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Civil Rights -- State Action is a Requirement for the Application of Section 1985(3) to First Amendment Rights

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NOTES

Civil Rights—State Action is a Requirement for the Application of Section 1985(3) to First Amendment Rights

For a century after its initial enactment as section 2 of the Ku Klux Klan Act, 42 U.S.C. section 1985(3)[1] was an unpopular and seldomly used civil rights remedy. However, in 1971 in *Griffin v. Breckenridge*[2] the United States Supreme Court revitalized section 1985(3) by eliminating state action[3] as a necessary element for recovery in suits involving racial discrimination. By limiting its holding in *Griffin* to the type of private conspiracy being challenged in that particular case, the Court left two important issues concerning the scope of section 1985(3) unanswered: first, to what forms of discrimination other than racial discrimination would section 1985(3) apply;[4] and second, whether section 5 of the fourteenth amendment empowered Congress to protect fourteenth-amendment-based rights against private action.[5] In *Bellamy*

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1. 42 U.S.C. § 1985(3) (1970). Section 1985(3) states in relevant part:

> 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; . . . 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.

2. 403 U.S. 88 (1971).

3. *Id.* at 101. The requirement of state action had been imposed twenty years earlier in Collins v. Hardyman, 341 U.S. 651 (1951). The effect of requiring state action was to limit application of section 1985(3) to use in actions that were more easily established under other civil rights statutes. As a result, prior to *Griffin,* section 1985(3) was infrequently and unsuccessfully used. Note, *Constitutional Law—Section 1985(3) of the Civil Rights Act of 1871—Color of Law Element Eliminated*—Griffin v. Breckenridge, 403 U.S. 88 (1971), 1972 U. ILL. L.F. 199, 199.

4. 403 U.S. at 102 n.9. One writer suggests that the Court virtually restricted the holding to cases involving racial discrimination by basing the constitutionality of the section primarily on thirteenth amendment grounds. Note, *Civil Rights: Are Private Conspiracies Redressable in Federal Courts?*, 25 U. MIAMI L. REV. 780 (1971). However, because of the quoted language in the text accompanying note 21 *infra*, and because the Court also based the constitutionality on Congress' power to protect the right to travel and specifically stated that it was not implying the absence of any other constitutional basis, the correctness of this suggestion is unlikely. 403 U.S. at 105-07.

5. The Supreme Court specifically avoided the issue whether Congress has power under section 5 of the fourteenth amendment to reach private conspiracies. 403 U.S. at 107.

v. Mason's Stores, Inc.[6] the Fourth Circuit Court of Appeals was squarely confronted with these questions in determining whether section 1985(3) would protect a person who was allegedly denied his first amendment right of freedom of association by a purely private conspiracy. The Fourth Circuit avoided the first of these questions, failing to consider whether section 1985(3) would cover the non-racial discrimination alleged in *Bellamy*; and, although implying that section 5 authorized Congress to protect fourteenth-amendment-based rights[7] from private action,[8] the court held that section 1985(3) displayed congressional intent that state action be required for an action based on a conspiracy to deprive first amendment rights.[9]

The suit arose after John Bellamy was fired from his position at Mason's, allegedly because of his membership in the Ku Klux Klan. Bellamy sued his former employer under Title VII, 42 U.S.C. sections 2000e-2 and 1985(3) for violating his right of free association.[10] The district court[11] dismissed the complaint for failure to state a claim for which relief could be granted under either statute,[12] and Bellamy appealed. The court of appeals summarily affirmed the district court's holding as to section 2000e-2[13] and addressed whether section 1985(3) protects an individual's first amendment rights from private conspiracies. The court held that section 1985(3) was applicable only when first amendment rights were violated as a result of state action. The court reasoned that the right of association is a first amendment right that is only protected from state action because of incorporation into the

6. 508 F.2d 504 (4th Cir. 1974).

7. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5. The first amendment right of freedom of association is incorporated into section 1 of the fourteenth amendment. NAACP v. Alabama, 357 U.S. 449 (1958).

8. For the majority's treatment of this issue, see note 42 and text accompanying notes 40-42 *infra*. In his concurring opinion, Judge Boreman states that Congress does not have the power under section 5 to reach private action. 508 F.2d at 508.

9. 508 F.2d at 506-07.

10. *Id.* at 505.

11. Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025 (E.D. Va. 1973).

12. *Id.* at 1026, 1029.

13. Section 2000e-2 is the modern statute proscribing employment discrimination based on race, color, national origin, sex, and religion. Bellamy alleged that the Ku Klux Klan was a religion "because its meetings were full of 'religious pomp and ceremony.'" 508 F.2d at 505. However, due to a failure to comply with pleading rules, this interesting proposition was not properly before the court. *Id.*

fourteenth amendment and that the language of section 1985(3) parallels the language of section 1 of the fourteenth amendment which requires state action;[14] therefore, it concluded that although Congress may have the power to reach a private conspiracy denying first amendment rights, section 1985(3) is not a reflection of that power.[15]

To consider the *Bellamy* decision in the proper perspective, a detailed examination of *Griffin v. Breckenridge* and subsequent lower court decisions is in order. *Griffin* concerned several black plaintiffs who were physically assaulted after the passage of their car on a public road was blocked by white defendants. The rights allegedly violated included the first amendment rights of freedom of speech, association and assembly.[16] The first issue the Supreme Court addressed was whether section 1985(3) applied to private conspiracies. The Court cited three reasons for answering this issue in the affirmative. First, the language of section 1985(3) indicated congressional intent to reach private parties. The Court focused on the words "go in disguise" and noted that such activity was little associated with official action, yet commonly connected with private marauders.[17] Second, Congress encompassed all types of state action in three companion provisions to section 1985(3). The three possible forms of state action are: (1) under color of state law, covered by the present 42 U.S.C. section 1983; (2) interference with or influence upon state authorities, covered by another clause of section 1985(3); and (3) a private conspiracy so massive and effective that it supplants state authorities, covered by section 3 of the Ku Klux Klan Act. In view of these three provisions, the Court reasoned that section 1985(3) would be a useless duplication unless it applied to private action.[18] Third, the legislative history indicated that the sponsors of section 1985(3) intended the statute to cover private acts. The Court noted that speeches of several supporters of original section 1985(3) stressed the need to reach private action.[19]

After determining that section 1985(3) applied to private conspiracies, the *Griffin* Court considered the requirements for the application

14. *Id.* at 506-07. For a fuller discussion of this aspect of the court's rationale, see notes 40-43 and accompanying text *infra.*

15. 508 F.2d at 508 (Boreman, C.J., concurring).

16. 403 U.S. at 89-91.

17. *Id.* at 96.

18. *Id.* at 98-99. "Given the existence of these three provisions, it is almost impossible to believe that Congress intended, in the dissimilar language of the portion of § 1985(3) now before us, simply to duplicate the coverage of one or more of them." *Id.* at 99.

19. *Id.* at 100-01.

of the statute. The Court first construed section 1985(3) as requiring some "racial, or perhaps otherwise class-based, invidiously discriminatory animus."[20] The Court saw this requisite as necessary to promote the policy of giving a civil rights statute " 'a sweep as broad as [its] language' "[21] without transforming it into a general federal tort statute.[22] The Court's failure to specify the scope of this criterion raises the question what type of discrimination other than racial discrimination is covered by section 1985(3).

The second requirement the Court imposed was the identification of some "source of congressional power to reach the private conspiracy alleged by the complaint in [each] case."[23] The Court found section 2 of the thirteenth amendment and the right of interstate travel to be the sources of congressional power to reach the private conspiracy alleged in *Griffin*.[24] However, the Court specified that

> [i]n identifying these two constitutional sources of congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment. By the same token, since the allegations of the complaint bring this cause of action so close to the constitutionally authorized core of the statute, there has been no occasion here to trace out its constitutionally permissible periphery.[25]

The Court's failure to "trace out the constitutionally permissible periphery" of the provision raises the question of the extent of congressional authority under section 5 of the fourteenth amendment. Not surprisingly, lower court opinions since *Griffin* have grappled confusedly with the scope of the *Griffin* criteria.

Most lower court decisions since *Griffin* have treated the "racial, or otherwise class-based, animus" as the initial element of a 1985(3) claim. Therefore, unless this threshold test is met, courts have been able to side-step the question of the extent of congressional power under

20. *Id.* at 102. The statutory basis for the Court's construction of section 1985(3) lies in the statute's language which parallels language of the fourteenth amendment. See notes 1 and 7 *supra* for the relevant language. The Court determined that instead of being merely a reference to the fourteenth amendment, the word "equal" was used to indicate the need of "class" discrimination. *Id.* at 102. *See* Note, 1972 U. ILL. L.F. *supra* note 3, at 205.

21. 403 U.S. at 97.

22. *Id.* at 101-02.

23. *Id.* at 104.

24. *Id.* at 105.

25. *Id.* at 107 (footnote omitted).

section 5. In cases which do not involve state action, some courts have construed the term "class-based discrimination" very narrowly, thereby avoiding the issue whether section 5 authorizes Congress to reach purely private activity.[26] On the other hand, those courts not faced with the section 5 issue, either due to the presence of state action in the claim alleged or due to the court's previous determination that state action is required, tend to interpret "class" very broadly.[27] In other words, most courts have avoided answering one question by a limiting construction of the other issue. As a result, the success of a 1985(3) cause of action absent state action has remained doubtful. However, two courts have found a cause of action under section 1985(3) in the absence of both state action and racial discrimination.

The Eighth Circuit in *Action v. Gannon*[28] held that a private conspiracy to deprive certain church members of first amendment rights mainly on the basis of their economic class was covered by section 1985(3).[29] The Eighth Circuit first found constitutional authority under section 5 by relying on the sentiments of six Supreme Court Justices expressed in two concurring opinions in *United States v. Guest*.[30] *Guest* concerned the criminal counterpart of section 1985(3).[31] In his concurring opinion in that case, Justice Clark summed up the opinion of the six Justices very succinctly: "[T]here now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—*with or without state action*—that interfere with Fourteenth Amendment rights."[32] The

26. Arnold v. Tiffany, 359 F. Supp. 1034, 1036 (C.D. Cal. 1973) (newspaper dealers trade association—no class); America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328, 335 (N.D. Ind. 1972) (all theaters showing unrated adult movies—no class). *See* Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 517 (1974).

27. Cameron v. Brock, 473 F.2d 608, 610 (6th Cir. 1973) (supporters of political candidate); Dombrowski v. Dowling, 459 F.2d 190, 193 (7th Cir. 1972) (criminal lawyers, case dismissed due to absence of state action); Azar v. Conley, 456 F.2d 1382, 1386 n.5 (6th Cir. 1972) (middle class white family).

28. 450 F.2d 1227 (8th Cir. 1971) (*en banc*).

29. *Id.* at 1232. Although racial implications were present, the court recognized that the primary motivation was based on economic class considerations.

30. 383 U.S. 745 (1966).

31. 18 U.S.C. § 241 (1970).

32. 383 U.S. at 762 (Clark, J., concurring) (emphasis added). *See also id.* at 774 (Brennan, J., concurring in part and dissenting in part). However, one writer notes that only two of the six *Guest* Justices who adhered to the quoted view remain on the Court and that subsequent lower court cases treat the concurring opinions as dicta. Comment, *Civil Rights—Section 1985(3)—Civil Remedy Provided to Redress Interference with First Amendment Right of Religious Freedom by Private Conspiracy—Action v. Gannon*, 47 N.Y.U.L. REV. 584, 587 n.25 (1972).

second basis of the Eighth Circuit's finding of constitutional authority was the intent of the legislature that passed the fourteenth amendment.[33] After examining the legislative history, the *Action* court concurred with the opinion that " '[a]ccording to the purpose and intention of the Amendment as disclosed in the debates in Congress and in the several state Legislatures and in other ways, Congress had the constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by States.' "[34]

Likewise, the Fifth Circuit in *Westberry v. Gilman Paper Co.*[35] held that a private conspiracy to deny an environmentalist and tax reformer his first amendment right of freedom of speech was reached by section 1985(3). Although this opinion has since been withdrawn[36]—the matter giving rise to the action being moot—and therefore has no precedential value, the court's analysis reflects valid considerations. In addition to the reasons given by the *Action* court, the Fifth Circuit based its finding of section 5 congressional power on the fact that the state action requirement has become so watered down[37] that many state action cases are indistinguishable from private action cases.[38]

Despite the recent varied judicial interpretations of section 1985(3), two aspects of the Fourth Circuit's holding in *Bellamy v. Mason's Stores, Inc.* are unique. First, the court did not discuss, or even recognize, the issue whether discrimination on the basis of membership in the Ku Klux Klan would satisfy *Griffin*'s "otherwise class-based, invidiously discriminatory animus." The court's failure to con-

33. 450 F.2d at 1236. *See* Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964). The author cites two reasons to support his thesis that Congress does have the power to reach private acts under section 5. First, the situation the fourteenth amendment was designed to remedy required action against private wrongs. *Id.* at 1354. Second, "the framers wrote in light of apparently settled constitutional doctrine that the mere recognition of a right in the federal constitution gives Congress implied power to protect it" from private acts, and thus section 5 was intended to broaden congressional power rather than limit it. *Id.* at 1357. *But see* Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U.L.J. 331 (1967).

34. 450 F.2d at 1237, *quoting* H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 277 (1908).

35. 507 F.2d 206 (5th Cir.), *vacated*, 507 F.2d 216 (5th Cir. 1975) (per curiam).

36. 507 F.2d at 216.

37. "A constitutional distinction cannot reasonably rest on the mere presense [sic] or absence of a non-injuring state representative if we are to retain the amendment's focus of protection of the victim." 507 F.2d at 214. For a brief summary of the broadening of the "state action" requirement, see Note, *Constitutional Law—Thirteenth Amendment—Federal Civil Remedy Encompassing Private Conduct in Civil Rights Violence*, 46 TUL. L. REV. 822, 824-27 (1972).

38. 507 F.2d at 211.

sider this issue is inconsistent with section 1985(3) litigation since *Griffin,* which has generally considered establishment of a class as a threshold for the application of the statute.[39]

Additionally, although recent case law indicates that a major problem in applying section 1985(3) to private conspiracies is finding constitutional authority for such action, the *Bellamy* court assumed that constitutional authority existed.[40] The Fourth Circuit's major concern was determining whether Congesss intended section 1985(3) to protect first amendment rights. One rationale the court gave for refusing to apply section 1985(3) to first amendment rights concerned the fact that the language of the statute parallels the language of section 1 of the fourteenth amendment.[41] The court relied on *United States v. Guest* for the proposition that no equal protection clause rights exist against purely private action.[42] However, the Supreme Court specifically recognized in *Griffin* that although a century of fourteenth amendment adjudication construing the equal protection clause makes "it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons, . . . there is nothing inherent in the phrase that requires the action working the deprivation to come from the State."[43] In light of the facts that *Griffin* was decided five years after *Guest,* and that *Griffin* dealt with section 1985(3) while *Guest* dealt with that section's criminal counterpart, the *Bellamy* court's reliance on *Guest* seems misplaced.

A second rationale is exhibited in the court's refusal to follow the Eighth Circuit's reasoning in *Action v. Gannon* as to application of section 1985(3) to first amendment rights.[44] This refusal followed from the Fourth Circuit's belief that the Supreme Court must extend the incorporation doctrine to private persons before the statute can be construed to protect first amendment rights. Although the court found

39. See notes 26-27 and accompanying text *supra.*

40. See note 8 *supra.*

41. For the comparative language, see notes 1 & 7 *supra.*

42. 508 F.2d at 507. Actually, this statement was an allegation of the defense. 383 U.S. at 754. Since the Court found allegations of state action, Justice Stewart's agreement with the allegation was not necessary to the Court's holding. However, six Justices in concurring opinions suggest that they were not in agreement as to the allegation. Nonetheless, many lower courts have treated the statement as part of the holding. *See* note 32 *supra.*

43. 403 U.S. at 97.

44. The Fourth Circuit sums up *Action*'s reasoning as going "from statutory language tracking the fourteenth amendment to the amendment itself to incorporation of the first amendment to application of that amendment to private persons, and jettisoning state involvement." 508 F.2d at 507.

the *Action* result appealing, it felt that the right of association was too far removed from the language of section 1985(3) for Congress to have intended its protection in that provision. However, again the court's position seems inconsistent with *Griffin*. The court misconstrued *Griffin* by confusing "source of constitutional authority" with "source of rights deprived." This confusion is illustrated by the court's citation of *Griffin* for the idea that section 1985(3) includes rights based upon the thirteenth amendment.[45] However, none of the rights allegedly denied in *Griffin* was based on the thirteenth amendment; in fact, several, including the right of freedom of association, were based on the first amendment.[46] Rather than being the source of the deprived rights, the thirteenth amendment was the source of constitutional authority for applying the statute in *Griffin*, since the requisite animus was based on race.

Although the *Bellamy* case was ideally suited for further definition of the *Griffin* criteria, the Fourth Circuit failed to take advantage of the opportunity. Based on the district court's finding that the Ku Klux Klan is a political organization,[47] indications are that membership in the Ku Klux Klan would be considered a sufficient class for section 1985(3) purposes. The Supreme Court has held that interference with the right of association for political groups also interferes with the right to vote.[48] In addition, discrimination on the basis of political association indicates a purpose to deny that particular group equal participation in the political process. The federal interest in protecting the right to vote and other political rights justifies considering discrimination on the basis of political association as satisfying the "otherwise class-based discriminatory animus."[49]

Indications are also good that the Supreme Court would uphold section 5 power to reach private action. As the *Action* court noted, although the Supreme Court left open the question of section 5 powers in *Griffin*, the fourteenth amendment and section 1985(3) are too closely related with respect to date of passage, authorship, and purpose to permit the Supreme Court to deny section 5 power to reach private action with consistency.[50] The similarity in language between section

45. *Id.* at 506.
46. 403 U.S. at 101.
47. 368 F. Supp. at 1028.
48. Williams v. Rhodes, 393 U.S. 23, 31 (1968).
49. Note, *Federal Remedy to Redress Private Deprivations of Civil Rights*, 85 HARV. L. REV. 95, 100 (1971).
50. 450 F.2d at 1236.

1985(3) and section 1 of the fourteenth amendment must be of some significance and gives credence to the argument that Congress intended section 1985(3) to protect fourteenth-amendment-based rights against private interference.

Besides the court's failure to deal with the scope of *Griffin*'s criteria, the *Bellamy* decision has other shortcomings. The Fourth Circuit virtually ignored the *Griffin* framework of section 1985(3) interpretation, while relying on older and less relevant cases. The court did not consider whether the requisite class discrimination was satisfied. Nor was *Griffin*'s policy of giving civil rights statutes a broad interpretation considered or followed. Finally, the minimum consideration given *Griffin* was based on a misinterpretation of the Supreme Court's holding in that case. Although section 1985(3) has made great strides since 1971 towards becoming a vital civil rights statute, the *Bellamy* decision indicates that, at least until the Supreme Court clearly defines the scope of the statute, application of section 1985(3) will be greatly restricted.

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Constitutional Law—State Action—Golden v. Biscayne Bay Yacht Club: Preventing Discrimination by Private Clubs

Using the bay bottom off Miami as a vantage point, the Fifth Circuit has launched a state action torpedo to sink the membership practices of a private yacht club. Although the Supreme Court has refrained from answering whether the membership policies of private clubs can be attacked on state action grounds,[1] the Court of Appeals for the Fifth Circuit found the question squarely presented to it in *Golden v. Biscayne Bay Yacht Club*[2] and answered the question in the affirmative. In *Golden* the court held that leasing publicly owned bay bottom land to a yacht club for its docks constituted sufficient state involvement to unleash a fourteenth amendment attack on racial and religious discrimination in the club's membership practices.[3]

1. In Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166-68 (1972), the Supreme Court refused on standing grounds to hear an attack on allegedly discriminatory membership practices of a private social club.

2. 521 F.2d 344 (5th Cir. 1975).

3. *Id.* at 352 (alternative holding).