to dispose of the state action limit. The aim of Section III is to help the reader understand the "protected class" issue which has become the focus of modern litigation under § 1985(3).[8] It will explain how and why this author believes that the Statute should be limited to particular classes, and the constitutional problems that surface if these limits are exceeded. The final section will conclude with a challenge to the courts to adhere to a strict principled guideline on the application of the Statute.

I. THE LEGISLATIVE AND JUDICIAL HISTORY OF § 1985(3)

Familiarity with the debate and factual circumstances surrounding the passage of the Ku Klux Klan Act and its judicial history is a necessary prerequisite to the proper construction of 42 U.S.C. § 1985(3). Without an understanding of the fears of the representatives in 1871, the original aims of the Act, the activities that led to its introduction and adoption, and its relative obscurity until 1971, the reader is likely to misunderstand its scope and will be more inclined to superimpose his concept of the nature of law onto the Statute.

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8. The protected class issue was first raised in *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

A. *The Historical Context*

1. Disfranchisement Efforts

The precursor[9] to § 1985(3) "was introduced into the federal statutes by the Act of April 20, 1871, entitled, 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.'"[10] According to Justice Jackson, the Act was popularly known as the Ku Klux Klan Act and was passed by a partisan vote in a highly inflamed atmosphere.[11] "It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse, and its defects were soon realized when its execution brought about a severe reaction."[12] What exactly led Congress to even consider an Act engendering such outrage and anger throughout both houses? The most concise answer is the Ku Klux Klan.

A detailed accounting of the troubles caused by the Ku Klux Klan was provided by Representative William Stoughton, a Republican member of the House of Representatives in the Forty-Second Congress.[13] Stoughton said that it was the "earnest hope" of the Republican Party that the spirit of violence in the South would end.[14] With this hope in mind, Congress had extended to its conquered enemy every possible right, and, at least in Stoughton's mind, the North had "every right to expect and demand at least a quiet submission to just and wholesome laws from . . . her late enemies."[15] Unfortunately, according to Stoughton, their reasonable expectations had not been met:

> There exists at this time in the southern States a treasonable conspiracy against the lives, persons, and property of Union citizens, less formidable it may be, but not less dangerous, to American liberty than that which inaugurated the horrors of the rebellion. The existence of this organization and its treasonable character are proved by the sworn testimony of an array of witnesses from all parts of the South which must carry conviction to the minds of the most skeptical.[16]

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9. 17 Stat. 13 (1871).
10. Collins v. Hardyman, 341 U.S. 651, 656 (1951).
11. *Id.* at 657.
12. *Id.*
13. SCHWARTZ, *supra* note 1, at 599.
14. *Id.*
15. Cong. Globe, 42d Cong., 1st Sess., 320 (1871).
16. *Id.*

Stoughton outlined four propositions that were supported by the evidence presented on the violence and lawlessness of the Ku Klux Klan. First, Stoughton maintained that the Ku Klux Klan organization was a widespread phenomena existing throughout the South. It had a political purpose, and was "composed of the members of the Democratic or Conservative Party."[17] Second, he averred that it sought "to carry out its purposes by murders, whippings, intimidation, and violence against its opponents."[18] Third, the Klan "not only binds its members to execute decrees of crime," he said, "but protects them against conviction and punishment, first by disguises and secrecy, and second, by perjury, if necessary, upon the witness-stand and in the jury-box."[19] Finally, and most frightening, Stoughton declared "that of all the offenders in this order, which has established a reign of terrorism and bloodshed throughout the State not one has yet been convicted."[20]

With respect to the character of the organization and the force of the vow which members were required to take, a former member of the Klan, James E. Boyd, testified to the House committee appointed to consider the bill.[21] He said that the meetings of the organization were held in secret in a place far from habitation to avoid detection.[22] The following is an abbreviated excerpt from his testimony:

> Q. ... are the members bound to carry out the decrees of the order if they involve murder and assassination?
> A. I think so, sir. If it was decided to take the life of a man a camp is ordered to execute the sentence, and is bound to do it.
> Q. What would be the penalty of any member who refused?
> A. I do not know that any penalty was prescribed for that. A member could excuse himself from meetings or from going upon raids if he had a proper excuse. The penalty prescribed in the regulations for the punishment of any member who should disclose the secrets of the order was death. Each member was informed upon his initiation that if he disclosed the secrets of the organization he should be the first victim.
> ....

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

> A. I think that was one of the objects and intentions of the organization, that a person on the witness-stand or in the jury-box should disregard his oath in order to protect a member of the organization.
> Q. State any of [the punishments] that you now remember.
> A. the most serious instance in my county, I believe was the hanging of a Negro man by the name of Outlaw, who was taken from his house ... at night, by a band of from eighty to a hundred men, and hung upon an elm tree, not very far from the courthouse door.
> Q. What is your knowledge of the object and extent of this organization throughout the State?
> A. The number of members of the organization is supposed to be forty thousand. Their object was the overthrow of the reconstruction policy of Congress and the disfranchisement of the Negro.
> Q. Were other punishments inflicted in your county besides this?
> A. Yes, sir...., a Negro by the name of William Puryear ... was drowned in the millpond.
> Q. Were there any whippings in the county?
> A. Yes, sir. I believe there were one hundred and fifty in the last two years in the county, white and black. Some have been whipped two or three times.[23]

Another witness corroborated the testimony of Mr. Boyd. The Honorable Thomas Settle, Justice of the North Carolina Supreme Court, testified that he believed that the Democratic Party was not only involved, but encouraging the violence.[24] He testified that Hamilton C. Jones, a member of the North Carolina Legislature, Mr. Boyd, who testified above, Dr. Moore, a former member of the House of Commons for Alamance County, and several other prominent political figures were all proven members of the Klan.[25] According to Justice Settle, "it is impossible for the civil authorities, however vigilant they may be, to punish those who perpetrate these outrages. The defect lies not so much with the courts as with the juries. You cannot get a conviction: you cannot get a bill found by the grand jury...."[26] When an indictment was handed down by the grand jury, the petit jury always acquitted the parties.[27] Furthermore, he testified that "it

23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*

came to our knowledge that it was the duty and obligation of members of this secret organization to put themselves in the way to be summoned as jurors, to acquit the accused, or to have themselves summoned as witnesses to prove an alibi. This they swore to...."[28]

Another piece of evidence revealing the atrocities occurring in the South, the story of the Meridian Massacre, is important to this discussion.[29] According to George McKee, a Republican from Mississippi, the Alabama Ku Klux Klan, who instigated the bloody massacre, was invited to Meridian Mississippi by its own Klan.[30] "Prior to the late butchery two colored officials had been murdered. Other outrages had been committed. But still it was deemed that enough had not been done, and the bloody work of death culminated in that infamous scene of riot and blood at Meridian."[31] Several events appear to have occurred in Meridian. A judge had been shot while presiding over his courtroom, and several black men were thrown out of the courtroom window. In addition, these actions spurred a series of killings throughout the area. What exactly happened at Meridian is uncertain, but the following is a narrative from the New York Tribune quoted in the Congressional Globe:

> The Ku Klux will endeavor to make the people of the North believe that Judge Bramlette was killed by a negro. They may make some believe it. But I do not believe that any of the arrested negroes had any weapon other than a pocket-knife, as I was present at the trial for some time and sat close to the accused, and saw none.... I believe, although I saw not the shooting, that one or many of the Ku Klux in carrying out their design, shot Judge Bramlette. After the negro was shot he jumped out of the two-story window; after which he was killed. George Dennis, colored, was shot in the court-room, after which he was thrown from the two-story window on to the brick pavement below, and as that did not kill him, they then cut his throat. After they had killed H. A. Moore they went and burned his house; and so they continued their hellish barbarities. They surrounded my brother's house. They were all armed with double-barreled shot-guns, and, as I was told, two hundred in number.[32] The

28. *Id.*
29. *Id.* at 321.
30. SCHWARTZ, *supra* note 1, at 612.
31. *Id.*
32. Cong. Globe, 42d Cong., 1st Sess., 321 (1871).

> Republicans claimed that twenty-five or thirty men were "killed in the streets and shot or hung in the swamps."[33] McKee noted that all of the dead were colored or Republicans. "[N]ot even the hair of the head of a single Democrat was harmed."[34] In his distress he said:
> The colored men of Meridian were shot in the streets and hunted and hung in the swamp. They fled to the forest, and their path was lit up by the light of the blazing roof trees of their lowly cabins, and by the burning church around which their little homes were clustered. And now the widow and the orphan and the refugee are scattered far and wide. The homes so dear to them are desolate and they dare not return. The church which, with prayer and toil, they had reared, to the erection of which I have often seen them giving their illy-spared mite out of their scanty earnings, and beneath the heaven-pointing spire of which they have so often gathered to worship God in their simple way - that too is destroyed. Their husbands and fathers are slain; and houseless and homeless, weary and tired, poor and hungry, they know not what to do! And yet gentlemen on the other side say these outrages are 'got up by Republicans for the occasion.' May God forgive them for the lying slander upon a stricken people.[35]

From these brief excerpts, the central concern of the Forty-Second Congress is clear. It was their goal to curb the tide of violence that had overtaken the South. In the incensed words of Benjamin Butler (R. Mass.) who introduced the bill into Congress, "Then indeed should midnight raider and the murderous Ku Klux smiter of defenseless women and children and the disguised assassin and burner of quiet men's houses hang on trees like ripe fruit ready to be plucked until every man's rights, however humble, should be respected, and every roof tree ... should be a safe castle."[36]

2. The Purposes of the Statute

What exactly were the purposes of the Ku Klux Klan Act? What did it attempt to do? There are several answers to these

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33. SCHWARTZ, *supra* note 1, at 612.

34. *Id.*

35. *Id.* The remarks of Representative McKee are representative of the tenor of the debate in both houses. Remarks of anger and frustration such as this are common, if not the norm, in the legislative history of the Ku Klux Klan Act.

36. *Id.* at 617.

questions. First of all, it is important to note that "Section 1985(3) ... creates no rights. It is a purely remedial Statute, providing a civil cause of action when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section."[37] In the words of Senator Edmunds, "All civil suits, as every lawyer understands, which this [A]ct authorizes, are not based upon it; they are based upon the right of the citizen. The [A]ct only provides a remedy."[38] Thus, the Statute provided a remedy in a civil action for a deprivation of the right to equal protection of the laws or equal privileges and immunities under the laws only when that deprivation was the result of conspiratorial activity by the defendants.

Bernard Schwartz noted two additional purposes of the Statute in his *Statutory History of the United States: Civil Rights, Part One.* According to Mr. Schwartz, the Act, "as introduced and ultimately passed, had two broad purposes: (1) to provide civil and criminal sanctions to deter infringements upon civil rights; and (2) to provide authority to the government to meet with force unlawful combinations and violence which interfered with civil rights or the execution of justice or federal law."[39] Schwartz's first purpose is visible in the language of 42 U.S.C. § 1985(3).[40] Not only is the Statute entitled "Conspiracy to interfere with civil rights," but its language also focused on violations of the civil rights of citizens, and it provided sanctions against the offenders.[41] With regard to Schwartz's second purpose, the Ku Klux Klan Act gave the federal government the power to deal with mob violence through the President's power "to use armed forces to suppress any violence which deprived any class of people of their constitutional rights if the state authorities refused or were unable to protect such rights."[42] The President was also authorized to suspend habeas corpus in order to curb the tide of violence.[43]

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37. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 376 (1979).

38. Cong. Globe, 42d Cong., 1st Sess., 568 (1871) *quoted in* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979). *Accord,* Great Am. Fed. Sav. & Loan Ass'n. v. Novotny, 442 U.S. 366, 381 (1979).

39. SCHWARTZ, *supra* note 1, at 591.

40. *Id.*

41. *See* 42 U.S.C. § 1985. Note that all three sections revolve around violations of civil rights as the result of a conspiracy, and a damage remedy is provided for all three in the final section. *See also* U.S. v. Harris, 106 U.S. 629 (1883), in which the Supreme Court reviewed the exact criminal counterpart of § 1985(3).

42. SCHWARTZ, *supra* note 1, at 591.

43. *Id.*

Another distinct purpose of the Statute was to deal specifically with the violent Ku Klux Klan. As will become visible through this paper, the principal problem to which the Act was aimed was the lawless state of the union created by the Ku Klux Klan. Of all the espoused purposes of the Statute, it is clear that it was enacted mainly to contend with this violent and lawless group.

3. Legitimate Scope

History also reveals something about the legitimate or intended scope of the Ku Klux Klan Act. After a thorough study of the debates in the Forty-Second Congress and the case law dealing with this issue, it becomes clear that the Act originally applied to racially-motivated conspiracies in which the state was a party. Although the intended scope has been extensively modified by court precedent, it is nevertheless relevant to a proper construction the Statute.

The intended purpose of a particular act must play an important role in its interpretation and application. When the courts apply a legislative enactment such as the Ku Klux Klan Act, they should do so with reference to its intended scope in order to prevent misuse of the Statute. In the case of § 1985(3), both the legislative history and the case precedent prior to 1971 expose a constant thread regarding the purpose of the Statute: it was intended to have limited scope. To properly understand and interpret this Act in accordance with its appropriate limits, it must first be understood that it was not intended to be a far-reaching enactment. Its legitimate purpose was confined to a particular variety of conspiracies, and when the courts interpret § 1985(3) to reach a broader class, they superimpose their desires on the Act and usurp the role of legislator. Justice Marshall, writing for the majority in *Marbury v. Madison*, wrote "it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[44] In the process of attempting to interpret and expound the rule of the Ku Klux Klan Act, the courts must remember that the intended objective of the Statute governs its application, because the aim of the framers of the Act is an essential part of the "rule" announced by the legislature.

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44. 5 U.S. (1 Cranch) 137, 177 (1803).

Although the state action element will be examined more thoroughly later in this note, it is important here to note some basic aspects of the requirement. In *Collins v. Hardyman*, the Court held that actions under 42 U.S.C. § 1985(3) required a showing of state action, and that allowing purely private conspiracies to fall within the Statute raised "constitutional problems of the first magnitude."[45] It is plausible that the virtual obscurity of the Statute for one hundred years reflected realistic fears that the expansion of the Statute's scope to include private conspiracies would seriously undermine the American system of federalism. The critical nature of this requirement, as noted in *Collins*, demands that the state action limit be vigorously defended in spite of the Court's later decision to overrule *Collins*.

That racial animus is an intended requirement is evident both from the nature of the debates in Congress and from the case precedent on the subject. The few excerpts above indicate that the discussion in 1871 revolved around conspiracy against Negroes. Mr. Edmunds, a Senator and chief proponent of the bill in 1871, made this clear when he referred to the Ku Klux Klan as "the violent people we desire to repress."[46] The crux of Edmund's oratory, as with most of the speeches during the debates, centered on the slavery issue and on the relation of § 1985(3) to the Fourteenth Amendment.

> "But the chief point now is ... that here is ... an express grant of power to us ... to defend the rights of citizens of the United States and all inhabitants of the country ... *against slavery*. Now, how are you going to do it? Are you going to do it by passing a proclamation to the State of Georgia when she may choose to *reenslave her negroes*? Or are you going to do it by making war upon her? Or, are you going to do it, as we by this bill do it under the Fourteenth Amendment, by declaring that any man who infracts that article shall be punished?[47]

Several cases have reinforced the notion that the Statute might very well extend only to racial animus. Justice Jackson wrote that "the purpose of the Act" was "to put the lately freed Negro on an equal footing before the law with his former master. The Act apparently deemed that adequate and went no further."[48]

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45. Collins v. Hardyman, 341 U.S. 651, 659-63 (1951).
46. SCHWARTZ, *supra* note 1, at 642.
47. *Id.* at 647 (emphasis added).
48. Collins v. Hardyman, 341 U.S. 651, 661 (1951).

Twenty years later, the Supreme Court agreed and wrote, "We can only conclude that Congress was wholly within its powers under section 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action."[49] Later in the opinion, Stewart noted that since the case before the court involved a conspiracy against blacks, it fell "so close to the constitutionally authorized core of the [S]tatute" that it was not necessary "to trace out its constitutionally permissible periphery."[50] Justice White, twelve years after *Griffin v. Breckenridge*, expressed similar views, except that he went so far as to say that the Statute may apply only to discriminatory action directed at blacks and their white supporters. The Court wrote in *United Brotherhood of Carpenters & Joiners, Local 610 v. Scott* that "[i]n the first place, it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans."[51] Although White did not claim that this issue was settled, he did indicate his belief that the Statute should be very limited in application.

It is evident that the Ku Klux Klan Act was passed for a specific purpose with a certain aim in mind. The focus of the debates in both houses concentrated on the violent deeds perpetrated against Negroes and Republicans by lawless bands of the Klan. In the eyes of the members of Congress, the Act most certainly was an attempt to stifle the efforts of the KKK to enslave and frighten the black "citizens" of the nation through murder and terror.

B. The Judicial History: From Non-Existence to Explosion

The Ku Klux Klan Act has survived in substantially the same form for over a century. Throughout the first one hundred years the Statute remained virtually dormant.[52] With the exception of a few isolated cases,[53] including *Collins v. Hardyman*,[54]

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49. Griffin v. Breckenridge, 403 U.S. 88, 105 (1971).

50. *Id.* at 107.

51. United Brotherhood of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825, 836 (1983).

52. *See* Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 371 (1979).

53. *See generally* Hague v. CIO, 307 U.S. 496 (1939) (plaintiff had stated claims under predecessors of 42 U.S.C. § § 1983 and 1985, but the Court dealt only with the former), Snowden v. Hughes, 321 U.S. 1 (1944) (plaintiff also stated claims under predecessors of 42 U.S.C. § § 1983 and 1985).

54. 341 U.S. 651 (1951).

the Statute remained buried in the books. However, with the 1971 decision in *Griffin v. Breckenridge*, the Statute was reborn.[55]

There are several logical reasons why the Statute was used so little. As mentioned previously, it is likely that this was the result of the accepted interpretation that the Statute required state action. This would severely limit the availability of causes of action under the Statute. In addition, in accordance with the opinion in *United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*, it had always been a "close question" whether the Statute could be extended beyond racial classes.[56] This also proscribed the reach of the Statute beyond limited situations. The continued dormancy of the Statute after *Collins*, in which the court declared that state action is a necessary prerequisite in § 1985(3) actions,[57] suggests that the courts understood that the Act was limited by its very nature and should be applied in very few situations. For policy reasons, such as avoiding a general federal tort law and interpreting statutes with reference to their history and purpose, actions under § 1985(3) were relatively nonexistent until 1971 when the Supreme Court undermined the two limits of the Statute: state action and racial animus.

Since the rebirth of the Statute, the courts have ennunciated four elements for a cause of action under § 1985(3). Justice White summarized them well in *United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*.[58] First, the existence of a conspiracy must be proven.[59] Second, the conspiracy must be "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."[60] Third, an act in furtherance of the conspiracy must have occurred.[61] Finally, a person must be "either injured in his person or property or deprived of any right or privilege of a citizen of the United States."[62] Of these elements, only the first and third have been free from debate. The remaining two have engendered vicious controversy; the second element over the meaning of the language and the fourth element over what rights or privileges are protected.

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55. 403 U.S. 88 (1971).
56. 463 U.S. 825, 836 (1983).
57. 341 U.S. 651, 661-62 (1951).
58. 463 U.S. 825 (1983).
59. *Id.* at 828.
60. *Id.* at 829.
61. *Id.*
62. *Id.*

1. Conspiracy Explosion

The case history of the Statute since 1971 is astounding. Put simply, the Act has become the very thing its proponents in Congress attempted to avoid, a general federal tort law. Because of the dramatic expansion of the scope of the Statute, matters which had been solely within the purview of state courts are now being considered by the federal courts in contravention of the federal system established in the Constitution. For example, of the many types of conspiracies which the federal court system has examined, the following is a partial list: race,[63] political beliefs,[64] sex,[65] handicap,[66] sexual orientation,[67] religion,[68] bankrupt status,[69] debtor status,[70] economic beliefs or associations,[71] environmentalists,[72] and attorneys practicing a particular specialty.[73] In one case an action was brought by a single, middle class white

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63. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971); Mclean v. International Harvester Co., 817 F.2d 1214 (5th Cir. 1987); Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (reverse racial discrimination); Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984) (conspiracy against black and white civil rights workers); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971) (advocates of racial equality in employment); Quinones v. Szorc, 771 F.2d 289 (7th Cir. 1985) (racial and political motives tied together). *See also* The Civil Rights Cases, 109 U.S. 3 (1883).

64. *See* Grimes v. Smith, 776 F.2d 1359 (7th Cir. 1985) (non-racial political animus not sufficient); Brown v. Reardon, 770 F.2d 896 (10th Cir. 1985) (group opposing political conduct not protected class); Conklin v. Lovely, 834 F.2d 543 (6th Cir. 1987) (conspiracy against Republicans is within § 1985(3)); Harrison v. KVAT Food Management, Inc., 766 F.2d 155 (4th Cir. 1985) (Republicans are not a protected class); Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973) (supporters of political candidate are protected); Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976) (right to vote in Indian tribal elections is protected); Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975), *cert. denied*, 423 U.S. 930 (1975); Keating v. Carey, 706 F.2d 377 (2d Cir. 1983) (Republicans are protected Class).

65. *See* Great Am. Fed. Sav. & Loan Ass'n. v. Novotny, 442 U.S. 366 (1979); Life Ins. Co. of North Am.v. Reichardt, 591 F.2d 499 (9th Cir. 1979); Cohen v. Illinois Inst. of Technology, 524 F.2d 818 (7th Cir. 1975), *cert denied*, 425 U.S. 943 (1976) (discriminatory hiring policy based on sex violates § 1985(3)); Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978); Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988).

66. *See* Wilhelm v. Continental Title Co., 720 F.2d 1173 (10th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984) (handicapped persons are not protected class).

67. *See* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).

68. *See* Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973).

69. *See* McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977).

70. *See* Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979).

71. *See* United Brotherhood of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825 (1983); Lopez v. Arrowhead Ranches, 523 F.2d 924 (9th Cir. 1975) (conspiracy against illegal alien farm workers).

72. *See* Westberry v. Gilman Paper Co., 507 F.2d 206 (5th Cir. 1975).

73. *See* Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972).

family.[74] In the controversial abortion area, the courts have heard many cases involving suits against "Operation Rescue" demonstrators, including a recent case in the Supreme Court.[75] The following is a brief outline of some of the decisions made by the courts in these different areas illustrating the widening of the scope of § 1985(3).

As mentioned earlier, *Griffin v. Breckenridge* was the watershed case in § 1985(3) litigation.[76] Broken down to its basics, two significant points are evident in the holding of the Supreme Court in this case. First of all, the Court, after noting that § 1985(3) requires a motive "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,[77] held for the first time that private conspiracies fall within the Statute.[78] Noting the remarkable similarity which the statute's language bears to section one of the Fourteenth Amendment and that "[a] century of Fourteenth Amendment adjudication has ... made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons," the Court, however, concluded "there is nothing inherent in the phrase that requires the action working the deprivation to come from the State."[79] The majority added, "Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of *all* deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' whatever their source."[80]

This, however, is merely speculation on the part of Justice Stewart, and is unsupported either by legislative history or Supreme Court precedent. One can argue with at least equal force that the legislature used this language with the understand-

74. *See* Azar v. Conley, 456 F.2d 1382 (6th Cir. 1982).

75. For the report of the case which came before the Supreme Court during the fall session in 1991, see National Org. of Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), *cert. granted*, 111 S.Ct 1070 (1991) (appellate court allowed the application of § 1985(3) against the demonstrators; the Supreme Court has decided to rehear oral arguments in the next term). For other abortion protest cases, *see, e.g.*, New York State National Org. of Women v. Terry, 886 F.2d 1339 (2nd Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218 (6th Cir. 1991).

76. Griffin v. Breckenridge, 403 U.S. 88 (1971).

77. *Id.* at 96-97 (quoting the language of § 1985(3)).

78. *Id.*

79. *Id* at 97.

80. *Id.*

ing that any reasonable person would surmise that it presupposes action by the state. And is it not likely that if the legislature intended for the Statute to reach private conspiracies, they would not have used language whose common meaning contemplates state action? If the Supreme Court is able to redefine a statute without reference to the common meaning of its language, then the separation of powers no longer exists, for the judiciary has abrogated the power to legislate.

The second aspect of Justice Stewart's majority opinion is that "[t]he language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[81] In other words, Stewart substituted a broader requirement that there be some "racial, *or perhaps otherwise class-based* animus," in place of the previous understanding of the scope of the Statute. Mr. Justice Harlan in his dissenting opinion in *Plessy v. Ferguson*[82] articulated clearly an authoritative understanding of the object of the Fourteenth Amendment and its language. He wrote, "I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation ... is inconsistent not only with that equality of rights which pertains to citizenship, ... but with the personal liberty enjoyed [by the people of the United States]."[83] Later in his opinion, Justice Harlan expounded on this idea when he wrote:

> There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[84]

When Stewart added "or perhaps otherwise class-based"[85] he significantly altered the normal understanding of the scope of the language. Although the Court expressly decided not to de-

81. *Id.* at 102.
82. 163 U.S. 537 (1896).
83. *Id.* at 554-55 (1896).
84. *Id.* at 559.
85. 403 U.S. at 102.

termine whether non-racial animus was sufficient under § 1985(3),[86] its interpretation of the language of the Statute opened the door for a wide variety of actions which would arguably meet the new standards announced in *Griffin*. Under Stewart's definition, practically any class may fall within the Statute as long as the conspiracy is based solely on that person's membership in the class. Because of an open-ended answer from the Supreme Court, classes such as homosexuals now have access to the federal court system in a discrimination action. In addition, cases which have always fallen within the jurisdiction of the state courts are placed in the jurisdiction of the federal courts, thus making mayhem of the federal system. Although granting the federal courts jurisdiction in various situations is necessary and profitable for justice, it is something of which we should be wary. Expansion of the jurisdiction of the federal courts may very well interfere with the balance of power between the state and federal system. This balance was created by the Constitutional drafters to avoid an abusive federal government and should be protected to every extent possible.

Following Stewart's ambiguous decision and the lack of guidance it provides, the circuit courts have expanded the scope of § 1985(3). Due to the limited nature of this note, it is impossible to consider all of the more egregious cases of misuse occurring in the lower federal courts. Although some proper decisions have been rendered, many, if not most, of these cases should not have received consideration from a federal court.

2. Before *Scott*

Many of the cases decided before 1983[87] applied the Statute to non-racially motivated conduct. One such area, discrimination against a particular political group or association, provides an excellent case study of the difference in results before and after 1983.

In *Cameron v. Brock*,[88] the plaintiff brought suit against the Sheriff of Hamblen County, Tennessee, his bonding company, and two deputies, claiming that the sheriff's action of arresting him for campaigning for the sheriff's opponent was actionable under

86. *Id.* at 102, n.9.

87. In 1983, *United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825 (1983) was decided by the Supreme Court.

88. 473 F.2d 608 (6th Cir. 1973).

§ 1985(3).[89] After a jury trial, the plaintiff was awarded $15,000, and the defendant appealed on the basis that the evidence was insufficient to support a verdict under the Statute.[90] Noting the decision in *Griffin*, the court concluded that the motivation under § 1985(3) must be invidiously discriminatory.[91] It is significant that the court in this case ignored the "class-based or perhaps otherwise" invidious language written in *Griffin*, and thus broadened the scope of the Statute even beyond the scope implied in *Griffin*. The court also referred to *Azar v. Conley*,[92] where "[t]his court recently found sufficient an allegation under § 1985(3) that a single family was deprived of the equal protection of the law."[93] In its final analysis, the court held "that the protection afforded by 1985(3) reaches clearly defined classes, including supporters of a political candidate. If a plaintiff can prove that he was denied the protection of the law because of the class of which he was a member, he has an actionable claim under 1985(3)."[94] In a futile attempt to protect its logic, the court proceeded to write, "This interpretation does not transform the [S]tatute into the 'general federal tort law' feared by the *Griffin* court and gives full effect to the congressional purpose in enacting the Statute."[95]

Clearly, not only is the logic of the *Cameron* court incorrect, but its holding is, in fact, contrary to the "congressional purpose in enacting the [S]tatute." Every person can define himself as part of a number of "clearly defined classes." The author of this note, for instance, is a member of the class of law students at Regent University. Furthermore, he is a member of the class of "law review editors." If his classmates conspired to interfere with his rights *because he was an editor*, would he then have a cause of action under § 1985(3)? May it never be! This reasoning flies in the face of the congressional purpose and does, in fact, create a general federal tort law. However, because the Supreme Court in *Griffin v. Breckenridge* erroneously decided the issue, it has opened the door for decisions such as *Cameron*, which are quick to accommodate mistaken logic.

Another political discrimination case is *Glasson v. Louisville*,[96] in which the plaintiff brought an action under § 1985(3)

89. *Id.* at 609.
90. *Id.*
91. *Id.* at 610.
92. 456 F.2d 1382 (6th Cir. 1972).
93. 473 F.2d 608, 610 (6th Cir. 1973).
94. *Id.*
95. *Id.*
96. 518 F.2d 899 (6th Cir. 1975).

against city police officers who tore up the plaintiff's signs during a political rally. The trial court held "that she could not recover damages under § 1985(3) because she had failed to prove that the destruction of her poster was motivated by an impermissible discriminatory animus."[97] The Sixth Circuit Court of Appeals reversed.[98] Following its previous decision in *Cameron*, the court determined that "[t]he record shows indisputably that the Louisville police officers established as a guideline for monitoring the crowd during the President's motorcade an invidious discrimination between persons displaying posters or signs critical of the President and those with posters or signs favorable to him."[99] Furthermore, it wrote that "appellees intended to permit no criticism of the President that day. A more invidious classification than that between persons who support government officials and their policies and those who are critical of them is difficult to imagine."[100] Clearly, this court stretched the Statute far beyond its intended and legitimate limit. This decision is a perfect example of the notion expressed in the hypothetical given earlier in this note that the Statute should be limited and that each extension of § 1985(3) beyond its original limits inevitably leads to further extensions. The plaintiff acquired a cause of action merely because she was a member of the class of people who disagreed with the President on that particular day. To utilize § 1985(3) in this manner is a calculated abuse of power accomplished by those sworn to uphold the Constitution and the laws of the United States.

The Eighth Circuit also decided a political discrimination case prior to *Scott. Means v. Wilson*[101] involved an Oglala Sioux Tribal election. Suit was brought against a newly elected president of the Tribal Council, his supporters, the Tribal Council, and the Tribal Election Board under § 1985(3).[102] With respect to the § 1985(3) claim, the court held first: "It is thus apparent that the right to vote in federal elections is a right of national citizenship protected from conspiratorial interference by 42 U.S.C. § 1985(3)."[103] Second, that "[t]here need not necessarily be an organizational structure of adherents, but there must exist an identifiable body with which the particular plaintiff associated

97. *Id.* at 901.
98. *Id.*
99. *Id.* at 912.
100. *Id.*
101. 522 F.2d 833 (8th Cir. 1975).
102. *Id.* at 836.
103. *Id.* at 838.

himself by some affirmative act."[104] Again, this is an excellent example of the proposition that any extension of the scope of the Statute will mandate further abusive extensions of the inherent limits created by the language of § 1985(3). This holding allowed § 1985(3) actions as long as the plaintiff belonged to or associated with an identifiable class (body). In this case, the winners of the election and their supporters had allegedly conspired against the losers and their supporters because of their political party affiliation.[105] In essence, the court held that a political party is an identifiable class under § 1985(3). Since the losers were part of the party, even if the party did not have an organizational structure, then they had a valid § 1985 claim.

The dissenting opinion in *Means v. Wilson* had a different view of the scope of § 1985(3). Judge Webster's opinion was properly aligned with the historical understanding of the Statute:

> I cannot agree that supporters of a particular candidate form a sufficiently discrete class upon which to predicate federal jurisdiction under 42 U.S.C. § 1985(3). Race is not involved in this contest; Indian supporters of one group of political candidates bring this action against Indian supporters of another. The holding in Part II of the majority opinion permits a non-insular, mutable, amorphous group to satisfy the alternative requirement in *Griffin v. Breckenridge* . . . that "there must be some racial, or perhaps *otherwise class-based*, invidiously discriminatory animus behind the conspirators' action."
>
> Taken to its local extension this holding grants federal jurisdiction to any group of supporters of a local candidate who claim they were purposefully victimized by their opponents in state or local elections. Thus is introduced into our system a "general federal tort law" feared by Justice Stewart.[106]

He has correctly perceived that decisions such as that of the majority allow the extension of the Statute far beyond legally permissible or advisable limits.

3. *Scott*: A Limiting Proposal

The decision in *United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*[107] was the first positive attempt by the Supreme

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104. *Id.* at 839-40 (quoting *Westberry v. Gilman Paper Co.*, 507 F.2d 206, 215 (5th Cir. 1975)).

105. *Id.* at 836-38.

106. *Id.* at 842.

107. 463 U.S. 825 (1983).

Court to limit its mistakes in *Griffin v. Breckenridge*. A.A. Cross Construction Co., Inc. (Cross) had contracted with the Department of the Army to construct the Alligator Bayou Pumping Station and Gravity Drainage Structure on the Taylor Bayou Hurricane Levee near Port Arthur, Texas.[108] As was its usual practice, it hired workers without regard to union membership.[109] The workers were warned by local residents that this practice could lead to trouble.[110] The evidence in the trial court showed that at a "meeting of the Executive Committee of the Sabine Area Building and Construction Trades Council a citizen protest against Cross's hiring practices was discussed and a time and place for the protest were chosen."[111] Two days later, union members who were present at the meeting gathered with a large group at the entrance to the Alligator Bayou construction site. From this group, several truckloads of men entered the site, assaulted and beat Cross employees, and burned and destroyed construction equipment.[112] The district court determined that further violence was likely "if the nonunion workers did not leave the area or concede to union policies and principles."[113] Cross defaulted on its contract as a result of the union violence.

Scott and Matthews, two employees who had been beaten, and the company brought suit against the Sabine Area Building and Trades Council, twenty-five local unions, and various individuals under § 1985(3). In a trial before the court, "a permanent injunction was entered, and damages were awarded against [eleven] of the local unions, $5,000 each to the individual plaintiffs and $112,385.14 to Cross, plus attorneys fees in the amount of $25,000."[114] Furthermore, the district court held "that section 1985(3) proscribes class-based animus other than racial bias, and that the class of non-union laborers and employers is a protected class under the section."[115]

The Seventh Circuit Court of Appeals affirmed the judgment of the district court.[116] The court agreed with the respondents' submission that "petitioners' conspiracy was aimed at depriving

108. *Id.* at 827.
109. *Id.*
110. *Id.* at 827-28.
111. *Id.* at 828.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 829.
116. *Id.* at 829-30.

respondents of their First Amendment right to associate ... and that this curtailment was a deprivation of the equal protection of the laws within the meaning of § 1985(3)."[117] Moreover, it rejected the argument "that it was necessary to show some state involvement to demonstrate an infringement of First Amendment rights."[118] It thought this argument had been expressly rejected in *Griffin*, and therefore felt compelled to disagree with two decisions of the Court of Appeals for the Seventh Circuit[119] espousing that position.[120] Therefore, it concluded that § 1985(3) reached conspiracies motivated by either political or economic bias, and that animus against non-union workers "embodied the kind of class-based animus contemplated by § 1985(3) as construed in *Griffin*."[121] In retrospect, both the district court and court of appeals opinions accord with the decisions described in the previous section of this comment. In addition, they arguably follow the rationale in *Griffin v. Breckenridge* that any class-based animus is sufficient in § 1985(3) actions.

However the Supreme Court disagreed. The majority concluded, first of all, "that an alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved that the State is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the State."[122] For the majority, Justice White wrote, "[i]t is commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. The Equal Protection Clause 'does not ... add any thing to the rights which one citizen has under the Constitution against another.'"[123] Referring to several other cases,[124] the majority concluded that "[t]his has been the view of the Court from the beginning."[125] Finally, the Court noted that

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117. *Id.* at 830.

118. *Id.*

119. Murphy v. Mount Carmel High School, 543 F.2d 1189 (7th Cir. 1976) and Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972).

120. 463 U.S. 825, 830 (1983).

121. *Id.*

122. *Id.*

123. *Id.* at 831 (quoting from *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1875)).

124. United States v. Williams, 341 U.S. 70, 92 (1951) (dissenting opinion) ("The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by individuals."); United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Harris, 106 U.S. 629 (1883); Civil Rights Cases, 109 U.S. 3 (1883); Hodges v. United States, 203 U.S. 1 (1906); United States v. Powell, 212 U.S. 564 (1909).

125. 463 U.S. at 831.

"the Court of Appeals for the Seventh Circuit was thus correct in holding that a conspiracy to violate First Amendment rights is not made out without proof of state involvement."[126] Thus, the Court limited § 1985(3) actions embracing First Amendment rights to those conspiracies involving state action. Although this was not a complete return to the original purpose of the Act, it was a step in the right direction.

The second facet of the *Scott* holding was an even more pronounced proscription on the Statute's application. Justice White wrote that "in our view the court of appeals should also be reversed on the dispositive ground that § 1985(3)'s requirement that there must be 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action' was not satisfied in this case."[127] The plaintiff argued that § 1985(3) reached not only racial but also economic animus.[128] In response, the Court concluded:

> We are unpersuaded. In the first place, it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans. The central theme of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominant purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters.... Although we have examined with some care the legislative history that has been marshaled in support of the position that Congress meant to forbid wholly nonracial, but politically motivated conspiracies, we find difficult the question whether § 1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group by use of otherwise unlawful means. To accede to that view would go far toward making the federal courts ... the monitors of campaign tactics in both state and federal elections, a role that the courts should not be quick to assume.[129]

In this text, the Court expressed its hesitation to extend the Statute beyond racial animus. The fifth sentence in particular should be noted, for the Court said that even political conspiracies

126. *Id.* at 832. (referring to *Murphy v. Mount Carmel High School*, 543 F.2d 1189 (1976)).

127. *Id.* at 834. (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

128. *Id.* at 835-36.

129. *Id.* at 836.

are not actionable unless there is a racial content to the conspiracies. Those who utilize the proposition that the Statute originally protected Republicans as a means to extend coverage to all political discrimination should realize that § 1985(3) only protected those Republicans who were injured as the result of animus against their position as civil rights supporters. It only protected those political conspiracies encompassed within a racial conspiracy.

In conclusion, the Court determined that even if the Statute is extended beyond racial classes, the present cause of action went too far: "Even if the section must be construed to reach conspiracies aimed at any class or organization on account of its political views or activities, or at any of the classes posited by Senator Edmunds,"[130] the Court found no support for the contention that it reaches "bias towards others on account of their *economic* views, status, or activities."[131]

By its decision in *Scott*, the Court accomplished three ends. First, it limited § 1985(3) actions under the First and Fourteenth Amendments to conspiracies involving state action or attempting to influence activity of the state. Second, it informed the lower courts that § 1985(3) judgments based solely on economic animus would be reversed. Third, it intimated to the lower courts that it might overturn them if they extended the Statute beyond the context of racial animus.

4. After *Scott*

Many cases decided subsequent to *Scott* have also involved non-racial politically motivated conspiracies. One such case is *Harrison v. KVAT Food Management, Inc.*[132] The district court dismissed for failure to state a claim upon which relief could be

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130. *Id.* at 836-37. This is a reference to Senator Edmunds' oft-quoted statement in support of extension of the Statute, "that if a conspiracy were formed against a man 'because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, ... then this section could reach it'" Cong. Globe, 42nd Cong., 1st Sess. 567 (1871). The Court responded with, "The provision that is now § 1985(3), however, originated in the House. The narrowing amendment, which changed § 1985(3) to its present form, was proposed, debated, and adopted there, and the Senate made only technical changes to the bill. Senator Edmunds' views, since he managed the bill on the floor of the Senate, are not without weight. But we were aware of his views in *Griffin* [citation omitted], and still withheld judgment on the question whether § 1985(3), as enacted, went any farther than its central concern...."

131. *Id.* at 837.

132. 766 F.2d 155 (4th Cir. 1985).

granted, and the plaintiff, James R. Harrison, appealed the dismissal.[133] The question, according to the court of appeals, was "whether a Republican, under the circumstances presented here, is a member of a protected class for purposes of § 1985(3)."[134] Harrison claimed that he was discharged from KVAT as a result of a conspiracy between the defendants designed to prevent him from running for public office as a Republican, "and that such a conspiracy constituted an interference with Harrison's First and Fourteenth Amendment rights of freedom of speech and freedom of association, in violation of 42 U.S.C. § 1985(3)."[135]

The district court relied on *Scott* to dismiss on the basis that "an alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved that the state is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the state," and that the Statute does not reach conspiracies based on economic animus.[136] On appeal, Harrison claimed that the conspiracy was aimed at influencing the activity of the state by influencing the outcome of the election, and that as a member of the Republican Party he was a member of a protected class.[137]

The Court of Appeals for the Fourth Circuit did not agree. It held "that Republicans ... do not constitute a protected class under § 1985(3)," and stated that "[a]s a result of our holding on this question, we need not reach the issue of whether the aim of the alleged conspiracy was to influence state activity to a degree sufficient to state a claim for relief."[138] After reviewing some of the same types of comments from the legislative history previously examined in this comment, the court began at the logical starting point, a review of *Griffin v. Breckenridge*.[139] Specifically, it noted the Supreme Court's explicit decision not to determine if § 1985(3) reached non-racial conspiracies and wrote "In so choosing, however, the Court did not define the limits of the scope of protection provided by the second requirement for a § 1985(3) claim. It is this question which now confronts us."[140]

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133. *Id.* at 155.
134. *Id.*
135. *Id.* at 156.
136. *Id.* (quoting the language of *Scott*, 463 U.S. 825, 830 (1983)).
137. *Id.*
138. *Id.*
139. 403 U.S. 88 (1971).
140. 766 F.2d at 159.

The court then examined a number of decisions both limiting and extending the protection of the Statute, and recognized that "despite those decisions which have limited the scope of the Statute, there exists support for the contention that Republicans constitute a class entitled to relief under § 1985(3)."[141] Specifically, the court observed that this argument is supported by the frequent references to Republicans in the Ku Klux Klan Act debates, and "was adopted by the Second Circuit in *Keating v. Carey*[142] ... in which the court directly held Republicans were a protected class for purposes of § 1985(3)...."[143]

The court then considered the *Scott* decision and the limits it placed on the Statute. It concluded:

> [I]n analyzing the *Scott* decision, we find little support for the contention that § 1985(3) includes in its scope of protection the victims of purely political conspiracies. Indeed, the opinion in *Scott* exhibits a noticeable lack of enthusiasm for expanding the coverage of § 1985(3) to any classes other than those expressly provided by the Court.... Since the Court in *Griffin* has provided blacks a remedy under § 1985(3) against private conspiracies, no other group or class has achieved similar status....
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> ....
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> We now conclude that such a view of Congress' intent is not justified.[144] We are concerned here with a [S]tatute enacted to fulfill a particular purpose and designed to meet particular conditions. The Supreme Court in *Scott* placed significant emphasis on the specific groups and concerns which were involved in the post-Civil War struggle for civil rights.[145]

Another important post-*Scott* case is *Grimes v. Smith*.[146] Since *Grimes* reviews much of the same material as *Harrison*, above,

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141. *Id.* at 159-60.

142. 706 F.2d 377, 380 (2nd Cir. 1983). (Although the factual situations in *Keating* and *Harrison* are quite similar, the court in the latter case arrived at a very different result. It is important to note that the decision in *Keating* was made the same year as that in *Scott*. In fact, *Keating* was decided eight days before *Scott* was argued before the Supreme Court. The *Keating* court was able to conclude under *Griffin* that Republicans were a protected class. In contrast, *Harrison* was decided after *Scott*, and the court concluded that the same class, Republicans, were not a protected class).

143. 766 F.2d at 160.

144. The view to which the court is referring is the reasoning of *Keating v. Carey*, 706 F.2d 377 (2nd Cir. 1983), which rested on the legislative history of the Ku Klux Act and concluded that since the class of Republicans was often mentioned in the legislative history, Congress intended that § 1985(3) reach purely political conspiracies.

145. 766 F.2d at 161.

146. 776 F.2d 1359 (7th Cir. 1985).

an extended discussion here would not be warranted. Predictably, the Court of Appeals for the Seventh Circuit reiterated that "[a]s construed in *Griffin* and *Scott*, § 1985(3) was enacted to fulfill a highly specific purpose and to meet an unusual condition in the Reconstruction era. Since its decision in *Griffin*, the Court has not expressly provided a remedy to a group or class other than blacks."[147] In addition, the court determined that "[t]he import of both *Griffin* and *Scott* is that the legislative history of § 1985(3) does not support extending the Statute to include conspiracies other than those motivated by a racial, class-based animus against 'Negroes and their supporters.'"[148] Thus, it joined the Fourth Circuit in the conclusion that § 1985(3) does not extend to purely political conspiracies.

One final case illustrates the ongoing debate over the scope of § 1985(3). Although decided after *Scott*, *Conklin v. Lovely*[149] held that *Scott* did not prevent the Statute from reaching purely political conspiracies. The Court of Appeals for the Sixth Circuit said that *Scott* "can be cited only for the proposition that § 1985(3) does not reach conspiracies motivated by bias based on economic views."[150] It based its logic on the Supreme Court's language that "[e]ven if this section must be construed to reach conspiracies aimed at any class or organization on account of its *political* views or activities," it does not reach those based on economic motivation.[151] It interpreted this language to mean that the Supreme Court had not completely foreclosed the possibility of classes based on political affiliation only, ignoring the rest of the reasoning in *Scott*. Although this holding can be justified under the weak language of *Scott*, it is an extremely liberal interpretation in light of the limits *Scott* clearly attempted to create.

The lack of clarity in the *Scott* decision is highlighted by the concurring opinion in *Conklin*. Circuit Judge Norris wrote, "Although I agree with what has been said by the majority, I concur in affirming the judgment against defendant ... only because we are bound to follow ... *Cameron v. Brock* [citation omitted]."[152] He wrote this while acknowledging that "adherence to the rea-

147. *Id.* at 1366.

148. *Id.*

149. 834 F.2d 543 (6th Cir. 1987).

150. *Id.* at 549.

151. *Id.* (quoting *Scott*, 463 U.S. 825, 837 (1983)).

152. *Id.* at 554. (In *Cameron*, 473 F.2d 608, 610 (6th Cir. 1973), the Sixth Circuit held that § 1985(3) protects any identifiable class).

soning relied upon by a majority ... in ... *Scott* [citation omitted] ... would appear to compel a contrary result."[153]

5. The Lack of Guidance

In order to expose the reader to the legal quagmire through which the courts are forced to wade in a § 1985(3) action, the previous three sections have focussed on only one particular area of conflict in the courts: the politically-based conspiracy. The Supreme Court has failed to furnish any definitive rule on which the lower federal courts are able to base their opinions, and most of them have spent the last twenty years in confusion. At this juncture, it is of paramount importance that the High Court pronounce some definite limits for the lower federal courts to follow and end the reign of confusion existing over the scope of the Ku Klux Klan Act. All that remains is determining how to accomplish that objective.

II. State Action Requirement

There are two methods by which the courts could limit the scope of 42 U.S.C. § 1985(3). The first is by reviving state action as a prerequisite to § 1985(3) conspiracy actions. In other words, the courts could require that the conspiracy be sanctioned, promoted or engineered by the states. The following section demonstrates that this requirement follows naturally from the language of the Ku Klux Klan Act when examined with reference to the judicial and legislative history, the purpose of its terms, and to comparable language in other Reconstruction Era legislation. The other method, restriction of the classes protected under § 1985(3), will be addressed in a subsequent section.

A. Definition and Relevance

Much debate has centered on the definition of state action. There are several ways in which this requirement can be fulfilled. The first and most obvious would be actual activity by the state in the formation and conduct of the conspiracy. The district court in *Collins v. Hardyman*[154] held that "the [S]tatute does not and

153. *Id.* at 553.
154. 341 U.S. 651 (1951).

cannot constitutionally afford redress for invasions of civil rights at the hands of individuals, but can only be applied to injuries to civil rights by persons acting pursuant to or under color of state law."[155] By affirming the district court's opinion, the Supreme Court necessarily implied that an act by a state official, or the effect of a state law, constituted state action to deprive the plaintiff of equal protection of the laws.

Whether the state's failure to act pursuant to a legal obligation fulfills a state action requirement is another issue. In the obvious sense of the term "state action," state inaction would seem to be adequate. If a state has a constitutional duty to perform a particular act or protect a certain right, the failure to comply with that duty is, in essence, state action. According to Bernard Schwartz, supporters of the bill argued that "state failure to act to protect constitutional rights furnished a sufficient basis for congressional action. In such a view, 'state inaction' was elevated to the 'state action' called for by the Fourteenth Amendment."[156] From the words of Congressman John Coburn, a principal supporter of the bill in 1871, it is apparent that the proponents of the bill intended it to be available when the state failed to perform its duty to provide equal protection of the laws, as well as when actual state action deprived citizens of equal protection. He wrote,

> Affirmative action or legislation is not the only method of a denial of protection by a State, State action not being always legislative action. A State may by positive enactment cut off from some the right to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms, and many other such things. This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his persecutor, and treat the one as a nonentity and the other as a good citizen. How much worse is it for a State to enact that certain citizens shall not vote, than allow outlaws by violence, unpunished, to prevent them from voting.... A systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of

155. *Id.* at 656.

156. SCHWARTZ, *supra* note 1, at 592.

> equal protection in the eye of reason and the law, and justifies, yes, loudly demands, the active interference of the only power that can give it. If, in addition to all this, the State should fail to ask the aid of the General Government in putting down the existing outlawry, would not a more complete and perfect case of denial of protection be made out? Indeed, it would be difficult to conceive of a more glaring instance of the denial of protection.[157] In essence, Coburn's words, as well as much of the legislative and judicial history, reveal that the Statute and its proponents did not distinguish between state action and the failure of the state to fulfill its legal obligations.

The state action requirement can also be met when the end of the conspiracy is to influence the activity of the state. In *Collins v. Hardyman*, the Court noted that "[s]uch private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so."[158] The Court, with that language, demonstrated its perception that action designed to influence the law is inherent in the definition of state action.

Thus, there are three primary ways in which this element of a § 1985(3) cause of action can be met: 1) by affirmative state activity including activity of individuals acting or purporting to act under color of the law; 2) by the state's failure to meet its legal obligations under the Fourteenth Amendment; and 3) by conspiratorial action designed to influence the activity of the state. The relevancy of this analysis is apparent. By reviving this requirement, the courts would severely limit the scope of § 1985(3), allowing a much narrower class of conspiracies to fall within its elements. This limit on § 1985(3) accords with all of the legislative and judicial history of the Act.

B. Its Source

The Fourteenth Amendment to the United States Constitution says, "nor shall any state deprive" a person of life, liberty, or property without due process of law. By its very terms, this amendment requires that the deprivation come from the state. In *Shelley v. Kraemer*,[159] the majority wrote that "the principle

157. *Id.* at 620.
158. 341 U.S. 651, 661 (1951).
159. 334 U.S. 1 (1948).

has become firmly embedded in our constitutional law that the action inhibited by ... the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[160] And again, in *United States v. Williams*, Justice Douglas' dissenting opinion reinforced the notion that "[t]he Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*."[161] These are only two of the many cases which have settled the law that the Fourteenth Amendment absolutely requires state action.

With regard to the Ku Klux Klan Act, the actual text of the Act expresses the state action element. In the first place, the original title "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes"[162] connotes that state involvement is necessary. This legislation was passed during the Reconstruction era in pursuance of an express grant of power to the legislature by the Fourteenth Amendment.[163] In the *Civil Rights Cases*,[164] Justice Bradley and a majority of the Supreme Court determined that the scope of the Fourteenth Amendment reached only state action.[165] Since the Ku Klux Klan Act was passed as a remedial measure under the Fourteenth Amendment, it follows naturally that its scope could not exceed that of the Constitutional provision which authorized it.

In addition, the language of the Ku Klux Klan Act is almost identical to that of the Fourteenth Amendment.[166] This reproduction cannot be dismissed lightly. Certainly the linguistic resemblance was not accidental, but expressed the intent of the drafters that the Ku Klux Klan Act applied only where the Fourteenth Amendment was applicable, and implied, or perhaps demanded, that the two legislative efforts were intended to have the same

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160. *Id.* at 13.
161. 341 U.S. 70, 92 (1951) (dissenting opinion).
162. Collins, 341 U.S. 651, 656 (1951).
163. *Id.* at 656-57.
164. 109 U.S. 3 (1883).
165. *Id.* at 9-11.
166. In pertinent part, the Fourteenth Amendment provides:
> No State shall make or enforce any law which shall abridge the *privileges and immunities* of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction *the equal protection of the laws.*

U.S. CONST. amend. XIV, section 1 (emphasis added).

scope in their application. The law is firmly settled that Fourteenth Amendment violations require state action. How, then, can a remedial measure enacted under the authority of the Fourteenth Amendment expand the scope of that amendment? Justice Jackson reaffirmed this hypothesis when he wrote,

> Passing the argument, fully developed in the *Civil Rights Cases*, that an individual or group of individuals not in office cannot *deprive* anybody of constitutional rights, though they may invade or violate those rights, it is clear that this [S]tatute does not attempt to reach a conspiracy to deprive one of rights, unless it is a deprivation of equality, of "equal protection of the law," or of "equal privileges and immunities under the law."[167]

C. The Demise of the State Action Requirement

As previously mentioned, the decision in *Griffin v. Breckenridge*[168] in 1971 completely changed the face of actions under § 1985(3). The Supreme Court interpreted the language of the Statute in a way contrary to all of the precedent before it, which established that "an individual or group of individuals not in office cannot *deprive* anybody of constitutional rights."[169] According to *Collins v. Hardyman*, only the state can deprive a person of the equal protection of the laws or of equal privileges and immunities under the laws.[170] In spite of the above, the Court in 1971 held that "[t]he language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[171] Thus, the Court, in its desire to rewrite the law, interpreted the Act's language without reference to its common interpretation for the last century. By destroying a foundation stone of the Ku Klux Klan Act, the *Griffin* Court contributed to the demise of the original interpretation by allowing it to exceed its intended scope far beyond what is permissible.

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167. Collins v. Hardyman, 341 U.S. at 661.

168. 403 U.S. 88 (1971).

169. Collins v. Hardyman, 341 U.S. at 661 (passing on the argument developed in the *Civil Rights Cases*).

170. *Id.*

171. 403 U.S. at 102.

III. THE PROTECTED CLASS

The Supreme Court could also clearly prescribe the types of classes able to maintain a cause of action under § 1985(3). This would be ineffective unless the Court follows a principled guideline to preserve the restricted nature of the Statute. As established earlier, the main objective and intended protected class envisioned by the proponents of the Ku Klux Klan Act were blacks and their supporters. As Justice White observed, "the facts in *Griffin* revealed an animus against Negroes and those who supported them, a class-based, invidious discrimination which was the central concern of Congress in enacting § 1985(3)."[172] At this point, the Court declared its reluctance to extend the Statute beyond racial animus.[173] In addition, the Court wrote that "[t]he animus was against Negroes and their sympathizers, and *perhaps* the Republicans as a class, but not against economic groups as such."[174]

Why did this limitation in application of § 1985(3) to racially based action endure for an entire century? The answer is simple. For those one hundred years, the intentions of the Forty-Second Congress were correctly understood and the Statute was properly applied. Even if one assumes that Congress is empowered by the Fourteenth Amendment to enact legislation protecting other classes, the congressional debates and court decisions surrounding § 1985(3) clearly demonstrate that it was enacted for a specific purpose and designed to reach a "narrow class of conspiracies."[175] The courts were unwilling to extend the Statute beyond this line because they were "convinced that it was not to be used to centralize power so as to upset the federal system."[176] The fear that this measure could forseeably be misinterpreted and consequently upset the federal system is visible throughout the congressional debates in 1871.

Every decision which broadens the scope of § 1985(3) undermines the federal system created by the Constitution. "This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted

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172. United Brotherhood of Carpenters and Joiners, Local 610 v. Scott, 463 U.S. 825, 835 (1983).

173. *Id.* at 836.

174. *Id.* at 838 (emphasis added).

175. Collins v. Hardyman, 341 U.S. 651, 662 (1951).

176. *Id.* at 657-58.

to it [is] now universally admitted."[177] Thus, the federal government, whether it be through the Judicial, Legislative, or Executive departments, can only exercise those enumerated powers granted by the Constitution or "all means which are appropriate" and "plainly adapted" to fulfill an enumerated constitutional end.[178] It has no power in the areas reserved to the states. This is the basis of federalism. Accordingly, if a particular judicial interpretation of a legislative enactment, in this case, the Supreme Court's interpretation of the Ku Klux Klan Act, does not fall within an enumerated power or an appropriate means, it is repugnant to the Constitution as a usurpation of the power of the states and is therefore void.

Because federalism is the pillar of our constitutional government, the majority in both *Collins v. Hardyman* and *Griffin v. Breckenridge* observed that § 1985(3) should never become a general federal tort law. In *Collins*, the Court noted that a judicial interpretation of the Ku Klux Klan Act which would include private conspiracies "raises constitutional problems of the first magnitude that, in the light of history, are not without difficulty."[179] These problems included the limits on "congressional power under and apart from the Fourteenth Amendment, the reserved power of the states, the content of rights derived from national as distinguished from state citizenship." and the application of the Ku Klux Klan Act to rights derived from state citizenship versus national citizenship.[180] The *Griffin* Court also recognized that strong "constitutional shoals ... lie in the path of interpreting § 1985(3) as a general federal tort law."[181] Limiting the classes able to maintain an action under § 1985(3) serves the end of avoiding a general federal tort law by providing a remedy only to those conspiracies which fall within the "narrow class of conspiracies defined by this [S]tatute."[182]

When the Supreme Court decided that state action was no longer required for § 1985(3) actions, it contributed to the continuing destruction of federalism by making a whole new variety of conspiracies actionable in the federal courts under the Statute.[183] Although this was a mistake, the plethora of decisions in which

177. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 405 (1819).
178. *Id.* at 421.
179. Collins v. Hardyman, 341 U.S. 651, 659 (1951).
180. *Id.*
181. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).
182. Collins v. Hardyman, 341 U.S. 651, 662 (1951).
183. Griffin v. Breckenridge, 403 U.S. 88 (1971).

the courts have examined private conspiracies indicates that the courts are at present unwilling to reverse their decisions. Thus, since it is likely that purely private conspiracies will continue to be actionable under § 1985(3), it is critical that the courts restrict the classes able to bring suit under it.

One of the opponents of the bill in 1871 expressed valid fears regarding the Act:

> These privileges are alleged to be such as are asserted in the Declaration of Independence, namely, "the enjoyment of life and liberty, with the right to acquire and possess property." That this makes it the duty of the General Government to protect all its citizens in all their rights, therefore, if some of them are alleged in small localities to be interfered with, Congress may destroy the whole framework of the States, the whole machinery of self-government, and violate, as to the whole body of the people, every provision of the Bill of Rights, make itself omnipotent, and place the life and liberty of every human being at the absolute mercy of the President, thus destroying the Constitution absolutely, everything of value in it, in order that they may do the work of local self-government, thereby changing the whole theory of our government.[184]

Yet, the precise problem which Stockton and his colleagues feared the most and which engendered heated debate in Congress has arisen as a result of the decisions of the Supreme Court in § 1985(3) cases.

In summation, one of the pillars of the American constitutional system is federalism. By extending the action to purely private conspiracies not involving racial motivation the courts will erode the federal system which the Founding Fathers gave their lives to create and defend. Only two methods to curb this tide of destruction appear to remain: reinstating the state action requirement and/or limiting the protected classes.

IV. THE CHALLENGE - RACIAL CLASS LIMITATION

This author believes the Supreme Court should limit § 1985(3) to conspiracies motivated by racial animus. This was the central concern of the Forty-Second Congress. However, a more substan-

184. John Stockton (Dem., N.J.) was only one of the many representatives who expressed the fear that this statute could easily be used to circumscribe the rights of the states and their authority to govern their own affairs. *See* SCHWARTZ, *supra* note 1, at 598.

tial justification than the intentions of 1871 legislators who focused on the disfranchisement efforts of the Klan is necessary. There is no doubt that the wording of the Statute is broad. However, when taken in consideration with the federalist nature of the American system, the discussion to follow forces one to conclude that the Statute should not be extended beyond the race category.

The courts have logically held that actions under § 1985(3) must allege that the plaintiff was injured solely because of his membership in a particular class.[185] For example, in *Griffin*, the court wrote "[t]hese allegations clearly support the requisite animus to deprive the petitioners of the equal enjoyment of legal rights because of their race."[186] Thus, a petitioner desiring to bring suit under § 1985(3) need only prove that the defendants conspired against him because of his membership in a particular class.

The above standard causes problems. It is nearly impossible to draw distinctions between the variety of classes seeking relief under § 1985(3). So long as the discrimination is based solely on the plaintiffs membership in the class, there is nothing to distinguish the class of blacks from the class of women; the class of women from the class of handicapped persons; the class of handicapped persons from the class of steelworkers; the class of steelworkers from the class of homosexuals; and onward down the line until every class, hence, every person is included in the Statute. Since America's system of justice depends on fairness and equality before the law, is it not a contradiction to furnish a remedy to a black man and not to a homosexual or a tenant who is deprived of his rights because he helped organize other tenants? Absolutely! Thus, if relief is extended to classes beyond those implied in the legislative history of the Act, women for instance, the courts will be caught in a never-ending cycle eventually encompassing every conspiracy based on an arguable class based animus. In the end, the *Regent University Law Review* Editor will obtain a cause of action under the Statute if the alleged violation of his rights is based solely on his membership in the class of Law Review Editors. Results such as this will create the general federal tort law feared by the drafters of the

185. *See, e.g.*, Griffin v. Breckenridge, 403 U.S. 88 (1971); Great Am. Sav. and Loan Ass'n v. Novotny, 442 U.S. 677 (1979); United Brotherhood of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825 (1983).

186. Griffin v. Breckenridge, 403 U.S. 88, 103 (1971).

Ku Klux Klan Act and will destroy the federal system so cherished by the Founding Fathers of the United States.

Although this extreme result may seem far-fetched to the reader, this exact line of reasoning was followed by the court of appeals in *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott*.[187] In answer to the question "whether a conspiracy motivated by invidiously discriminatory intent other that racial bias would be actionable" under § 1985(3), both the circuit court and court of appeals decided that § 1985(3) "not only reaches conspiracies other that those motivated by racial bias but also forbids conspiracies against workers who refuse to join a union."[188] According to the Supreme Court,

> The court of appeals arrived at its result by first describing the Reconstruction-era Ku Klux Klan as a political organization that sought to deprive a large segment of the Southern population of political power and participation in the governance of those States and of the Nation. The court of appeals then reasoned that because Republicans were among the objects of the Klan's conspiratorial activities, Republicans in particular and political groups in general were to be protected by § 1985(3). Finally, *because it believed that an animus against an economic group such as those who preferred nonunion association is "closely akin" to the animus against political association, the court of appeals concluded that the animus against nonunion employees in the Port Arthur area was sufficiently similar to the animus against a political party to satisfy the requirements of § 1985(3).*[189]

Sound familiar? This chain of reasoning follows naturally from the reality that it is impossible to draw lines between many of the various classes seeking relief under § 1985(3).

Several other cases also illustrate this problem. In *Marlowe v. Fisher Body*,[190] the plaintiff brought an action against his employer because he had been denied a promotion and overtime hours by reason of both his membership in the Jewish faith and his national origin.[191] Although the § 1985(3) claim was not raised until the case was appealed to the Court of Appeals for the Sixth Circuit, that court said "the amended complaint does contain a

187. 463 U.S. 825 (1983).
188. *Id.* at 835.
189. *Id.* at 835-36 (emphasis added).
190. 489 F.2d 1057 (6th Cir. 1973).
191. *Id.* at 1059.

statement of the basis upon which the court's jurisdiction under § 1985(3) could be maintained.... Since both defendants were before the court under other allegations of jurisdiction, there would be no prejudice ... in determining that jurisdiction exists under § 1985(3)."[192] In summary, the court concluded that "[u]pon remand the plaintiff will be permitted to amend for the purpose of asserting jurisdiction under 42 U.S.C. § 1985(3)."[193] The court of appeals sanctioned the application of § 1985(3) to a conspiracy based on animus against the class of people who practice the Jewish faith.

Another such case is *Westberry v. Gilman Paper Company*.[194] Although the opinion was later withdrawn, its logic displays the inherent problem with attempts to draw distinctions between supposed classes under the Statute. In *Westberry*, an environmental activist brought suit under § 1985(3) against Gilman Paper Company and its officers who allegedly conspired to take his life and have him dismissed from his job solely because he was an environmentalist.[195] The court decided that this plaintiff had a cause of action under § 1985(3).[196] It held:

> Westbury's alignment with environmental causes, coupled with the judge's finding on the conspiracy to murder issue raises a sufficient inference that there may have been a "class-based, invidiously discriminatory animus behind the alleged actions of the conspirators" to evidence subject matter jurisdiction in the district court under § 1985(3) and to raise genuine issues of material fact which make summary judgment inappropriate.[197]

The court was incorrect in holding that summary judgment was inappropriate. The plaintiff failed to state any claim upon which relief could be granted, because 42 U.S.C. § 1985(3) does not give a remedy to the class of environmentalists. In spite of its long discussion of the history of the Act and *Griffin v. Breckenridge*,[198] the court erroneously held that federal subject matter jurisdiction existed in this case. This is a perfect example of the reality that every extension of the Statute will always lead to a further extension.

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192. *Id.* at 1065.
193. *Id.*
194. 507 F.2d 206 (5th Cir. 1975).
195. *Id.* at 209.
196. *Id.* at 208.
197. *Id.* at 210.
198. *Id.* at 208-09.

V. CONCLUSIONS

This note has attempted to demonstrate the problems which surface when the judicial system fails to honor the limits inherent in the intended scope of legislative enactments—in particular, the Ku Klux Klan Act. As a result of its failure to examine the historical purpose behind the Act, the Supreme Court has increasingly and erroneously broadened the scope of § 1985(3). Eventually, if it has not already occurred, the Act will become a general federal tort law under which every victim of a conspiracy will have a federal remedy. Although nothing is wrong with providing a remedy to some of these victims, the preservation of the federal system demands that jurisdiction over most of these cases remain in state courts.

The only guide available to the Supreme Court is history. Through the legislative history and court precedent, the present day courts must attempt to ascertain the central concern of the original drafters of the Act and the purpose it was intended to serve. With these in mind, the court must then restructure its understanding of the Ku Klux Klan Act in conformity with its original intent.

The analysis of the judicial history and court decisions in this note have made apparent that the original intent of the Act was to reach conspiracies involving state action based on a racial animus. To maintain the integrity of the Statute, the courts should consider enforcing the limited scope of § 1985(3). The author is not opposed to protecting homosexuals, women, or any of the variety of classes which have been considered under 42 U.S.C. § 1985(3). To the contrary, it is essential that the law protect everyone from injury if at all possible. However, it is more important that we endeavor to protect the constitutional nature of the government which men such as George Washington, Thomas Jefferson, Samuel Adams and many others devoted their lives to create, for that system of government has proven to be the most effective method of preserving the rights of minority classes without sacrificing the freedom of the individual. If we continue to superimpose our desires on this legislative effort to protect the black men and women of the South in 1871, we will contribute to the continued erosion of the federal system.

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