Missouri Law Review

Volume 50
Issue 1 *Winter 1985*

Article 11

Winter 1985

Civil Rights Conspiracies: Section 1985(3) after Carpenters v. Scott

Rick E. Temple

CIVIL RIGHTS CONSPIRACIES: SECTION 1985(3) AFTER *CARPENTERS v. SCOTT*

United Brotherhood of Carpenters Local 610 v. Scott[1]

During the mid-1950's to mid-1970's, civil rights issues took a forefront in the legal and political arena. During this period, several Reconstruction Era acts were revived by court decisions.[2] One of the most misunderstood of the civil rights statutes is 42 U.S.C. § 1985(3).[3] A recent United States Supreme Court case shed substantial light on the statute. In *United Brotherhood of Carpenters Local 610 v. Scott*,[4] the Court held that a group of non-union workers were not protected by section 1985(3) because the statute does not

---

1. 103 S. Ct. 3352 (1983).

2. After the ratification of the thirteenth amendment, organizations arose to oppose equality between blacks and whites. The most notorious of these groups was the Ku Klux Klan. Congress responded by enacting a series of civil rights laws: Civil Rights Act of 1866, 14 Stat. 27; Civil Rights Act of 1870, 16 Stat. 140; Force Act of 1871, 16 Stat. 433; Civil Rights Act of 1871 (Ku Klux Klan Act of 1871), 17 Stat. 13; and Civil Rights Act of 1875, 18 Stat. 335.

Many of these laws have been resurrected in recent court decisions. *See, e.g.*, Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (holding that 42 U.S.C. § 1981 reaches private racial discrimination in contractual relations); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (holding that 42 U.S.C. § 1982 reaches private racial discrimination in property transactions); Monroe v. Pape, 365 U.S. 167 (1961) (holding that 42 U.S.C. § 1983 protects rights guaranteed by the fourteenth amendment).

3. (1976). The statute provides a damages remedy to persons injured where two or more persons conspire for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the law and an act is done in furtherance of the object of such conspiracy whereby another is injured.

The statute is a codification of section 2 of the Ku Klux Klan Act of 1871, 17 Stat. 13. The Supreme Court did not address the statute until 1951. In Collins v. Hardyman, 341 U.S. 651 (1951), the Court required state action for a section 1985(3) cause of action. Consequently, the statute remained dormant because 42 U.S.C. § 1983 already provided a civil remedy for constitutional violations by state actors. In Griffin v. Breckenridge, 403 U.S. 88 (1971), the Court first allowed an action against private persons under section 1985(3). In *Griffin*, black plaintiffs were prevented from exercising their constitutional right to interstate travel. In granting relief, the Court left only vague guidelines as to when section 1985(3) reaches private conduct. For example, after ruling that section 1985(3) does cover private conspiracies, the Court stated that their conclusion did not mean that section 1985(3) applies to all tortious, conspiratorial interferences with the rights of others. *Id.* at 101. *See generally* Esbeck & Schumaker, *Current Practice Under 42 U.S.C. Sections 1985 and 1986*, BARRISTER, Fall 1984, at 34.

4. 103 S. Ct. 3352 (1983).

reach private conspiracies to deprive one of first amendment rights or conspiracies based upon economic bias.[5] As a result, the Court implicitly overruled a growing body of lower court decisions which were expanding section 1985(3) protection.[6] The application of section 1985(3) is now limited by *Scott* in two areas: rights protected and classes protected.

In *Scott*, the Cross Construction Company (Cross) brought in non-union workers for a construction project near Port Arthur, Texas.[7] Cross had no collective bargaining agreement with any labor union and none were seeking to organize the company. Nevertheless, several local residents warned Cross employees that continued hiring of non-union workers would lead to grave consequences.

At a meeting of the Executive Committee of the Sabine Area Building and Construction Trades Council, a union respresentative announced a citizen protest against Cross's hiring practices.[8] Two days later, a large group of union members and supporters assembled near the construction site. Several truckloads of men emerged from the group and drove onto the site. These men attacked Cross employees and destroyed construction equipment. Several of the men made threats of future violence if non-union workers continued on the job site.

Cross and two of its injured employees brought a section 1985(3) action in federal district court against the local trades council, twenty-five local unions, and several individuals.[9] The plaintiffs claimed that the defendants had conspired to deprive plaintiffs of their constitutional right of association. The plaintiffs sought monetary damages and an injunction to restrain future interference with their right to work in a non-union environment.

The district court ruled in favor of the plaintiffs.[10] In reaching its decision, the court analyzed the five elements of a section 1985(3) action: (1) a conspiracy; (2) with intent to deprive a person, or class of persons, of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an invidious, class-based animus; (4) an act in furtherance of the conspiracy; and (5) an injury.[11] The court found that the conspiracy, act, and injury

---

5. *Id.* at 3356.

6. After *Griffin v. Breckenridge*, lower courts began searching for outer limits of section 1985(3). Two areas where the courts have sought expansion are the rights protected and the classes sufficient to meet the *Griffin* invidious, class-based animus requirement. Comment, *A Construction of Section 1985(c) in Light of its Original Purpose*, 46 U. CHI. L. REV. 402, 407 (1979).

7. 103 S. Ct. at 3355.

8. *Id.*

9. *Id.*

10. Scott v. Moore, 461 F. Supp. 224 (E.D. Tex. 1978), *aff'd*, 680 F.2d 979 (5th Cir. 1982), *rev'd sub nom.*, United Bhd. of Carpenters, Local 610 v. Scott, 103 S. Ct. 3352 (1983).

11. *See* 461 F. Supp. at 227. The court also addressed the interpretation of the elements set out in McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977) (en banc). *Id.* at 228.

elements were easily satisfied. More problematic were the issues of deprivation of a protected right and an invidious, class-based animus motivating the defendants.

In analyzing the invidious, class-based animus element, the court decided that section 1985(3) extends beyond racially based conspiracies.[12] The court supported this ruling with statements from legislative history and by contrasting the general language of section 1985(3) with the specific prohibitions against race discrimination in other civil rights statutes. The court also found that non-union laborers and employers of non-union laborers have common characteristics making them a discernible class.[13] Consequently, the court concluded that the plaintiffs were a class deserving of section 1985(3) protection.

The court also held that the defendants had deprived the plaintiffs of their first amendment right of association.[14] No explanation was given as to the constitutional authority for allowing a section 1985(3) recovery when the deprivation of first amendment rights was by *private* defendants. Instead, the court concluded that the defendants' acts of violence were manifestations of ill-will and hatred toward the plaintiffs based on their non-association with the union.

The United States Court of Appeals for the Fifth Circuit affirmed.[15] Following *Kimble v. D.J. McDuffy, Inc.*,[16] the court ruled that section 1985(3) extends beyond racially based conspiracies to encompass at least some conspiracies motivated by political or economic bias.[17] Because the plaintiffs were discriminated against based upon their non-association with the union, the court characterized the class-animus as economic in nature and granted section 1985(3) relief. In examining the rights protected by section 1985(3), the court rejected any state action requirement for recovery under section 1985(3) for first amendment violations.[18] Although recognizing that the first amend-

12. 461 F. Supp. at 229.
13. *Id.* at 230.
14. *Id.*
15. Scott v. Moore, 680 F.2d 979 (5th Cir. 1982), *rev'd sub nom.*, United Bhd. of Carpenters, Local 610 v. Scott, 103 S. Ct. 3352 (1983). Though the district court ruled against eleven local unions, the court of appeals set aside judgment against eight of the unions because the evidence of their participation in the conspiracy was insufficient.
16. 648 F.2d 340 (5th Cir. 1981) (en banc). The court in *Kimble* established two categories of non-racial classes protected by section 1985(3): (1) those classes afforded special protection under the equal protection clause; and (2) those classes whose members were discriminated against because of their political beliefs or associations. *Id.* at 347. It should be noted that the Supreme Court in *Scott* gave no deference to the two class distinction established by *Kimble.*
17. 680 F.2d at 991-96. The court cautioned against an overly broad interpretation of section 1985(3) and emphasized three limitations on the statute: (1) it cannot be invoked to disrupt the operation of a comprehensive statutory remedial scheme; (2) without more, it cannot remedy an unfair labor practice; and (3) it does not cover a class created solely on the basis of unionism or nonunionism. *Id.* at 996.
18. 680 F.2d at 990. Because an actual first amendment infringement requires

ment normally provides protection only from infringement by the government, the court felt compelled to follow the holding in *Griffin v. Breckenridge*[19] that section 1985(3) reaches both public and private constitutional wrongs.

After construing section 1985(3) as applicable to the plaintiffs' case, the court of appeals addressed the constitutional source of Congress' power to enact section 1985(3).[20] The court recognized that the circuits are divided as to whether section 5 of the fourteenth amendment allows Congress to reach purely private conduct.[21] Because the United States Supreme Court had yet to rule on the issue, the court sidestepped the uncertainty of section 5 of the fourteenth amendment and relied on the commerce clause[22] to establish constitutional authority for section 1985(3).[23] The court reasoned that attacks on workers of a construction firm engaged in interstate commerce have a direct effect on the flow of goods and services among the states.

In a closely divided opinion, the United States Supreme Court reversed.[24] The battleground between the majority and minority opinions is found in the statutory construction of section 1985(3). Two areas of disagreement are explicit in the opinions. First, the majority disallowed section 1985(3) recovery for conspiratory activities motivated by economic bias.[25] Second, the majority refused section 1985(3) protection for violations of first amendment rights absent a showing of state involvement.[26] In contrast, the dissent advocated section 1985(3) protection for all classes not receiving equal protection of the laws by local authorities, and protection for violations of first amendment rights regardless of any showing of state involvement.[27] By analyzing these issues, we can better understand the application of section 1985(3) after *Scott*.[28]

---

state action, the court must have meant that the same rights are protected against private infringement under section 1985(3) as are protected against government infringement under the first amendment.

19. 403 U.S. 88 (1971).

20. 680 F.2d at 996.

21. *Compare* Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (en banc); *and* Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971) (holding that the fourteenth amendment authorizes Congress to reach purely private conduct) *with* Murphy v. Mount Carmel High School, 543 F.2d 1189 (7th Cir. 1976) (finding it does not).

22. U.S. CONST. art. I, § 8, cl. 3.

23. 680 F.2d at 997.

24. United Bhd. of Carpenters, Local 610 v. Scott, 103 S. Ct. 3352 (1983) (White, J.) (joined by Burger, C.J., and Stevens, Rehnquist, and Powell, JJ.).

25. *Id.* at 3360.

26. *Id.* at 3357.

27. *Id.* at 3361.

28. Though there was no disagreement among the justices concerning the constitutional basis of Congressional power to enact section 1985(3) and to use it to reach private conspiracies, it is helpful to examine the underlying importance of the issue in guiding the Court's statutory construction. Since *Griffin v. Breckenridge*, courts have sought to base congressional power for section 1985(3) on section 5 of the fourteenth amendment. Because *Griffin* withheld judgment on the issue, the problem has divided the courts.

Justice White, writing for the majority, concluded that section 1985(3) cannot be used against an infringement of fourteenth amendment rights unless it is shown that the state was involved in the conspiracy or that the aim of the conspiracy was to influence the state. White explained that section 1985(3) is purely remedial and that violation of a protected right independent of section 1985(3) must be shown. White then distinguished those rights protected from private interferences from those protected only from state interference. Because the plaintiffs showed no state action in the alleged deprivation of their first amendment right of association, the Court refused a section 1985(3) remedy.[29]

Justice Blackmun, writing for the dissent,[30] concluded that section 1985(3) provides protection from conspiracies regardless of the presence of state action.[31] Blackmun asserted that when Congress enacted the Civil Rights Act of 1871, the Republican majority believed the fourteenth amendment conferred rights which could be violated by private conspirators.[32] Blackmun also explained that the "equal protection" language of section 1985(3) was added only to avoid creating a general federal criminal law, not to require state

---

Both the majority and minority opinions in *Scott* recognized congressional power to reach purely private conspiracies based upon the commerce clause, U.S. CONST. art. I, § 8, cl. 3. Like *Griffin*, the Court in *Scott* sidestepped the fourteenth amendment issue and withheld judgment. 103 S. Ct. at 3358.

Over the years, the commerce clause has been given a very broad interpretation. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942). Because courts will most always be able to rely on the commerce clause as a basis to justify section 1985(3) reaching private private conspiracies, the need to address and decide how far Congress's power extends under section 5 of the fourteenth amendment may never arise.

Regardless of the source the Court gives for congressional power to reach private conspiracies uner section 1985(3), the more important issue is the effect the source has upon the Court's statutory construction of section 1985(3). Implicit in every determination of those rights which are protected by section 1985(3) is the assertion that Congress has the power to reach such prohibited conduct under section 1985(3). Under the guise of statutory construction, Justice White, writing for the majority in *Scott*, in effect rejects congressional power of section 5 of the fourteenth amendment to reach private conspiracies. By refusing section 1985(3) protection for deprivation of fourteenth amendment rights without a requisite showing of state action, White has forced the Court to search for an additional source of constitutional power to reach purely private conspiracies.

29. 103 S. Ct. at 3357. White recognized the *Griffin* holding that section 1985(3) can reach purely private conspiracies; but White explained that the statute only reaches those "private conspiracies aimed at interfering with rights constitutionally protected against private, as well as official, encroachment." *Id.* at 3358.

30. Blackmun was joined by Justices Brennan, Marshall and O'Connor.

31. *Id.* at 3362.

32. *Id.* at 3365. At the time the Civil Rights Act of 1871 was enacted, the landmark *Civil Rights Cases* had not been decided. It was in the Civil Rights Cases, 109 U.S. 3 (1883), that the United States Supreme Court for the first time ruled that the fourteenth amendment protects individuals' rights only from government infringement, i.e., state action.

involvement.[33]

Considering the history and purpose of section 1985(3), the majority opinion correctly limited the application of the statute by requiring state action to recover for a fourteenth amendment infringement. Through *Scott*, the Court significantly curtailed an effort in the lower federal courts to expand section 1985(3).

This expansion began with *Griffin v. Breckenridge*.[34] In *Griffin*, black plaintiffs were traveling on a public highway when they were stopped by the defendants.[35] Believing the auto driver was a civil rights worker, the defendants forced the plaintiffs out of the auto and beat each of them. The Court allowed section 1985(3) recovery against the private conspirators based upon deprivation of the plaintiffs' thirteenth amendment right to be free from the badges of slavery and the deprivation of the constitutional right to travel.[36] The Court explained that there is nothing inherent in the section 1985(3) phrase which requires the deprivation to involve the state.[37]

Because *Griffin* extended section 1985(3) coverage to include *private* conspiracies, some lower courts began an expansion to allow section 1985(3) recovery for the violation of substantive rights regardless of state action requirements.[38] This approach was exemplified in the *Scott* decisions in the lower courts.[39]

This misconception was corrected by the Supreme Court's decision in *Scott*. To recover under section 1985(3), one must allege and prove a violation of an underlying substantive right.[40] If the underlying substantive right is a *constitutional* right, one must next determine if state action is necessary. To make this determination, look to the source of the underlying substantive right. For example, to establish a fourteenth amendment violation, state action has been required since the *Civil Rights Cases*.[41] This was reaffirmed in *United States v. Guest*,[42] where private defendants were indicted for a crimi-

33. *Id.* Blackmun stated that the equal protection language was to alleviate the fears of the more moderate Republicans who feared that the creation of a general federal criminal law in section 1985(3) would raise serious constitutional problems. To create a general federal criminal law would undermine state control over criminal actions. *Id.*

34. 403 U.S. 88 (1971).

35. *Id.* at 90.

36. *Id.* at 103-04. The Court in *Scott* re-emphasized that the *Griffin* decision was not based on infringement of first amendment rights. 103 S. Ct. at 3358.

37. 403 U.S. at 97.

38. *See, e.g.*, Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (en banc) (section 1985(3) protection of fourteenth amendment rights does not require state action); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971) (elimination of any state action requirement for section 1985(3) jurisdiction).

39. Both the district court and the court of appeals required no state action for a section 1985(3) suit for violation of first amendment rights. 680 F.2d at 990.

40. 103 S. Ct. at 3357-58.

41. 109 U.S. 3 (1883).

42. 383 U.S. 745 (1966).

nal conspiracy in violation of 18 U.S.C. § 241,[43] often referred to as the criminal counterpart to 42 U.S.C. § 1985(3). Upon remanding for further consideration of whether state officials cooperated in the conspiracy, the Court, in *Guest*, stressed that the fourteenth amendment protects an individual against state infringement of constitutional rights and not against private wrongs.[44] Therefore, a section 1985(3) action based upon a deprivation of rights guaranteed by the fourteenth amendment requires a showing of state action. To overturn this fundamental principle would create chaos in our legal system and flood the federal courts with cases of private discrimination based upon fourteenth amendment rights.

In contrast, state action is not required for a section 1985(3) cause of action based upon a conspiracy to interfere with one's thirteenth amendment right to be free from badges of slavery.[45] Likewise, a section 1985(3) action based upon deprivation of the constitutional right to travel[46] or other rights of national citizenship provided by the privileges and immunities clause[47] requires no showing of state action. These bases were established in *Griffin* and reaffirmed in *Scott*.

Beyond these examples involving constitutional rights, the Court previously has given a few additional guidelines involving *statutory* rights as an underlying basis for a section 1985(3) cause of action. In *Great American Federal Savings & Loan Association v. Novotny*,[48] the Court implicitly foreclosed a section 1985(3) action based on deprivation of a state statutory right or a federal statutory right which includes a comprehensive remedial scheme. In *Novotny*, the plaintiff, a male, expressed support for female employees at a

---

43. (1976). The statute criminalizes a conspiracy to intimidate any citizen in the exercise of his rights given him by the constitution or laws of the United States.

44. 383 U.S. at 755. Nearly all of the protections of the Bill of Rights are applicable to the states through the due process clause of the fourteenth amendment. *See, e.g.*, Alexander v. Louisiana, 405 U.S. 652 (1972); Hurtado v. California, 110 U.S. 516 (1884).

45. Griffin v. Breckenridge, 403 U.S. 88, 105 (1971). Though the thirteenth amendment basis may seem limited, Congress does have the power to declare acts as constituting badges of slavery. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439, 440 (1968).

46. 403 U.S. at 106.

47. *Id.* In *Griffin*, the Court explained that rights of national citizenship are within the power of Congress to protect by appropriate legislation. *Id.* Therefore, it could be argued that *Griffin* stands for the principle that all rights of national citizenship are proper bases for a section 1985(3) cause of action without regard to any state action requirement.

The constitutional rights of national citizenship are derived from the privileges and immunities clauses of article IV, section 2 and the fourteenth amendment. On the general subject of rights of national citizenship, see A. LIEN, PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES (1913); A. LIEN, CONCURRING OPINION (1957); KURLAND, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U.L.Q. 405; Lomen, *Privileges and Immunities Under the Fourteenth Amendment*, 18 WASH. L. REV. 120 (1943).

48. 442 U.S. 366, 378 (1979).

meeting of the board of directors of a private corporation.[49] Subsequently he was fired. He brought suit under section 1985(3), claiming injury by a conspiracy because of his support for Title VII rights of female employees. The Court centered its discussion on the deprivation of "federal" rights.[50] By negative implication, this apparently eliminates the deprivation of a state-law right as a proper basis for a section 1985(3) cause of action.[51] Second, *Novotny* refused to allow a section 1985(3) suit based on Title VII, a federal statute, because it contained a comprehensive remedial scheme of its own.[52] The Court reasoned that to allow the section 1985(3) suit would bypass the administrative process established by Congress in Title VII.[53]

In summary, the majority in *Scott* tightened the requirements for those substantive rights protected by section 1985(3). No longer does section 1985(3) provide a remedy for all conspiracies directed at individuals solely on the basis of their membership in a given class. When deciding if a right is protected under section 1985(3), consider the following analysis:

What substantive right was violated?

1. Is it a right guaranteed by the fourteenth or fifteenth amendment? If so, state action is required.

---

49. *Id.* at 369.

50. *Id.* at 376. The Court eventually denied relief to the plaintiff ruling that a Title VII violation may not be asserted within the remedial framework of section 1985(3).

51. Whether a state statutory right can serve as a proper basis for a section 1985(3) cause of action is an undecided question. Since the Supreme Court has not ruled directly on the issue, considerable room for disagreement is allowed within the circuits.

Three arguments are offered to refute the "*Novotny* implication." First is the ruling in McLellan v. Mississippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977). The court in *McLellan* permitted state statutory rights as a basis for section 1985(3) if the state law was transgressed. In support of its holding, the court stated that one element in the *Griffin* decision was that the alleged conspiracy encompassed violations of both civil and criminal laws of Mississippi. *Id.* at 926. This reliance appears questionable after the *Scott* decision where Justice White clearly reiterated the violations relied upon in *Griffin* were the thirteenth amendment and the right to interstate travel. 103 S. Ct. at 3358. The *McLellan* opinion has not been accepted by the Supreme Court but likewise has not been rejected by the Court. It remains good law in the fifth and eleventh circuits. Second, the statement by Justice White in the *Scott* opinion recites the second issue of the case, "whether respondents' action could be sustained under § 1985(3) as involving a conspiracy to deprive respondents of rights, privileges, or immunities under state law . . ." 103 S. Ct. at 3358. By inference, the Court is accepting that section 1985(3) can be used to recover for deprivations of a state statutory right. Third is the fact that the "federal" limitation in *Novotny* was not crucial to the facts of the case since the underlying claim involved a federal statutory right. The argument would contend that the use of the word "federal" was inadvertent and not meant to eliminate state statutory rights as bases for section 1985(3) suits.

52. 442 U.S. at 378. This is analogous to the ruling in Maine v. Thiboutot, 448 U.S. 1 (1980), which precluded a 42 U.S.C. § 1983 claim for violation of any federal statutory right if the federal statute contains a comprehensive remedial scheme.

53. 442 U.S. at 376.

2. Is it a right guaranteed by the thirteenth amendment, privileges and immunities clause, or right to travel?

If so, state action is not required.

3. Is it a right guaranteed by a federal statute?

If so, a section 1985(3) action is precluded if the statute contains a comprehensive remedy.

4. Is it a right guaranteed by state statute?

If so, does your particular circuit allow a section 1985(3) cause of action?

The second area of dispute in *Scott* concerned the classes protected by section 1985(3). Justice White characterized the union/non-union dispute as an economic based classification.[54] Because the conspiracy involved an economic, class-based animus, White held that section 1985(3) did not provide a remedy.[55] Following the 1971 decision of *Griffin v. Breckenridge*,[56] White declined to decide whether section 1985(3) extends to conspiracies motivated by non-racial bias.[57] In dicta, White noted that even if section 1985(3) was construed to reach conspiracies motivated by political bias, it does not reach conspiracies motivated by an economic, class-based animus.[58]

Justice Blackmun, for the dissent, asserted that section 1985(3) provides a federal remedy for "all classes" seeking to exercise legal rights in circumstances where local laws and law enforcement efforts do not provide equal protection to members of the class.[59] Because the plaintiffs were retaliated against based on their non-union status, Blackmun supported section 1985(3) protection. It appears that state and local law enforcement efforts to protect the plaintiffs' rights were unsuccessful.[60]

---

54. 103 S. Ct. at 3361.

55. *Id.* White reasoned that labor disputes are adequately covered by the National Labor Relations Act, 29 U.S.C. § 151-69 (1982). As construed by the lower court *Scott* decisions, section 1985(3) would infringe on the NLRA jurisdiction.

56. 403 U.S. 88 (1971).

57. 103 S. Ct. at 3360.

58. *Id.* In examining legislative history, White concluded that the Ku Klux Klan activities which the Act of 1871 intended to curtail were not based on an animus against either labor or capital but were based on an animus against blacks and their sympathizers. White then concluded that section 1985(3) was not meant to reach economic, class-based animus. Second, White stated that economic conflicts should be dealt with by statutes specifically addressed to such problems or by general law proscribing personal injury. *Id.* at 3361.

59. *Id.* at 3367. In contrast with the majority, Blackmun categorized the early Klan activities as an effort to resist the economic exploitation of the South. Since the Act of 1871 was an attempt to reach such Klan activities, Blackmun believed section 1985(3) should be interpreted accordingly. *Id.* at 3368.

Blackmun interpreted the legislative history to create a functional definition of those classes protected under section 1985(3). Rather than establishing a list of actionable class traits, Blackmun advocated protection for all classes which are unprotected (i.e. left vulnerable) by the states.

60. In his dissent, Blackmun noted that some victims of the union violence had

Missouri Law Review, Vol. 50, Iss. 1 [1985], Art. 11

The issue of the classes protected under section 1985(3) has its origins in *Griffin*, where the Court established an intent requirement.[61] To recover under section 1985(3), one requirement is that the conspiratorial discrimination be motivated by some invidious, class-based animus.[62] The Court, in *Griffin*, established such an element to avoid section 1985(3) becoming a general federal tort law.[63]

Before *Scott*, lower courts had searched for the outer limits of section 1985(3) protection.[64] Race was the obvious class subject to invidious discrimination.[65] Other classes which the lower courts protected included women,[66] political groups,[67] religious groups,[68] and a single family unit.[69] Numerous other classes were excluded by some jurisdictions, including homosexuals,[70] debtors,[71] bankrupts,[72] tenant organizers,[73] physicians,[74] and union/non-union

---

trouble obtaining injunctive relief from the state courts against future episodes of violence. *Id.* at 3369 n.20.

61. Griffin v. Breckenridge, 403 U.S. 88, 100-02 (1971).

62. *Id.* at 102. Another recent Supreme Court case, Kush v. Rutledge, 103 S. Ct. 1483 (1983), ruled that no allegation of racial or invidious, class-based animus is required to establish a cause of action under 42 U.S.C. § 1985(2) (1982). The first part of section 1985(2) relates to conspiracies which interfere with federal judicial proceedings. The Court distinguished those actions which deal with processes of the federal government from those which deal primarily with state concerns.

63. 403 U.S. at 102.

64. Courts are in agreement concerning the basic requirements of an invidious, class-based animus. Those basic requirements are: (1) that the plaintiffs are victims because of their membership in or affiliation with a particular class, not because of any animus against the particular individual, *see* Kimble v. D.J. McDuffy, Inc., 648 F.2d 340, 345 (5th Cir.), *cert. denied*, 102 S. Ct. 687 (1981), and (2) that the class must exist independent of the defendant's actions, i.e. that a group of victims does not make a class, *see Scott*, 103 S. Ct. at 3367, (Blackmun, J., dissenting). The disagreement among the courts arises when deciding which classes are protected by section 1985(3).

65. *See, e.g.*, Bethel v. Jendoco Constr. Corp. 570 F.2d 1168 (3d Cir. 1978) (employer discrimination against a black construction worker); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971) (white employee discharged for his views against employer's racially discriminatory employment practices).

66. *See, e.g.*, Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499 (9th Cir. 1979) (women purchasers of disability insurance); Hodgin v. Jefferson, 447 F. Supp. 804 (D. Md. 1978) (woman employee received salary lower than employer's stated minimum rate).

67. *See, e.g.*, Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975) (holder of protest sign along presidential motorcade); Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973) (distributor of campaign leaflets).

68. *See, e.g.*, Ward v. Connor, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (member of religious group kidnapped by parents); Marlowe v. Fisher Body (General Motors Corp.), 489 F.2d 1057 (6th Cir. 1973) (employment discrimination based upon religious views held by employee).

69. *See, e.g.*, Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972) (a single family); Harrison v. Brooks, 446 F.2d 404 (1st Cir. 1971) (married couple).

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

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

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

groups.[75]

Scott shed new light on the issue.[76] Racial groups are absolutely protected;[77] economic groups are not.[78] Protection for political classes is highly disfavored.[79] Protection for all other groups is left unanswered in *Scott*.[80]

Despite serious limitations, section 1985(3) can be used to provide a valuable remedy against conspiracies. Any conspiratory activity motivated by racial bias clearly can be reached under section 1985(3). Among those rights clearly protected from private conspiracies are the thirteenth amendment right to be free from badges of slavery, the implicit constitutional right to travel, and those rights granted by the privilege and immunities clause. Section 1985(3) can also overlap 42 U.S.C. § 1983[81] to reach deprivations of constitutional rights which involve state action. Still another possible use of section 1985(3) involves a remedy for conspiratory deprivation of federal or state statutory rights.

An example of the type of case which survives *Scott* is *Ward v. Connor*.[82] In *Ward*, the plaintiff became a member of the Unification Church.[83] Because of his membership in the church, the plaintiff was kidnapped, held captive, and subjected to deprogramming efforts by his parents and others acting in concert. Plaintiff filed a section 1985(3) suit for deprivation of his constitutional right to travel. In granting relief, the court concluded that the plaintiff

---

1977) (en banc).

73. *See* Carchman v. Korman Corp., 594 F.2d 354 (3d Cir. 1979), *cert. denied*, 444 U.S. 898 (1980).

74. *See* Bricker v. Crane, 468 F.2d 1228 (1st Cir. 1972), *cert. denied*, 410 U.S. 930 (1973).

75. *See, e.g.*, Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980) (employees who were discharged for complaining of employer's labor practices); Ohio Inns, Inc. v. Nye, 542 F.2d 673 (6th Cir. 1976) (cancellation of government contracts because of plaintiff's union dispute), *cert. denied*, 430 U.S. 946 (1977).

76. In interpreting the *Griffin* invidious, class-based animus requirement, the Court reaffirmed its position of avoiding the creation of a general federal tort law in section 1985(3). But through *Scott*, the Court has in effect created a specific federal tort law for racial discrimination in section 1985(3). When two or more conspire, with racial animus, to deprive the plaintiff of his protected rights, he now has a choice of actions: sue in state court on a tort action or sue in federal court on a section 1985(3) action.

77. 103 S. Ct. at 3359.

78. *Id.* at 3360.

79. *Id.* at 3359.

80. Because the Supreme Court has not ruled on the issue except for *Scott*, the issue is left open to the circuits.

81. 42 U.S.C. § 1983 (1982) provides a remedy to any person who is deprived of their rights, under the constitution and laws, by a state actor.

82. 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). Though *Ward* involves a religious class-based animus which is questioned as sufficient for a section 1985(3) action in some circuits, it is still illustrative of the type of case which provides a basis for a section 1985(3) cause of action.

83. *Id.* at 46.

had been deprived of his protected right to travel by two or more persons, based upon his membership in the Unification Church.[84]

In *Griffin v. Breckenridge* in 1971, the United States Supreme Court revived and revitalized 42 U.S.C. § 1985(3). In its most recent case, *United Brotherhood of Carpenters Local 610 v. Scott*, the Court has limited the use of section 1985(3). Because of *Scott*, conspiracies motivated by economic bias are not actionable under section 1985(3). Likewise, deprivations of fourteenth amendment rights without state involvement are not actionable under section 1985(3). Though these limitations appear substantial, with proper study and adherence to the statutory construction given section 1985(3), one can use the statute to provide a federal remedy to a victim who was previously confined to a prejudicial state court tort action.

In its divided opinion, the Court in *Scott* has taken one more step to guarantee that section 1985(3) does not become a generalized federal tort law. In principal effect, section 1985(3) provides a specific federal tort law available to attack conspiratorial discrimination based on race.

RICK E. TEMPLE

84. *Id.* at 48.