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Taunya Lovell Banks

University of Maryland School of Law, [tbanks@law.umaryland.edu](mailto:tbanks@law.umaryland.edu)

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## COMMENT

# Rethinking *Novotny* in Light of *United Brotherhood of Carpenters & Joiners v. Scott*: The Scope and Constitutionally Permissible Periphery of Section 1985 (3)

TAUNYA LOVELL BANKS\*

### I. INTRODUCTION

One of the least frequently used, yet most troublesome remnants of the Reconstruction Civil Rights legislation is 42 U.S.C. § 1985(3).<sup>1</sup> This provision has been troublesome not only to litigants but to the courts because of the questions raised and not fully answered about Section 1985(3)'s constitutional basis and the need for some state involvement in the challenged action.<sup>2</sup> In addition, modern litigants have raised questions about the types of violations that can be reme-

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\* Associate Professor, Thurgood Marshall School of Law, Texas Southern University, Houston, Texas. B.A. Syracuse, J.D. Howard University School of Law. The author wishes to acknowledge the research assistance of Lawrence F. Cerf, class of 1984 in the preparation of this article.

1. 42 U.S.C. § 1985(3) (Supp. V 1981).

[If] two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Although the language of the section has remained the same, it was codified in the 1970 United States Code as § 1985(3), in the 1976 United States Code as § 1985(c) but it has appeared in all subsequent supplements as § 1985(3). This article will use the designation § 1985(3).

2. See *infra* note 9 and accompanying text.

died by the provisions.<sup>3</sup>

Section 1985(3) originally was enacted as part of the Ku Klux Act of 1871,<sup>4</sup> along with its more frequently used companion, section 1983.<sup>5</sup> However, section 1983 was designed to provide a civil remedy for civil rights violations suffered at the hands of persons "acting under color of state law," whereas section 1985(3) was designed to provide civil remedies for damage suffered as a result of private conspiracies to deprive civil rights.<sup>6</sup> Section 1985(3) laid dormant for almost ninety years until the United States Supreme Court in *Collins v. Hardyman* held that the statute reached only conspiracies conducted under state law.<sup>7</sup> *Collins* in effect prohibited the use of sec-

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3. See *infra* note 8 and accompanying text.

4. Ch. 22, 17 Stat. 13. For a discussion of the political environment surrounding the Act's passage see *Comment, A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402, (1979) [hereinafter cited as *Comment, A Construction of Section 1985(3)*].

5. 42 U.S.C. § 1983 (Supp. V 1976).

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Both sections 1983 and 1985(3) were originally enacted as sections one and two respectively of the Ku Klux Act, Act of Apr. 20, 1871. However, section 1983 following the 1961 U.S. Supreme Court decision in *Monroe v. Pape*, 365 U.S. 167 (1961), has been used to challenge a variety of state practices probably not foreseen by the drafters of the provision. See, e.g., *Whitman, Constitutional Torts*, 79 MICH. L. REV. 5 (1980).

6. Section 1983's statutory language indicates that it was directed at state action resulting in "deprivation of any rights, privileges or immunities secured by the Constitution and laws . . . ." 42 U.S.C. § 1983 (Supp. V 1976). The "under color of law" language of section 1983 has been construed to require some state action. *Monroe v. Pape*, 365 U.S. 167 (1961). Section 1985(3), on the other hand, contains no such language. It is directed at conspiracies by private persons that aim to deprive an individual of "equal protection of the laws or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3) (Supp. V 1981).

The Court has consistently held that Congress cannot reach private discriminatory conduct through the Fourteenth Amendment. See *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Iris*, 407 U.S. 163 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Civil Rights Cases*, 109 U.S. 3 (1883). Thus, it is necessary to first determine the extent to which Congress can provide civil remedies for private interference with constitutional rights before the statutory reaches of section 1985(3) can be determined.

7. *Collins v. Hardyman*, 341 U.S. 651 (1951). Petitioners, members of a political club, sued the respondents, private citizens, under section 1985(3) asserting that respondents conspired to disrupt petitioners' political meeting because respondents opposed petitioners' political views. The Supreme Court held that petitioners had failed to state a cause of action under section 1985(3) since there was no allegation that respondents were "acting under color of state law." *Id.* at 661. See *supra* note 6 and accompanying text for a discussion of the significance of the phrase "under color of state law."

tion 1985(3) to remedy purely private discrimination.

Twenty years after *Collins* the United States Supreme Court in *Griffin v. Breckenridge* held that state action was not needed to recover under section 1985(3).<sup>8</sup> However, the Court did not completely repudiate its decision in *Collins*. Upon close inspection, *Griffin* really qualified rather than overruled *Collins* by holding that state action was not necessary where the constitutional authority asserted was a provision other than the fourteenth amendment.<sup>9</sup> Subsequently, the United States Supreme Court in *Great American Federal Savings & Loan Association v. Novotny* found that section 1985(3) was remedial in nature and not as broad in scope as its companion provision section 1983.<sup>10</sup>

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8. *Griffin v. Breckenridge*, 403 U.S. 88 (1971). In *Griffin*, black citizens of Mississippi filed a damage action under 42 U.S.C. § 1985(3), charging that respondents, white citizens of Mississippi, had conspired to assault petitioners and to prevent them through force, violence and intimidation, from freely traveling upon federal, state, and local highways. The Court held that § 1985(3) does not require state action but reaches private conspiracies that are aimed at an invidiously discriminatory deprivation of the equal enjoyment of rights secured to all by law. *Id.* at 95-103.

9. *Griffin*, 403 U.S. at 97. Note also what the *Griffin* Court said regarding *Collins*: Whether or not *Collins* was correctly decided on its own facts is a question with which we need not here be concerned. But it is clear, in the light of the evolution of decisional law in the years that have passed since that case was decided, that many of the constitutional problems there perceived simply do not exist.

*Id.* at 95-96.

The Court in *Griffin* based its ruling on the thirteenth amendment and the right of interstate travel implied in the Constitution. *Id.* at 105-06. *But cf.* Justice Blackmun's dissent in *United Brotherhood of Carpenters & Joiners v. Scott*, 103 S. Ct. 3352-66 n.13 (1983). Justice Blackmun asserted that *Griffin* clearly repudiates the notion that state action may be required in some section 1985(3) actions. The specific language referred to reads:

An element of the cause of action established by the first section [of the Act of 1871], now 42 U.S.C. § 1983, is that the deprivation complained of must have been inflicted under color of state law. To read any such requirement into § 1985(3) would thus deprive that section of all its independent effect. (footnote omitted).

*Id.* at 99.

The Supreme Court has always maintained, since its decision in the Civil Rights Cases, 109 U.S. 3 (1883) that state action must be asserted to state a cognizable action under the fourteenth amendment. *See supra* note 6. Thus, if some constitutional source of authority other than the fourteenth amendment could be used to legitimize section 1985(3), the state action requirement could be avoided. This result would enable litigants to reach conspiracies by private persons that if committed by government would violate an individual's civil rights.

10. *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979). In *Novotny*, the respondent, a white male loan officer and member of the board of directors of Great American Federal Savings and Loan Association, sued the Association and its directors alleging that the Association had intentionally denied its women employees equal employment opportunities. Respondent claimed that he was fired because he expressed support for the women employees at a board of directors meeting. He claimed his termination violated Title VII, 42 U.S.C. § 2000e (1976). *Novotny* also claimed damages under section

However, *Collins*, *Griffin* and *Novotny* leave several questions about section 1985(3) unanswered. First, the Court in *Griffin* and *Novotny* stated that there might be other constitutional sources of congressional authority to support enactment of section 1985(3) be-

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1985(3) asserting that he had been injured as a result of a conspiracy to deprive him of equal protection and privileges and immunities under the laws.

The Supreme Court held that although section 1985(3) was remedial, Title VII cannot be used as the source of the substantive right asserted under § 1985(3) because Title VII contains its own remedial provisions. "[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." *Novotny*, 422 U.S. at 376.

The significance of designating § 1985(3) as a remedial as opposed to a substantive statute is that with a substantive statute plaintiffs need only allege a deprivation of those rights guaranteed under § 1985(3), whereas use of a remedial statute requires that plaintiffs identify some independent substantive right the denial of which can be remedied by use of a statute like § 1985(3). Since most substantive statutes also include remedies for their denial, the Court in *Novotny* by classifying § 1985(3) as remedial, drastically limited its potential use as a means of checking private conspiracies to deprive civil rights.

In an earlier article the author questioned the correctness of this conclusion in light of the questionable support provided by the legislative history of the 1871 Act and the fact that only Justice Stevens in his concurring opinion attempted to infer that the legislative history supports the majority's conclusion. See *Novotny*, at 382 n.1. See also Banks, *The Scope of Section 1985(3) "in Light of Great American Savings and Loan v. Novotny: Too Little Too Late?"*, 9 HASTINGS CONST. L.Q. 579, 585-59 (1982). This point merits reconsideration here in light of Justice Blackmun's dissenting opinion in *Scott*, 103 S. Ct. 3352, 3361 (1983). Justice Blackmun, joined by Justices Marshall, Brennan and O'Connor suggests that the Court's statement in *Novotny* as to section 1985(3)'s remedial nature, while accurate in that case's context, does not necessarily preclude an action where there is no violation of an independent substantive legal right. See *Scott*, 103 S. Ct. at 3362, 3365 n.10. Justice Blackmun suggests that section 1985(3) is unique, like traditional conspiracy statutes, which cannot be characterized as either purely substantive or remedial. See *Scott*, 103 S. Ct. at 3365 n.10 citing Note, *Private Conspiracies to Violate Civil Rights: The Scope of Section 1985(3) After Great American Federal Savings and Loan Association v. Novotny*, 61 B.U.L. REV. 1007, 1021 (1981) [hereinafter cited as *Private Conspiracies to Violate Civil Rights*]. It should be noted that the dissenters in *Novotny*, Justices White, Brennan and Marshall, also rejected the majority's conclusion that section 1985(3) was remedial, although Justice White's argument while somewhat ingenious is at times tenuous. See *Novotny*, 442 U.S. at 385. Justice Blackmun's reasoning more logically explains how a statute whose language sounds remedial can have substantive qualities and nevertheless have its use with another substantive statute or right reconciled. This point is discussed at length in Section IV, *infra*.

The Court in *Griffin* set forth the requirements of a conspiracy that would be actionable under § 1985(3). The conspiracy must: (1) involve "racial, or perhaps otherwise class-based, invidiously discriminatory animus" which is the basis of the conspirator's action; and (2) be "aim[ed] at the deprivation of the equal enjoyment of rights secured by the law to all." See *Griffin*, 403 U.S. at 102.

Section 1983 on the other hand by virtue of its broader statutory language has been held to remedy violations of federal statutory as well as constitutional laws. See *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980). In *Thiboutot* the Court concluded that the phrase "and laws" in § 1983 "means what it says," and thus applies to a broad range of laws, including in that instance the Social Security Act. *Id.*

sides the fourteenth and thirteenth amendments.<sup>11</sup> Since the primary obstacle to greater use of section 1985(3) is the question about the source of Congress' authority to regulate discriminatory acts by non-governmental persons, it is important to determine whether some other constitutional basis can be found that gives Congress such authority and whether it can be successfully asserted that the drafters of section 1985(3) intended to rely on some constitutional basis other than the fourteenth amendment. Secondly, the Court in *Novotny* while holding section 1985(3) was remedial in nature did not indicate what substantive rights, if any were secured by the provision.<sup>12</sup>

Therefore, it seems appropriate to examine the post *Novotny* cases to determine the extent and degree to which they clarify the unanswered questions about section 1985(3)'s scope and "constitutional periphery." This article will attempt to do so paying particular attention to the Court's most recent decision involving section 1985(3), *United Brotherhood of Carpenters & Joiners v. Scott*.<sup>13</sup>

## II. THE FOURTEENTH AMENDMENT: A REMEDY FOR PRIVATE DISCRIMINATION?

Since *Novotny*<sup>14</sup> there has been only one reported case that has sought to use some constitutional basis to invoke section 1985(3) remedies other than the thirteenth and fourteenth amendments or the right of interstate travel. That case is *United Brotherhood of Carpenters & Joiners v. Scott*.<sup>15</sup> In *Scott*, a non-unionized construc-

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11. *Griffin*, 403 U.S. at 101-02. The Court in *Griffin* stated that it was not going to determine at the juncture this "constitutionally permissible periphery" of § 1985(3). *Id.*, at 107; *Novotny*, 442 U.S. at 370-78.

12. *Novotny*, 442 U.S. at 375. Nevertheless, there was some discussion by several members of the Court on this point. Justice Powell argued that section 1985(3) was limited to remedying violations of "those fundamental rights derived from the Constitution." 442 U.S. at 379 (Powell, J., concurring), whereas Justice Stevens contended that section 1985(3) was not "intended to provide a remedy for violation of statutory rights—let alone rights created by statutes that had not yet been enacted [at the time of 1871] . . . ." *Id.* at 385 (Stevens, J., concurring). But cf. Justice White's statement that "[Section 1985(3)] encompasses all rights guaranteed in federal statutes as well as those rights guaranteed directly by the Constitution." See *Novotny*, 442 U.S. at 389 n.5 (White, J., dissenting).

13. *United Brotherhood of Carpenters & Joiners v. Scott*, 103 S. Ct. 3352 (1983).

14. See *supra* note 10.

15. *Scott v. Moore*, 461 F. Supp. 224 (E.D. Tex. 1978), *aff'd in part & rev'd in part*, 640 F.2d 708, *reh'g en banc granted*, 656 F.2d 109 (5th Cir. 1981), *aff'd in part & rev'd in part*, 680 F.2d 979 (5th Cir. 1982), *sub nom.* *United Brotherhood of Carpenters & Joiners v. Scott*, 103 S. Ct. 3352 (1983).

tion company, located in a right to work state,<sup>16</sup> hired employees without regard to union membership. Local residents became disturbed over the hiring of non-union employees and ultimately violence erupted.<sup>17</sup> The residents threatened to continue the violence as long as the company employed non-union persons. As a result of the violence and accompanying vandalism, the company defaulted on its contract.<sup>18</sup> The company and two employees beaten during the violence sued both the union and various named individuals asserting that the defendants illegally conspired to deprive plaintiffs of their legally protected rights under section 1985(3). Specifically, the plaintiffs alleged that the defendants conspired to deprive them of equal protection of the laws and equal privileges and immunities under the law when defendants planned and carried out an attack on the company's construction site, assaulting workers and destroying property.<sup>19</sup>

Plaintiffs sought and obtained a temporary injunction restraining defendants from conspiring to commit further acts of violence or intimidation against employees at the construction company's pump station site.<sup>20</sup> The defendants claimed that the district court lacked the power to issue the injunction requested because the Norris-LaGuardia Act<sup>21</sup> deprived "the court of jurisdiction to enjoin labor unions from engaging in conspiratorial conduct."<sup>22</sup> The district court, claiming to apply the four elements set forth in *Griffin*,<sup>23</sup> concluded that there has been a conspiracy to harm the non-unionized employees of a non-unionized company and since the conspiracy violated both state civil and criminal laws, section

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16. Texas law prohibits so called closed shops where union membership is a condition of hiring and/or continued employment.

17. *Scott*, 103 S. Ct. at 3355.

18. *Id.* The company, A.A. Cross Construction Company had contracted with the Department of the Army to construct a pumping station and gravity drainage structure on the Taylor Bayou Hurricane Levee near Port Arthur, Texas. *Id.*

19. *Scott v. Moore*, 680 F.2d 979, 982 (5th Cir. 1982).

20. *Id.* at 984.

21. 29 U.S.C. § 101 (1976).

22. *Scott v. Moore*, 680 F.2d at 985.

23. The Court in *Griffin* ruled that section 1985(3) plaintiffs must plead and prove four elements: (1) existence of a conspiracy; (2) the purpose of the conspiracy was to deprive plaintiffs, either directly or indirectly, as a class of the equal protection of the laws or equal privileges and immunities under the law; (3) an act in furtherance of the conspiracy; and (4) resultant personal or property injury or a deprivation of any right or privilege of a citizen of the United States. 403 U.S. at 102-03.

1985(3) afforded a proper remedy.<sup>24</sup> In so ruling the district court found that the class of non-union employees and employers fell within those protected classes covered by section 1985(3).<sup>25</sup> Further, the court found that the plaintiffs' constitutional right of association had been violated.<sup>26</sup>

On appeal, the Court of Appeals for the Fifth Circuit, sitting *en banc*, affirmed the judgment of the district court holding that the purpose of the conspiracy was to deprive plaintiffs of their first

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24. *Scott v. Moore*, 461 F. Supp. 224, 228 (E.D. Tex. 1978). The district court also relied on *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (*en banc*) which held that a private person could deprive another of equal protection of the laws only when the defendant acted in violation of a state or federal provision. *Id.* at 933. Thus, the district court found that § 1985(3) was being invoked to remedy a violation of the first amendment guarantee of freedom of association. Although this amendment normally applies only against governments, it was applied to the private individuals in *Scott* because the defendants' actions violated state and federal laws thus constituting an "independent illegality" resulting in a deprivation of plaintiffs rights of equal protection of the law. *Id.* at 228.

The doctrine of "independent illegality" developed from *McLellan* where the court in denying relief under section 1985(3) to a plaintiff discharged from employment because he filed a petition in voluntary bankruptcy stated that a private individual could deprive another of equal protection of the laws only by an illegal action. *McLellan*, 545 F.2d at 925. In *Scott* the illegal acts were the physical assaults and destruction of property, and criminal acts under state law. Thus the defendants' conduct was unlawful and independent of the section 1985(3) violation (freedom of association). See *Scott v. Moore*, 680 F.2d at 982-88.

25. See *Scott v. Moore*, 461 F. Supp. at 229-30. Section 1985(3) has not been limited to racial discrimination, however, courts require that the plaintiff be victimized as a member of a particular class rather than as an individual. See, e.g., *Crabtree v. Brennan*, 466 F.2d 480, 481 (6th Cir. 1972) (no protection for individual teacher whose contract was not renewed); *Doyle v. Unicare Health Servs.*, 399 F. Supp. 69, 75 (N.D. Ill. 1975), *aff'd without opinion*, 541 F.2d 283 (7th Cir. 1976) (health care institution did not discriminate on a class basis against mentally retarded patient); *Schoonfield v. Mayor & City Council*, 399 F. Supp. 1068, 1085 (D. Md. 1975), *aff'd without opinion*, 544 F.2d 515 (4th Cir. 1976) (no class-based discrimination involved in firing of jail warden).

Lower courts have found the following classes protected by section 1985(3): (1) *religious groups*, *Action v. Gannon*, 450 F.2d 1227-32 (8th Cir. 1971) (white catholics); *Baer v. Baer*, 450 F. Supp. 481, 490-91 (N.D. Cal. 1978) (members of the Unification Church); and (2) *political and/or social protest groups*, *Westberry v. Gilman Paper Co.*, 507 F.2d 206, 215, *vacated as moot*, 507 F.2d 216 (5th Cir. 1976) (*per curiam*) (environmentalists); *Glasson v. City of Louisville*, 518 F.2d 899, 911 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975) (political protestors); *Cameron v. Brock*, 473 F.2d 608, 610 (6th Cir. 1973) (supporters of a political candidate); *Richardson v. Miller*, 446 F.2d 1247, 1249 (3d Cir. 1971) (white civil rights supporters); *Local 1 (ACA), Broadcast Employees of the Int'l Bhd. of Teamsters v. International Bhd. of Teamsters*, 419 F. Supp. 263, 266-77 (E.D. Pa. 1976) (members of a local union); *Brown v. Villanova Univ.*, 378 F. Supp. 342, 344-45 (E.D. Pa. 1974) (student protest group); *Franceschina v. Hasle*, 331 F. Supp. 833, 838-39 (S.D. Ind. 1972) (migrant farm workers); *Folqueras v. Morgan*, 346 F. Supp. 615, 625 (W.D. Mich. 1971) (migrant farm organizers).

26. *Scott v. Moore*, 461 F. Supp. at 230. "this Court believes that men and women have the right to associate or not to associate with any group or class of individuals, and concomitantly, to be free of violent acts against their bodies and property because of such association or non-association." *Id.*

amendment right not to associate with a union.<sup>27</sup> The court of appeals rejected the argument that absent some proof of state action there could be no infringement of first amendment rights.<sup>28</sup> The court of appeals went even further holding that section 1985(3) reached conspiracies motivated by either political or economic bias, finding congressional authority to regulate such behavior in the Commerce Clause.<sup>29</sup>

The United States Supreme Court granted certiorari<sup>30</sup> and reversed holding in a 5 to 4 decision that section 1985(3), absent some proof of state action, does not prohibit private conspiracies to abridge the right of association guaranteed by the first amendment.<sup>31</sup> The majority opinion, written by Justice White, author of the dissenting opinion in *Novotny*, while conceding that the Commerce Clause gives Congress the authority to regulate private conspiracies, concluded that since section 1985(3) is remedial and the substantive right invoked—the first amendment—restrains only governmental action, reliance on the Commerce Clause is inappropriate here.<sup>32</sup> Justice Blackmun, writing for the four dissenting justices, admitted that under the Commerce Clause Congress has the power to ban private conspiracies, but he found it unnecessary to address whether the Commerce Clause could be used as a constitutional basis for section 1985(3) suits.<sup>33</sup> Instead, Justice Blackmun's dissent is based on the proposition that the drafters of section 1985(3) believed that the prohibitions of the fourteenth amendment were intended to apply

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27. *Scott v. Moore*, 680 F.2d 979, 1004 (5th Cir. 1982). The court did set aside four judgments rendered without proof against eight of the eleven unions concluding that there was insufficient evidence of participation by them in the conspiracy. *Id.*

28. *Id.* at 988-89. *But see Scott v. Moore*, 680 F.2d at 1004 (Rubin and Williams, JJ., joined by Brown, Vance, Kravitch, Randle, Tate and Johnson, JJ., dissenting); *Id.* at 1022 (Anderson, J., dissenting); *Id.* (Garwood, J., dissenting).

29. *Id.* at 990-96.

30. *United Brotherhood of Carpenters & Joiners v. Scott*, 103 S. Ct. 3352 (1982).

31. *See supra* note 6 and accompanying text. The Court also held that section 1985(3) does not reach conspiracies "motivated by economic or commercial animus." *Id.* at 3360. The Court in explaining this statement referred to anti-union, anti non-union and anti-employer bias. *Id.* at 3361.

It should be noted that Justice White in his dissenting opinion in *Novotny* suggested that the commerce clause could provide a constitutional basis for a § 1985(3) action to remedy discriminatory conspiracies to deny Title VII rights. 442 U.S. at 396 n.20.

32. *Scott*, 103 S. Ct. at 3358.

33. *Scott*, 103 S. Ct. at 3366 n.14. (Blackmun, J., joined by Brennan, Marshall and O'Connor, JJ., dissenting).

against both public and private actors<sup>34</sup> and accordingly, since the first amendment guarantee of freedom of association has been incorporated into the fourteenth amendment,<sup>35</sup> no state action is necessary in a section 1985(3) suit.<sup>36</sup>

The Court's reluctance to use the Commerce Clause as one of the constitutional bases for section 1985(3) is understandable. Whereas the public accommodations section of the 1964 Civil Rights Act<sup>37</sup> evidenced a clear legislative intent that the Commerce Clause should be the source of congressional authority to regulate the private conduct covered by the Act.<sup>38</sup> In 1871 when section 1985(3) was enacted, the Commerce Clause was not deemed to be nearly as potent and extensive as it had become by 1964.<sup>39</sup> While this fact in itself should not be dispositive of the issue, it also seems fairly clear that the drafters of section 1985(3) did not rely on the Commerce Clause as a basis for their exercise of authority.<sup>40</sup> Thus, the majority

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34. *Id.* at 3363.

35. *Fiske v. Kansas*, 274 U.S. 380 (1927).

36. *Scott*, 103 S. Ct. at 3362-66. Properly interpreted, § 1985(3) prohibits private conspiracies designed to interfere with a person's equal enjoyment and exercise of their civil rights even if those conspiracies have no state involvement of any kind. *Id.* at 3366.

37. *E.g.*, 42 U.S.C. § 2000a—2000a(6). The Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (July 2, 1964), was the first modern comprehensive civil rights law covering, among other things, public accommodations, voting, school desegregation and discrimination in employment. This Act was followed by the 1965 Voting Rights Act, 42 U.S.C. § 1973 and the 1968 Civil Rights Act, 42 U.S.C. § 3601 (1976) (fair housing, indian rights, civil obedience and voting).

38. *See*, *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257-58 (1964).

39. *See, e.g.*, the Sherman Anti-Trust Act, 15 U.S.C. § 1 (1973) enacted in 1890 pursuant to Congress' power to regulate commerce, was a piece of economic legislation. As the Court's decision in *California v. Central Pacific*, 127 U.S. 1 (1888) and *Roberts v. Northern Pacific*, 158 U.S. 1 (1894) indicate, the regulation contemplated during the late 1800's, invoking Congress' power to regulate commerce was economic and not politically or racially based. *See also Scott v. Moore*, 680 F.2d at 1019-20 (Rubin, J., dissenting).

40. Judge Clark, Chief Judge of the Court of Appeals for the Fifth Circuit in his majority opinion in *Scott* argued that the original drafters of § 1985(3) implied that an alternative source of Congressional authority for the section may be found in the commerce clause. *See* 680 F.2d at 997. However, this position is weak since Judge Clark could find little legislative history to support this proposition. *See, e.g.*, CONG. GLOBE, 42d Cong. 1st sess. 81 (1871). Senator Bingham states: "It was always competent for the United States by law to enforce every affirmative grant of power." (cited in *Scott* by Judge Clark in support of his proposition). Circuit Judges Rubin and Williams in their dissent in *Scott* point out that the Ku Klux Act "does not invoke the commerce clause, nor does it distinguish between conspiracies that affect interstate commerce and those whose aim is solely intrastate." *Scott v. Moore*, 680 F.2d at 1019. The dissenters go on to state that:

[t]he debates of the 1871 Congress focused on the constitutional power of Congress under the Thirteenth, Fourteenth, and Fifteenth Amendments . . . . The Forty-Sec-

faced with a century of case law requiring state action in cases relying on the fourteenth amendment<sup>41</sup> logically concluded that, based on the facts in *Scott*, state action was required.<sup>42</sup>

What the majority fails to do, as Justice Blackmun points out, is to reconcile this conclusion with their statement in *Griffin* that in light of the state action requirement of section 1985(3)'s companion provision, section 1983, imposing a similar requirement on section 1985(3) would make that section redundant and superfluous.<sup>43</sup> Therefore, as the dissenters fully recognize, the Court must re-examine not merely the intent of the drafters of section 1985(3), but also the Forty-Second Congress' view of its constitutional authority in 1871 to reach private conduct under the fourteenth amendment.<sup>44</sup> Thus, it appears that the question the Court managed to avoid in *Griffin*, namely whether the fourteenth amendment can ever be a basis for legislation regulating private discrimination, begs to be squarely addressed in order to reconcile the requirements of section 1985(3) and 1983.

In at least one case, *United States v. Guest*,<sup>45</sup> six justices believed

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ond Congress, accustomed to a narrow construction of the Commerce Clause and seeking to reach that denied equality whether or not interstate commerce was implicated, never considered the Commerce Clause as its authority. (footnotes omitted).

*Scott v. Moore*, 680 F.2d at 1029-30.

41. See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883) which held the public accommodations provision of the Civil Rights Act of 1875 unconstitutional because the fourteenth amendment does not apply to the wrongful acts of private individuals in the absence of some state support. The Supreme Court continues to cite the *Civil Rights Cases* for the proposition that the fourteenth amendment's self-executing impact extends only to state action and consequently does not reach private discrimination, even though notions of what constitutes state action have expanded considerably since 1883. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (holding a state initiative prohibiting the regulation by government of the sale or rental of real property invalid because it "encouraged" private discrimination); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (holding that exclusion based solely on race from a restaurant located in an off-street automobile parking building owned and operated by an agency of the state but leased to private persons constituted significant state contacts to be deemed state action); *Marsh v. Alabama*, 326 U.S. 501 (1946) (private enterprises which perform essentially "public functions" will be treated as a state for the purposes of applying constitutional guarantees).

42. *Scott*, 103 S. Ct. at 3358. The Court based its conclusion on the fact that the right asserted in *Scott*, the first amendment, only prohibits governmental action and thus to make out a case under section 1985(3) it was necessary to demonstrate some state involvement in the conspiracy. *Id.*

43. 103 S. Ct. at 3362 citing *Griffin*, 403 U.S. 563 (1968).

44. *Id.* 103 S. Ct. at 3362 n.3.

45. *United States v. Guest*, 383 U.S. 745 (1966). Defendants, private citizens, were indicted under 18 U.S.C. § 241, the criminal counterpart to section 1985(3), for conspiring to

in varying degrees that section five of the fourteenth amendment could be used to regulate private discrimination in the absence of state involvement.<sup>46</sup> However, Justice Stevens, in his concurring opinion in *Novotny*, suggested that the fourteenth amendment requires state presence, although the degree of state involvement is something less than traditional state action and does not have to be part of the conspiracy itself.<sup>47</sup> Prior to *Scott* the circuit courts faced with this issue were divided over the state action requirement, the Seventh Circuit adopting Justice Stevens' position,<sup>48</sup> the Fourth Circuit requiring traditional state action;<sup>49</sup> and the Fifth and Eighth Circuits reading *Griffin* as construing section 1985(3) to reach both the public and private deprivations of constitutional rights.<sup>50</sup> Following the Court's decision in *Scott*, the continued viability of the

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deprive black citizens of the free exercise and enjoyment of rights secured by the Constitution and laws of the United States.

46. *Id.* at 755-56, 761-62 (Clark, J., joined by Black and Fortas, JJ., concurring); 777-81 (Brennan, J., joined by Warren, C.J., and Douglas, J., concurring in part and dissenting in part); see also *United States v. Price*, 383 U.S. 787, 795-96 (1966); *United States v. Williams*, 341 U.S. 70 (1951).

47. *Novotny*, 442 U.S. 384-85 (Stevens, J., concurring). Note also that Justice Stevens conceded that no state involvement is required for private conspiracies to deprive individuals of either their right to travel or their right to be free of badges and incidents of slavery, but argued that recovery for equal protection violations occurs only when state action is present. *Id.* at 383-85. For a discussion of what Justice Stevens meant by state action see *infra* notes 55-58 and accompanying text.

48. *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975); *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972). The opinions in both of these cases were written by Justice Stevens, then a member of the Court of Appeals for the Seventh Circuit; *Schneider v. Bahler*, slip op. No. 18-310 (N.D. Ind. June 2, 1983) adamantly reaffirmed *Dombrowski* and cited Justice Stevens' concurrence in *Novotny* as support for the state action requirement where the fourteenth amendment was involved.

49. *Doski v. M. Goldseker Co.*, 539 F.2d 1326 (4th Cir. 1976); *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974). More recently see *Nutt v. Duke Precision Dental & Orthodontic Lab*, 698 F.2d 676, 680 (4th Cir. 1983), reaffirming *Doski*. For a discussion of state action, see *supra* note 41.

50. The Eighth Circuit holds that the fourteenth amendment protects certain rights from both state and private infringements. *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (en banc) (first amendment freedom of religion); *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975) (right to vote in state or tribal elections). Prior to *Scott* the Fifth Circuit, based upon its decision in *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc) said the conspiracy alleged under § 1985(3) must be "to deprive another of the enjoyment of legal rights by independently unlawful conduct." 545 F.2d at 927. *McLellan* cited *United States v. Harris*, 106 U.S. 629 (1883) as authority for the proposition that a private party can deprive another of equal protection of the laws by committing some civil or criminal offense against the party seeking relief under § 1985(3). 106 U.S. at 295. The Fifth Circuit felt that such a construction "limited the potentially boundless reach of [§ 1985(3)] . . . and provided meaning to the concept of private impairment of constitutional rights." *Scott v. Moore*, 640 F.2d 708, 718 (5th Cir. 1981).

decisions on section 1985(3) from the Eighth and Fifth Circuits are now in question.

The Court's decision in *Scott* is consistent with Justice Stevens' position in *Novotny* and the position taken by the other lower federal courts since *Novotny*. With the exception of the Fifth and Eighth Circuits, the remainder require some form of state action for invocation of the first and/or fourteenth amendments.<sup>51</sup> The problems these courts faced centered around explaining what constitutes state action. Arguably the majority in *Scott* appears to adopt the Seventh Circuit's more relaxed position on the state action question citing *Dombrowski v. Dowling*<sup>52</sup> and *Murphy v. Mount Carmel High School*.<sup>53</sup> Whether this means that the majority in *Scott* has also

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51. See, e.g., *Rice v. New England College*, 676 F.2d 9 (1st Cir. 1982) (a sex discrimination suit in which the court in dismissing held that the fourteenth amendment requires that some state action and sex discrimination suits could not be based on the thirteenth amendment); *Weise v. Syracuse Univ.*, 553 F. Supp. 675 (N.D.N.Y. 1982) (court held that if section 1985(3) action is based upon the fourteenth amendment, then there must be state action. The court did not, however, define state action). Cf. *People v. Cornwell Co.*, 695 F.2d 34 (2d Cir. 1982) the Court of Appeals citing *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) held that where a private conspiracy hindered the state "from carrying out its chosen means of securing substantive rights" this constitutes a fourteenth amendment violation and gave the state a cause of action under section 1985(3). 676 F.2d at 41-42. The Third Circuit in *Dogin v. Beralem Township*, 616 F.2d 680 (3d Cir. 1980) implied a state action requirement for 1985(3) claims invoking the fourteenth amendment. A district court in *Daley v. Saint Agnes Hospital, Inc.*, 490 F. Supp. 1309 (E.D. Pa. 1980), in a case factually similar to *Novotny*, held on the issue of remedying private conspiracies invoking the fourteenth amendment that "it would be unsound for a federal court absent clear guidance from the Supreme Court, to decide this complex question by holding that § 5 of the Fourteenth Amendment empowers Congress to reach purely private conspiracies to violate First Amendment rights." 490 F. Supp. at 1319. In *Nash v. City of Oakwood, Ohio*, 94 F.R.D. 83 (S.D. Ohio 1982) the court avoided a direct ruling on state action since § 1983 was invoked. Cf. *Taylor v. Gilmartin*, 686 F.2d 1346 (10th Cir. 1982) an adult plaintiff sued religious deprogrammers and sought recovery under section 1985(3) claiming denial of the fourteenth amendment guarantee to equal protection, due process, and freedom of religion and association through the wrongful use of the sheriff's office in Oklahoma. The court of appeals found that there was "state action", thus logically implying a state action requirement because the private parties conspired to cause the sheriff's office to violate the aforementioned constitutionally protected rights. The appellate court held that § 5 of the fourteenth amendment can be a congressional source of power to remedy actions by private parties to induce the state to deprive individuals of first or fourteenth amendment rights. 686 F.2d at 1348-50.

52. *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972). In *Dombrowski* a white criminal lawyer was denied rental space in an office building because of a belief that a large number of his clients would be black. The Court of Appeals for the Seventh Circuit held that discrimination by the landlord did not violate one's civil rights absent a showing of state involvement. *Id.* at 196.

53. *Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976). In *Mt. Carmel* a tenured teacher at a privately operated high school was dismissed for failing to adhere to the school's recently enacted dress code. The Court of Appeals for the Seventh Circuit held that

accepted the Seventh Circuit's definition of state action is unclear. The dissenting opinion in *Scott* suggests that the majority has.<sup>54</sup>

In the Seventh Circuit, the state action required in a section 1985(3) case goes to the right asserted. For example, in *Cohen v. Illinois Institute of Technology*,<sup>55</sup> the court in an opinion written by Justice Stevens, then a member of that court, said "there is no statutory requirement for state participation in or support of the conduct of the individual conspirators proscribed by section 1985(3). There is, however, a requirement that the conspiracy deprive plaintiffs of a federally protected right."<sup>56</sup> The court went on to say that "[i]t is clear that a private conspiracy to cause plaintiff to receive unequal treatment from the state, or a state agency, would violate section 1985(3)."<sup>57</sup> In *Dombrowski*, the court, in another Stevens authored opinion, wrote that the state involvement required under section 1985(3) goes to the "nature of the plaintiff's rights" being asserted since only some rights are protected from state infringement.<sup>58</sup> Thus, if the Supreme Court fully adopts the *Dombrowski* rationale, section 1985(3) actions invoking fourteenth amendment rights would have to show some state involvement, but this involvement is not as stringent as traditional notions of state action. However, this approach while preferable to the more stringent traditional state action requirement, still does not eliminate the overlap between sections 1985(3) and 1983.

The other alternative suggested by the dissenters in *Scott*, namely a more liberal reading of the fourteenth amendment to cover private conspiracies without any state involvement, would probably create more problems for the Court than are created by a relaxation

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§ 1985(3) cannot be used to remedy a purely private conspiracy to interfere with freedom of expression without state involvement. *Id.* at 1192.

54. *Scott*, 103 S. Ct. at 3361 n.2. For the Seventh Circuit's definition of state action see *infra* notes 55-58 and accompanying text.

55. *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975).

56. *Id.* at 829-30.

57. *Id.* at 828 n.27 (citing *United States v. Guest*, 383 U.S. 745 (1966)).

58. *Dombrowski*, 459 F.2d at 194 (1972). The court in *Dombrowski* indicated that: The breadth of the statute's [§ 1985(3)] coverage is yet to be determined, but three categories of protected rights have been plainly identified. *Griffin* gives express recognition to a black citizen's Thirteenth Amendment Rights and to his federal right to travel interstate; the title of the statute expressly identifies the third category, namely rights protected by the Fourteenth Amendment. (Footnotes omitted).

*Id.*

of the state action requirements.<sup>59</sup> The dissenters' position requires a reinterpretation of the fourteenth amendment<sup>60</sup> which, even if limited to instances where a denial of equal protection or equal privileges and immunities is claimed, would generate a wealth of unwanted litigation for the Court.<sup>61</sup> Therefore, the Court's decision in *Scott* suggests that a bare majority favor some relaxation of state action requirements in section 1985(3) actions invoking fourteenth amendment rights rather than risk any reinterpretation of that amendment's coverage. It is doubtful that it can do so satisfactorily without reconciling the rapidly fading distinction between sections 1983 and 1985(3).

### III. THE CONSTITUTIONALLY PERMISSIBLE PERIPHERY OF SECTION 1985(3)

Of all of the possible constitutional sources for Congress' authority to enact section 1985(3), reliance on the commerce clause would give the statute its broadest reach since it is well settled that Congress can regulate private discriminatory acts under that clause.<sup>62</sup> However, as mentioned earlier,<sup>63</sup> to do this a majority of the Court would have to be willing to ignore both the original intent of the drafters of section 1985(3) and the Forty-Second Congress'

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59. *Scott*, 103 S. Ct. at 3362-65. For example, the class protected under the fourteenth amendment would include all persons discriminated against, as a class, in such a way as to deny equal protection of the laws. Such an interpretation would greatly expand the classes of persons covered by section 1985(3). See *supra* note 25. The Court had a similar experience with section 1983. For a discussion of the Court's dissatisfaction with section 1983 actions, see generally Whitman, *Constitutional Torts*, *supra* note 5. Increasing the classes of persons entitled to use section 1985(3) to remedy civil rights violations would no doubt result in a flood of litigation further clogging an already over crowded federal court docket.

60. Justice Blackmun acknowledges that his contention that state action is not required is inconsistent with "current interpretations of the First or Fourteenth Amendments." *Scott*, 103 S. Ct., at 3362 n.3. (Blackmun, J., dissenting). As indicated earlier, the Supreme Court has consistently since the *Civil Rights Cases* held that state action was required to state a cause of action under the fourteenth amendment. See *supra* note 41 and accompanying text. Justice Blackmun contends that the Court should follow the intent of the drafters of section 1985(3) because they believed that Congress could constitutionally legislate against private discrimination. *Scott*, 103 S. Ct. at 3362-65.

61. See *supra* note 59.

62. See *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257-58 (1964); *Great American Federal Savings and Loan Assoc. v. Novotny*, 442 U.S. 366, 372 (1979).

63. See *supra* note 39-40.

understanding of the scope of the commerce clause.<sup>64</sup> Reliance on the commerce clause approach would be a more radical departure from traditional notions of statutory interpretation than relaxation of state action requirements under the fourteenth amendment because of the Forty-Second Congress' view of its commerce power.<sup>65</sup> But there is judicial precedent for such reinterpretation.<sup>66</sup>

64. The drafters', as Justice Blackmun suggests in his dissent in *Scott*, intended to assert the fourteenth amendment as Congress' constitutional basis for enacting section 1985(3). See *Scott*, 103 S. Ct. at 3362-65 (Blackmun, J., dissenting). Justice Blackmun cites the following in support of this contention: CONG. GLOBE, 42d Cong., 1st Sess., App. 153 (April 4, 1871) (remarks of Rep. Garfield); *Id.* at 486 (April 5, 1871) (remarks of Rep. Cook); See also *Comment, A Construction of Section 1985(c), supra* note 4, at 412-420 (1979).

65. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 251 (1964). But cf. language in this same case that suggests that Congress' power to regulate under the Commerce Clause was as broad in 1871 as it is today. *Id.* 253-261. Thus, Justice Blackmun correctly notes in *Scott* that the Court is confusing statutory construction with constitutional interpretation. 103 S. Ct. at 3362 n.3.

[T]he two questions are separate. Determining the scope of § 1985(3) is a matter of statutory construction and has nothing to do with current interpretations of the First or Fourteenth Amendments. The Forty-Second Congress' view of its constitutional authority in 1871 to reach private conduct under the Fourteenth Amendment is relevant in interpreting the reach of § 1985(3).

*Id.*

66. E.g., the Court in the *Civil Rights Cases* originally adopted a very narrow view of Congress' authority under the thirteenth amendment to reach private discrimination. The Court while concluding that the thirteenth amendment gave Congress the authority to reach private conduct, went on to state that the amendment only prohibited imposition of "badges and incidents of slavery." 109 U.S. at 20-25 (1883). As one commentator noted, the effect of this decision was to preclude the application of § 1985(3) to private actions unrelated to slavery. See, *Private Conspiracies To Violate Civil Rights, supra* note 10, at 1008. This view changed substantially a century later when the Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) concluded that Congress had the power under the thirteenth amendment "to determine what are badges and the incidents of slavery, and the authority to translate that determination into effective legislation," even where it reached private discriminatory conduct.

In *Jones* petitioners, relying in part on 42 U.S.C. § 1982 sued because respondents had refused to sell them a home based solely on race. The Court held "that § 1982 bars all racial discrimination, private as well as public, in the sale or rental of property and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." *Jones*, 392 U.S. at 413. The Court "distinguished" the Civil Rights Case *supra* note 6 saying that whatever the merits of the majority's rationale in the case, the enactment of Title II of the Civil Rights Acts of 1964 *supra* note 37 and the decisions in *Heart of Atlanta* and *McClung*, *supra* note 38, made the matter academic. See *Jones*, 392 U.S. at 441 n.78. Further, the Court overruled that portion of *Hodges v. United States*, 203 U.S. 1 (1906) which said that Congress' authority under the thirteenth amendment was limited to reaching conduct that actually enslaves. See 203 U.S. at 1.

The Court in *Guest* has already established the ground work for a similar transfer of authority with respect to § 5 of the fourteenth amendment.

I acknowledge that some of the decisions of this Court, most notably an aspect of the Civil Rights Cases (citation omitted) . . . have declared that Congress' power under § 5 [of the Fourteenth Amendment] is confined to the adoption of 'appropriate legislation for correcting the effects of . . . prohibited State laws and State acts . . . ' and a majority of the Court today rejects—this interpretation of § 5.

The other constitutional bases for section 1985(3) cited by the Court have built in limitations.<sup>67</sup> For example, actions using the thirteenth amendment are limited to (1) racially motivated acts that (2) constitute badges and incidents of slavery.<sup>68</sup> Thus, the thirteenth amendment places severe limitations both on the persons and rights covered by section 1985(3). It could not, for example be asserted to remedy conspiracies aimed at gender-based discrimination.

Although the Court in *Griffin* acknowledged that certain "rights and privileges of national citizenship [may be] assertable against private as well as governmental interferences . . .,"<sup>69</sup> the Court has never clearly delineated these rights or determined which also apply against private interferences.<sup>70</sup> Further, the thirteenth amendment does not cover conspiracies aimed at aliens. Therefore, this constitutional basis of authority is much more limited than reliance on the fourteenth amendment using a relaxed state action standard.

Nevertheless, it appears that the Court does not want to explore the possible use of the commerce clause as a constitutional basis for section 1985(3). Both the majority and the dissenters prefer to rely on other constitutional bases which are more consistent with the drafter's original intent, for section 1985(3) (thirteenth and fourteenth amendments and right to travel). However, the Court acknowledges the commerce power as a valid means of regulating private discrimination.<sup>71</sup> This preference appears consistent with the

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*See Guest*, 383 U.S. at 782-83. (Brennan, J., concurring in part and dissenting in part). Justice Brennan goes on to say: "Viewed in its proper perspective, § 5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens." *See Guest*, 383 U.S. at 784.

67. *See supra* note 58 for the constitutional bases for § 1985(3) cited by the Court.

68. *Jones v. Mayer*, 392 U.S. 409, 439-44 (1968); *Civil Rights Cases*, 109 U.S. 3, 20-25 (1883).

69. 403 U.S. at 105.

70. *See Fiallo v. Bell*, 430 U.S. 787 (1977); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Mathews v. Diaz*, 426 U.S. 67 (1970); *Twining v. New Jersey*, 211 U.S. 78 (1908).

71. *See Scott*, 103 S. Ct. at 3358, 3366 n.14.

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.

*Id.* at 3359. *But cf.*

In my view Congress intended to provide a federal remedy for all classes that seek to exercise their legal rights in unprotected circumstances similar to those of the victims of Klan violence . . . . As Representative Garfield stated in the debates, the chief

*Scott* view that section 1985(3) was enacted to protect political rights as opposed to the broader notion of civil rights.<sup>72</sup>

#### IV. THE NATURE OF SECTION 1985(3), NEITHER REMEDIAL NOR SUBSTANTIVE

Discussions about the constitutional periphery of section 1985(3) are mere academic exercises so long as the Court continues to consider it remedial. The characterization in *Novotny* of section 1985(3) as remedial is without question the greatest limitation that the Court has placed on the statute.<sup>73</sup> Requiring plaintiffs to invoke some independent right whose denial section 1985(3) is suppose to remedy practically emasculates the provision since most federal statutory rights have their own exclusive administrative and judicial remedies and very few constitutional provisions apply against private persons. Thus, the arguments over section 1985(3)'s scope are not as crucial to its future use as the question of its nature.

In that regard, *Scott* provides some hope since the four dissenters, Blackmun, Brennan, Marshall and O'Connor suggest in a footnote that section 1985(3) can not be characterized as either remedial or substantive, but must be treated like most conspiracy statutes.<sup>74</sup> There is some legislative history to support this notion. During the 1871 congressional debates Senator Edmunds, the senate manager of the bill that subsequently became known as the Ku Klux Act<sup>75</sup> said of section 2 (now section 1985(3)):

The second section . . . only provides for the punishment of any act done in pursuance of the conspiracy, but only a conspiracy to deprive citizens of the United States, in the various ways named, of the rights which the Constitution *and laws* of the United States

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danger was 'a systematic maladministration of [the laws], or a neglect or refusal to enforce their provisions.' (citations omitted).

*Id.*, at 3367 (Blackmun, J., dissenting).

Note that the majority opinion unlike Justice Blackmun's dissenting opinion cited no legislative history to support its narrower view for the purpose for the enactment of section 1985(3).

72. See *supra* note 71.

73. 442 U.S. at 376.

74. 103 S. Ct. at 3365 n.10 (Blackmun, J., dissenting). For a discussion on how conspiracy statutes operate, see *infra* notes 77 and 78 and accompanying text.

75. The Sixth Circuit Court of Appeals, in *Browden v. Tipton*, 630 F.2d 1149, 1151-52 (6th Cir. 1980) and the Court in *Scott*, 103 S. Ct. at 3360 refer to Senator Edmunds as the floor manager of the bill. George Edmunds, a Republican from Vermont, was one of the most outstanding radical New England constitutionalists.

made pursuant to it give to them; that is to say . . . conspiracies to deprive people of the equal protection of the laws, *whatever those laws may be* . . . It punishes the conspiracy alone, leaving the States, if they see fit, to punish the acts and crimes which may be committed in pursuance of the conspiracy.<sup>76</sup>

The conclusion can be drawn from these comments that Congress intended to create a separate and independent cause of action that would not preclude existing state remedies. This conclusion is re-enforced by the legal understanding of conspiracy laws in 1871. At that time, civil conspiracy was virtually unknown, formal recognition of such an action did not occur until the early 1900's.<sup>77</sup> So conspiracy in the 1870's was criminal and viewed as a separate, substantive crime that did not merge with any crime perpetrated by the conspirators.<sup>78</sup> Thus, Congress probably believed a civil conspiracy law would be an effective way the federal government could protect civil rights without overlapping or surplanting state authority since civil conspiracy at the state level was unknown in 1871.

Footnote ten in the dissenting opinion in *Scott*<sup>79</sup> is a positive sign when read with Justice White's dissenting opinion,<sup>80</sup> because there appear to be five members on the Court who are willing to reject the limiting characterization of section 1985(3) as a purely re-

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76. CONG. GLOBE, 42 Cong., 1st Sess. 568 (1871) (remarks of Senator Edmunds) (emphasis added).

77. See, Burdick, *The Tort of Conspiracy*, 8 COLUM. L. REV. 117, 119 (1908) citing BIGELOW ON TORTS 24 (8th ed. 1907); see also Note, 22 L.Q. REV. 117 (1906) and Charlesworth, *Conspiracy as a Ground of Liability in Tort*, 36 L.Q. REV. 38 (1920). The tort of conspiracy began to be used by English judges during the latter part of the nineteenth century as a tool to oppress and harass labor groups. Comment, *Reason by Analogy: Agency Principles Justify Conspirator's Liability*, [hereinafter cited as Comment], 12 STAN. L. REV. 476, 477 n.3 (1960); Sayre, *Labor and the Courts*, [hereinafter cited as Sayre], 39 YALE L.J. 682, 686 (1930); COLE, THE BRITISH WORKING CLASS MOVEMENT, 292-96 (1948 ed.); WEBB AND WEBB, HISTORY OF TRADE UNIONISM, 597-604 (1965 ed.). Civil conspiracy was originally limited to instances where persons conspired to abuse legal process; see Comment, *supra* at 477. It has been expanded today to include almost every conspiracy having an illegal object or pursuing a legal object by illegal means. *Id.* see Sayre, *supra* at 684. Some states had a writ of conspiracy, but it was limited to providing a statutory remedy for malicious prosecution. Burdick, *Conspiracy as a Crime, and as a Tort*, 7 COLUM. L. REV. 229, 232 (1907) [hereinafter cited as *Conspiracy as a Crime*]; see also Mott v. Danford, 6 Watts 304 (Pa., 1837). Further, once civil conspiracy was recognized as an action, it was assumed to be substantive in nature. *Conspiracy as a Crime, supra* at 229.

78. *Conspiracy as a Crime, supra* note 77 at 229.

79. See *supra* note 74 and accompanying text.

80. *Novotny*, 442 U.S. at 388-91.

medial statute.<sup>81</sup> Removing the remedial label, however, would not make section 1985(3) a general tort conspiracy statute. If treated as a conspiracy statute there would still be sufficient pre-existing limitations on section 1985(3) to avoid an unwarranted intrusion into state affairs. For example, plaintiffs would still have to demonstrate that the conspirators have some discriminatory class-based animus and that the aim of the conspiracy was to deprive a person or class of persons of equal protection or equal privileges and immunities of the law.<sup>82</sup> Thus, if the Court is truly committed to interpreting section 1985(3) consistent with the intent and understanding of the 1871 Congress, it must first remove the remedial label.

### V. THE SCOPE OF SECTION 1985(3)

As mentioned earlier, none of the Court's decisions interpreting section 1985(3) has resolved the question of its scope. The Court in *Griffin* was silent whereas the *Novotny* court was divided.<sup>83</sup>

Following *Novotny*, many courts citing that decision refused to allow section 1985(3) to be used to remedy violations of a federal statutory right.<sup>84</sup> There were, however, some post-*Novotny* decisions that refused to extend the Court's reasoning to other reconstruction era statutes.<sup>85</sup> Finally, some courts suggested that the statute could

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81. Justice Blackmun and the three justices who joined in his dissent in *Scott*, Brennan, Marshall and O'Connor, plus Justice White based on his dissent in *Novotny*, *supra* note 80.

82. The basic requirements of a section 1985(3) action are set forth in *Griffin*, *supra* note 23.

83. *Novotny*, 442 U.S. at 379 (Powell, J., concurring). *Id.* at 381-85 (Stevens, J., concurring) both of these justices favor limiting the scope of section 1985(3) to constitutional violations. *But cf.* *Novotny*, 442 U.S. at 391-96 (White, J., dissenting) Justice White, joined by Justices Brennan and Marshall urged that section 1985(3) be applied to all rights guaranteed by federal statutes.

84. *Staitos v. Bouden*, 514 F. Supp. 1288 (D. Mass. 1981) (holding that a constitutional violation would support a § 1985(3) claim), *Winty v. Port Authority*, 551 F. Supp. 1323 (S.D.N.Y. 1982) (held § 1985(3) not available to remedy a Title VII violation and only appropriate if "the employment discrimination violates the Constitution.") *Id.* at 1325; *Purtill v. Harris*, 658 F.2d 134 (3d Cir. 1981) (age discrimination in Employment Act held closely analogous to Title VII and thus not coextensive with § 1985(3)); *see also* *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981) (although plaintiffs used § 1983 to challenge the Education of All Handicapped Children Act, 20 U.S.C. § 1401(16), the court of appeals looked to *Novotny* and its treatment of § 1985(3) in conjunction with Title VII and found "an elaborate administrative and judicial enforcement system" evidencing a Congressional intent to have the Act as an exclusive remedy). *Id.* at 1216.

85. *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982) (the court refused to extend *Novotny* to § 1981 claiming it did contain substantive rights); *Herebschen v. Department of Health and Social Services*, 547 F. Supp. 1168 (W.D. Wisc. 1982) (the court refused to extend

be used to remedy a federal statutory violation but failed to specifically indicate which ones.<sup>86</sup> But overall, *Novotny* has had a chilling effect on attempts to use section 1985(3) with federal statutes. However, Justice White's statement in his dissenting opinion in *Novotny* that section 1985(3) may be used to remedy violations of federal statutory rights provides some glimmer of hope that the statute's coverage will be expanded.<sup>87</sup>

Further, Justice White's majority opinion in *Scott* suggests that he still believes section 1985(3) can be used to remedy some federal statutory rights.<sup>88</sup> He also suggests that the discriminatory animus requirement set forth in *Griffin* could be something other than a racially motivated one.<sup>89</sup> His discussion of this second issue strongly suggests that he rejects the narrower interpretation of section 1985(3)'s purpose, or at the very least asserts that the Court in *Griffin*, *Novotny* and now in *Scott* has not squarely addressed this question.<sup>90</sup>

The dissenters in *Scott* while criticizing the majority's very restrictive interpretation of the scope of section 1985(3) are silent on the question of the statute's application to federal statutory rights.<sup>91</sup>

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*Novotny* to bar use of § 1983 in a Title VII suit to recover compensatory and punitive damages).

86. *Ragin v. Bensalem Township*, 616 F.2d 680 (3d Cir. 1980) (the court said that § 1985(3) could be used with other federal statutes, but did not identify them); *People v. Cornwell Co.*, 695 F.2d 34 (2d Cir. 1982) (the court said that § 1985(3) could be used to remedy violations of both federal and state rights, here the New York Human Rights law); *Daley v. Saint Agnes Hosp., Inc.*, 490 F. Supp. 1309 (E.D. Pa. 1980) (here the plaintiff attempted to use § 1985(3) to remedy a violation of the Sherman Anti-Trust Act, but the court without passing on the scope of § 1985(3) ruled that the plaintiff alleged insufficient facts to show a violation).

87. *Novotny*, 442 U.S. at 391-96.

88. *Scott*, 103 S. Ct. at 3358.

Because of that holding the Court of Appeals found it unnecessary to determine whether respondent's action could be sustained under § 1985(3) as involving a conspiracy to deprive respondents of rights, privileges, or immunities under state law or those protected against private action by the Federal Constitutional or federal statutory law.

*Id.* [emphasis added]

89. "In the first place, it is a close question whether § 1985(3) was intended to reach any class-based animus other than an animus against Negroes and those who championed their case, most notably Republicans." *Id.* at 3359.

90. *Id.* at 3359-60. For a discussion of the views about section 1985(3)'s purpose see *supra* note 71.

91. "The Court assumes that § 1985(3) merely bans private conspiracies to accomplish deprivations that are actionable under § 1983 when caused by state officials. Although Congress could have passed such as statute, the simple fact is that it did not." 103 S. Ct. at 3361-62.

One reason for their silence might be because the facts of *Scott* do not specifically address this issue. However, a more realistic explanation might be that they did not agree on this issue and thus did not address it. Still another reason for the silence is probably due in part to the Court's holding in *Novotny* that section 1985(3) is not co-extensive with Title VII nor arguably any statute with its own administrative remedies.<sup>92</sup> Thus, the Court still has not resolved the question.

On the other hand, one way of resolving some of the aforementioned problems with section 1985(3) actions would be to narrowly define the scope of such actions. At least one commentator suggests limiting section 1985(3) actions to private conspiracies aimed at interfering with or disrupting the ability of government to politically carry out its functions.<sup>93</sup> He contends that this was the original purpose of the statute, but asserts that some courts and commentators have erroneously viewed the Ku Klux Act as a general anti-discrimination statute applying it to a broad range of inequalities never intended by the drafters of the act.<sup>94</sup> This is an extremely restrictive view of section 1985(3) but arguably, as the commentator points out, such an interpretation would minimize potential federalism problems<sup>95</sup> and bar use of the statute as a remedy for infringements of federal statutory rights.<sup>96</sup> Also, this approach would be consistent with the factual situation in *Griffin* and may be used to explain the contrary results in *Novotny* and *Scott*.<sup>97</sup> However, such a restrictive view of section 1985(3) seems to be inconsistent with the spirit of the 1871 Congress.

## VI. CONCLUSION

In *Scott*, Justice White concludes the majority opinion with the following statement:

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92. *Novotny*, 442 U.S. at 378.

93. Comment, A Construction of Section 1985(3), *supra* note 4, at 436.

94. *Id.* at 427.

95. See *Griffin*, 403 U.S. at 102 where the Court in adding the requirement of some discriminatory animus speaks of avoiding "the shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law . . . ." *Id.*

96. Comment, A Construction of Section 1985(c), *supra* note 4, at 429, 430.

97. See *supra* note 8 and accompanying text. Even the Court in *Griffin* stated that the fact situation of the case fit squarely within the situation that Congress intended to remedy. 403 U.S. at 103.

If we have misconstrued the intent of the 1871 Congress, or, in any event, if Congress now prefers to take a different task, the Court will, of course, enforce any statute within the power of Congress to enact.<sup>98</sup>

Perhaps Justice White realizes that the Court is not prepared now or ever to resolve the questions about section 1985(3) constitutional periphery, nature and scope. The Court has acknowledged that Congress now has the constitutional authority under the commerce clause to reach purely private actions. Thus, Justice White seems to be asking Congress to resolve these issues by either enacting new legislation or by its inaction let section 1985(3) return to oblivion in light of the Court's restrictive stance. As things stand now, unfortunately, the latter is more likely than the former.

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98. *Scott*, 103 S. Ct. at 3361.