

1975

## Constitutional Law-Civil Rights-Absent State Involvement, Right of Association Not Protected by 42 USC § 1985(3)

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### Recommended Citation

*Constitutional Law-Civil Rights-Absent State Involvement, Right of Association Not Protected by 42 USC § 1985(3)*, 9 U. Rich. L. Rev. 753 (1975).

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# RECENT DECISIONS

**Constitutional Law—Civil Rights—ABSENT STATE INVOLVEMENT, RIGHT OF ASSOCIATION NOT PROTECTED BY 42 U.S.C. § 1985(3)—*Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974).**

42 U.S.C. § 1985(3) was enacted<sup>1</sup> to curtail the Ku Klux Klan's terrorist activities in the South<sup>2</sup> by prohibiting conspiracies to deprive any person "of the equal protection of the laws, or of equal privileges and immunities under the laws. . . ." <sup>3</sup> From its inception, the major controversy has concerned whether the statute requires an element of state action. The first judicial statement construed the statute as reaching only conspiracies carried out under color of state law.<sup>4</sup> Twenty years later, a unanimous Supreme Court found the statute to "fully encompass the conduct of private persons" attempting to deprive an individual of his right to travel interstate and his thirteenth amendment rights.<sup>5</sup>

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1. 42 U.S.C. § 1985(3) (1970) (originally enacted as Ku Klux Act of April 20, 1871, ch. 22, § 2(3), 17 Stat. 13, *codified in* Rev. Stat. of 1874, § 1980).

2. *See* CONG. GLOBE, 42d Cong., 1st Sess. 153-54 (1871) (remarks of Senator Sherman).

3. 42 U.S.C. § 1985(3) reads as follows:

If two or more persons in any State or Territory conspire or go in disguise on the highway . . . 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 or exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

4. *Collins v. Hardyman*, 341 U.S. 651 (1951). In this case plaintiffs, members of a political club, alleged that the defendants carried out a conspiracy to disrupt their meeting. The Court stated:

[A]n individual or group of individuals not in office cannot *deprive* anybody of constitutional rights, though they may invade or violate those rights, it is clear that this statute does not attempt to reach a conspiracy to deprive one of rights, unless it is a deprivation of equality, of "equal protection of the law," or of "equal privileges and immunities under the law." *Id.* at 661.

The Court concluded that "private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so." *Id.* This decision conceptually wed the coverage of § 1985(3) to the traditional scope of the fourteenth amendment; as a result, neither enactment was perceived as protecting against purely private discrimination. However, unlike § 1985(3), the fourteenth amendment is on its face a prohibition only against the states. In attaching this state action requirement to § 1985(3), the Court avoided the possibility of establishing a federal tort law and thus left to the states the role of safeguarding the civil rights of their citizens.

5. *Griffin v. Breckenridge*, 403 U.S. 88, 96 (1971). This case involved an allegedly racially

In *Bellamy v. Mason's Stores, Inc.*,<sup>6</sup> plaintiff sought injunctive and monetary relief from his former employer, a private Virginia corporation, for being discharged from his job solely because he was a member of the United Klans of America, allegedly in violation of two federal statutes.<sup>7</sup> The Fourth Circuit affirmed the dismissal of the complaint. No cause of action was stated under 42 U.S.C. § 2000e-2, since plaintiff characterized his organization as patriotic and hence it did not fall within the ambit of § 2000e-2, a "statute directly aimed at discrimination based on the suspect classifications of race, color, national origin, sex, and religion."<sup>8</sup>

In regard to the § 1985(3) claim, the court viewed the issue as "whether the right of association is protected against private interference."<sup>9</sup> The court, although paying lip-service to the view that state action is not an essential element under the statute, felt constrained to require "some state involvement" in this particular situation.<sup>10</sup> In order to protect plaintiff's first amendment right of association the court must find that this right has been incorporated into the fourteenth amendment and that the amendment is a source of congressional power to reach private discrimination.<sup>11</sup> While the court deferred regarding § 5 of the fourteenth amendment as such a source, it nonetheless implied the constitutional validity of Con-

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motivated assault on blacks committed by a group of whites on a public highway in Mississippi. The Court concluded that "all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985(3)'s coverage of private conspiracies." *Id.* at 101. In regard to the text of the statute and the absence of any express state action requirement, the Court declared that "the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of all deprivations . . . whatever their source." *Id.* at 97. In reference to the statute's companion legislation, the Court reasoned that the imposition of a state action requirement into § 1985(3) would render the statute virtually identical to 42 U.S.C. § 1983. *Id.* at 99. Moreover the Court found in the statute's legislative history an intent to reach purely private action. *Id.* at 100-01.

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

7. 42 U.S.C. § 1985(3) (*see notes 1 & 3 supra*); 42 U.S.C. § 2000e-2, which reads in part as follows:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . .

8. 508 F.2d at 505. The court declined to consider plaintiff's contention that the pomp and ceremony manifest at Klan meetings are sufficient to make the organization a religion for purposes of Title VII. *Accord*, *Bradington v. IBM*, 360 F. Supp. 845, 852 (D. Md. 1973); *Andres v. Southwestern Pipe, Inc.*, 321 F. Supp. 895, 898 (W.D. La.), *aff'd*, 446 F.2d 899 (5th Cir. 1971).

9. 508 F.2d at 505.

10. *Id.* at 506.

11. *Id.* at 506-07.

gress' power to reach private action contingent only upon a clear signal from a higher authority.<sup>12</sup>

The Eighth Circuit has taken the innovative step the Fourth Circuit declined by deciding a § 1985(3) claim against a purely private conspiracy.<sup>13</sup> The court ruled that the fourteenth amendment incorporates the first amendment rights of freedom of assembly and worship<sup>14</sup> and protects these rights not only against state action, but against private interference as well.<sup>15</sup> The court concluded that § 1985(3) is a valid exercise of congressional power pursuant to § 5 of the fourteenth amendment.<sup>16</sup> Although this holding represents a severe departure from the traditional view that the fourteenth amendment is only a prohibition against the states,<sup>17</sup> the decision is not unsupported by authority.<sup>18</sup>

12. [T]he first amendment now speaks to the states by way of the fourteenth amendment, but to say that it also speaks to private persons seems to us an innovation that must come from the Congress or the Supreme Court. *Id.* at 507.

13. *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971). This case involved a group of black demonstrators disrupting the church services of a St. Louis Catholic parish. After four disruptions, the Eighth Circuit ruled that injunctive relief was appropriate to protect plaintiffs' rights of freedom of assembly and worship.

14. *Id.* at 1233-35.

15. "We believe that Congress was given the power in § 5 of the Fourteenth Amendment to enforce the rights guaranteed by the Amendment against private conspiracies." *Id.* at 1235.

16. *Id.* at 1235-36.

17. Beginning in the 1830's, the Supreme Court announced that the fourteenth amendment is directed at state action of a particular character: "civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." *Civil Rights Cases*, 109 U.S. 3, 17 (1883). *See also* *United States v. Harris*, 106 U.S. 629 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1875). The doctrine would seem to prevail today: "[P]rivate action is immune from the restrictions of the Fourteenth Amendment . . ." *Jackson v. Metropolitan Edison Co.*, 95 S. Ct. 449, 453 (1974). This is also the position espoused by the concurring opinion in *Bellamy*:

[N]either the Congress nor the federal judiciary has the authority to protect an activity (freedom of association) specifically designated as a First Amendment right from any infringement other than that proscribed (governmental infringement) by the language establishing the right. 508 F.2d at 509.

18. *See* *United States v. Guest*, 383 U.S. 745 (1966):

[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. *Id.* at 762 (Clark, J., joined by Black, J., and Fortas, J., concurring).

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. *Id.* at 784 (Brennan, J., joined by Warren, C.J., and Douglas, J., concurring in part and dissenting in part).

Despite labeling this result "appealing," the court in *Bellamy* reiterated that the impetus for such a departure must come from an authority greater than a circuit court.<sup>19</sup> In so ruling, the court suggests that while Congress may indeed have the power to protect fourteenth amendment rights from private interference, a statute whose language merely "tracks that of the fourteenth amendment" cannot be regarded as a valid exercise of this potential power.<sup>20</sup> Hence, the court invites the Supreme Court or Congress to act: the former to explicitly rule that § 1985(3) reaches private, non-racial discrimination, or alternatively, the latter to pass new legislation pursuant to § 5 of the fourteenth amendment directly aimed at this type of discrimination.<sup>21</sup>

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In addition to the dicta in *Guest*, various commentators have advanced the theory that the originally intended scope of the fourteenth amendment encompassed the conduct of individuals as well as that of the states. See Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 162-65 (1950); Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts,* 73 YALE L.J. 1353, 1354-55 (1964). See also *Commonwealth v. Local 542, I.U.O.E.,* 347 F. Supp. 268, 296-97 (E.D. Pa. 1972), ruling that Congress can reach purely private conspiracies under § 5 of the fourteenth amendment and that § 1985(3) is a valid constitutional exercise of this power. Cf. *District of Columbia v. Carter,* 409 U.S. 418, 424 n.8 (1973) (dictum). *Contra,* Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment,* 11 ST. LOUIS L.J. 331, 376-77 (1967).

19. 508 F.2d at 507.

20. This deference finds support in *United States v. Bass,* 404 U.S. 336, 349 (1971):

[I]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

In a criticism of *Action v. Gannon,* 450 F.2d 1227 (8th Cir. 1971), a strong argument was advanced that § 1985(3) cannot be regarded as a clear statement of congressional intent to rid the fourteenth amendment of its state action limitation:

Neither the general language used in § 1985(3), nor the remarks of its sponsors in the 42d Congress, provide clear evidence of congressional intent to have the statute applied to the type of fact pattern presented in *Action v. Gannon*. Indeed, in light of the conflicting views as to the scope of federal power under the Civil War Amendments at the time of the enactment of the Civil Rights Act of 1871, it is difficult to believe that a "clear congressional purpose" to bring about the type of significant change in federal state relations effected by the *Action* decision could ever be established. Comment, *Constitutional and Jurisdictional Problems in the Application of 42 U.S.C. § 1985(3),* 52 B.U.L. REV. 599, 618 (1972).

21. 508 F.2d at 507. The court demonstrated this latter alternative by way of a hypothetical in which it suggests that Congress could "make it a criminal offense for any person to interfere by force or violence with the attendance of children at public school." *Id.* The source of congressional power to enact such a statute would be "the duty of the state under the fourteenth amendment to afford to all school children the equal protection of the laws." *Id.* This hypothetical considerably narrows the inference made earlier by the court regarding Congress' power to reach private action in that it involves access to state facilities. Since the state has provided these facilities, at least a minimal element of state action is involved before

An important issue not squarely addressed in *Bellamy* is whether non-racial discrimination is actionable under § 1985(3). To avoid creating "general federal tort law" the Court in *Griffin v. Breckenridge*,<sup>21,1</sup> read the statute to require "some racial, or perhaps otherwise class-based"<sup>22</sup> discrimination. This limitation has precipitated some controversy, particularly where neither state action nor racial discrimination is alleged. The cases uniformly hold that an actionable complaint must allege that the discrimination stemmed from the fact that the plaintiff is a member of a particular class.<sup>23</sup> Once this hurdle is cleared, the court is left to decide whether plaintiff's class, though not racial, warrants the protection of the statute. Many "classes" have been held not to merit such protection.<sup>24</sup> Quite a few decisions, however, have stated that § 1985(3)'s protection does extend beyond racial discrimination.<sup>25</sup> In cases involving state action, the

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the protection of the fourteenth amendment is triggered. This theory finds support in Justice Brennan's opinion in *Guest*:

[I]t must be emphasized that we are here concerned with the right to equal utilization of *public facilities owned or operated by or on behalf of the State*. To deny the existence of this right or its constitutional stature is to deny the history of the last decade, or to ignore the role of federal power, predicated on the Fourteenth Amendment, in obtaining nondiscriminatory access to such facilities. 383 U.S. at 780-81 (Brennan, J., joined by Warren, C.J., and Douglas, J., concurring in part and dissenting in part).

See also Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 244 (1971); 52 CORNELL L. REV. 586, 588-89 (1967). Cf. Huey v. Barloga, 277 F. Supp. 864, 870 (N.D. Ill. 1967).

21.1 403 U.S. 88 (1971).

22. *Id.* at 102.

23. See *Hughes v. Ranger Fuel Corp.*, 467 F.2d 6, 10 (4th Cir. 1972) (defendants' act "purely spontaneous . . . not alleged to be a part of any general pattern of discriminatory action directed to any class . . ."); *Place v. Shepherd*, 446 F.2d 1239, 1245 (6th Cir. 1971) (complaint "described no racial involvement nor class-based discrimination"); *Barrio v. McDonough Dist. Hosp.*, 377 F. Supp. 317, 320-21 (S.D. Ill. 1974) (complaint alleging only an "animosity . . . against the plaintiff, as an individual . . ."); *Potts v. Wright*, 357 F. Supp. 215, 219 (E.D. Pa. 1973) (complaint containing "no allegations of 'racial, or perhaps otherwise class-based, invidiously discriminatory animus 'behind the conspirators' action"); *Wade v. Bethesda Hosp.*, 356 F. Supp. 380, 384 (S.D. Ohio 1973) (no allegation that plaintiff "was denied the protection of the law because of the class of which he was a member").

24. See, e.g., *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972), *cert. denied*, 410 U.S. 930 (1973) (class comprised of those physicians who have testified in malpractice cases); *Jacobson v. Industrial Foundation*, 456 F.2d 258 (5th Cir. 1972) (class composed of those workers who have filed claims for workmen's compensation); *Dreyer v. Jalet*, 349 F. Supp. 452 (S.D. Tex. 1972), *aff'd*, 479 F.2d 1044 (5th Cir. 1973) (class comprised of prisoners in custody of the Texas Department of Corrections).

25. See, e.g., *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971), holding that a cause of action is made by allegations that plaintiff was discharged for criticising his employer's racist employment practices, even though the plaintiff was not a member of the class subject to the discriminatory practices. Following this decision, two district courts in this circuit ruled

courts have seemed to broaden the scope of the statute in regard to the class-based animus requirement.<sup>26</sup> However, even where an element of state action is clearly present, the courts have not extended § 1985(3) to encompass every class.<sup>27</sup>

The narrow ruling in *Bellamy* is that in the absence of state involvement, racial discrimination, or violation of a federal right,<sup>28</sup> a complaint will not be actionable under § 1985(3).<sup>29</sup> Although the decision is counter to the recent trend of lower court rulings, some justifications for the court's reticence are apparent. First, there is the uncertainty of Congress' power to enact legislation punishing private discrimination pursuant to § 5 of the fourteenth amendment.<sup>30</sup> Second, assuming Congress has this power, there

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that discrimination on the basis of sex is actionable under § 1985(3). *See* *Pendrell v. Chatham College*, 370 F. Supp. 494 (W.D. Pa. 1974) (professor at a private college alleged that her contract was not renewed because of her sex and age); *Stern v. Massachusetts Indem. & Life Ins. Co.*, 365 F. Supp. 433 (E.D. Pa. 1973) (allegation that insurance company refused to sell disability insurance to women containing the same terms and conditions available to men solely on the basis of sex).

In *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973), the Sixth Circuit held that discrimination on the basis of religion or national origin is actionable. *Accord*, *Arnold v. Tiffany*, 487 F.2d 216, 217 (9th Cir. 1973) (dictum). In *Westberry v. Gilman Paper Co.*, 43 U.S.L.W. 2318 (5th Cir. Jan. 22, 1975), the Fifth Circuit ruled that § 1985(3) provided a remedy against private parties who allegedly conspired to kill a white environmental activist.

26. *See, e.g.*, *Cameron v. Brock*, 473 F.2d 603 (6th Cir. 1973) (class comprised of supporters of a political candidate); *Azar v. Conley*, 456 F.2d 1382, 1386 n.5 (6th Cir. 1972) (class composed of a white middle-class family) (dictum); *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah 1973) (class comprised of a faction of Indians seeking election to their tribe's business council).

27. *See* *Potts v. Wright*, 357 F. Supp. 215 (E.D. Pa. 1973) (eight female junior high school students subjected to strip search while attending school); *Bond v. County of Delaware*, 368 F. Supp. 618 (E.D. Pa. 1973) (prison guard permanently suspended allegedly for failing to contribute to the Republican Party: "The class deprived of employment is all persons other than Republicans. The converse would perhaps be a § 1985(3) violation . . .").

28. The list of federal rights or "rights of national citizenship" is relatively short: *United States v. Guest*, 383 U.S. 745, 759 (1966) (right to travel interstate); *In re Quarles*, 158 U.S. 532, 535-36 (1894) (right to inform federal officials of violations of federal law); *Logan v. United States*, 144 U.S. 263, 284 (1892) (right to be protected while in the custody of a U.S. Marshall); *Ex parte Yarbrough*, 110 U.S. 651, 665 (1884) (right to be free from interference while voting in federal elections); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (right to petition Congress for redress of grievances).

29. *Accord*, *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (white attorney's allegation that defendants refused to rent him space in an office building because his clientele were black or Latin-American not actionable: "[A]n arbitrary business discrimination against lawyers engaged in the practice of criminal law does not deprive plaintiff of 'equal protection of the laws' within the meaning of § 1985(3) if there is no state involvement whatsoever in the discrimination.").

30. It is clear that Congress has the power to enact prophylactic legislation pursuant to §

is uncertainty whether in enacting § 1985(3) Congress clearly intended to alter the federal-state balance. While *Bellamy* recognizes the potential of congressional legislation aimed at protecting fourteenth amendment rights from private conspiracies, the court also appreciates the nebulous legislative history of § 1985(3), and hence, draws the line at interpreting the statute as such an enactment. This decision places the issue before the Supreme Court or Congress and invites a definitive response.

*S.M.D. V.*

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5 of the fourteenth amendment to secure the amendment's guarantees against state infringement. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court stated:

By including § 5 the draftsmen sought to grant to Congress . . . the same broad power expressed in the Necessary and Proper Clause. . . . Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment. *Id.* at 650-51.

The Court has not yet explicitly ruled that Congress may use this broad enactment power to legislate against private interference with fourteenth amendment rights. Moreover, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court set forth some limits on congressional power to legislate pursuant to the amendment:

First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only "enforce" the provisions of the amendments and may do so only by "appropriate legislation." *Id.* at 128.

It is this second limitation, *i.e.*, federalism, which seems to provide the strongest argument against permitting Congress to legislate against purely private discrimination. See Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 526 (1974).