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## Is It Really All About Race?: Section 1985(3) Political Conspiracies in the Second Circuit and Beyond

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## **IS IT REALLY ALL ABOUT RACE?: SECTION 1985(3) POLITICAL CONSPIRACIES IN THE SECOND CIRCUIT AND BEYOND**

*Lee Pinzow\**

*The recent scandal involving the Internal Revenue Service's targeting of conservative Tea Party groups highlights the need for a judicial remedy to politically motivated deprivations of legally recognized rights. Section 2 of the Ku Klux Klan Act, codified as 42 U.S.C. § 1985(3), presents such a remedy.*

*However, it is unclear whether the statute applies to conspiracies motivated solely by political animus. The U.S. Supreme Court in *Griffin v. Breckenridge* and *United Brotherhood of Carpenters Local 610 v. Scott* delved into the question but chose not to resolve the issue. Based on the Court's discussion of the statute's legislative history in *Griffin and Scott*, eight of the eleven federal circuit courts to address the issue now require racial animus to motivate conspiracies against politically defined classes. Two circuits maintain their pre-*Scott* application of § 1985(3) conspiracies motivated by political party affiliation. After *Scott*, the Second Circuit applies the racial animus requirement to politically motivated conspiracies against members of classes defined by common actions or commonly held beliefs, but it has yet to decide whether its pre-*Scott* application of § 1985(3) to political affiliation motivated conspiracies remains valid. The district courts within the Second Circuit have articulated different approaches to applying Second Circuit precedent to political affiliation animus cases.*

*This Note describes the holdings of the Second Circuit in the context of the greater circuit split and examines the approaches taken by the district courts within the Second Circuit. This Note concludes that the Second Circuit could resolve the confusion among its district courts by extending § 1985(3) to conspiracies motivated solely by political party affiliation but by requiring racial animus for all other politically motivated conspiracies. This would remain consistent with the legislative history, historical context, and Supreme Court interpretation of the Ku Klux Klan Act.*

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INTRODUCTION.....	1033
I. HISTORICAL PURPOSE AND JUDICIAL INTERPRETATION OF THE KU KLUX KLAN ACT.....	1036
A. <i>The Historical Background of the Ku Klux Klan Act</i> .....	1036
B. <i>The Supreme Court's Jurisprudence Between Enactment         and Bray</i> .....	1046
C. <i>The Circuit Court Divide on Racial Animus Requirement</i> ....	1051
1. Majority: Racial Animus Is Required for Political Conspiracies .....	1051
2. Minority Position: Political Affiliation Animus Is Individually Recognized .....	1054
3. The Second Circuit Is Unsettled After <i>Scott</i> .....	1055
II. SECOND CIRCUIT DECISIONS CAUSE DISTRICT COURT CONFUSION.	1056
A. <i>Before Scott: The Second Circuit Recognizes Political         Animus</i> .....	1056
B. <i>After Scott: The Gleason Dicta Indicates a Limiting of         Scope</i> .....	1057
C. <i>District Courts Split on Applying Keating and Gleason</i> .....	1058
1. Approach One: Racial Animus Required Absent Political Party Animus .....	1058
2. Approach Two: <i>Gleason</i> Requires Racial Class-Based Animus .....	1061
3. Two Districts Have Not Directly Decided the Issue.....	1063
III. THE SECOND CIRCUIT SHOULD RECOGNIZE POLITICAL ANIMUS FOR § 1985(3) CONSPIRACIES.....	1064
A. <i>The Racial Animus Requirement Is Inconsistent with         Legislative and Social History</i> .....	1064
B. <i>The Distinction Between Political Parties and Shared         Beliefs Is Consistent with Scott and Bray</i> .....	1066
C. <i>Reconciling Keating and Gleason</i> .....	1068
D. <i>The Impact on District Court Holdings</i> .....	1069
1. The Proposed Standard Is Consistent with Holdings by the Northern and Eastern Districts of New York .....	1069
2. The Proposed Standard Strikes Down the Western District of New York's Racial Animus Requirement .....	1070
3. The Proposed Standard Resolves the Inconsistency in Southern District of New York Holdings.....	1071
CONCLUSION.....	1072

## INTRODUCTION

In May 2013, allegations arose that, in the lead up to the 2010 congressional elections, the Internal Revenue Service (IRS) targeted Tea Party–affiliated groups seeking tax-free status for politically motivated selective review.<sup>1</sup> The IRS allegedly sought the donor lists, volunteer lists, and party affiliations of these conservative organizations’ officers and directors.<sup>2</sup> IRS officials also inquired about any times that these officers and directors had previously run for office and about any future political ambitions these individuals might have.<sup>3</sup> An avalanche of news stories appeared after the Associated Press brought to light a Treasury Department Inspector General draft report that found Tea Party–affiliated groups were placed under undue scrutiny by IRS junior staff members.<sup>4</sup> Republican legislators and conservative pundits accused the White House of attempting to cover up the scandal.<sup>5</sup> Some IRS employees believed that President Obama wanted to “crack down” on conservative organizations seeking not-for-profit status.<sup>6</sup> This may have been because “in every meaningful sense [these groups] were operating as units of the Republican Party” and were instrumental in the Republican’s retention of control of the House of Representatives.<sup>7</sup>

Forty-one Tea Party groups brought suit against the United States, the IRS, IRS officials, and U.S. Treasury Department officials.<sup>8</sup> The Tea Party groups allege constitutional violations, violations of the Administrative Procedure Act,<sup>9</sup> and violations of the Internal Revenue Code.<sup>10</sup> However, the Tea Party groups have chosen not to avail themselves of a potential civil rights statutory remedy.

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1. See, e.g., Paul M. Barrett, *The IRS Scandal: Tempest and the Tea Party*, BLOOMBERG BUSINESSWEEK (May 16, 2013), <http://www.businessweek.com/printer/articles/116958-the-irs-scandal-tempest-and-the-tea-party>.

2. See Complaint at 20, *Linchpins of Liberty et al. v. United States*, No. 1:13-cv-00777-RBW (D.D.C. June 25, 2013) [hereinafter *Linchpins Complaint*], available at <http://media.aclj.org/pdf/tea-party-complaint-amended.pdf>.

3. *Id.*

4. See Jeffrey Toobin, *The Real I.R.S. Scandal*, NEW YORKER DAILY COMMENT BLOG (May 14, 2013), <http://www.newyorker.com/online/blogs/comment/2013/05/irs-scandal-tea-party-oversight.html>; see also *The IRS Targeting Controversy: A Timeline*, CBS NEWS (May 24, 2013, 12:02 PM), <http://www.cbsnews.com/news/the-irs-targeting-controversy-a-timeline/>.

5. See Barrett, *supra* note 1.

6. See Stephen Dinan, *IRS Officials Thought Obama Wanted Crackdown on Tea Party Groups, Worried About Negative Press*, WASH. TIMES, Sept. 17, 2013, <http://www.washingtontimes.com/news/2013/sep/17/report-irs-staff-acutely-aware-tea-party-antipathy/?page=all>. Judicial Watch, a government watchdog group, went so far as to allege that “[t]he Obama IRS suppressed the entire tea party movement just in time to help Obama win reelection.” See Cheryl K. Chumley, *Judicial Watch Sues IRS for Stonewalling on Tea Party FOIA*, WASH. TIMES (Oct. 15, 2013), <http://www.washingtontimes.com/news/2013/oct/15/judicial-watch-sues-irs-stonewalling-tea-party-foi/>.

7. See Toobin, *supra* note 4.

8. See *Linchpins Complaint*, *supra* note 2, at 1–6.

9. 5 U.S.C. § 500 (2012).

10. *Linchpins Complaint*, *supra* note 2, at 27–40.

42 U.S.C. § 1985(3)<sup>11</sup> provides a federal cause of action to a person injured by an act in furtherance of a conspiracy to deprive that person of his or her civil rights against any member of said conspiracy. Section 1985(3) provides this remedy to victims who are members of an identifiable class of persons targeted because of “racial, or perhaps [some other] class-based, invidiously discriminatory animus.”<sup>12</sup> The statute could provide an avenue of relief to Tea Party members if a conspiracy motivated by animus against the Tea Party, ostensibly part of the Republican Party,<sup>13</sup> is within the intended reach of the statute.

Section 1985(3) originated as section 2 of “[a]n act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes”—commonly known today as the Ku Klux Klan Act or the Civil Rights Act of 1871.<sup>14</sup> Congress passed the Act in response to escalating violence in the Reconstruction South that was perpetrated by the Ku Klux Klan and similar groups against blacks and Republicans.<sup>15</sup> The Act created two ways for the federal government to combat Klan violence in the South.<sup>16</sup> First, the measure created a role for the federal courts in deterring civil rights violations by imposing federal civil and criminal penalties for such violations.<sup>17</sup> Second, the measure provided the president with the authority to declare martial law or suspend habeas corpus to quell violence that interfered with the “execution of justice or federal law.”<sup>18</sup>

The Supreme Court’s refusal to declare whether § 1985(3) requires victims of conspiracies that target members of political organizations to allege racial animus as a motivating factor, and dicta indicating that such a requirement may exist, led to a circuit split on the issue.<sup>19</sup> The circuits

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11. See 42 U.S.C. § 1985(3) (2012) (“If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . [and] if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.”).

12. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

13. See *supra* note 7 and accompanying text.

14. Kenneth A. K. Martin, Note, *The Sixth Circuit Takes a Stand: Conklin v. Lovely and the Extension of Protection Under 42 U.S.C. § 1985(3) to Victims of Non-Racial, Politically Discriminatory Conspiracies*, 20 U. TOL. L. REV. 733, 735 (1989).

15. *Id.* at 735–36 & n.12.

16. See 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 591 (Bernard Schwartz ed., 1970). See generally Act of Apr. 20, 1871 (Ku Klux Klan Act of 1871), ch. 22, 17 Stat. 13.

17. See 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 16, at 591.

18. See *id.*

19. See *infra* Part I.C.

continue to struggle to define actionable nonracial class-based animus.<sup>20</sup> The Second Circuit once rejected the racial animus requirement,<sup>21</sup> but called its previous decision into question in response to the Supreme Court dicta.<sup>22</sup> The Second Circuit elected not to resolve the issue.<sup>23</sup> The failure of both the Supreme Court and Second Circuit to decide whether the racial animus must motivate conspiracies against members of political parties led to divergent applications among the district courts within the Second Circuit.<sup>24</sup>

As a result, the viability of a potential § 1985(3) claim by members of Tea Party groups in the Second Circuit may depend on the county in which the action is brought. It appears that a Tea Party group bringing an action in Brooklyn may state a § 1985(3) claim related to IRS targeting, but a group bringing an action in Manhattan may not.<sup>25</sup>

This Note examines the issues raised by the Court's holding in *Griffin v. Breckenridge*<sup>26</sup> and dicta in *United Brotherhood of Carpenters Local 610 v. Scott*,<sup>27</sup> regarding a potential racial animus requirement for purely political § 1985(3) conspiracy claims. In doing so, this Note identifies the circuit court split over the racial animus requirement and closely examines the disparate positions taken by the district courts of the Second Circuit. Part I discusses the historical background of the Ku Klux Klan Act, including the social and political atmosphere of the Reconstruction South, the motivations behind Klan violence, and the purpose for the Act derived from the debates of the 42nd Congress. Part I also summarizes the Supreme Court's treatment of the Act from its enactment to *Bray v. Alexandria Women's Health Clinic*<sup>28</sup> and describes a long-lasting circuit split over whether injuries caused by conspiracies targeting people based on their political affiliation are actionable under § 1985(3). Part II describes the different approaches taken by the district courts within the Second Circuit in their attempts to reconcile the Second Circuit's holdings in *Keating v. Carey*<sup>29</sup> and *Gleason v. McBride*.<sup>30</sup> Part III suggests that the Second Circuit should accept targeting based on membership in a political party as sufficient to establish class-based animus. Part III, furthermore, recommends that the Second Circuit distinguish between political party affiliation, and collective action or shared beliefs. By drawing this distinction and holding the latter insufficient to define class-based animus required by *Griffin* and *Scott*, the proposed position would keep the Second

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20. See *infra* Part I.C.

21. See *infra* Part II.A.

22. See *infra* Part II.B.

23. See *infra* Part II.B.

24. See *infra* Part II.C.

25. See *infra* Parts I.C.1, II.C.1–2.

26. 403 U.S. 88 (1971).

27. 463 U.S. 825 (1983).

28. 506 U.S. 263 (1993).

29. 706 F.2d 377 (2d Cir. 1983).

30. 869 F.2d 688 (2d Cir. 1989).

Circuit in compliance with both *Scott* and *Bray*, while reconciling *Keating* with *Gleason*.

### I. HISTORICAL PURPOSE AND JUDICIAL INTERPRETATION OF THE KU KLUX KLAN ACT

After close to a century of near dormancy, a resurgence of section 2 of the Ku Klux Klan Act—presently codified as 42 U.S.C. § 1985(3)—and the Supreme Court’s opinions interpreting the statute’s legislative history, have led federal courts to disagree over whether Congress intended the Act to remedy purely political conspiracies. Part I.A illustrates the social and political landscape that the 42nd Congress faced when debating the Ku Klux Klan Act. Part I.A also explores the rich legislative history of the Act to elucidate what motivated Congress to act. Part I.B tracks the evolution of the Supreme Court’s interpretation of the statute and its legislative history. Part I.C outlines the federal circuit court split over whether § 1985(3) provides a remedy to injuries caused by political conspiracies not motivated by racial animus.

#### A. *The Historical Background of the Ku Klux Klan Act*

The Civil War and Reconstruction drastically changed “the economic and political map of the white South.”<sup>31</sup> Before the end of the war, the white plantation elite lost economic and political power as a result of the Union administration of abandoned or confiscated plantations,<sup>32</sup> execution of President Abraham Lincoln’s plan to quickly restore former rebellious states into the Union,<sup>33</sup> and the loss of economic independence of yeoman farmers.<sup>34</sup> The planter class was also “devastated” by battle casualties, loss

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31. See ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877, at 17 (Henry Steele Commager & Richard B. Morris eds., Perennial 2002).

32. See *id.* at 55. Starting in late 1862, abandoned cotton plantations in Louisiana were leased to Northern investors to be put back into operation. *Id.* Former slaves worked on these plantations for wages, in a “transition from slave to free labor.” *Id.* In the spring of 1863, General Lorenzo Thomas planned to lease plantations along the Mississippi River to Northerners and those Southern planters who “renounced their allegiance to the Confederacy,” on the condition that both groups hire blacks to work under terms set by the Army. *Id.* at 57. On January 16, 1865, General William T. Sherman issued Special Field Order No. 15, which set aside the Sea Island and a portion of the Charleston coast for the settlement of blacks. See *id.* at 70. Each family would be granted forty acres of land and loaned an army mule, to relieve the pressure the increasing mass of freed slaves placed on army supplies and movement. See *id.* at 70–71.

33. See *id.* at 35, 37. On December 8, 1863, President Lincoln issued a Proclamation of Amnesty and Reconstruction, offering a pardon and restoration of all rights, except for slave ownership, to anyone who pledged future loyalty to the Union and acceptance of abolition. See *id.* A state could establish a new state government and regain representation in Congress when the number of persons making the pledge reached 10 percent of the votes cast in the 1860 presidential election for that state, so long as the new government drafted a new constitution abolishing slavery. *Id.* at 35–36. For example, Louisiana’s first Reconstruction constitution “ratified the overthrow of Louisiana’s old order.” *Id.* at 49. Delegates included professionals, “small businessmen, artisans, and civil servants,” reflecting the urban orientation of the unionist coalition and a departure from the traditional control of slaveholders. *Id.*

34. *Id.* at 17.

of life savings in Confederate bonds, and the loss of both unpaid labor and family net worth from emancipation.<sup>35</sup>

With the end of the war, President Andrew Johnson continued a program of presidentially directed reconstruction.<sup>36</sup> By 1866, congressional Republicans attempted to adjust presidential Reconstruction with the passage of a Freedman's Bureau bill and a civil rights bill, because they believed that President Johnson's program of restoration of Southern states did not sufficiently ensure the loyalty of Southern officeholders.<sup>37</sup> President Johnson's vetoes of both bills, and Congress's successful override of the Civil Rights bill, galvanized radical and moderate Republicans in the belief that they could no longer work with the President.<sup>38</sup> The Republican Congress wrested control of Reconstruction policy from President Johnson with its override of the President's veto of the Reconstruction Act of 1867.<sup>39</sup>

Between 1867 and 1869, Southern states engaged in a round of constitutional conventions to draw up new state constitutions in compliance with requirements for readmission into the Union.<sup>40</sup> These conventions consisted largely of blacks, Northern Republicans (carpetbaggers) and Southern Unionists (scalawags).<sup>41</sup> Most antebellum officials were barred from participating and many opponents of Reconstruction who remained eligible to participate abstained from voting for delegates.<sup>42</sup> As a result, the

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35. *See id.* at 129.

36. *See id.* at 181–83. Initially, President Johnson indicated he would recognize the new Southern state governments created under Lincoln's Amnesty Proclamation—governments that did not grant black suffrage. *Id.* at 182. The President also granted amnesty to all participants in the rebellion who swore an oath of loyalty to the Union unless they were high-level Confederate officials, owners of more than \$20,000 in taxable property, or another member of thirteen classes of Confederates. *Id.* at 183. Individuals not granted general amnesty could gain amnesty upon individual application to the President. *Id.*

37. *See id.* at 240–42, 246. The Freedman's Bureau bill extended the life of the Freedman's Bureau in the South and provided the federal justice system with the authority to punish state officials who denied blacks the "civil rights belonging to white persons." *Id.* at 243 (quoting Letter from Lyman Trumbull to Dr. William Jayne (Dec. 24, 1865), in DR. WILLIAM JAYNE PAPERS (on file with Illinois State Historical Society)). The civil rights bill granted national citizenship to all people, except Native Americans, born in the United States, and listed certain rights that could not be deprived on the basis of race. *Id.*

38. *See id.* at 250–51.

39. *See id.* at 267, 271. In December of 1866, months before the passage, veto, and veto override of the Reconstruction Act of 1867, Senator James Grimes described Congress's mood about the upcoming legislative session when he said: "The President has no power to control or influence anybody and legislation will be carried on entirely regardless of his opinions or wishes." *Id.* at 271. The Act divided the South into five military districts to ensure internal security and laid out steps for Southern states' readmission into the Union, including writing new state constitutions and ratification of the Fourteenth Amendment. *Id.* at 267. An amendment to the Act clarified that anyone holding an office before the war that required swearing an oath to the U.S. Constitution could not vote to support these new constitutions. *See Act of Mar. 23, 1867, ch. 6, 15 Stat. 2.*

40. *See FONER, supra note 31, at 316–17.*

41. *See id.*

42. *See id.*; Lou Falkner Williams, *The Constitution and the Ku Klux Klan on Trial: Federal Enforcement and Local Resistance in South Carolina, 1871–1872*, 2 GA. J. S. LEGAL HIST. 41, 43 (1993).

former white political elite did not recognize the legitimacy of the resulting governments.<sup>43</sup> A common belief within this group was that the resulting state governments were incapable of representing Southern gentlemen because of their composition.<sup>44</sup> Southern whites were also infuriated by Republican reliance on property taxes to fund public schools, hospitals, mental health facilities, and other internal improvements.<sup>45</sup> Despite the failure of property taxes as a method of land redistribution,<sup>46</sup> large Southern landowners perceived the tax program as a method to force owners to sell unused land, often in small parcels, and to collect land forfeited after tax defaults to distribute to freedmen.<sup>47</sup> Resentment over newly imposed high taxes “undermined the authority of the Republican government, as surely as . . . racism.”<sup>48</sup>

In 1868, violence, long a tool in enforcing social mores,<sup>49</sup> entered the electoral process.<sup>50</sup> The Ku Klux Klan launched a “reign of terror” on white and black Republican leaders and black voters, to prevent the election of the Republican slate of federal and state officials.<sup>51</sup> White gangs also attacked Republican political meetings and destroyed local Republican newspapers.<sup>52</sup> It is clear from the 1868 election results that the aim of this violence was the defeat of Republican candidates from the president down to the local level.<sup>53</sup>

The Klan expanded its use of violence in nearly every Southern state in response to the imposition of congressional Reconstruction and the election of Republicans in 1868.<sup>54</sup> The Klan acted as a counterrevolutionary

43. See FONER, *supra* note 31, at 346; Williams, *supra* note 42, at 44–45. Men who held a position requiring an oath of office to the U.S. Constitution before the Civil War were denied voting rights if they supported the Confederacy during the war. See Act of Mar. 23, 1867, ch. 6, 15 Stat. 2; FONER, *supra* note 31, at 275; Williams, *supra* note 42, at 43.

44. See Williams, *supra* note 42, at 45 (quoting Benjamin F. Perry, Speech at Anderson Court House 10–11 (March 1868), in Benjamin F. Perry Papers, *microformed on S. Historical Collection of the Univ. of N.C. Library* (Photographic Serv., Univ. of N.C. Library)). The white political elite confronted new governments controlled by three disfavored groups: blacks, believed not to be entitled to a role in governance; carpetbaggers, or Northerners generally hated by Southerners; and scalawags, considered traitors or lepers among Southerners loyal to the Confederacy. See FONER, *supra* note 31, at 297, 346–47.

45. See Williams, *supra* note 42, at 46.

46. See FONER, *supra* note 31, at 376.

47. See Williams, *supra* note 42, at 46.

48. *Id.* at 47.

49. See FONER, *supra* note 31, at 17, 119–21, 425. From the beginning of the Civil War, Unionists in the South were persecuted. See *id.* at 17. “They were driven from their homes . . . persecuted like wild beasts by the rebel authorities, and hunted down in the mountains; they were hanged on the gallows, shot down and robbed.” *Id.* (quoting CARL MONEYHON, *REPUBLICANISM IN RECONSTRUCTION TEXAS* 18 (1980)). At the end of the war, this expanded to include violence against Blacks, motivated by a determination to stop Blacks from establishing autonomy from their former owners. See *id.* at 119–21.

50. See *id.* at 342.

51. See *id.*

52. See *id.*

53. See *id.* at 343. Democratic candidate for president Horatio Seymour won Georgia and Louisiana, two states where Klan violence decimated the Republican Party organization. *Id.* Even in states where Grant won, the Republican vote fell sharply. *Id.*

54. See *id.* at 425.

military force “serving the interests of the Democratic Party, the planter class,” and those who supported a return to white supremacy.<sup>55</sup> The Klan sought to reverse the sweeping political and economic changes resulting from the Civil War and Reconstruction by destroying Republican infrastructure, undermining what the majority of white Southerners deemed as illegitimate Reconstructionist state governments, reasserting control over blacks as a source of labor, and restoring the social subordination of blacks.<sup>56</sup> Klan members attacked blacks to force them to renounce their allegiance to the Republican Party and drive them from other employment back to the plantations.<sup>57</sup> They also attacked whites and their property for voting the Republican ticket or helping to educate blacks.<sup>58</sup> The Klan murdered both black and white Republican leaders and elected officials.<sup>59</sup> One Democrat in the 42nd Congress rationalized the violence as a result of the stripping of political power and control of Southern governments from “the wise, virtuous, influential men of the South [to give] to adventurers and negroes.”<sup>60</sup> It became clear to Republicans in the North that the Ku Klux Klan and like groups were engaged in a campaign of intimidation, terror, and violence directed at blacks and white Republicans throughout the South “in an attempt to overthrow the Reconstruction policy of the Republican Congress.”<sup>61</sup>

The legislative history of the Ku Klux Klan Act indicates that the President and Congress intended to address violence that was motivated by racial animus or the restoration of political control of local and state governments.

On March 28, 1871, President Ulysses S. Grant sent a special message to Congress that urged legislation to address an intensifying level of political and racial violence in the South, which was perpetrated by the Ku Klux Klan and other similar groups.<sup>62</sup>

Congress was also independently concerned about the targeted violence in the South. On March 10, 1871, a select committee of the Senate issued a

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55. *See id.*

56. *See id.*; *see also* Janet A. Barbieri, Note, *Conspiracies to Obstruct Justice in the Federal Courts: Defining the Scope of Section 1985(2)*, 50 *FORDHAM L. REV.* 1210, 1224–25, 1227 (1982).

57. *See* Williams, *supra* note 42, at 52.

58. *See id.*

59. *See* FONER, *supra* note 31, at 426–28.

60. *See* CONG. GLOBE, 42d Cong., 1st Sess. 386 (1871) (statement of Rep. Joseph Lewis); Mark Fockele, Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 *U. CHI. L. REV.* 402, 408 n.31 (1979).

61. Joseph A. Culig, Note, *Farber v. City of Paterson: The Third Circuit Weighs In on the Future of Protecting Political Classes Under Section 1985(3)*, 57 *DEPAUL L. REV.* 1053, 1056 (2008) (quoting Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 *TEX. L. REV.* 527, 534 (1985)); *see also* Barbieri, *supra* note 56, at 1225; Fockele, *supra* note 60, at 404–05 (concluding that Congress passed the Ku Klux Klan Act to address the violence and “acts of terror,” motivated by Southern resistance to political equality).

62. CONG. GLOBE, 42d Cong., 1st Sess. 236 (1871); *see* 1 *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS*, *supra* note 16, at 591; Barbieri, *supra* note 56, at 1225; Martin, *supra* note 14, at 735.

report on the activities of the Ku Klux Klan, using North Carolina as a case study.<sup>63</sup> The report emphasized that the Klan acted with the political purpose to oppose the policies of Reconstruction, including black enfranchisement.<sup>64</sup> Both the Senate's instruction to its Judiciary Committee and the Select Committee report's conclusions expressed a desire to stop violence not only against blacks but against Republicans, Northern businessmen, and Unionist Southerners.<sup>65</sup> Additionally, the House directed a joint committee, established to investigate violence in the South, to ascertain whether organized bands of a "political character" were responsible for the reported violence, and whether people and property in the South were secure.<sup>66</sup>

Two weeks after the Senate report, Representative Samuel Shellabarger introduced H.R. 320, intended to secure and expand the protections of the Civil Rights Act of 1866 to all people deprived of rights derived from national citizenship.<sup>67</sup> Section 2 of the original bill established criminal penalties for a list of acts contemplated or completed for the purpose of either depriving another of their rights or preventing state governments from enforcing their laws.<sup>68</sup> The House debates over the bill between March 28 and April 6, 1871 covered both the concerns that motivated the eventual passage of the Act and the concerns over the breadth of its language.<sup>69</sup> The record in the House contains many statements from the floor indicating that Klan violence targeted Republicans.<sup>70</sup>

Much of Representative William Stoughton's testimony referenced the March 10 Senate report on violence in North Carolina in support of his argument that Klan violence was politically motivated.<sup>71</sup> Stoughton argued

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63. See S. REP. NO. 42-1, at I-II (1871); see also Neil H. Cogan, *Section 1985(3)'s Restructuring of Equality: An Essay on Texts, History, Progress, and Cynicism*, 39 RUTGERS L. REV. 515, 555-56 (1987).

64. See Cogan, *supra* note 63, at 556.

65. See *id.* at 566.

66. Fockele, *supra* note 60, at 408 (citing H.R. REP. NO. 42-1, at ii (1871)).

67. See Cogan, *supra* note 63, at 556 (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871)).

68. See Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 537 n.17 (1985) ("That if two or more persons shall . . . conspire . . . to do any act in violation of the rights, privileges, or immunities of another person, which . . . would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny; and if one or more of the parties to said conspiracy . . . shall do any act to effect the object thereof, all the parties to . . . said conspiracy or combination . . . shall be deemed guilty of a felony, and . . . shall be punishable as such in the courts of the United States." (quoting the original text of section 2 of H.R. 320 from CONG. GLOBE, 42d Cong., 1st Sess. app. 68-69 (1871))); see also Barbieri, *supra* note 56, at 1228.

69. See 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 16, at 597-620.

70. See *infra* notes 73-79 and accompanying text.

71. See Michael Scott Russell, Note, *The Ku Klux Klan Act and the Proper Perspective on the Scope of 42 U.S.C. § 1985(3)*, 2 REGENT U. L. REV. 73, 77 (1992). Representative William Stoughton was a Republican from Michigan in the 42nd Congress who spent a

that the Klan served a political purpose and was comprised of members of the Democratic—or Conservative—party who sought to use violence against their opponents while successfully being protected from conviction by the use of disguises, secrecy, and perjury in local courts.<sup>72</sup> Representative Stoughton also noted that the efforts to “murder . . . leading Republicans” and terrorize the black population to control the result of elections were celebrated as victories for the Democratic Party.<sup>73</sup> Lamenting the success of the Klan’s tactics, Representative Stoughton rhetorically asked how long it would be before the “Tammany Hall Democracy”—the New York City Democratic organization—adopted similar tactics to influence politics in the North.<sup>74</sup>

Representative George McKee (a Republican from Mississippi) was adamant about the Klan’s designs against Republicans.<sup>75</sup> He warned about the potential for Klan practices—murdering opponents and perjuring to escape justice—to spread into the North as the Klan increased its influence over the Democratic Party.<sup>76</sup> He then described the differences between Democratic and Republican descriptions of a killing at Meridian, Mississippi, where—despite the differences in number—all the casualties were Republicans.<sup>77</sup> As in similar incidents, initial reports that black rioting caused the violence gave way to final reports that only blacks and Republicans were killed.<sup>78</sup> The targeting of Republicans for Democratic gain was a common concern among many House Republicans.<sup>79</sup>

The House also considered testimony and floor speeches about both the Klan’s use of violence and threats to achieve political ends, and the strategies of Klan members to subvert the judicial system and avoid prosecution. Representative Stoughton detailed testimony that established a link between Democratic political figures, Klan membership, and acts of

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significant amount of time speaking on Congress’s justification for H.R. 320. *See* 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 16, at 599–608.

72. *See* Russell, *supra* note 71, at 77.

73. *See* 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 16, at 604 (statement of Rep. Stoughton).

74. *See id.* at 605.

75. *See id.* (statement of Rep. McKee).

76. *See id.* at 611.

77. *See id.* at 612.

78. *See id.*

79. *See, e.g.,* Steven F. Shatz, *The Second Death of 42 U.S.C. Section 1985(3): The Use and Misuse of History in Statutory Interpretation*, 27 B.C. L. REV. 911, 930 (1986) (“It is evident that the lawlessness of the South, at first undirected save by its hates, is now become organized in the service of a political party to crush its opponents, and to drive from their borders every friend of a Republican Administration . . . . If it was not political in the beginning, yet as the objects of its fury, as to persons, were negroes and northern men who had gone South . . . it has necessarily become a political engine in the hands of the Democracy.” (quoting CONG. GLOBE, 42d Cong., 1st Sess. 443 (1871) (statement of Rep. Benjamin Butler))); *id.* at 930–31 (The acts of violence are “crimes perpetrated by concert and agreement . . . acting with a common purpose for the injury of a certain class of citizens entertaining certain political principles . . . . We find that this society is political in its nature . . . and is utterly hostile to the Republican party . . . and that its victims are members of that party” (quoting CONG. GLOBE, 42d Cong., 1st Sess. 457 (1871) (statement of Rep. John Coburn))); *see also* Fockele, *supra* note 60, at 408–09 n.32.

violence perpetrated to disrupt emerging political processes without fear of legal consequence.<sup>80</sup> When asked about the “object” of the Klan, a former Democratic state legislative candidate and Klan initiate testified that “[t]heir object was the overthrow of the reconstructionist policy of Congress and the disenfranchisement of the negro.”<sup>81</sup> Another witness testified that members of the Democratic Party invariably supported the Klan, with those denouncing the Klan being the exception.<sup>82</sup>

Representative Stoughton also recounted testimony from blacks who were visited by members of the Klan.<sup>83</sup> One witness testified that Klan members intimidated blacks to prevent them from voting for Republican candidates.<sup>84</sup> In the witness’s experience, however, Klan members did not block blacks from voting if they were convinced to vote for Democrats.<sup>85</sup>

The House debate included numerous examples of statements indicating that membership in political parties or other nonracial groups were protected by the Act.<sup>86</sup> Supporters of the bill viewed the Klan as a political organization that used threats and violence to obtain and maintain Democratic control over Southern state and local governments.<sup>87</sup> They saw

80. See Russell, *supra* note 71, at 77–79. Acts of intimidation and compliance with the terms of Klan membership effectively annulled penal laws and allowed perpetrators to go unpunished by limiting the power to arrest transgressors, engaging in the intimidation of witnesses, and engendering an unwillingness of white juries to convict whites accused of targeted violence or acts that obstructed prosecutions. See CONG. GLOBE, 42d Cong., 1st Sess. 456–57 (1871); see also 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 16, at 601, 603, 618; Barbieri, *supra* note 56, at 1225; Stephanie M. Wildman, 42 U.S.C. § 1985(3)—A Private Action to Vindicate Fourteenth Amendment Rights: A Paradox Resolved, 17 SAN DIEGO L. REV. 317, 322 (1980).

81. See 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 16, at 601.

82. See *id.* at 601–02 (comments by Rep. Stoughton reading testimony given by Judge Thomas Settle).

83. See *id.* at 603–04 (comments by Rep. Stoughton, recounting testimony given by Caswell Holt, “a poor and ignorant, but honest and conscientious negro who was twice visited by the Ku Klux”).

84. See *id.* at 604; see also Fockele, *supra* note 60, at 410.

85. See 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 16, at 604 (comments by Rep. Stoughton, presenting testimony given by Caswell Holt); see also Fockele, *supra* note 60, at 410.

86. See, e.g., David S. Schindler, Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(3): A Limiting Strategy Gone Awry?*, 83 MICH. L. REV. 88, 99 & n.74 (1985) (“The proposed legislation is not intended to be partisan in its beneficent operations. It is not to protect Republicans only in their property, liberty, and lives, but Democrats as well, not the colored only, but the whites also; yes, even women and children, all races and all classes, will be benefited alike, because we are simply contending for good government and righteous laws.” (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. 190 (statement of Rep. Charles Buckley))).

87. *Id.* at 100; see also *United Bhd. of Carpenters Local 610 v. Scott*, 463 U.S. 825, 850 n.15 (1983) (Blackmun, J., dissenting) (“The Klan’s goal was to overthrow Republican Reconstruction policies both by terrorizing local supporters of those policies in order to place sympathetic Democrats in office, and when that failed by supplanting the authority of local officials directly with mob violence.”). The Republican majority thought the primary goal of the Klan was to remove Republicans from power in Southern state governments and reestablish “Democratic hegemony.” Fockele, *supra* note 60, at 409 & n.34. This included seizing control of state governments, reversing the changes made by Reconstruction policies,

the Act as a tool to ensure that Reconstructionist policies would continue to impact the “Southern political system.”<sup>88</sup> Although blacks were frequently the victims of this violence, they were “simply one symbol” of hated Reconstructionist policies.<sup>89</sup>

Republican speakers identified three groups which were targeted by the Klan: Unionists, blacks, and Northerners.<sup>90</sup> Unionists were targeted because of their political beliefs; blacks, because of their electoral support for Republican Party candidates as well as their race; and Northerners, both because of sectional animus and presumed affiliation with the Republican Party.<sup>91</sup> Former Klan member Thomas Willeford’s testimony supported this belief. He testified that at his initiation, he was told that the object of the organization was to “damage the Republican party as much as they could,” by attacking blacks.<sup>92</sup> In fact, to join the Klan, one had to swear to “oppose all Radicals and negroes in all their political designs.”<sup>93</sup>

Many have interpreted the actions of the 42nd Congress to be solely motivated by race.<sup>94</sup> There was, however, no dissent within the Republican majority of the 42nd Congress that the Act targeted more than racial violence.<sup>95</sup> Representative Horace Maynard, for instance, said that the Act would cover situations where a group conspires to expel “all the northern men, all the ‘Yankees,’ [and] all the ‘carpetbaggers’ from the community.”<sup>96</sup> He continued that conspiracies to prevent men from voting for the Republicans would also be covered by the statute and concluded that he believed it was the duty of Congress to ensure that it was as safe to vote for Republican candidates anywhere in the country as it was to vote for Democratic candidates.<sup>97</sup> He believed that the Klan was targeting three groups—Northerners, Unionist Southerners, and Republicans—in addition to blacks.<sup>98</sup> He also indicated that H.R. 320’s protection was not limited to these three classes.<sup>99</sup>

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and making the Thirteenth, Fourteenth, and Fifteenth Amendments irrelevant through the use of “political terror.” *Id.* at 409–11.

88. See Schindler, *supra* note 86, at 100–01.

89. See *Scott*, 463 U.S. at 850 n.15.

90. See Shatz, *supra* note 79, at 932.

91. See *id.*

92. See 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 16, at 603; Gormley, *supra* note 68, at 535 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 329 (testimony of Thomas Willeford)).

93. See Gormley, *supra* note 68, at 535 n.10 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 329 (1871)).

94. See *infra* notes 172, 191, 197, 217 and accompanying text.

95. See Cogan, *supra* note 63, at 562.

96. CONG. GLOBE, 42d Cong., 1st Sess. app. 310 (1871).

97. *Id.* Some commenters have argued that—abolitionists aside—Republicans at the time were more concerned with strengthening the party than the “unselfish concern for the plight of the freedmen.” See, e.g., Shatz, *supra* note 79, at 934. For example, at the height of Reconstruction, Republicans favored black suffrage in the South where the party needed additional votes to defeat Democrats, but opposed enfranchisement in the North where the party’s political power was stronger. See *id.* at 935.

98. See Cogan, *supra* note 63, at 560–61 (citing CONG. GLOBE, 42d Cong., 1st Sess. app. 309 (1871)).

99. See *id.*

The primary objection in the House to the originally proposed language of section 2 of H.R. 320 was its potential applicability to any ordinary conspiracy.<sup>100</sup> Section 2, as originally introduced, may have been broad enough to allow for the federal prosecution of a list of criminal offenses governed by state law, where at least two people were involved.<sup>101</sup> Moderate and Radical Republicans disagreed over whether the enforcement power granted by § 5 of the Fourteenth Amendment was broad enough to allow federal prosecution of traditionally state law offenses.<sup>102</sup> Democrats objected that the original language would allow for the federal prosecution of any mere assault and battery, carrying a sentence of up to ten years imprisonment and a \$10,000 fine.<sup>103</sup> Representative Shellabarger denied that the statute would federalize ordinary criminal offenses, and he argued that the list of offenses served to limit the scope of activities covered by the statute.<sup>104</sup> He, however, distinguished ordinary crimes from acts that prevented others from exercising their constitutional rights and took the position that the latter should be punishable by the federal government.<sup>105</sup>

In response to these concerns, section 2 was amended to remedy conspiracies that deprived people of “equal protection of the laws” or enjoyment of “equal privileges or immunities under the laws,” and conspiracies to prevent states from protecting equal protection of the law.<sup>106</sup> When the language was amended to limit application to equal protection, it was assumed that the statute was still intended to combat Klan violence against those identified in the preceding debate.<sup>107</sup> Statements by Representatives Shellabarger, Cook, and Willard, the authors and sponsors of the amended equality language, gave no indication that they believed the change limited application of the proposal to cases of racial animus, continuing to present it as a remedy to discrimination against Republicans, Unionists, Northerners, and Southerners deemed disloyal to the South.<sup>108</sup>

The amended version gained approval after Representative Shellabarger responded to then-Representative James Garfield’s suggestion that the bill should be limited to private conspiracies “aimed at particular *classes* of citizens” of the type targeted by the Klan.<sup>109</sup> Moderate Republicans were concerned that the original language would reach crimes generally

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100. See Gormley, *supra* note 68, at 537; Martin, *supra* note 14, at 735–36 & n.15.

101. See Gormley, *supra* note 68, at 537.

102. Fockele, *supra* note 60, at 412.

103. See 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 16, at 610–11 (comments by Rep. William Arthur, noting that the offenses listed in the original section 2 were offenses that the states punished as felonies or misdemeanors, according to the circumstances of each offense and exclaiming “Shades of Draco and of Jeffreys! [W]here is the parallel to this wickedness?” to the assault and battery example).

104. Fockele, *supra* note 60, at 413 (citing CONG. GLOBE., 42d Cong., 1st Sess. 382 (1871) (statement of Rep. Samuel Shellabarger)).

105. *Id.* at 413–14.

106. Act of Apr. 20, 1871 (Ku Klux Klan Act of 1871), ch. 22, 17 Stat. 13.

107. See Cogan, *supra* note 63, at 563–65.

108. See *id.*

109. See Gormley, *supra* note 68, at 538.

governed by state law, not that the statute would reach rights violations motivated by membership in a nonracial class.<sup>110</sup>

The Senate debated on H.R. 320 from April 11 to April 14, 1871.<sup>111</sup> Much of the Senate debate centered on the scope of the Fourteenth Amendment and a different, unadopted amendment to the proposed statute.<sup>112</sup> Senator George Edmunds, the floor manager of the bill, however, did describe what he believed to be the scope of the bill. He stated that the Act was intended to reach conspiracies formed against men because of their political affiliation, religion, or state of origin, but not private plots that may grow out of animosity between individuals.<sup>113</sup>

On April 20, 1871, the 42nd Congress enacted the Ku Klux Klan Act.<sup>114</sup> Section 1 of the final act created a cause of action against government actors acting under the color of law, and exists to the present day, codified as 42 U.S.C. § 1983.<sup>115</sup> Section 2 of the original act created a federal criminal offense and federal civil cause of action for private conspiracies to deprive a person of the equal protection of the law or equal enjoyment of “privileges and immunities” either through direct action or by preventing state governments from effectively safeguarding those rights.<sup>116</sup> Much of section 2 remains to this day in revised form as a provision for civil liability under 42 U.S.C. § 1985.<sup>117</sup> Section 3 of the Act authorized the President of the United States to use the militia or federal armed forces to quell violence or “insurrection” aimed at depriving citizens of their civil rights in a state if the state government refuses or fails to take effective action.<sup>118</sup> Under the provision, the state’s failure to defend the civil rights of its citizens is the equivalent of state action that deprives those rights.<sup>119</sup> Congress was sufficiently concerned that planned campaigns of severe violence or threats of violence in the South would replace legitimate civil authority, actually overthrow local governments, or oppose federal authority with force,<sup>120</sup> to

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110. *See id.*

111. *See* 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 16, at 620.

112. *See id.* at 620–50.

113. *See id.* at 623 (comments by Sen. George Edmunds). In a statement often quoted for the proposition that § 1985(3) extends beyond racially motivated conspiracies, Senator Edmunds stated while reflecting on a murder in Florida of a man killed because he was from Vermont, that “if in a case like this, it should appear that this conspiracy was formed against a man because he was a Democrat . . . a Catholic, . . . a Methodist, or . . . a Vermonter, . . . then this section could reach it.” *Id.*

114. Act of Apr. 20, 1871 (Ku Klux Klan Act of 1871), ch. 22, 17 Stat. 13; *see* Shatz, *supra* note 79, at 911.

115. *See* § 1, 17 Stat. at 13; 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 16, at 592.

116. *See* § 2, 17 Stat. at 13–14.

117. 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 16, at 591; *see* 42 U.S.C. § 1985(3) (2012).

118. *See* § 3, 17 Stat. at 14.

119. *See id.*

120. Fockele, *supra* note 60, at 405 & n.9; *see* § 3–4, 17 Stat. at 14–15.

include presidential authority to declare martial law and suspend habeas corpus in sections 3 and 4 of the Act.<sup>121</sup>

*B. The Supreme Court's Jurisprudence Between Enactment and Bray*

During the century following the enactment of the Ku Klux Klan Act, the Supreme Court rendered the broad language of the Act's protections "largely impotent."<sup>122</sup> In 1883, in *United States v. Harris*,<sup>123</sup> the Supreme Court held the criminal penalties of section 2 of the Act—then codified as section 5519 of the Revised Statutes of the United States<sup>124</sup>—unconstitutional.<sup>125</sup> In *Harris*, R. G. Harris and nineteen others were accused of conspiring to deprive four people of the right to be protected from attack while in police custody.<sup>126</sup> The Court found that none of the Civil War Amendments granted Congress the authority to impose the criminal sanctions found in section 2 of the Ku Klux Klan Act.<sup>127</sup>

Nearly five years later, the Court reaffirmed *Harris* in *Baldwin v. Franks*.<sup>128</sup> In *Baldwin*, Thomas Baldwin, in a petition for writ of habeas corpus, challenged his detention by U.S. Marshal C.J. Franks's for violating the criminal section of the Ku Klux Klan Act.<sup>129</sup> Franks claimed that unlike *Harris*, this application of the Act was constitutional because the federal government was obligated by treaty to protect the rights of Chinese subjects on American soil.<sup>130</sup> The Court held that *Harris* controlled and dismissed the distinction asserted by Franks because the section of the Act struck down in *Harris* was not separable from a specific section protecting foreign nationals.<sup>131</sup>

The civil claims section of the Ku Klux Klan Act was rarely invoked after its criminal counterpart was struck down,<sup>132</sup> possibly because *Harris*

121. See § 3–4, 17 Stat. at 14–15.

122. See Schindler, *supra* note 86, at 89.

123. *United States v. Harris*, 106 U.S. 629 (1883).

124. *Id.* at 632.

125. *Id.* at 644.

126. See *id.* at 629–32. R.G. Harris and nineteen others allegedly "beat[], bruis[ed], wound[ed], and otherwise ill-treat[ed]" four individuals who, at the time of the incident, were being held in the custody a deputy sheriff in Crockett County, Tennessee, for some other criminal offense. *Id.*

127. See *id.* at 641 (holding that the guarantee of equal protection under the law is broader than the protection against involuntary servitude); *id.* at 638 (holding that the enforcement authority granted to Congress by § 5 of the Fourteenth Amendment permits legislation to guarantee protection from state action, but not legislation to suppress "crime within the states"); *id.* at 637 (holding that the Fifteenth Amendment does not grant Congress the authority to enact the Act's criminal penalties because (1) the Amendment does not provide citizens with a right to vote, but only protects them from racially discriminatory deprivations of that right and (2) the statute is not tailored to remedy voting rights violations).

128. See 120 U.S. 678, 685 (1887).

129. See *id.* at 679–82. Baldwin was accused of conspiring to and carrying out the forced expulsion of a group of "Chinese aliens" from the town of Nicolaus, California. *Id.* at 680–82.

130. See *id.* at 680–81, 685–86.

131. See *id.* at 685–86.

132. See *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 371 (1979) (noting that, after the Court invalidated the criminal offence created by the Ku Klux Klan

and *Baldwin* could be read to limit the statute to remedy violations of the Reconstruction Amendments.<sup>133</sup> In 1951, after nearly seventy years of silence,<sup>134</sup> the civil cause of action came before the Court. In *Collins v. Hardyman*,<sup>135</sup> political club members who were meeting to oppose the Marshall Plan alleged that the defendants conspired to disrupt the club's meetings,<sup>136</sup> and that the conspiracy was actionable under what is now 42 U.S.C. § 1985(3).<sup>137</sup> The district court dismissed the case because it found that state action was necessary to state a claim under the statute.<sup>138</sup> The Ninth Circuit reversed,<sup>139</sup> reasoning that, if Congress had intended a state action requirement, it would have included one similar to section 1 of the Klan Act,<sup>140</sup> today's 42 U.S.C. § 1983.<sup>141</sup> The U.S. Supreme Court subsequently reversed the Ninth Circuit.<sup>142</sup> The Court interpreted § 1985(3) to require state action in furtherance of a conspiracy to deprive equal protection of the law.<sup>143</sup> The Court found that, absent state action that deprived plaintiffs of legal recourse in California state courts, defendants may have been guilty of violating local penal laws but not of depriving the plaintiffs of equal protection of the law.<sup>144</sup>

The section "languished in relative obscurity" until 1971,<sup>145</sup> when the Court took up *Griffin v. Breckenridge*.<sup>146</sup> In *Griffin*, two white adults assaulted the black passengers of a car traveling in Mississippi under the mistaken belief that the owner of the car was working to secure civil rights for blacks.<sup>147</sup> The defendants drove their truck into the path of the car, forced the passengers out of the car, prevented them from escaping, and

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Act, the civil provisions remained valid but were "rarely, if ever, invoked"); Cogan, *supra* note 64, at 532.

133. See *Baldwin v. Franks*, 120 U.S. 678, 689–90 (1887); *United States v. Harris*, 106 U.S. 629, 636–38, 641 (1883).

134. See Beth E. Hansen, Note, "Invidiously Discriminatory Animus"—A Class Based on Gender and Gestation Under 42 U.S.C. § 1985(3): *Lewis v. Pearson Foundation, Inc.*, 24 CREIGHTON L. REV. 1097, 1105 (1991).

135. 341 U.S. 651 (1951).

136. *Id.* at 653–54. Commentators have indicated that this means the *Collins* Court assumed members of political organizations were a protected class under the statute. See, e.g., Cogan, *supra* note 63, at 525.

137. See *Collins*, 341 U.S. at 653; 42 U.S.C. § 1985 (2012).

138. See *Collins*, 341 U.S. at 656.

139. See *id.*

140. *Hardyman v. Collins*, 183 F.2d 308, 311 (9th Cir. 1950).

141. See *supra* note 115 and accompanying text.

142. See *Collins*, 341 U.S. at 663.

143. See *id.* at 661.

144. See *id.* The Court stated that "[s]uch private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so." *Id.* A commentator has argued that the Court's reading of a state action requirement within both the criminal portion of the original statute and the civil remedy in § 1985(3) is a result of reading the principle of federalism into the statute. See Cogan, *supra* note 63, at 522–24. States were the traditional defenders of the rights of their citizens and the Fourteenth Amendment only granted the federal government legislative authority to ensure the states continued to fulfill this role. See *id.*

145. Schindler, *supra* note 86, at 89.

146. 403 U.S. 88 (1971).

147. *Id.* at 90.

threatened them with guns, while clubbing the owner of the car.<sup>148</sup> The district court dismissed the complaint and the Fifth Circuit affirmed, both relying on *Collins*.<sup>149</sup> The *Griffin* Court overturned *Collins* and held that, despite linguistic similarities between § 1985(3) and the Equal Protection Clause, the statute contained no explicit requirement of state action.<sup>150</sup> The Court, like the Ninth Circuit in *Collins*, reasoned that, if Congress intended a state action requirement, it would have included one like it did in § 1983, and to read that requirement into § 1985(3) would render it redundant.<sup>151</sup> The Court also found that § 1985(3) was intended to remedy violence by private actors to deprive equal protection of rights.<sup>152</sup> The Court declared that, absent the state action requirement, the proper inquiry was whether Congress had the power to reach the private conspiracy alleged in the given case.<sup>153</sup> The Court found that § 1985(3) could reach private conspiracies to deprive a person of equal protection of the right to interstate travel.<sup>154</sup>

In reaching this holding, the *Griffin* Court outlined the elements for a § 1985(3) claim. First, a court must determine whether the alleged conduct falls within the purview of the statute.<sup>155</sup> A plaintiff must sufficiently allege that (1) at least two people conspired to go in disguise on the highway or trespass on another's property (2) to deprive a person or class of persons of equal protection of, or equal privileges and immunities under the law (3) and that at least one conspirator acted in furtherance of the conspiracy (4) causing injury to a person or property or depriving a person of exercising a right or privilege of a citizen of the nation.<sup>156</sup> Second, the trial court must examine the right violated to determine whether Congress has the constitutional authority to regulate or prohibit the conduct alleged in the particular case.<sup>157</sup>

Out of concern—shared by the 42nd Congress—that the statute would become a general federal action for “tortious, conspiratorial interferences” with the rights of others,<sup>158</sup> the Court read into the equal protection language of the statute a requirement that conspiracies must be motivated by “racial, or perhaps otherwise class-based, invidiously discriminatory

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148. *Id.* at 90–91.

149. *Id.* at 92.

150. *Id.* at 96–97. Section 1 of the Fourteenth Amendment limits the Amendment's scope to regulation of state actions that deprive protected rights. *See* *United States v. Cruikshank*, 92 U.S. 542, 554–55 (1875). The notion of state action has expanded to include some activities of private actors. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 18 (1948) (state enforcement of private covenants).

151. *Griffin*, 403 U.S. at 98–99; *see also supra* note 140 and accompanying text.

152. *Griffin*, 403 U.S. at 100.

153. *Id.* at 104.

154. *Id.* at 105.

155. Fockele, *supra* note 60, at 406 (citing *Griffin*, 403 U.S. at 102–03).

156. *Griffin*, 403 U.S. at 102–03.

157. Fockele, *supra* note 60, at 406 (citing *Griffin*, 403 U.S. at 104–07). Congress may act against conspiracies implicating its commerce power, for the protection of “rights of national citizenship,” or pursuant to the Fourteenth Amendment (deprivation of rights by state or local government actors). *See id.*

158. *See Griffin*, 403 U.S. at 101; Russell, *supra* note 71, at 74.

animus.”<sup>159</sup> This also allowed the Court to avoid the question of the constitutionality of a federal tort statute.<sup>160</sup> The Court found that the plaintiffs’ allegation of racial motivation fulfilled the class animus requirement.<sup>161</sup> Consequently, the Court concluded it need not define other examples of class-based animus sufficient to state a § 1985(3) claim.<sup>162</sup>

Twenty-two years after the *Griffin* Court indicated that § 1985(3) may protect members of nonracial classes,<sup>163</sup> the Supreme Court had the opportunity to clarify how it defined nonracial classes of persons protected by § 1985(3), but failed to do so. In *United Brotherhood of Carpenters Local 610 v. Scott*,<sup>164</sup> the local construction trades union organized a protest against a Texas construction company for hiring nonunion labor.<sup>165</sup> Protesters attacked company employees and threatened to continue the violence until all nonunion workers left town and the company changed its hiring practices.<sup>166</sup> The Court faced the question of whether a nonracial group could state a conspiracy claim under § 1985(3) against a labor union and its supporters, aimed at depriving the nonunion laborers of their free associational right not to join a union.<sup>167</sup> The Court echoed the concern voiced in *Griffin*, that an overly expansive interpretation of § 1985(3) would allow claims for general tortious interference with one’s civil rights.<sup>168</sup> The Court held that discrimination against nonunion laborers motivated by disapproval of their economic activities or beliefs was not sufficient to constitute class-based animus.<sup>169</sup> However, the Court neither defined nonracial class-based animus, nor explicitly excluded all nonracial class-based animus from the statute’s protections.<sup>170</sup>

Justices on the Court disagreed over whether the legislative history of § 1985(3) supported a racial animus requirement.<sup>171</sup> The majority in *Scott* was convinced that the purpose of § 1985(3) was to combat the Ku Klux Klan’s violent efforts to resist black emancipation and voting.<sup>172</sup> In the Court’s view, Republicans, whites, and Northerners were subject to violence because of their perceived sympathy for blacks, not because of any independent hatred toward those groups.<sup>173</sup> After acknowledging that there

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159. *Griffin*, 403 U.S. at 102.

160. *Id.*

161. *Id.* at 102 & n.9.

162. *Id.*

163. *Id.* at 102.

164. *See* *United Bhd. of Carpenters Local 610 v. Scott*, 463 U.S. 825 (1983).

165. *See id.* at 827–28.

166. *Id.* at 828.

167. *See id.* at 830, 836–38.

168. *See id.* at 837.

169. *See id.* at 838. The Court also held that there was a state action requirement for § 1985(3) claims where the conspirators violated a right protected by the federal government against the states. *See id.* at 832–33.

170. *See id.* at 837–39.

171. *See id.* at 836–37; *id.* at 851–52 (Blackmun, J., dissenting).

172. *See id.* at 836 (majority opinion) (“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.”).

173. *See id.*

is legislative history supporting a broader interpretation of legislative intent, the Court concluded that Congress did not intend the statute to address conspiracies motivated solely by economic animus.<sup>174</sup> The Court elected not to answer whether Congress intended the statute to address conspiracies solely motivated by political affiliation because neither party presented evidence of legislative intent not considered by the *Griffin* Court.<sup>175</sup>

However, the Court in dicta doubted that § 1985(3) should or was intended to apply to purely political conspiracies.<sup>176</sup> The majority was not convinced that the Klan attacked Republicans in the South for any partisan reason independent of their support for black legal and political equality.<sup>177</sup> The Court was concerned that opening § 1985(3) to political conspiracies would expand the statute beyond the general tort law feared by some of the 42nd Congress's moderate Republicans to include minor disputes over one party heckling another.<sup>178</sup>

In his dissent, Justice Blackmun expressed a more expansive view of the underlying evil motivating the 42nd Congress to act.<sup>179</sup> Justice Blackmun was convinced that the 42nd Congress viewed Klan violence as motivated by the political viewpoints of its victims, including a general opposition to Reconstruction policies in the South.<sup>180</sup> Unlike the majority opinion,<sup>181</sup> Justice Blackmun examined a broader set of statements from the debates prior to the passage of the Ku Klux Klan Act.<sup>182</sup> Justice Blackmun argued that the principal difference between the radical and moderate factions of

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174. *See id.* at 837–38. The Court concluded that carpetbaggers were not targeted in the South because of their free labor and capital ideology but because they were either Republicans or supporters of black suffrage. *Id.* at 838. The Court also quoted Senator John Pool who argued that whenever a Northerner entered the South, the Northerner would no longer be considered a carpetbagger if they joined or served the needs of the Democrats. *See id.* at 838 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 607 (1871) (statement of Sen. Pool)).

175. *See id.* at 837.

176. *See id.* at 836 (“Although we have examined with some care the legislative history that has been marshaled in support of the position that Congress meant to forbid wholly non-racial, but politically motivated conspiracies, we find difficult the question whether § 1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group by use of otherwise unlawful means.”).

177. *See id.*

178. *See id.* at 837.

179. *See id.* at 839 (Blackmun, J., dissenting) (“The Ku Klux Klan Act was the Reconstruction Congress’ response to *politically motivated* mob violence in the Postbellum South designed to intimidate persons in the exercise of their legal rights.” (emphasis added)).

180. *See id.* at 851.

181. *See* Cogan, *supra* note 63, at 536. There was little discussion in the *Scott* decision of the specific parts of the legislative history of § 1985(3) that support the contention that racial discrimination “was the central concern of Congress”; the only source the *Scott* Court cited for the proposition—its opinion in *Griffin*—made the statement without referring to a source for support. *See id.* (quoting *Scott*, 463 U.S. at 835 (majority opinion)). An example of the *Scott* majority not looking searchingly into the legislative history is that they seemingly ignored the House rejection of a Senate amendment that would have provided further protections if local government subdivisions deprived certain rights *only* because of the target’s “race, color, or previous condition of servitude.” *See id.* at 567–68 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871)).

182. *See Scott*, 463 U.S. at 841–46 (Blackmun, J., dissenting).

the Republican Party was the scope of activity that could be reached by the statute, not the scope of persons who may be protected by the statute.<sup>183</sup>

In 1993, the Supreme Court once more narrowed how classes protected by § 1985(3) may be defined. In *Bray v. Alexandria Women's Health Clinic*,<sup>184</sup> the court excluded definitions of classes based solely on common conduct, belief, or injury.<sup>185</sup> In *Bray*, pro-life activists organized by Operation Rescue, an unincorporated association of abortion opponents, obstructed access to abortion clinics in the Washington, D.C. area and, on at least one occasion, forced a clinic to close for more than six hours.<sup>186</sup> Nine abortion clinics and five women's rights groups brought a § 1985(3) claim against Operation Rescue and six protestors for conspiring to infringe upon the right to practice and have access to abortions.<sup>187</sup> The Court distinguished the potential class of women from a class of women who support abortion rights or seek abortions.<sup>188</sup> The Court concluded that the latter could not be protected by § 1985(3), because to allow classes defined by the "desire to engage in conduct that the [] defendant disfavors" would expand § 1985(3) into a general tort law.<sup>189</sup>

### C. The Circuit Court Divide on Racial Animus Requirement

The Supreme Court's refusal to decide whether to apply the racial animus requirement to political conspiracies under § 1985(3) left the circuit courts to determine whether to apply the requirement. Part I.C.1 presents the majority position among the circuits: racial animus is a required element of politically motivated conspiracy claims. Part I.C.2 presents the minority position: Section 1985(3) was intended to apply to discrimination motivated exclusively by political party animus. Part I.C.3 briefly introduces the potentially inconsistent holdings in the Second Circuit from before and after *Scott*.

#### 1. Majority: Racial Animus Is Required for Political Conspiracies

Though the Supreme Court withheld judgment on whether Congress intended a racial animus requirement for § 1985(3) conspiracy claims,<sup>190</sup> eight of the eleven circuits deciding the issue were convinced by either

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183. *See id.* at 842–43.

184. 506 U.S. 263 (1993).

185. *Id.* at 269–70.

186. *See id.* at 266, 284.

187. *See id.* at 266; Nat'l Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1487 (E.D. Va. 1989) *aff'd*, 914 F.2d 582 (4th Cir. 1990) *judgment rev'd in part, vacated in part sub nom. Bray*, 506 U.S. 263.

188. *See id.* The Court found that it need not decide whether women as a class were protected by § 1985(3) because the acts alleged in the case were motivated either by the defendants' opposition to abortions or defendants' desire to save unborn children, not by the plaintiffs' gender itself. *Id.* at 269–70.

189. *See id.* at 269–71.

190. *See supra* notes 170, 175 and accompanying text.

*Griffin* or the *Scott* dicta to impose such a requirement.<sup>191</sup> Within two years of the *Scott* decision, three circuits concluded that a person claiming that they were discriminated against because of their political affiliation must assert some racial motivation to sustain a claim pursuant to § 1985(3).

In *Harrison v. KVAT Food Management, Inc.*,<sup>192</sup> the Fourth Circuit adopted the view of the majority in *Scott* that the Ku Klux Klan Act was a response to racially motivated violence.<sup>193</sup> James Harrison, an employee of KVAT Food Management, claimed that he was fired from his job because he announced his candidacy for the Republican nomination for countywide office.<sup>194</sup> Harrison contended that other employees were permitted to run for office as Democrats without being fired.<sup>195</sup> The Fourth Circuit was convinced by the *Scott* dicta that the 42nd Congress's primary concern was combatting violent efforts to block implementation of the Civil War Amendments.<sup>196</sup> Accordingly, the Fourth Circuit held that, absent further evidence of congressional intent, the court should not extend the scope of § 1985(3) to any class not approved by the Supreme Court.<sup>197</sup> Consequently, the Fourth Circuit requires racial animus as an element of § 1985(3) conspiracy claims.<sup>198</sup>

In *Brown v. Reardon*,<sup>199</sup> the Tenth Circuit held that politically motivated § 1985(3) claims must have a racial component.<sup>200</sup> *Brown* was a consolidation of four cases against Kansas City, Kansas, and a number of city officials.<sup>201</sup> In *Brown*, four city employees were laid off after refusing to purchase tickets to their employers' political fundraiser or make contributions to their employers' political organization.<sup>202</sup> The plaintiffs

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191. See, e.g., *Perez-Sanchez v. Pub. Bldg. Auth.*, 531 F.3d 104, 109 (1st Cir. 2008) ("We find the Supreme Court's dicta in *Scott* and the reasoning of our sister circuits persuasive. Recognizing a claim under § 1985(3) for discrimination due to political affiliation would open the federal courts to a wide variety of claims, ranging from employment disputes such as this one to election-related claims. We thus decline to extend § 1985(3)'s protection to political affiliation."); *Farber v. City of Paterson*, 440 F.3d 131, 140 (3d Cir. 2006) ("As to both groups, however, the invidiously discriminatory animus behind the Klan's actions was motivated by racial hatred, not by its victims' political party affiliation."); *Grimes v. Smith*, 776 F.2d 1359, 1366 (7th Cir. 1985) ("The import of both *Griffin* and *Scott* is that the legislative history of § 1985(3) does not support extending the statute to include conspiracies other than those motivated by a racial, class-based animus against 'Negroes and their supporters.'"); *Brown v. Reardon*, 770 F.2d 896, 905 (10th Cir. 1985) (rejecting class definitions broader than "race, sex, religion, or national origin"); *Harrison v. KVAT Food Mgmt., Inc.*, 766 F.2d 155, 161 (4th Cir. 1985) ("In analyzing the *Scott* decision, we find little support for the contention that § 1985(3) includes in its scope of protection the victims of purely political conspiracies.")

192. 766 F.2d 155 (4th Cir. 1985).

193. See *id.* at 157 ("The passage of the Ku Klux Klan Act was in response to widespread violence and acts of terror directed at blacks and their supporters in the postwar South.")

194. *Id.* at 156.

195. See *id.*

196. See *id.* at 162.

197. See *id.* at 161.

198. See *id.*

199. 770 F.2d 896 (10th Cir. 1985).

200. See *id.* at 907.

201. *Id.* at 897.

202. *Id.*

claimed that they were terminated because of their membership in a class defined by opposition to the political activities of their employers.<sup>203</sup> The Tenth Circuit found that the plaintiffs failed to meet the class-based animus requirement from *Griffin* and *Scott*.<sup>204</sup> The court read *Scott* and *Griffin* to require racial animus to prevent the statute from becoming a general tort law.<sup>205</sup> In light of *Scott*, the Tenth Circuit concluded that “[t]he statute . . . was intended . . . to provide redress for victims of conspiracies impelled by a *commingling* of racial and political motives.”<sup>206</sup>

In *Grimes v. Smith*,<sup>207</sup> the Seventh Circuit went further and held that § 1985(3) only remedies conspiracies based on racial, class-based animus.<sup>208</sup> In *Grimes*, Doug Grimes and two voters claimed that a number of individuals conspired to mislead voters to prevent him from winning the Democratic Primary for City Judge by placing a person with a name similar to Grimes on the ballot.<sup>209</sup> Grimes claimed that the conspiracy deprived him of the right of meaningful participation in electoral politics.<sup>210</sup> The Seventh Circuit reasoned that to interpret § 1985(3) so broadly would require courts to determine the outcome of elections, determine whether a candidate is a serious candidate or not, and face cases of “garden-variety . . . vote fraud,” which neither the federal courts nor § 1985(3) are equipped to address.<sup>211</sup> Based on the *Scott* analysis of legislative history, the Seventh Circuit held that § 1985(3) is limited to conspiracies motivated by racial animus.<sup>212</sup>

More recently, the Third Circuit decided *Farber v. City of Paterson*.<sup>213</sup> Roberta Farber was an administrative employee whose employment may have been subject to the city’s collective bargaining agreement with the local public employees union.<sup>214</sup> The Third Circuit addressed the question of whether the violence that prompted the Ku Klux Klan Act was racially motivated or politically motivated.<sup>215</sup> The court discounted the political motivations of Klan violence, including blocking carpetbaggers from profiting off of the economic condition of the South and the general disdain

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203. *See id.* at 905.

204. *See id.* at 905–06. The Tenth Circuit had interpreted *Griffin* to require that class animus be based on race, gender, religion, or national origin. *See id.* at 905.

205. *See id.* at 906.

206. *Id.* at 907 (emphasis added) (quoting *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979)).

207. 776 F.2d 1359 (7th Cir. 1985).

208. *See id.* at 1366.

209. *See id.* at 1360–63.

210. *See id.* at 1363.

211. *See id.* at 1367.

212. *See id.* at 1366. The Seventh Circuit agreed that the intent of Congress was to remedy violence against blacks and against those targeted because of their support for blacks. *Id.*

213. 440 F.3d 131 (3rd Cir. 2006).

214. *See id.* at 133. The court commented that this case appeared to be one of political patronage, where the newly elected Democratic mayor fired city employees who supported the former Republican incumbent. *Id.* at 132–33.

215. *Id.* at 134–35.

for Republicans.<sup>216</sup> As a result, the court concluded that the targeting of members of those groups was incidental to the Klan's targeting of blacks and their perceived allies.<sup>217</sup> The court also concluded that political animus was insufficiently "invidious" to support a § 1985(3) claim.<sup>218</sup>

The common thread in these cases is the circuit courts' reliance on the *Scott* Court's examination and interpretation of § 1985(3)'s legislative history—an inquiry concentrated on whether Congress intended to address economic class-based animus.

## 2. Minority Position: Political Affiliation Animus Is Individually Recognized

Two circuit courts maintained their pre-*Scott* holdings that animosity toward a person's political affiliation or association was sufficient to fulfill the intent requirement of § 1985(3). The Sixth Circuit continued to hold that the racial animus requirement is not included in the statute and, absent clear Supreme Court precedent requiring racial animus, the Sixth Circuit is bound by its own precedent.<sup>219</sup> The Fifth Circuit also held that classes characterized by their "political beliefs or associations" are protected under § 1985(3).<sup>220</sup> The Fifth Circuit found that Congress intended to protect those all of those targeted by the Ku Klux Klan including whites, who were targeted because of their political beliefs or affiliation with a political party.<sup>221</sup>

The Sixth Circuit maintained its pre-*Scott* position that political affiliation is a class protected by § 1985(3). In *Cameron v. Brock*,<sup>222</sup> opponents to the election of the sitting sheriff claimed that the defendants destroyed their political pamphlets under an implicit threat of arrest and arrested other members of the sheriff's opposition while passing out flyers.<sup>223</sup> The court rejected the racial animus requirement for three reasons: (1) Section 1985(3) does not state a racial discrimination requirement; (2) the Supreme Court in *Griffin* declined to rule on whether nonracial discrimination was covered; and (3) the Court in *Snowden v. Hughes*<sup>224</sup> indicated that conspiracies motivated by animus against nonracial groups may be actionable.<sup>225</sup> Accordingly, the Sixth Circuit followed its own precedent and accepted nonracial discrimination as sufficient to meet the animus requirement in *Griffin*.<sup>226</sup>

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216. *See id.* at 140–41.

217. *See id.*

218. *See id.* at 138.

219. *See Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987); *Cameron v. Brock*, 473 F.2d 608, 610 (6th Cir. 1973).

220. *See McLean v. Int'l Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987) (quoting *Kimble v. D. J. McDuffy, Inc.*, 623 F.2d 1060, 1066 (5th Cir. 1980)).

221. *See Kimble v. D. J. McDuffy, Inc.*, 648 F.2d 340, 347 (5th Cir. 1981).

222. 473 F.2d 608 (6th Cir. 1973).

223. *Id.* at 609.

224. 321 U.S. 1 (1944).

225. *See Cameron*, 473 F.2d at 610.

226. *See id.*

In *Conklin v. Lovely*,<sup>227</sup> an employee of both the County Clerk and County Treasurer, each Republicans, brought a § 1985(3) claim alleging that she was terminated from her position because of her support for the incumbent Democrat County Prosecuting Attorney against a Republican challenger.<sup>228</sup> The Sixth Circuit narrowly read *Scott* to only exclude economic affinity or interest groups from the protection of § 1985(3).<sup>229</sup> Because the Supreme Court came to no clear holding regarding the racial animus requirement and political party-based discrimination, the Sixth Circuit held that it was required to follow its own precedent, permitting claims by purely political groups.<sup>230</sup>

In *McLean v. International Harvester Co.*,<sup>231</sup> the Fifth Circuit maintained the validity of political affiliation-motivated conspiracy claims under § 1985(3).<sup>232</sup> In *McLean*, George McLean claimed he was in a class of employees scapegoated in a Foreign Corrupt Practices Act investigation into both him and his employer.<sup>233</sup> The Fifth Circuit's position on § 1985(3) is that it protects against conspiracies motivated by animus against racial groups, groups defined by other immutable characteristics, and groups defined by common political ideology.<sup>234</sup> The court acknowledged the *Scott* dicta's concern about the scope of the statute beyond race-based claims but continued to apply the circuit's pre-*Scott* test.<sup>235</sup> Applying the test, the court dismissed the claim because plea bargain scapegoats did not fall into a protected category.<sup>236</sup>

### 3. The Second Circuit Is Unsettled After *Scott*

In light of the *Scott* dicta, the Second Circuit shifted its interpretation of § 1985(3) but left its district courts without clear guidance to follow regarding political conspiracies. Before the *Scott* decision, the Second Circuit in *Keating v. Carey*<sup>237</sup> held that political affiliation was a class protected by § 1985(3).<sup>238</sup> After *Scott*, the Second Circuit in *Gleason v.*

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227. 834 F.2d 543 (6th Cir. 1987).

228. *See id.* at 544–45.

229. *See id.* at 548–49. The Sixth Circuit held that the *Scott* Court limited its own holding to economic animus in the Court's dicta, which indicated its holding would not change if § 1985(3) covered political animus-motivated conspiracies. *Id.* at 549.

230. *See id.* For a broader discussion of the Sixth Circuit's balance between *Scott* and its own pre-*Scott* precedent, see generally Martin, *supra* note 14.

231. 817 F.2d 1214 (5th Cir. 1987).

232. *See id.* at 1219 (citing *Kimble v. D. J. McDuffy, Inc.*, 623 F.2d 1060, 1066 (5th Cir. 1980)).

233. *See id.* at 1218.

234. *See id.* at 1219 (citing *Kimble*, 623 F.2d at 1066). The court stated two categories that the circuit recognized: “those characterized by ‘political beliefs or associations’” and “those characterized by ‘some inherited or immutable characteristic.’” *Id.* (quoting *Kimble*, 623 F.2d at 1066). Though race is among the “inherited or immutable characteristic[s]” mentioned in *McLean*, this Note separates race as a category for easier comparison with cases that limit class-based animus to exclusively racial animus.

235. *See id.* at 1218–19.

236. *See id.* at 1219.

237. 706 F.2d 377 (2d Cir. 1983).

238. *See id.* at 387.

*McBride*<sup>239</sup> called the continued viability of *Keating* into question because of the *Scott* Court's interpretation § 1985(3)'s legislative history.<sup>240</sup> The court refrained from deciding the question because it was unnecessary to resolve the case.<sup>241</sup> Part II examines *Keating* and *Gleason* in greater detail.

## II. SECOND CIRCUIT DECISIONS CAUSE DISTRICT COURT CONFUSION

The Second Circuit's inability to address the question of politically motivated conspiracies—left open by *Scott*—has led to a split among the district courts of the Second Circuit that is remarkably similar to the national circuit split. Part II.A discusses the Second Circuit's recognition of political animus-based § 1985(3) claims before *Scott*. Part II.B examines the Second Circuit's narrowed scope of actionable § 1985(3) claims in light of the dicta in *Scott*. Part II.C explores the district courts' divergent attempts to reconcile Second Circuit precedent applicable to § 1985(3) claims brought against members of politically motivated conspiracies.

### A. Before *Scott*: The Second Circuit Recognizes Political Animus

Before *Scott*, the Second Circuit unambiguously recognized the applicability of § 1985(3) to conspiracies motivated solely by political affiliation.<sup>242</sup> In *Keating v. Carey*—decided the same year as, but without the benefit of, *Scott*—Robert Keating was one of nine employees chosen to run the office now known as the Division of Criminal Justice Services.<sup>243</sup> Keating's background as a journalist covering law enforcement qualified him to be an Associate Public Information Specialist for the division.<sup>244</sup> When Keating took the job, he was told that the position came with protections equivalent to tenured competitive civil servants.<sup>245</sup> After Democratic Governor Hugh Carey was elected, Keating was told that he was to be terminated because of his Republican Party affiliation.<sup>246</sup> Keating brought claims under §§ 1981, 1983, 1985(3), and 1986.<sup>247</sup> Keating based his § 1985(3) claim on his political affiliation–motivated termination, and an alleged conspiracy to both hide his legally enforceable tenure rights from him and deter him from bringing suit in federal court.<sup>248</sup> The district court, in a footnote, dismissed Keating's § 1985(3) claim because he failed to allege defendants motive was class based.<sup>249</sup>

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239. 869 F.2d 688 (2d Cir. 1989).

240. *See id.* at 695.

241. *See id.*

242. *See Keating*, 706 F.2d at 387.

243. *Id.* at 380.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 379–80.

248. *Id.* at 380. Keating claimed that the defendants alternatively threatened to bring up fabricated charges against him if he brought suit and promised replacement employment for Keating's silence. *Id.*

249. *Id.* at 381.

The Second Circuit held that discrimination motivated by membership in the Republican Party was actionable under § 1985(3).<sup>250</sup> Based on the extensive references to Klan violence against Republicans in the statute's legislative history,<sup>251</sup> the court found the exclusion of political affiliation-based discrimination from statutory protection to be indefensible.<sup>252</sup> According to the court, Congress saw the Ku Klux Klan not "solely as a racist organization . . . but as a political organization intent on establishing Democratic hegemony in the South," by attacking blacks, carpetbaggers and Southern "men of union sentiment."<sup>253</sup>

The court was critical of Judge Meskill's dissenting argument that the statute was limited to race-based conspiracies because Klan attacks on Republicans were racially motivated.<sup>254</sup> Judge Meskill argued that the Klan only attacked Republicans because they supported equal legal rights for blacks, including suffrage.<sup>255</sup> The majority concluded that this ignored the historical context of the South's nonracial resentment against Northern occupation and exploitation of the South.<sup>256</sup>

*B. After Scott: The Gleason Dicta Indicates a Limiting of Scope*

In *Gleason v. McBride*,<sup>257</sup> decided five years after *Scott*, the Second Circuit was more circumspect about whether § 1985(3) protected victims of purely political conflicts. In light of *Scott*, the Second Circuit signaled a narrowing of what it would recognize as actionable class-based discrimination, leaving unclear whether the circuit would continue to recognize political party class-based animus.

*Gleason* concerned a conspiracy motivated by the claimant's political opposition to the mayor of the Village of Mount Kisko.<sup>258</sup> Thomas Gleason claimed that he was targeted for arrest and conviction for the harassment of a village teenager, because he challenged the sitting village mayor for reelection as an independent candidate.<sup>259</sup> The district court found that opposition to a candidate for office as a political independent could not define a class protected by § 1985(3).<sup>260</sup> In affirming, the circuit court examined how the *Scott* decision impacted its own holding in *Keating*.<sup>261</sup> While finding that Gleason, as a political independent, failed to claim that he was targeted because of his political affiliation, the *Gleason* court noted

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250. *See id.* at 387.

251. *See supra* Part I.A.

252. *See Keating*, 706 F.2d at 387.

253. *Id.*

254. *See id.* at 387 n.17.

255. *See id.* at 393–94 (Meskill, J., dissenting).

256. *See id.* at 387 n.17 (majority opinion); *see also supra* Part I.A.

257. 869 F.2d 688 (2d Cir. 1989).

258. *See id.* at 690–91, 694.

259. *See id.* at 690–91.

260. *See Gleason v. McBride*, 715 F. Supp. 59, 63 (S.D.N.Y. 1988).

261. *See Gleason*, 869 F.2d at 694–95.

that § 1985(3) might no longer extend to discrimination against political groups absent racial motivation.<sup>262</sup>

But, just as the Supreme Court left the question open in *Scott*, the Second Circuit did not decide whether partisan animus against a member of another political party was sufficient to state a § 1985(3) claim. The court found no need to address the issue further because Gleason (1) did not claim to be a member of a political party and (2) claimed to have been discriminated against because of his individual actions rather than class-based animus.<sup>263</sup> Though the Second Circuit has yet to readdress political affiliation-based conspiracies, the Second Circuit has consistently held that that political or shared ideology-based conspiracies, absent race or political affiliation, are not actionable under § 1985(3).<sup>264</sup>

### C. District Courts Split on Applying *Keating* and *Gleason*

The district courts within the Second Circuit have taken two approaches over whether to impose a racial animus requirement on § 1985(3) political conspiracies after the *Gleason* court's dicta called *Keating*'s validity into doubt. Part II.C.1 explores cases from the Eastern and Northern Districts of New York, which continue to follow *Keating*. Part II.C.2 discusses cases in the Southern and Western Districts of New York, which have articulated a narrower scope of § 1985(3) in light of *Gleason* and *Scott*. Part II.C.3 explores District of Connecticut cases which, although they do not involve claims of purely political animus, lean toward *Keating*.

#### 1. Approach One: Racial Animus Required Absent Political Party Animus

Judges in the Eastern and Northern Districts of New York have attempted to reconcile the holdings of *Gleason* and *Keating*. In these districts, plaintiffs need not meet the racial animus requirement for claims involving political affiliation class-based conspiracies, but must satisfy the

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262. *See id.* at 695 (citing *United Bhd. of Carpenters Local 610 v. Scott*, 463 U.S. 825, 836–37 (1983)).

263. *See id.* The court further noted that it agreed with a portion of Justice Blackmun's dissent in *Scott*, where he stated that “the intended victims [of discrimination] must be victims not because of any personal malice the conspirators have toward them, but because of their membership in or affiliation with a particular class.” *Id.* (quoting *Scott*, 463 U.S. at 850 (Blackmun, J., dissenting)). This is consistent with the Supreme Court's later holding in *Bray* that a class or class-based animus could not be defined by opposition to abortion. *See supra* notes 185–89 and accompanying text.

264. *See Arteta v. County of Orange*, 141 F. App'x 3, 8 (2d Cir. 2005) (refusing to recognize political opponents as a class); *Graham v. Henderson*, 89 F.3d 75, 82 (2d Cir. 1996) (applying *Scott* to reject § 1985(3) claim that defendants “discriminated against [the plaintiff] because of his leadership role in protesting the change in work conditions”). *Arteta* was another case where government employees alleged that an elected official caused them injury because they opposed his election. *Arteta*, 141 F. App'x at 8. The court did not mention *Keating* or address the *Gleason* dicta calling *Keating* into question, but held that *Gleason* applied because the plaintiffs did not claim party affiliation as a motivating factor. *See id.*

requirement for claims involving class-based animus defined by political opposition to a candidate, governmental action, policy, or issue.

In *Platsky v. Kilpatrick*,<sup>265</sup> Judge Glasser in the Eastern District found that *Keating* and *Gleason* could be reconciled, preserving both as good law.<sup>266</sup> In *Platsky*, Henry Platsky claimed that he suffered harassment, intimidation, false arrest, and eviction because he was an avowed Socialist who belonged to a number of Socialist organizations.<sup>267</sup> The court chose not to decide the viability of *Keating* because it found insufficient evidence linking any animus to the defendants' actions.<sup>268</sup>

However, Judge Glasser, assuming *Keating* remained good law after *Scott* and *Gleason*, identified plausible interpretations of the two cases so that *Gleason* would not overrule *Keating*.<sup>269</sup> The court read *Keating* to hold that political animus, like racial animus, could fulfill the class and intent requirements of § 1985(3).<sup>270</sup> The court then read *Gleason* to exclude claims based on opposing political views, support or opposition for a candidate, or opposition to governmental policies.<sup>271</sup> Following this approach, *Gleason* limits actionable political animus to animus based on one's political party affiliation.<sup>272</sup>

In 2011, the Eastern District in *Fishman v. County of Nassau*<sup>273</sup> continued to apply *Keating* to § 1985(3) conspiracy claims.<sup>274</sup> Alan Fishman claimed that he was dismissed from his position as Special Assistant to the Clerk of the Legislature for the newly Republican-controlled Nassau County legislature because he was a Democratic County Committee member.<sup>275</sup> Special Assistant to the Clerk of the Legislature is a bipartisan position serving both party caucuses with no political affiliation requirement.<sup>276</sup> The court held that, because the warnings in both *Scott* and *Gleason* were dicta, *Keating*'s rejection of a racial requirement for political party-motivated conspiracies remained good law.<sup>277</sup>

Even as recently as this year, Eastern District of New York opinions acknowledged that the Second Circuit has not clearly decided whether discrimination based on political party membership qualifies as class-based animus.<sup>278</sup>

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265. 806 F. Supp. 358 (E.D.N.Y. 1992).

266. *See id.* at 362–63.

267. *See id.* at 359–60, 363.

268. *Id.* at 363.

269. *See id.* at 362–63.

270. *See id.*

271. *See id.*

272. *See id.*

273. No. 10 CV 3231(DRH)(AKT), 2011 WL 3919713 (E.D.N.Y. Sept. 7, 2011).

274. *See id.* at \*9.

275. *See id.* at \*2.

276. *See id.* at \*1.

277. *See id.* at \*9.

278. *See, e.g.,* *Frasco v. Mastic Beach Prop. Owners' Ass'n*, No. 12-CV-2756 (JFB)(WDW), 2014 WL 3735870, at \*4–5 (E.D.N.Y. July 29, 2014) (dismissing § 1985(3) claim based on class defined by support for village incorporation); *Fotopolous v. Bd. of Fire Comm'rs of Hicksville Fire Dist.*, No. 11-CV-5532(MKB), 2014 WL 1315241, at \*17 (E.D.N.Y. Mar. 31, 2014) (“Although it is unclear whether under Second Circuit law a

The Northern District of New York similarly distinguishes claims of conspiracies motivated by shared political ideals or positions from conspiracies motivated by political party membership. In *Barber v. Winn*,<sup>279</sup> the Northern District of New York interpreted *Gleason* narrowly to exclude prospective classes defined by “political or philosophical opposition” to a candidate or political issue.<sup>280</sup> In *Barber*, plaintiffs Robert Barber and William L. Nikas alleged that Washington County District Attorney Robert Winn and other county officials conspired to maliciously prosecute Barber and Nikas for bribery, conspiracy, fraud, and conflict of interest, in an effort to avoid the political and economic consequences of a county construction contract.<sup>281</sup> In their § 1985(3) claim, the plaintiffs argued that they were conspired against because they were members of a group which “actively and rigorously endorsed and promoted” the construction project.<sup>282</sup> Consistent with the distinction recognized in the Eastern District, the court held that shared political support or opposition to a political issue cannot define a class of individuals protected by § 1985(3).<sup>283</sup>

The Northern District of New York also follows *Keating*'s holding that animus against a person motivated by their membership in a political party can sustain a § 1985(3) claim. In *Citizens Accord, Inc. v. Town of Rochester*,<sup>284</sup> members of Citizens Accord, a not-for-profit group, alleged that certain town actions violated their Equal Protection rights.<sup>285</sup> The town acquiesced to operations at Accord Speedway in violation of noise variances, altered procedures concerning testimony at hearings on the topic, and changed the monitoring of noise levels to benefit the speedway.<sup>286</sup> The court voiced doubts about the viability of the *Keating* holding but concluded that, until the case was overturned, *Keating* was still binding authority.<sup>287</sup> Applying *Keating*, the court concluded that membership in Citizens Accord was insufficient to sustain a § 1985(3) claim.<sup>288</sup> Citizens Accord was organized as a not-for-profit corporation to promote local “socially responsible land use control.”<sup>289</sup> The court found that it was not a

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political party is a protected group satisfying § 1985's class-based discrimination requirement, the Second Circuit has clearly stated that a plaintiff who claims discrimination because he or she stood ‘in political and philosophical opposition to the defendants’ and were ‘outspoken in their criticism of the defendants’ political and governmental attitudes and activities do not constitute a cognizable class under Section 1985.’” (quoting *Gleason v. McBride*, 869 F.2d 688, 695 (2d Cir. 1989)).

279. No. 95-CV-1030(FJS), 1997 WL 151999 (N.D.N.Y. Mar. 31, 1997) *aff'd*, 131 F.3d 130 (2d Cir. 1997).

280. *See id.* at \*10 (quoting *Gleason*, 869 F.2d at 695).

281. *See id.* at \*1.

282. *Id.* at \*10.

283. *See id.*; *supra* Part II.C.1.

284. *Citizens Accord, Inc. v. Town of Rochester*, No. 98-CV-0715, 2000 WL 504132 (N.D.N.Y. Apr. 18, 2000) *aff'd*, 29 F. App'x 767 (2d Cir. 2002).

285. *Id.* at \*5.

286. *Id.* at \*1.

287. *See id.* at \*8.

288. *See id.* at \*9.

289. *See id.*

political organization.<sup>290</sup> “The fact that a group bands together to voice opposition to conduct of another does not, in and of itself, place this group within a class protected by § 1985(3).”<sup>291</sup>

## 2. Approach Two: *Gleason* Requires Racial Class-Based Animus

The second approach taken by district courts to remedy the confusion caused by *Gleason* is to follow the admonitions in the *Gleason* dicta and impose a racial animus requirement. The Western District of New York and the Southern District of New York, like a majority of the federal district courts, have articulated racial animus requirements on purely political § 1985(3) conspiracy claims.<sup>292</sup>

In 1998, the Western District heard *Adamczyk v. City of Buffalo*,<sup>293</sup> a case involving the violation of a plaintiff’s Fourteenth Amendment and other statutory rights for political gain.<sup>294</sup> Plaintiff Lawrence Adamczyk accused someone in the Buffalo police department of anonymously faxing a police report from a drunk driving arrest, which recorded Adamczyk admitting to taking AZT for HIV, with a cover letter warning voters of Adamczyk’s HIV status.<sup>295</sup> The report was released when Adamczyk was the Campaign Manager of Erie County Executive Dennis Gorski’s reelection campaign.<sup>296</sup> It was clear to the court that the leak was intended to give Gorski’s opponents an advantage in the election.<sup>297</sup> However, the court dismissed Adamczyk’s § 1985(3) claims, in part because he failed to demonstrate that he was a member of a protected class and that a conspiracy was motivated by such membership.<sup>298</sup>

In *Juncewicz v. Patton*<sup>299</sup>—decided four years later and citing *Adamczyk*—the court held that political affiliation alone does not satisfy the animus or protected group membership requirements of a § 1985(3) claim.<sup>300</sup> In *Juncewicz*, Annette Juncewicz was appointed to and held a

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290. *See id.*

291. *Id.* at \*8.

292. *See* Lederman v. Giuliani, No. 98 CIV.2024LMM/JCF, 2007 WL 1623103, at \*4 (S.D.N.Y. June 5, 2007); *Juncewicz v. Patton*, No. 01-CV-0519E(SR), 2002 WL 31654957, at \*3 (W.D.N.Y. Oct. 8, 2002); *supra* Part I.C.1.

293. *See* No. 95-CV-1023E(H), 1998 WL 89342 (W.D.N.Y. Feb. 23, 1998).

294. *See id.* at \*2, \*6–7.

295. *See id.* at \*1–2.

Dear Voter,

We are bombarded with facts and half-truths in the County Executive race. One concrete fact we all must know is that Gorski’s campaign manager, Larry Adamczyk[,] is infected with AIDS and is HIV+. All voters should know the people around Gorski are not normal people and these people will be running county affairs with Gorski the next 4 years. (Adamczyk[’s] last arrest and cellblock sheet are attached for proof).

*Id.* at \*2.

296. *See id.*

297. *See id.*

298. *See id.* at \*6.

299. *See* *Juncewicz v. Patton*, No. 01-CV-0519E(SR), 2002 WL 31654957 (W.D.N.Y. Oct. 8, 2002).

300. *See id.* at \*3.

competitive civil service position with the county water authority over the opposition of the chairman of the county Democratic Party.<sup>301</sup> Juncewicz's position was eliminated from the authority's budget a year later.<sup>302</sup> Juncewicz brought a § 1985(3) claim alleging that her position was eliminated as retribution against her husband, a Democratic county legislator, who supported a faction in the Democratic Party opposed to its chairman.<sup>303</sup> Citing *Adamczyk*, the court dismissed the claim because political affiliation or association does not fulfill the class membership or animus requirements of § 1985(3).<sup>304</sup>

In *Fulani v. McAuliffe*,<sup>305</sup> the Southern District also parted with the Eastern and Northern Districts' application of *Gleason*, opting for a narrower interpretation of invidious class-based animus that excluded animus against a political party as a motivation that could support a claim under § 1985(3).<sup>306</sup> In *Fulani*, a group of political independents accused Democratic officials of conspiring to violate their rights to vote and freely associate by trying to keep Ralph Nader's name off the ballot in a number of states during the 2004 presidential election.<sup>307</sup> Despite the opportunity to limit the court's holding to the shared political belief reasoning—recognized by the entire circuit<sup>308</sup>—the court stated that, “[m]ore importantly,” political affiliation was not recognized by the Supreme Court or the Second Circuit as a class definition protected by § 1985(3).<sup>309</sup> Judge Preska appears to have interpreted the class-based animus requirement as narrowly as the majority of circuit courts.<sup>310</sup>

Two years later, another judge in the Southern District of New York did not impose a racial animus requirement on a political party-based claim. In *Lederman v. Giuliani*,<sup>311</sup> Robert Lederman was a member of a group of street artists who advocated for greater First Amendment rights for street artists.<sup>312</sup> The defendants, two court officers, knew Lederman for his leafleting near the courthouse.<sup>313</sup> Lederman brought a § 1985(3) action claiming that the two court officers led him out of court on the pretext of searching for a weapon or recording device and assaulted him.<sup>314</sup> Lederman claimed that the attack was motivated by his political activity and

301. *See id.* at \*1.

302. *See id.*

303. *See id.*

304. *See id.* at \*3.

305. *See* No. 04 Civ. 6973(LAP), 2005 WL 2276881 (S.D.N.Y. Sept. 19, 2005).

306. *See id.* at \*6.

307. *Id.* at \*1.

308. *See id.* at \*6 (“Class-based discrimination against these seven Plaintiffs would seem to be made rather difficult, if not impossible, as these Plaintiffs themselves refuse to be politically classified.”).

309. *See id.*

310. *Compare id.*, with *supra* Part II.C.1. (recognizing the similarity between Judge Preska's interpretation of *Gleason* with the majority of circuit courts' interpretations of *Scott*).

311. No. 98 Civ.2024LMM/JCF, 2007 WL 1623103 (S.D.N.Y. June 5, 2007).

312. *Id.* at \*1.

313. *Id.*

314. *Id.* at \*5.

affiliation with the street artists' First Amendment group.<sup>315</sup> Consistent with Second Circuit precedent, the court acknowledged that groups of individuals with shared political beliefs or a shared opposition to policy or government actions were not protected against injury from conspiracies under § 1985(3).<sup>316</sup> The court however denied summary judgment because it found a question of fact as to whether the artists' group was a political organization.<sup>317</sup>

Most recently, in 2014, however, a judge in the Southern District again articulated the narrower interpretation of class-based animus. In *Dolan v. Connolly*,<sup>318</sup> an inmate, Rory Dolan, claimed that he was targeted by corrections personnel while incarcerated—both at Fishkill Correctional Facility and Cayuga Correctional Facility—because he often gave legal advice to inmates and aided them in complaints made to the Department of Corrections about facility conditions and staff conduct.<sup>319</sup> The court dismissed Dolan's § 1985(3) claim because he did not argue that his treatment was motivated by racial or other class-based animus.<sup>320</sup> The court limited class-based animus to animus against “those groups with discrete and immutable characteristics such as race, national origin, and sex.”<sup>321</sup> In any event, the Southern District has not held that animus motivated by political party can constitute the animus required to sustain § 1985(3) claims under *Scott*.

### 3. Two Districts Have Not Directly Decided the Issue

The Districts of Connecticut and Vermont do not appear to have addressed the racial animus requirement to political party based conspiracies. However, in one recent decision, a judge in the District of Connecticut indicated that classes and class-based animus may exist in categories other than those defined by race.<sup>322</sup> Furthermore, at least two

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315. *Id.*

316. *See id.* (“[T]hose who are in political and philosophical opposition to [the defendants], and who are, in addition, outspoken in their criticism of the [defendants'] political and governmental attitudes and activities' do not constitute a cognizable class under Section 1985.” (quoting *Gleason v. McBride*, 869 F.2d 688, 695 (2d Cir. 1989)).

317. *Id.* The *Lederman* court seemingly distinguished between *Keating* and *Gleason* after the Second Circuit may have hinted at such a distinction in an unpublished decision. *See id.*; *Arteta v. County of Orange*, 141 F. App'x 3, 8 (2d Cir. 2005). However, it is unlikely that the *Lederman* court relied on *Arteta* because *Lederman* only cites to *Gleason* and not *Arteta*. *See generally Lederman*, 2007 WL 1623103.

318. No. 13 Civ. 5726(GBD)(GWG), 2014 WL 1876524 (S.D.N.Y. May 8, 2014), *report and recommendation adopted*, 2014 WL 3057973 (S.D.N.Y. June 27, 2014).

319. *Id.* at \*1.

320. *Id.* at \*12.

321. *Id.* (quoting *Vega v. Artus*, 610 F. Supp. 2d 185, 204 (N.D.N.Y. 2009)).

322. *See Orr v. Wisner*, No. 3:08-CV-953(JCH), 2010 WL 2667918, at \*9 (D. Conn. June 29, 2010). After concluding that plaintiffs did not claim a conspiracy motivated by racial animus, the court stated that it “must consider whether there is evidence of a conspiracy motivated by animus that is ‘otherwise class-based.’ . . . [A] federal court must consider whether the ‘class’ at issue in fact constitutes a ‘class,’ rather than merely a group of individuals ‘seeking to engage in the activity the defendant has interfered with.’” *Id.* (quoting *Town of West Hartford v. Operation Rescue*, 991 F.2d 1039, 1046 (2d Cir. 1993)).

District of Connecticut cases cited *Keating* to list political affiliation as one of many nonracial classes that fall within the gamut of § 1985(3).<sup>323</sup> Additionally, the District of Connecticut is in agreement with the other districts in the circuit in refusing to find classes defined by a shared position on an issue to be protected by § 1985(3).<sup>324</sup>

### III. THE SECOND CIRCUIT SHOULD RECOGNIZE POLITICAL ANIMUS FOR § 1985(3) CONSPIRACIES

The Second Circuit should resolve the confusion among its district courts by adopting the reconciliation of *Keating* and *Gleason* articulated by Judge Glasser of the Eastern District of New York in *Platsky v. Kilpatrick*. Judge Glasser interpreted § 1985(3) to address political party animus absent racial animus, while excluding classes defined by shared political belief or common political activity.<sup>325</sup> Part III.A argues that both the history of the Reconstruction South and the legislative history of the Ku Klux Klan Act indicate Congress's intent to cover politically motivated conspiracies. Part III.B discusses how recognition of political party-motivated conspiracies is consistent with *Scott* and *Bray*. Part III.C explains that the Second Circuit can reconcile *Keating* and *Gleason* by recognizing political party-motivated animus. Part III.D applies the proposed rule to the district court cases discussed in Part II.C.

#### A. *The Racial Animus Requirement Is Inconsistent with Legislative and Social History*

The social history of the Reconstruction South and legislative history of the Ku Klux Klan Act do not support a racial animus requirement on § 1985(3) claims against political conspiracies. Both the Ku Klux Klan Act and the violence it was intended to address took place in the context of economic and political instability in the South.<sup>326</sup> The economy was devastated and new governments were being formed without the participation or recognition of the former political and social elite.<sup>327</sup> In a society where violence was a common tool to enforce social norms,<sup>328</sup> it is far too simplistic to view Klan violence as exclusively racially motivated.

The Klan of the Reconstruction South may be characterized more accurately as a counterrevolutionary militant force, attempting to reverse Reconstruction and restore the South's Antebellum Democratic political leadership to power.<sup>329</sup> White legal and social supremacy was a component

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323. *Nixon v. Blumenthal*, No. CIV 3:08CV1933 (JBA), 2010 WL 918091, at \*6 n.3 (D. Conn. Mar. 11, 2010), *aff'd*, 409 F. App'x 391 (2d Cir. 2010); *see also Orr*, 2010 WL 2667918, at \*9.

324. *Mahoney v. Nat'l Org. for Women*, 681 F. Supp. 129, 135 (D. Conn. 1987); *see supra* notes 271, 283, 290, 298, 316 and accompanying text.

325. *See supra* notes 269–72 and accompanying text.

326. *See supra* notes 31–35, 40–45 and accompanying text.

327. *See supra* notes 31–35, 40–45 and accompanying text.

328. *See supra* note 49.

329. *See supra* notes 55–61 and accompanying text.

of the antebellum South that the Klan was trying to restore.<sup>330</sup> But the principal goal of the movement was the restoration of Democratic control of local politics and the local economy.<sup>331</sup> As the statute was enacted to combat Klan violence, it is unlikely that Congress would limit its applicability to only one aspect of what motivated that violence.

Indeed, the legislative history of the Act is replete with floor speeches and committee reports that indicate that the Republican majority in Congress was motivated by more than racial discrimination. Legislative committees were tasked with discovering whether bands of a “political character” were waging a campaign of violence.<sup>332</sup> A Senate report concluded that the Klan carried out its violence—against blacks, Northern Republicans and Southern Republicans—with the goal of restoring white Democratic rule.<sup>333</sup>

Congress filled volumes of the legislative record with floor speeches, including excerpts of testimony given in committee, about the scope of Klan violence beyond its racial motivations. Representative William Stoughton, one of the primary supporters of the Act in the House, expounded on the political motivation to Klan violence by highlighting the relationship between Klan membership and the Democratic Party, the murders of leading Republicans, and the use of terrorism against blacks to ensure Democratic victory at the polls.<sup>334</sup> Other legislators in the Republican majority echoed this sentiment, and in various ways, expressed their understanding that Klan violence was political violence targeting Republicans.<sup>335</sup> Committee testimony from Klan members stated that Democrats invariably supported the Klan, and that the Klan’s self-described purposes were the overthrow of Reconstructionist policies (northern Republican control) and the disenfranchisement of blacks.<sup>336</sup> Committee testimony read during the House floor debates contained accounts of Klan members using intimidation to deter blacks from voting Republican, but refraining from attacking blacks who they convinced to vote Democratic.<sup>337</sup> It appears evident that, though race was a motivating factor in Klan violence against blacks, black suffrage and black free labor were just components of the Klan’s hatred of Republicans.<sup>338</sup>

The most defensible conclusion drawn from an examination of the social history of the Reconstruction South and the legislative history of the Ku Klux Klan Act is that Congress intended to address violence motivated by either racial hatred or antagonism against the opposing political party.

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330. *See supra* note 55 and accompanying text.

331. *See supra* notes 55–61 and accompanying text.

332. *See supra* note 66 and accompanying text.

333. *See supra* notes 50–64 and accompanying text.

334. *See supra* note 73 and accompanying text.

335. *See supra* notes 86–87.

336. *See supra* notes 81–82 and accompanying text.

337. *See supra* notes 84–85 and accompanying text.

338. *See supra* Part I.A.

B. *The Distinction Between Political Parties and Shared Beliefs  
Is Consistent with Scott and Bray*

The Second Circuit can adopt an interpretation of § 1985(3) that defends against political affiliation–motivated conspiracies while remaining consistent with *Scott* and *Bray*. In *Scott*, nonunion laborers claimed that they were attacked because of opposition to their employer’s use of nonunion construction labor.<sup>339</sup> The Court faced two definitions of classes potentially protected by § 1985(3): a class defined by shared economic ideology or a class defined by common economic conduct.<sup>340</sup> Read narrowly, *Scott* only excludes conspiracies motivated by shared *economic beliefs* or *activities*. This is supported by the Court’s conclusion that carpetbaggers were not targeted because of their independent economic activities but because they were either Republicans or supporters of blacks.<sup>341</sup> The *Scott* Court called into question extending § 1985(3) to politically motivated–conspiracies *in dicta* because of a concern over the potential breadth of cases that may ensue.<sup>342</sup>

In *Bray*, the Court confirmed its position that common activities or beliefs could not define a § 1985(3) protected class or class-based animus.<sup>343</sup> The Court rejected the argument of abortion providers and women’s rights groups that § 1985(3) protected women seeking abortions or women supporting abortion rights from efforts by pro-life activists to block access to abortion services.<sup>344</sup> The Court found that permitting class definitions based solely on common actions or commonly held beliefs would turn § 1985(3) into the general tort statute opposed by the 42nd Congress.<sup>345</sup>

The *Scott* decision does not preclude the Second Circuit from affirming its *Keating* holding, which rejected the racial animus requirement for asserted political affiliation–based conspiracy claims. The two cases are distinguishable. Keating claimed his tenure rights as a civil service employee were violated because he was a member of the Republican Party.<sup>346</sup> In *Scott*, the laborers were targeted because of each individual’s choice to work in the construction trade *without* joining a union.<sup>347</sup> The *Scott* Court’s refusal to recognize a class based on the common activity of unaffiliated individuals is consistent with the Court’s goal to prevent § 1985(3) from becoming a general torts statute.<sup>348</sup> However, Keating was

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339. See *supra* note 167 and accompanying text.

340. See *United Bhd. of Carpenters Local 610 v. Scott*, 463 U.S. 825, 837–38 (1983).

341. See *supra* note 174 and accompanying text. Given the North’s reluctance to adopt racial social equality and identification of the Democratic Party with secession, a carpetbagger would more likely be a Republican than interested in black suffrage.

342. See *supra* note 178.

343. See *supra* note 185 and accompanying text.

344. See *supra* notes 188–89 and accompanying text.

345. See *supra* notes 158, 189 and accompanying text.

346. See *supra* notes 243–46 and accompanying text.

347. See *supra* note 167 and accompanying text.

348. See *supra* note 168 and accompanying text.

a formal member of a political party,<sup>349</sup> whose membership is limited and defined by the party itself and state election law.<sup>350</sup> Recognition of conspiracies motivated by membership in a state-defined political party may allow application of § 1985(3) that is true to its legislative history while precluding claims where the class is self-defined by its members based on their shared actions or beliefs.

The Second Circuit, like it did in *Keating*, may refuse to require racial animus in political affiliation animus cases based on the statute's legislative history,<sup>351</sup> notwithstanding the *Scott* Court's interpretation of that history. Unlike the argument in Justice Blackmun's dissent, the *Scott* Court's discussion of the statute's legislative history is limited to Senator Edmunds's expounding on the scope of the statute<sup>352</sup> and Senator Pool's denial of any economic motivation for Klan violence.<sup>353</sup> The *Scott* Court needed to look to the broadest statements of legislative intent because there was no mention of the statute protecting collective bargaining rights in the legislative history.<sup>354</sup> The Court supported its rejection of the sufficiency of economic bias absent racial animus to state a § 1985(3) claim with floor statements that elevated the Southerners' political motivations over their animosity toward carpetbaggers, a symbol of Northern economic exploitation of the South.<sup>355</sup> The federal government would not protect collective bargaining rights until the mid-1930s.<sup>356</sup> Conversely, the legislative history of the Ku Klux Klan Act is replete with congressmen decrying Klan's targeting of Republicans for electoral gain.<sup>357</sup> The *Scott* Court may have simply dismissed the abundance of references to protecting Republicans as immaterial to the question of economic ideological animus.

Admittedly, the Second Circuit's requirement of the presence of racial animus in political conspiracies not involving party membership is consistent with *Scott* and *Bray*. In *Scott*, the Court found that laborers who individually chose not to join a union could not claim class-based discrimination based on their common activity absent some tangible affiliation or racial animus.<sup>358</sup> In *Bray*, the Court found that the planned obstruction of abortion clinic operations motivated by opposition to abortion did not give rise to a § 1985(3) cause of action.<sup>359</sup> Similarly in *Gleason*, the Second Circuit found that a political independent could not state a § 1985(3) conspiracy claim motivated by opposing a sitting mayor's

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349. See *supra* note 246 and accompanying text.

350. See, e.g., N.Y. ELEC. LAW §§ 5-300 to -310 (McKinney 2010).

351. See *supra* Part III.A.

352. See *supra* notes 172, 181–82 and accompanying text.

353. See *supra* note 174.

354. See generally CONG. GLOBE, 42d Cong., 1st Sess. (1871).

355. See *supra* note 174 and accompanying text.

356. See National Labor Relations Act, Pub. L. No. 74-196, §§ 7–8, 49 Stat. 449, 452–53 (1935) (codified at 29 U.S.C. § 151 (2012)); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42–43 (1937).

357. See *supra* notes 64–65, 72–87, 90–93, 97–98 and accompanying text.

358. See *supra* notes 167, 170 and accompanying text.

359. See *supra* notes 185–89.

reelection.<sup>360</sup> Both courts, concerned with the potential for an unlimited scope of coverage, left the potential for a bright line regarding animus based on political affiliation.

Formal party affiliation may be the best way to limit the scope of § 1985(3) claim while staying true to the intent of Congress. Political parties are limited, predictable, and legally defined classes of individuals.<sup>361</sup> The Second Circuit's rejection of political issue-motivated animus<sup>362</sup> prevents the potential of an infinite number of class-based animus definitions based on an indefinite number of potential issues or positions on issues.

The *Scott* Court's concern that applying § 1985(3) to political conspiracies absent racial animus would lead to abuses is addressed by the *Scott* decision itself. The *Scott* Court claimed that absent the racial animus requirement, courts would be open to claims against hecklers at political speeches for violating the speaker's First Amendment Rights.<sup>363</sup> However, the *Scott* Court's state action requirement for § 1985(3) claims protecting First Amendment rights would preclude the Court's hypothetical.

Additionally, application to cases concerning political patronage positions would be precluded by the exclusively remedial nature of the statute. Section 1985(3) does not create rights; it is only a remedy for legally protected rights.<sup>364</sup> Therefore, § 1985(3) would not apply to at-will patronage jobs but only to positions covered by civil service protections.

### C. Reconciling Keating and Gleason

The Second Circuit can and should clarify its position on the racial animus requirement for politically motivated conspiracies to clear up the confusion among its component district courts without overruling *Keating* or *Gleason*. Drawing a bright line between conspiracies motivated by the target's political affiliation and conspiracies motivated by opposition to an issue or candidate would fulfill both of these goals.

This distinction is the principle difference between *Keating* and *Gleason*. In *Keating*, Keating was explicitly told that he lost what he believed to be a civil service position with tenure rights because of his political party position.<sup>365</sup> He was denied equal protection of a legally recognized right because of his formal membership in a political party. The *Keating* holding—the plaintiff could state a § 1985(3) claim based on party affiliation animus, absent racial animus—would be affirmed by a circuit decision clarifying the distinction between party membership and mere political opposition.

Similarly, all but the *Gleason* dicta on the racial class-based animus requirement would be affirmed by a court decision clarifying the distinction

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360. See *supra* notes 258–61 and accompanying text.

361. See *supra* note 350 and accompanying text.

362. See *supra* Part II.B.

363. See *supra* note 178 and accompanying text.

364. See *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979).

365. See *supra* notes 243–46 and accompanying text.

between party membership-based claims and political opposition-based claims. In *Gleason*, the court rejected a political independent's claim of discrimination motivated by electoral opposition in a previous mayoral campaign.<sup>366</sup> This result and more recent Second Circuit decisions concerning politically motivated conspiracy claims<sup>367</sup>—absent party membership—would be affirmed by drawing this distinction.

#### D. *The Impact on District Court Holdings*

Adopting a bright-line rule distinguishing between conspiracies motivated by political affiliation-based animus, and those motivated by common beliefs or activities will impact how some of the district courts within the Second Circuit interpret *Scott*, *Keating*, and *Gleason*. Part III.D.1 explains that the proposed bright-line rule would have had little impact on the dispositions of the previously discussed cases from the Northern and Eastern Districts of New York. Part III.D.2 describes how the proposed bright-line rule would repudiate the Western District of New York's approach to interpreting the meaning of *Gleason* and *Scott*. Part III.D.3 discusses how the proposed bright-line rule would resolve the potentially conflicting approaches employed by judges in the Southern District of New York.

##### 1. The Proposed Standard Is Consistent with Holdings by the Northern and Eastern Districts of New York

Little would change in the Northern and Eastern Districts of New York if the Second Circuit adopted the reconciliation of *Gleason* and *Keating*, proposed in *Platsky*.

In the Eastern District of New York case *Fishman v. County of Nassau*, Fishman claimed that he lost his county employment solely because of his political party.<sup>368</sup> Under the proposed reconciliation, because Fishman's government employer conspired with the Republican Party leadership to discriminate against Fishman because of his membership in the Democratic Party,<sup>369</sup> the claim would remain actionable. The only difference would be that the district court would not have to rely on precedent of doubted validity.

In a hypothetical case similar to *Platsky v. Kilpatrick*, but where there was sufficient linkage between class animus and the defendant's actions,<sup>370</sup> a district court applying the proposed distinction may find a § 1985(3) claim actionable. In *Platsky*, Henry Platsky claimed that he faced harassment, intimidation, false arrest, and eviction because he was an avowed Socialist who belonged to numerous Socialist organizations.<sup>371</sup> If

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366. See *supra* notes 258–61 and accompanying text.

367. See *supra* note 264.

368. See *supra* notes 275–76 and accompanying text.

369. See *supra* note 275 and accompanying text.

370. *Contra supra* note 268 and accompanying text.

371. See *supra* note 267 and accompanying text.

the same case were to arise today under the proposed standard, the district court would dismiss the claim unless the plaintiff was enrolled in a Connecticut town Socialist Party.<sup>372</sup> The plaintiff may be a member of groups of self-identifying Socialists, but there would be no party affiliation. If the Socialist Party did exist within the Second Circuit and a conspiracy was motivated by membership in that party, a claim would be actionable under the proposed standard.

The disposition of neither Northern District of New York case, both discussed in Part II.C.1, would change under the proposed bright-line rule. In *Barber*, Robert Barber and William L. Nikas alleged that defendants, the Washington County District Attorney and other county officials, conspired to maliciously prosecute the plaintiffs on bribery, fraud, and conflict of interest charges.<sup>373</sup> The plaintiffs further alleged that the conspiracy was motivated by their common support for a county-funded construction project.<sup>374</sup> In *Citizens Accord*, the plaintiffs were members of a non-profit group interested in promoting responsible land use control.<sup>375</sup> Under the proposed standard, a district court would find neither claim actionable because in each case the proposed purely political class was not a political party. The only difference in a future case would be that the district court would not have to apply *Keating* while doubting its continued validity.

## 2. The Proposed Standard Strikes Down the Western District of New York's Racial Animus Requirement

The proposed standard that preserves *Keating* would overturn the Western District of New York's imposition of a racial animus requirement for purely political classes. In *Juncewicz v. Patton*, Juncewicz was a civil service employee who claimed she lost her job in an act of political retribution for her husband's failure to support their county party's chairman.<sup>376</sup> Though the *Juncewicz* court's interpretation of § 1985(3) and the proposed standard would result in the same disposition, the reasoning would be different. The Western District dismissed the claim because the asserted class was defined by political affiliation or association.<sup>377</sup> Under the proposed standard, because the case appears to be an intraparty squabble, where personal opposition motivated any conspiracy, the fact

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372. See *Minor Parties in Connecticut*, CONN. SEC'Y OF STATE, <http://www.ct.gov/sots/cwp/view.asp?a=3179&q=532972> (last visited Oct. 19, 2014) (no socialist party with statewide enrollment privileges in Connecticut). The claim would be dismissed if it arose in New York or Vermont because neither state has a Socialist Party. See NEW YORK STATE BOARD OF ELECTIONS, NEW YORK STATE VOTER REGISTRATION FORM, (June 2013), available at <http://www.elections.ny.gov/NYSBOE/download/voting/voteform.pdf> (not listing the Socialist Party as one recognized by the New York State Board of Elections); *Parties*, VERMONT DEPARTMENT OF STATE, <https://www.sec.state.vt.us/elections/parties.aspx> (last visited Oct. 19, 2014).

373. See *supra* note 281 and accompanying text.

374. See *supra* note 282 and accompanying text.

375. See *supra* notes 286, 289 and accompanying text.

376. See *supra* notes 301–03 and accompanying text.

377. See *supra* note 304 and accompanying text.

pattern lacks animus based on party enrollment. The case would fall under the second prong, requiring racial animus in political cases based on opposition to a candidate, issue, or common activity.

### 3. The Proposed Standard Resolves the Inconsistency in Southern District of New York Holdings

Under existing Second Circuit jurisprudence, the Southern District of New York consistently denies purely political § 1985(3) claims that are not based on political affiliation.<sup>378</sup> However, the court has produced inconsistent results with regards to political affiliation based § 1985(3) claims.<sup>379</sup> In *Fulani*, the court heard a discrimination claim made by political independents alleging an infringement of rights motivated by the plaintiff's support for Ralph Nader over John Kerry. The court dismissed the case, articulating a rejection of all purely political class-based animus claims, including classes defined on the basis of political party affiliation.<sup>380</sup> Two years later, the court, in *Lederman*, signaled a willingness to apply *Keating* when it denied summary judgment despite Lederman's claims based either on disfavored political behavior or affiliation with a First Amendment advocacy group.<sup>381</sup>

Adoption of the proposed standard would not change how the Southern District of New York decides purely political § 1985(3) claims based on shared political ideology or political beliefs. Absent formal party affiliation, those claims would be dismissed. Under the proposed bright-line rule, the *Fulani* case would result in the same disposition: dismissal of the § 1985(3) claim. However, under the proposed bright-line rule, the § 1985(3) claim of political independents alleging a conspiracy motivated by opposition in an election absent racial animus would be dismissed for failure to allege political party animus.

Finally, adoption of the proposed bright-line rule may narrow circumstances where § 1985(3) claims may be made for purely political conspiracies. Unlike *Lederman*, which entertained the possibility of a First Amendment advocacy group being protected as a political party, under the proposed standard, the statute would only apply to conspiracies motivated by membership in an officially recognized political party. Treating every advocacy group like a political party would allow any group of people defined by a shared position on an issue or opposition to a candidate to fall under the statute by virtue of incorporating under state law. This would defeat the limit the *Gleason* court intended to impose.

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378. See *supra* Part II.C.2.

379. Compare *supra* notes 306–10 and accompanying text, with *supra* notes 311–17 and accompanying text (demonstrating the inconsistency between two judges in the Southern District of New York: Judge Preska's broad rejection of political party-based animus with Judge McKenna's leaving open the question of § 1985(3) protection for First Amendment political groups).

380. See *supra* notes 308–09 and accompanying text.

381. See *supra* notes 311–17 and accompanying text.

## CONCLUSION

In light of recent accusations of political bias at the IRS,<sup>382</sup> it may be an appropriate time to reassess the potential for existing statutes to remedy party affiliation–motivated discrimination. Though not a perfect fit, rejecting a racial animus requirement on purely political conspiracy claims motivated by political party animus but imposing the requirement for all other political conspiracies may preserve § 1985(3) as a remedy for Tea Party groups combating the IRS’s alleged discrimination. The ability of Tea Party groups to take advantage of § 1985(3) under this standard would depend on whether the court believes the Tea Party organizations are independent advocacy organizations, unprotected by the standard proposed in Part III, or an organ of the Republican Party as some pundits have suggested.<sup>383</sup>

The Tea Party aside, the existing § 1985(3) jurisprudence created an inconsistency in the application of the statute.<sup>384</sup> This Note suggests a solution the Second Circuit may adopt to resolve the inconsistencies in the application of § 1985(3) among its district courts, absent clarification from the Supreme Court. However, only the Supreme Court can reach an ultimate resolution of the question of a racial animus requirement for purely political conspiracies. It would require a Supreme Court decision on the issue to resolve the nationwide circuit split.

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382. *See supra* notes 1–7.

383. *See supra* note 7 and accompanying text.

384. *See supra* Parts I.C, II.A–C.