THE SUPPORT OR ADVOCACY CLAUSE OF § 1985(3)

INTRODUCTION

Julieta Garibay received an unexpected message in January 2019.[1] Despite Garibay's status as a naturalized citizen, Texas officials were investigating her voter registration.[2] Garibay had appeared on a list of "Possible Non U.S. Citizens" created by the Texas Secretary of State.[3] The Secretary had instructed Texas counties to use the list for voter roll maintenance, suggesting the counties should require those listed to prove their U.S. citizenship.[4] Garibay told media outlets that she "felt outraged. . . . They basically accused me — and thousands of others — of committing fraud."[5] She and several coplaintiffs sought damages and other relief in a class lawsuit.[6] In addition to bringing claims under the First and Fourteenth Amendments, section 2 of the Voting Rights Act, and the Civil Rights Act, Garibay and her coplaintiffs also alleged violations of 42 U.S.C. § 1985(3),[7] a provision of the Ku Klux Klan Act of 1871.[8]

The Ku Klux Klan Act was passed at the behest of President Ulysses S. Grant following the Civil War.[9] The Act created the precursor to the well-known civil rights statute 42 U.S.C. § 1983[10] and authorized a temporary suspension of the writ of habeas corpus.[11] The Act also imposed civil liability and criminal penalties for a range of private conspiracies.[12] These included conspiracies to overthrow the government; wage war against the United States; "depriv[e] any person or any class of persons of the equal protection of the laws"; or use "force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from

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[1] *See* Ashley Lopez, *This Austin Resident Was on Texas' List of Potential Illegal Voters. Now She's Suing.*, KUT (Feb. 4, 2019), https://www.kut.org/post/austin-resident-was-texas-list-potential-illegal-voters-now-shes-suing [https://perma.cc/X3UH-36CJ].

[2] *Id.*

[3] Third Amended Class-Action Complaint at 5, Garibay v. Whitley, SA-19-CV-074 (W.D. Tex. Mar. 4, 2019) [hereinafter Garibay Complaint].

[4] *Id.* at 3.

[5] Mary Tuma, *Austin Resident Named in Texas Voter Purge Debacle, Files Suit*, AUSTIN CHRON. (Feb. 5, 2019, 4:30 PM), https://www.austinchronicle.com/daily/news/2019-02-05/austin-resident-named-in-texas-voter-purge-debacle-files-suit [https://perma.cc/93YE-ET7S].

[6] *See* Garibay Complaint, *supra* note 3, at 70–72.

[7] *Id.* at 63–68.

[8] Ch. 22, § 2, 17 Stat. 13, 13–14 (codified as amended at 42 U.S.C. § 1985 (2012)). The statute is also referred to as the Third Enforcement Act.

[9] Xi Wang, *The Making of Federal Enforcement Laws, 1870–1872*, 70 CHI.-KENT L. REV. 1013, 1049 (1995).

[10] § 1, 17 Stat. at 13; *see* 42 U.S.C. § 1983.

[11] § 4, 17 Stat. at 14–15.

[12] § 2, 17 Stat. at 13–14.

giving his support or advocacy" to a federal candidate.[13] This last "Support or Advocacy Clause" underlaid Garibay's § 1985(3) claim.[14]

Despite its early provenance, very few cases have been brought under the Support or Advocacy Clause. Modern-day scholars describe the provision as "obscure"[15] and "often-neglected."[16] Lower courts are divided on whether the Support or Advocacy Clause (1) applies to actions harming any citizen, or only members of protected classes; (2) creates a substantive right, or only provides a remedy for separate statutory or constitutional violations; and (3) protects against private action, or only state action.[17] Within the past two years, judges in the same federal district have issued divergent opinions on cases presenting these legal questions.[18]

Clarifying the meaning of § 1985(3) is especially important given the difficulty of deterring private voter intimidation with injunctive relief alone, and given courts' increasing reluctance to make findings of discriminatory intent.[19] Unlike other voting rights statutes,[20] the Support or Advocacy Clause authorizes private suits for damages and arguably does not require a showing of purposeful discrimination.[21] The clause could therefore be a powerful tool for voting rights advocates, particularly in an era of widespread voter intimidation perpetrated by private actors.[22]

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[13] *Id.*

[14] *See* Garibay Complaint, *supra* note 3, at 66–67.

[15] Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 186 (2015).

[16] Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 551 n.78 (1985).

[17] *Compare* Ariz. Democratic Party v. Ariz. Republican Party, No. CV-16-03752, 2016 WL 8669978, at *5 n.4 (D. Ariz. Nov. 4, 2016) (noting that the "plain language of [the Support or Advocacy Clause] does not require" a showing of racial animus or state action), *and* League of United Latin Am. Citizens (LULAC) v. Pub. Interest Legal Found., No. 18-cv-00423, 2018 WL 3848404, at *4–6 (E.D. Va. Aug. 13, 2018) (describing the Support or Advocacy Clause as not requiring allegations of discriminatory animus or violation of a freestanding substantive right), *with* Cockrum v. Donald J. Trump for President, Inc., 365 F. Supp. 3d 652, 661 (E.D. Va. 2019) (describing the Support or Advocacy Clause as strictly remedial and often requiring state action).

[18] *Compare LULAC*, 2018 WL 3848404, at *4–6, *with Cockrum*, 365 F. Supp. 3d at 661.

[19] *See* Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1215 (2018) (explaining that the federal judiciary has not "developed a consistent approach to the evidentiary tools through which discriminatory intent is substantiated"); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 953 (1989) (arguing that "the discriminatory intent standard leads to speculative or meaningless questions").

[20] *See, e.g.*, Voting Rights Act of 1965, Pub. L. No. 89-110, § 11(b), 79 Stat. 437, 443 (codified as amended at 52 U.S.C. § 10307(b) (2012)). Section 11(b) may also raise questions regarding Congress's power to regulate local and state elections. *See* Cady & Glazer, *supra* note 15, at 212.

[21] *See infra* Parts II–III, pp. 1388–400.

[22] *See, e.g.*, WENDY WEISER & ADAM GITLIN, BRENNAN CTR. FOR JUSTICE, DANGERS OF "BALLOT SECURITY" OPERATIONS: PREVENTING INTIMIDATION, DISCRIMINATION, AND DISRUPTION 4–6 (2016), https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Ballot_Security_Voter_Intimidation.pdf [https://perma.cc/6UHD-3S5A] (describing activists "hover[ing] near voters" and "snapping photos of voters' license plates," as well as candidates ordering false robocalls, *id.* at 5).

This Note argues that the legislative history and early application of the Support and Advocacy Clause validate its present-day use by voting rights advocates. Part I explains why the Support or Advocacy Clause is an important tool to protect voting rights and frames three unresolved questions regarding the clause's meaning. Part II examines the history of the clause, including legislative debates and early judicial applications, to clarify why a robust interpretation of the clause is appropriate. Part III demonstrates how lower courts have erroneously constrained the Support or Advocacy Clause, by applying limitations that were applicable only to other portions of § 1985(3). Part IV argues for the present-day use of the Support or Advocacy Clause, demonstrating the provision's particular usefulness given current challenges to voting rights.

I. WHY THE SUPPORT OR ADVOCACY CLAUSE?

A. The Promise of the Support or Advocacy Clause

Political participation is at the heart of our democracy. And yet the right to vote is under attack from numerous sides. State actors impose procedural hurdles to voting,[23] adopt racially discriminatory voting policies,[24] fail to correct deficiencies in voting infrastructure,[25] and dilute their citizens' votes through gerrymandering.[26] Meanwhile, private actors deceive[27] and intimidate[28] voters in election after election.

Few legal tools can address these issues effectively. The Supreme Court has eviscerated the preclearance requirement of the Voting Rights Act[29] and has rejected a federal constitutional remedy to partisan

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[23] *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES 83–199 (2018) (reviewing recent changes in voting laws).

[24] *See, e.g.*, N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) (ruling that a North Carolina voting law, which had been enacted after *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), "target[ed] African Americans with almost surgical precision"); Veasey v. Abbott, 796 F.3d 487, 493 (5th Cir. 2015) (affirming district court's holding that Texas's voter ID law had racially discriminatory effects).

[25] *See* Camille Fischer & Shahid Buttar, *Election Security Remains Just as Vulnerable as in 2016*, ELECTRONIC FRONTIER FOUND. (Sept. 28, 2018), https://www.eff.org/deeplinks/2018/09/election-security-remains-just-vulnerable-2016 [https://perma.cc/8DTJ-RCJA].

[26] *See* William T. Adler & Ella Koeze, *One Way to Spot a Partisan Gerrymander*, FIVETHIRTYEIGHT (Jul. 9, 2019, 1:38 PM), https://projects.fivethirtyeight.com/partisan-gerrymandering-north-carolina [https://perma.cc/A6ER-WCCF] (explaining that "[t]he four U.S. House elections" since 2012 "have the highest levels of partisan bias among all elections since 1992").

[27] *See* Keesha Gaskins, *Real Solutions Needed on Voter Deception*, BRENNAN CTR. FOR JUST. (Dec. 13, 2011), https://www.brennancenter.org/blog/real-solutions-needed-voter-deception [https://perma.cc/HBF7-YLUE].

[28] *See* WEISER & GITLIN, *supra* note 22, at 5.

[29] Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965) (codified as amended at 52 U.S.C. § 10304 (2012)); *see Shelby County*, 133 S. Ct. at 2631 (invalidating the formula used to identify states and localities subject to the preclearance requirement).

gerrymandering.[30] The Department of Justice oversees enforcement of important voting rights statutes, including the Voting Rights Act[31] and criminal statutes prohibiting private intimidation in federal elections. Vigorous enforcement of those laws is thus dependent in part upon political conditions in the federal government. In this context, private lawsuits to vindicate voting rights can be especially important.

Three statutes currently authorize private suits for voter intimidation in federal elections: section 131 of the Civil Rights Act of 1957,[32] section 11(b) of the Voting Rights Act of 1965,[33] and the Support or Advocacy Clause. Both section 131 and section 11(b) authorize only injunctive suits, limiting plaintiffs' recovery to attorney's fees and costs.[34] Plaintiffs bringing such claims risk total nonrecovery, despite the significant costs required to bring a voting rights suit.[35] In contrast, the Support or Advocacy Clause allows claims for compensatory and punitive damages.[36] Such damages might include "emotional distress in severe cases of intimidation" or "wages lost due to fighting a frivolous voter registration challenge."[37]

Plaintiffs seeking relief under the Support or Advocacy Clause face their fair share of hurdles. They must navigate considerable judicial confusion, as is detailed below. They must establish both the existence of a conspiracy[38] and the conspiracy's plan to use "force, intimidation, or threat."[39] These evidentiary requirements are not insignificant.

But the Support or Advocacy Clause offers substantial practical benefits. It allows individuals to bring suit, rather than waiting for an enforcement action by the federal government. It spares plaintiffs the difficulty of proving racial motivation on the part of defendants.[40] And it allows victims to seek compensatory and punitive damages. Injunctive

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30 Rucho v. Common Cause, 139 S. Ct. 2484, 2506–08 (2019).

31 *See Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/section-2-voting-rights-act#enforce [https://perma.cc/6BKC-PBTL].

32 Pub. L. No. 85-315, § 131, 71 Stat. 634, 637 (codified as amended at 52 U.S.C. § 10101(b)).

33 § 11(b), 79 Stat. at 443 (codified as amended at 52 U.S.C. § 10307(b)).

34 *See* Cady & Glazer, *supra* note 15, at 207–08. Lower courts are divided on whether section 131(b) provides a private right of action at all. *See id.* at 192 & n.122.

35 *See* Perry Grossman, *The Case for State Attorney General Enforcement of the Voting Rights Act Against Local Governments*, 50 U. MICH. J.L. REFORM 565, 567 (2017).

36 *See* Forsberg v. Pefanis, 634 Fed. App'x 676, 680 (11th Cir. 2015) (holding that § 1985 permits punitive damages, even in the absence of compensatory damages).

37 Cady and Glazer, *supra* note 15, at 207.

38 Other works have addressed the difficulty of proving civil rights conspiracies in jurisdictions that have adopted the intracorporate conspiracy doctrine. *See, e.g.*, Jennifer Martin Christofferson, Note, *Obstacles to Civil Rights: The Intracorporate Conspiracy Doctrine Applied to 42 U.S.C. § 1985(3)*, 1995 U. ILL. L. REV. 411, 414.

39 A recent scholarly work has reviewed judicial interpretations of the terms "intimidate" and "threaten" as they relate to the Support or Advocacy Clause and similar statutes. *See* Cady & Glazer, *supra* note 15, at 193 n.130, 193–202. This Note does not reproduce those arguments.

40 Section 131(b) has a "purpose" element that some courts have interpreted as requiring a showing of racial motivation. *See, e.g.*, Brooks v. Nacrelli, 331 F. Supp. 1350, 1352 (E.D. Pa. 1971). Section 11(b) specifically omits such an intent requirement. *See* LULAC v. Pub. Interest Legal Found., No. 18-cv-00423, 2018 WL 3848404, at *3–4 (E.D. Va. Aug. 13 2018); Cady & Glazer, *supra* note 15, at 202–03.

claims of voter intimidation are often rendered moot by the passage of elections. In contrast, damages vindicate plaintiffs' rights, impose consequences for voter intimidation, and deter defendants' future wrongdoing.

The substantial promise of the Support or Advocacy Clause is matched by substantial confusion about its purpose and proper application. The next subsection outlines three outstanding questions about the Support or Advocacy Clause that will be resolved by the historical and doctrinal analysis in Parts II and III.

B. Judicial Confusion on the Support or Advocacy Clause

The Support or Advocacy Clause of § 1985(3) reads:

> [I]f two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; . . . 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.[41]

Compared to the other portions of § 1985(3), the Support or Advocacy Clause has received relatively little attention from litigants or scholars.[42] Over the past two years, courts have issued contradictory decisions on three fundamental questions regarding the scope and operation of the clause.[43] These questions are:

First, does the Support or Advocacy Clause apply to conspiracies against any citizen, or only to conspiracies driven by animus for members of a protected class? Plaintiffs suing under the "equal protection of the laws" portion of § 1985(3) (herein labeled the "equal protection provision") must allege that the offending conspiracy was motivated by a "racial" or "class-based, invidiously discriminatory animus."[44] This effectively requires plaintiffs to show both that defendants were motivated by animus *and* that the animus was directed toward a member of

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[41] 42 U.S.C. § 1985(3) (2012).

[42] *See, e.g.*, United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 828–29 (1983) (discussing a different portion of § 1985(3)); Devin S. Schindler, Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(3): A Limiting Strategy Gone Awry?*, 84 MICH. L. REV. 88, 88 (1985) (same).

[43] *See supra* note 18.

[44] Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

a protected class. But the Supreme Court has suggested that such allegations are not required for other portions of § 1985.[45]

The Support or Advocacy Clause does not require a showing that defendants acted with discriminatory animus. The text of the clause confers a cause of action on "any citizen" who is injured on account of their support or advocacy. Supreme Court dicta strongly suggest that claims brought under the clause do not require allegations of racial animus.[46] As explained above, the Support or Advocacy Clause's lack of a racial animus requirement makes it an attractive tool for civil rights plaintiffs, given the difficulty of establishing discriminatory intent in court.[47]

Second, does the Support or Advocacy Clause create a substantive right, or does it merely provide a remedy for a separate statutory or constitutional violation? Supreme Court precedent is least clear on this question. Anticonspiracy suits under the "equal protection of the laws" or "equal privileges and immunities under the laws" portions of § 1985(3) must allege that the plaintiff has suffered a deprivation of a separate federal statutory or constitutional right.[48] But the text of the Support or Advocacy Clause, unlike that of the equal protection provision, does not refer to any other laws. Still, lower courts have split on whether the Support or Advocacy Clause is remedial rather than substantive.[49] Some courts have interpreted Support or Advocacy Clause claims as alleging violations of the First Amendment[50] or the right of qualified voters to cast a ballot.[51] Other courts have understood the clause as creating a new substantive right, pursuant to Congress's constitutional power to protect the integrity of federal elections.[52] The answer to this rights/remedies question determines whether plaintiffs bringing a Support or Advocacy Clause claim must prove only the elements of § 1985(3), or whether they must also bear the burden of proving a separate violation of another right.

Third, does the Support or Advocacy Clause protect against purely private conspiracies, or must plaintiffs allege state action? The text of § 1985(3) does not mention state action. Accordingly, the Supreme

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[45] *See* Kush v. Rutledge, 460 U.S. 719, 726 (1983); *see also* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 281 n.13 (1993) (emphasizing the connection between the "animus requirement" and the equal protection language in § 1985(3)).

[46] *See infra* notes 118–128 and accompanying text.

[47] *See supra* notes 19–22 and accompanying text.

[48] *See infra* notes 133–137 and accompanying text.

[49] *Compare* LULAC v. Pub. Interest Legal Found., No. 18-cv-00423, 2018 WL 3848404, at *6 (E.D. Va. Aug. 13 2018) (finding that the Support or Advocacy Clause creates a substantive right), *with* Federer v. Gephardt, 363 F.3d 754, 760 (8th Cir. 2004) (interpreting the Support or Advocacy Clause as merely remedial).

[50] *See, e.g.*, *Federer*, 363 F.3d at 760.

[51] *See, e.g.*, Means v. Wilson, 522 F.2d 833, 838 (8th Cir. 1975).

[52] *See Ex parte* Yarbrough, 110 U.S. 651, 657–58, 661–62, 666 (1884); *infra* notes 94–102 and accompanying text.

Court held in *Griffin v. Breckenridge*[53] that § 1985(3) reaches purely private conspiracies, as well as conspiracies involving state action.[54] Nevertheless, some courts have effectively required a showing of state action for Support or Advocacy Clause claims by presuming, pursuant to the second question above, that the clause only remedies violations of substantive rights outside of § 1985(3).[55] In Support or Advocacy Clause cases, some courts have assumed the substantive right at issue is the First Amendment, which regulates only state action.[56] These assumptions limit the applicability of the Support or Advocacy Clause by making it useful only against voter intimidation involving state actors.[57]

The value of the Support or Advocacy Clause as a modern tool against voter suppression depends on the answers to these three questions. The clause would provide a viable cause of action against private voter intimidation if courts were to find that the provision (1) shields all citizens, not only victims of class-based animus, (2) confers a substantive right, and (3) regulates private action. Over the twentieth century, judicial opinions have exacerbated confusion over these three issues by failing to distinguish between the different provisions of § 1985(3).[58] This Note focuses specifically on the Support or Advocacy Clause in order to ensure that the clause's potential is not lost.

II. HISTORY OF THE SUPPORT OR ADVOCACY CLAUSE

This Part examines the legislative history and early judicial applications of the Support or Advocacy Clause as a means of answering the three questions raised above. The Supreme Court has reviewed the legislative history of the Ku Klux Klan Act several times,[59] but hardly any judicial discussion has focused on the Support or Advocacy Clause.

Three observations from this history support a robust interpretation of the Support or Advocacy Clause. First, the clause was created, at least in part, to address threats to voters by private actors, such as the Ku Klux Klan (KKK). Given this purpose, it is unlikely that Congress intended to

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[53] 403 U.S. 88 (1971).

[54] *Id.* at 101.

[55] *See, e.g.*, *Federer*, 363 F.3d at 760 (dismissing a claim under the Support or Advocacy Clause because "the substantive federal right that [the plaintiff] wishe[d] to vindicate [was] a First Amendment right," so "state action [was] required").

[56] *See id.*

[57] The second question of substantive rights is bound up with the third question of rights and remedies. Arguably, the state action issue is implicated only when a court interprets the Support or Advocacy Clause to be purely remedial. This Note addresses both issues separately here in order to minimize the possibility of confusion.

[58] *See, e.g.*, Buschi v. Kirven, 775 F.2d 1240, 1257–58 (4th Cir. 1985) (referring generally to actions under 1985(3), in a case considering the "equal protection of the law" portion of the Act).

[59] Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 370 n.7 (1979) (listing the Court's opinions that have reviewed the Ku Klux Klan Act's legislative history).

limit the clause to circumstances involving state action. Second, nothing in the legislative history endorses a narrow view of the Support or Advocacy Clause. In fact, the floor debates support the view that the clause was understood to be far-reaching and uncontroversial. Third, early judicial applications of the Support or Advocacy Clause demonstrate that it was interpreted separately from the equal protection provision of § 1985(3).

A. Legislative History

The carnage of the Civil War was followed by "crisis in the Reconstruction South."[60] The KKK and other domestic terrorists acted with impunity, overwhelming government forces in several states.[61] The KKK conducted a campaign of political terrorism focused on members of the Republican Party, particularly Black individuals.[62]

Reports of mob violence, torture, and intimidation of Black and Republican citizens prompted President Grant to write to Congress on March 23, 1871.[63] President Grant recommended "such legislation as in the judgement of Congress shall effectively secure life, liberty, and property, and the enforcement of law in all parts of the United States."[64] Upon this request, the House appointed a select committee to draft legislation implementing the promises of Reconstruction.[65] A few days later, Representative Samuel Shellabarger (R-OH) introduced H.R. 320, a bill "to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes."[66]

Section 1 of the bill provided a model for the later 42 U.S.C. § 1983. It created a right of action in federal courts for violations of constitutional rights under color of state law.[67] Section 2, the precursor to § 1985(3), imposed civil liability and criminal punishment for more than ten types of intrastate conspiracies.[68] Section 3 enabled the President to deploy federal troops where state governments were unable to prevent the violent deprivation of constitutional rights, while section 4 authorized the President to

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[60] Janis L. McDonald, *Starting from Scratch: A Revisionist View of 42 U.S.C. § 1985(3) and Class-Based Animus*, 19 CONN. L. REV. 471, 477 (1987).

[61] Daniel E. Durden, Note, *Republicans as a Protected Class?:* Harrison v. KVAT Food Management, Inc. *and the Scope of Section 1985(3)*, 36 AM. U. L. REV. 193, 196 (1986).

[62] *See id.* at 196–97, 197 n.25; Mark Fockele, Comment, *A Construction of 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402, 409–10 (1979).

[63] 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, 913 (1986); *see also* CONG. GLOBE, 42d Cong., 1st Sess. 487 (1871) (statement of Rep. Tyner) (noting that "assassinations, murders, whippings, and mutilations are almost nightly committed" and that "these outrages are also of a purely political character").

[64] CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871).

[65] *Id.* at 244–49.

[66] *Id.* at 317.

[67] *Id.*

[68] *Id.*

suspend the writ of habeas corpus and impose martial law if a state could not protect its citizens or was complicit in a conspiracy against its citizens.[69]

The Support or Advocacy Clause was not included in this original version of H.R. 320. In fact, it was added as an amendment on April 14 and 15, 1871, after nine days of congressional debate on the bill had already taken place.[70] Review of that debate provides useful context for present-day disputes on the scope of the clause.

Though the Republican Party controlled Congress in the spring of 1871, its power was waning. Republicans had lost supermajority status during the 1870 midterms, as Democrats gained seats in the South with the aid of the KKK.[71] Faced with the possibility of further electoral losses, Republican members of Congress divided over the means of implementing Reconstruction. Radical elements of the party called for heightened national power to achieve equality between White and Black citizens, while moderate elements emphasized the necessity of rebuilding Southern state governments.[72]

This strategic and ideological rift played out in the debates over H.R. 320. Moderate Republicans objected to section 2 as an unconstitutional encroachment on states' criminal jurisdiction.[73] As originally written, the section punished conspiracies "to do any act in violation of the rights, privileges, or immunities of any person."[74] As some members of Congress pointed out, this provision would have enabled federal sanction against *any* crime committed by two or more individuals.[75] In response to such critiques, Representative Shellabarger introduced an amendment to section 2 to "confine the authority of [the] law to the prevention of deprivations which shall attack the *equality* of rights of American citizens."[76] The House accepted the amendment.[77]

In the Senate, discussion focused on the length of authorization for the President to suspend habeas corpus, the possibility of holding localities liable for property damage resulting from riots, and the maintenance of a loyalty oath for those serving on federal juries.[78] On April 14, shortly before the Senate's final vote on the bill, Senator George Edmunds (R-VT) introduced the Support or Advocacy Clause as an

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[69] *Id.*

[70] *Id.* at 704, 724.

[71] Jeffery A. Jenkins & Justin Peck, Congress and Civil Rights: The Demise of Reconstruction, 1871–1877, at 3 (Aug. 29, 2016) (unpublished manuscript) (on file with the Harvard Law School Library); *see also* Wang, *supra* note 9, at 1046.

[72] Jenkins & Peck, *supra* note 71, at 2, 5.

[73] *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. app. 138–39 (1871); *see also* McDonald, *supra* note 60, at 481.

[74] CONG. GLOBE, 42d Cong., 1st Sess. app. 138 (1871).

[75] *See* Shatz, *supra* note 63, at 914.

[76] CONG. GLOBE, 42d Cong., 1st Sess. 478 (1871) (emphasis added).

[77] *Id.* at 522.

[78] Jenkins & Peck, *supra* note 71, at 13–14.

amendment.[79] Explaining that the suggestion resulted from an informal "consultation among gentlemen on the [drafting] committee," Senator Edmunds noted that he "presume[d] there [would] be no objection" to the amendment.[80] The amendment and the entirety of the discussion on it, as printed in the Congressional Globe, is as follows:

> MR. EDMUNDS. . . . I move after the word "laws," in line forty-three of section two on page 3, to insert these words:
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> Or by force, intimidation, or threats to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy, in a lawful manner, toward or in favor of the election of any lawfully qualified person as an elector of President or Vice President in the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy.
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> MR. TRUMBULL. There ought not to be any objection to that, I think.
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> The VICE PRESIDENT. The question is on this amendment of the Senator from Vermont.
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> Mr. CASSERLY. That is a new amendment, and rather a long one, and I should like to have it read again. Am I correct in understanding that it comes from the committee?
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> The VICE PRESIDENT. The Senator from Vermont stated that it did not come from the committee, but from a conference of members of the committee, the committee not having agreed upon it in a regular committee meeting. The amendment will be read, at the request of the Senator from California.
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> The Chief Clerk read the amendment.
>
> The amendment was agreed to.[81]

The amendment passed in the House by a voice vote the next day.[82] After additional debate on unrelated portions, both houses of Congress passed the bill.[83] President Grant signed it into law on May 3, 1871.[84]

Both the text and legislative history of the Support or Advocacy Clause suggest that the clause was not merely remedial, but rather conferred a substantive right. The Support or Advocacy Clause, unlike other portions of section 2, was not constrained to violations of "equal protection of the laws." Though Congress was unsure of its authority to regulate conspiracies generally, it "never doubted its authority to directly regulate interference in federal elections."[85] As Representative Burton C. Cook (R-IL) explained during debate, a citizen supporting or advocating a federal

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[79] CONG. GLOBE, 42d Cong., 1st Sess. 704 (1871).
[80] *Id.*
[81] *Id.*
[82] *Id.* at 724.
[83] *Id.* at 832.
[84] Ulysses S. Grant, By the President of the United States of America: A Proclamation (May 3, 1871), *in* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1902, at 134, 134–35 (James D. Richardson ed., 1903).
[85] Cady & Glazer, *supra* note 15, at 187.

candidate "is exercising a *right* secured to him clearly by the fundamental law of this nation. Hence, a combination to deprive the citizen of that right, or to punish him for its exercise, is an offense against the United States, and may be so declared and punished by national law."[86] The apparently uncontroversial nature of the Support or Advocacy Clause seems to reflect that view.

B. Early Judicial Applications

In 1874, Congress authorized the revision of the United States Code.[87] During the revision, the civil portions of section 2 of the Ku Klux Klan Act were rearranged into three subsections.[88] The criminal portions of the Act were codified separately. Notably, Congress placed the criminal sanctions corresponding to the Support or Advocacy Clause in a separate statute, section 5520 of the Revised Statutes, apart from the sanctions corresponding to the equal protection provision, section 5519 of the Revised Statutes.[89] The provisions were also analyzed separately by the Supreme Court, demonstrating that both legislators and judges viewed them as distinct.

The Supreme Court considered the constitutionality of section 5519 in 1883. In *United States v. Harris*,[90] the Court concluded that Congress did not have authority under the Thirteenth or Fourteenth Amendments to enact section 5519.[91] The Fourteenth Amendment authorized legislation restricting only state action, not purely private conduct.[92] And the Thirteenth Amendment's prohibition on slavery did not support the broad scope of the statute, which restricted conspiracies targeting White and Black citizens.[93]

The Court considered the constitutional justifications for the Support or Advocacy Clause the next year. In *Ex parte Yarbrough*,[94] the Court upheld section 5520 as constitutional, holding that Congress had power to enact the legislation pursuant to Article I, Section 4 of the Constitution (the Elections Clause),[95] the Fifteenth Amendment,[96] and

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86 CONG. GLOBE, 42d Cong., 1st Sess. 486 (1871) (emphasis added).

87 *See* Brawer v. Horowitz, 535 F.2d 830, 838 n.16 (3d Cir. 1976).

88 *See id.* at 838–39; *see also* Revised Statutes of 1874, tit. 24, § 1980, 18 Stat. 348, 348–49.

89 *See* Revised Statutes of 1874, tit. 70, ch. 7, § 5519, 18 Stat. 1073, 1076 (criminal sanction for conspiracy to deprive others of equal protection of the law); *id.* § 5520, 18 Stat. at 1076 (criminal sanction corresponding with the Support or Advocacy Clause). Minor grammatical changes were made, though with the explicit proviso that they were not intended to change the meaning of the statutes. *See Brawer*, 535 F.2d at 838–39, 838 n.16.

90 106 U.S. 629 (1883).

91 *Id.* at 639, 642; *see* U.S. CONST. amends. XIII, XIV.

92 *Harris*, 106 U.S. at 640.

93 *Id.* at 641.

94 110 U.S. 651 (1884).

95 *Id.* at 662; *see id.* at 660 (quoting U.S. CONST. art. I, § 4, cl. 1).

96 *Id.* at 664–65; *see id.* at 664 (quoting U.S. CONST. amend. XV).

possibly also the structural requirements of the Constitution.[97] The Court reasoned that the Elections Clause gave Congress the "power to protect the elections on which its existence depends from violence and corruption."[98] Congress could therefore "by law protect the act of voting, the place where it is done, and the man who votes, from personal violence or intimidation."[99] The passage of the Fifteenth Amendment supported this view, as it demonstrated that the right to vote "was not intended to be left within the exclusive control of the States."[100] Congress could therefore act to protect the right to vote.[101] Congress's power to do so, the Court explained, was "essential to the successful working of this government."[102] *Yarbrough*'s reasoning applies with equal force to the civil provision of the Support or Advocacy Clause. The Elections Clause, the Fifteenth Amendment, and structural considerations empower Congress to legislate to protect federal elections.

Though no published federal cases during the nineteenth century appear to have considered the civil Support or Advocacy Clause, cases reviewing federal prosecutions brought under the criminal version of the clause can provide useful context on both clauses' meaning and operation.[103] The civil and criminal versions of the Support or Advocacy Clause were near identical.[104] Furthermore, criminal prohibitions tend to be interpreted narrowly because of the rule of lenity, making it possible that the civil Support or Advocacy Clause should be interpreted more robustly than the criminal statute.

United States v. Butler[105] provides historical insight on the first question described in Part I — whether the Support or Advocacy Clause protects all citizens, or only those harmed due to discriminatory animus. The case involved the prosecution of a group accused of intimidating an African American citizen of South Carolina in the run-up to the 1876 federal election.[106] Two of the four criminal charges were predicated upon section 5520 of the Revised Statutes, corresponding to the Support or Advocacy Clause; the other two were predicated upon section 5508 of the Revised Statutes,[107]

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[97] *Id.* at 666.
[98] *Id.* at 658.
[99] *Id.* at 661.
[100] *Id.* at 664.
[101] *See id.* at 665.
[102] *Id.* at 666.
[103] Congress repealed section 5520 in 1894, after the end of Reconstruction. *See* Act of Feb. 8, 1894, ch. 25, § 1, 28 Stat. 36, 37. Congress then passed a nearly verbatim version of the law in 1939. *See* Hatch Political Activities Act, ch. 410, § 1, 53 Stat. 1147, 1147 (1939) (codified as amended at 18 U.S.C. § 594 (2012)).
[104] *See* Revised Statutes of 1874, tit. 24, § 1980, 18 Stat. 348, 348–49; *id.* tit. 70, ch. 7, § 5520, 18 Stat. 1073, 1076.
[105] 25 F. Cas. 213 (C.C.D.S.C. 1877) (No. 14,700).
[106] *Id.* at 214.
[107] Revised Statutes of 1874, tit. 70, ch. 7, § 5508, 18 Stat. 1073, 1076.

which criminalized conspiracies to "injure, oppress, threaten, or intimidate any citizen" in the "exercise or enjoyment" of a separate federal right.[108] The federal jury instructions, reprinted in the *Butler* opinion, indicate that the section 5520 charges did not require a demonstration that the victim was a member of a protected class.[109] The district court explained that section 5520 required a finding that the victim was targeted "on account of his having given support or advocacy" of a federal candidate,[110] whereas "[t]he controlling element in the [section 5508 charges was] the race or color" of the victim.[111] *Butler* thus suggests that a showing of discriminatory animus is not required in a Support or Advocacy Clause suit.

United States v. Goldman,[112] decided the year after *Butler*, sheds light on the second and third questions related to the Support or Advocacy Clause. Years before the Supreme Court decided *Yarbrough*, the Circuit Court for the District of Louisiana in *Goldman* upheld the constitutionality of section 5520.[113] The court reasoned that because Congress had the power, pursuant to the Elections Clause, to regulate the manner of holding federal elections, it could enact laws "to enable the voter to make a free and intelligent choice, and to express that choice freely at the ballot-box."[114] This power extended to the imposition of criminal punishment on those who conspired to threaten, coerce, or intimidate citizens seeking to support or advocate for candidates in federal elections.[115]

The *Goldman* court's constitutional reasoning suggests an answer to the second question, of whether the Support or Advocacy Clause creates a substantive right or merely provides a remedy for violations of other laws. If Congress enacted the clause as a valid exercise of its authority to regulate federal elections, as the *Goldman* court held, then courts need not look to other provisions of law to give the clause meaning. The clause creates a standalone, substantive right.

Both *Butler* and *Goldman* provide insight on the third question, of whether the Support or Advocacy Clause applies to purely private conduct. Both cases involved prosecutions of private citizens. The courts considering their prosecutions did not require state action to find criminal liability,[116] indicating that the Support or Advocacy Clause was understood at the time to extend to purely private acts.

The end of Reconstruction and the Democratic takeover of Congress led the civil Support or Advocacy Clause to fall into disuse by the last

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[108] *Butler*, 25 F. Cas. at 223.
[109] *Id.* at 223–24.
[110] *Id.* at 223.
[111] *Id.* at 224.
[112] 25 F. Cas. 1350 (C.C.D. La. 1878) (No. 15,225).
[113] *Id.* at 1354.
[114] *Id.*
[115] *Id.*
[116] *See id.* at 1352; *Butler*, 25 F. Cas. at 223.

decade of the nineteenth century.[117] However, courts have heard dozens of cases regarding other provisions of § 1985(3), leading to much confusion on the meaning of the Support or Advocacy Clause.

III. THE EQUAL PROTECTION PROVISION OF § 1985(3)

Lower courts have erroneously constrained the Support or Advocacy Clause by applying limitations that are applicable only to other portions of § 1985(3).[118] In the late twentieth century, the Court issued three major decisions on the equal protection provision of § 1985(3). Each decision narrowed the scope of relief under the provision. Despite the Court's repeated explanation that its decisions were limited to the equal protection provision,[119] lower courts have persisted in either ignoring the difference between[120] or proactively conflating[121] the equal protection provision and the Support or Advocacy Clause.

A. Section 1985(3) in the Supreme Court

The more frequently litigated portion of § 1985(3), referred to here as the "equal protection provision," creates a cause of action for injury caused by "two or more persons . . . [who] conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving . . . any person or class of persons of the equal protection of the laws."[122] A brief review of the decisions interpreting this provision is helpful to understand the later misapplication by lower courts.

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[117] This author was able to find no more than thirty cases analyzing the Support or Advocacy Clause, using a standard legal database search.

[118] As the Court has explained, § 1985 contains several different provisions aimed at proscribing different types of conspiracies. *See* Kush v. Rutledge, 460 U.S. 719, 724 (1983) ("Although [the statute] contained only one long paragraph when it was originally enacted, that single paragraph outlawed five broad classes of conspiratorial activity. In general terms, [the statute] proscribed conspiracies that interfere with (a) the performance of official duties by federal officers; (b) the administration of justice in federal courts; (c) the administration of justice in state courts; (d) the private enjoyment of 'equal protection of the laws' and 'equal privileges and immunities under the laws'; and (e) the right to support candidates in federal elections."). The Court went on to note that the "first two and the fifth . . . contain no language requiring that the conspirators act with intent to deprive their victims of the equal protection of the laws." *Id.* at 724–25.

[119] *See id.* at 726 (stating that "[t]here is no suggestion" that discrimination requirements applicable to § 1985(3) equal protection claims should apply "to any other portion" of § 1985 and explaining that the legislative background giving rise to the equal protection provision of § 1985(3) "does not apply to the portions of the statute that prohibit interference with federal officers, federal courts, or federal elections"); Griffin v. Breckenridge, 403 U.S. 88, 99 (1971) (discussing only "the portion of § 1985(3) now before us"); *see also* LULAC v. Pub. Interest Legal Found., No. 18-cv-00423, 2018 WL 3848404, at *5 (E.D. Va. Aug. 13, 2018).

[120] *See, e.g.*, Buschi v. Kirven, 775 F.2d 1240, 1257 (4th Cir. 1985) (analyzing a claim under the equal protection provision of § 1985(3) but speaking generally of "action[s] under section 1985(3)").

[121] *See* Cockrum v. Donald J. Trump for President, Inc., 365 F. Supp. 3d 652, 660–65 (E.D. Va. 2019).

[122] 42 U.S.C. § 1985(3) (2012).

In *Griffin v. Breckenridge*,[123] the Supreme Court established a discriminatory animus requirement for claims brought under the equal protection provision.[124] The *Griffin* Court determined that § 1985(3) was intended to apply to private conspiracies, in addition to conspiracies involving state action.[125] The Court was hesitant, however, to interpret the statute in a manner that empowered the federal government to regulate all conspiracies, even those that were intrastate and purely private. The Court acknowledged the "constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law."[126] In order to limit the equal protection provision, the Court required plaintiffs to establish "the kind of invidiously discriminatory motivation" reflected in the "language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities."[127] Plaintiffs would have to demonstrate "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[128]

The constitutional concerns animating *Griffin* do not apply to the Support or Advocacy Clause. As the Court later explained in *Kush v. Rutledge*,[129] the Support or Advocacy Clause "relate[s] to institutions and processes of the Federal Government."[130] The *Griffin* Court's federalism-driven concerns about a general federal tort law therefore do not apply to the Support or Advocacy Clause.[131] Plaintiffs suing under the clause therefore need not allege discriminatory animus.[132]

In *Great American Federal Savings & Loan Ass'n v. Novotny*,[133] the Court held that the equal protection provision of § 1985(3) "provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates."[134] The opinion discussed "section 1985(3)" broadly,

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123 403 U.S. 88.

124 *Id.* at 102. The Court has not articulated a similar restriction for other portions of § 1985(3). *See Kush*, 460 U.S. at 724–26.

125 *Griffin*, 403 U.S. at 96–101. In so concluding, the Court reversed its holding from *Collins v. Hardyman*, 341 U.S. 651 (1951), which construed the provision to reach only conspiracies formed under color of state law. *See id.* at 661–62.

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

127 *Id.*

128 *Id.*

129 460 U.S. 719.

130 *Id.* at 724.

131 *See id.* at 725 (noting that the Support or Advocacy Clause "contain[s] no language requiring that the conspirators act with intent to deprive their victims of the equal protection of the laws").

132 *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 266, 267 (1993) (reaffirming, in the context of class-based animus, the distinction between the "first clause" of § 1985(3), meaning the equal protection provision, and other parts of the statute).

133 442 U.S. 366 (1979).

134 *Id.* at 372. For criticism of this conclusion, see Note, *Private Conspiracies to Violate Civil Rights:* McLellan v. Mississippi Power & Light Co., 90 HARV. L. REV. 1721 (1977), which argues that "independent illegality confines section 1985(3) in a formalistic and overrestrictive way," *id.* at 1724–25.

but discussed only statutory language and precedents related to the equal protection provision.[135]

Given courts' frequent failure to distinguish between the different portions of § 1985(3), it is near certain that *Novotny* limits only the equal protection provision of § 1985(3). Indeed, the equal protection provision refers to other substantive laws (by referencing a violation of the "equal protection of the laws"), but the Support or Advocacy Clause contains no similar reference. Other portions of § 1985, such as § 1985(1) and (2),[136] similarly contain no invocation of the equal protection of the laws, and no cases have held that those provisions are solely remedial.[137]

In *Griffin*, the Court also rejected a state action requirement for claims brought under the equal protection provision.[138] Unlike the analysis on discriminatory animus, the Court's reasoning on state action applies equally well to the Support or Advocacy Clause. As to text, the *Griffin* Court explained that nothing on the face of the equal protection provision spoke to state action.[139] Similarly, nothing in the text of the Support or Advocacy Clause requires state action. As to related statutes, the *Griffin* Court pointed to the criminal counterpart of § 1985(3), which had not been limited to state action.[140] Likewise, the criminal counterpart of the Support or Advocacy Clause was not limited to state action.[141] The *Griffin* Court also noted that other portions of the Ku Klux Klan Act of 1871 attempted to regulate state action, making it less likely that the equal protection provision (or the Support or Advocacy Clause) was intended to do the same.[142] Finally, as to the legislative history of the equal protection provision, the *Griffin* Court explained that during floor debates "there was no suggestion whatever that liability would not be imposed for purely private conspiracies."[143] This also holds true for

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135 Immediately before declaring that "[s]ection 1985(3) provides no substantive rights," the *Novotny* Court quoted in full *Griffin*'s test for establishing a claim under the equal protection provision of § 1985(3). *Novotny*, 442 U.S. at 372. The *Novotny* Court erroneously described the test as the "criteria for measuring whether a complaint states a cause of action under § 1985(3)." *Id.* The *Novotny* opinion did not acknowledge the existence of the Support or Advocacy Clause. *See id.* at 370–72. Neither did the dissent, which discussed only the meaning of the "equal privileges and immunities under the laws" language of § 1985(3). *Id.* at 388–90 (White, J., dissenting).

136 *See* 42 U.S.C. § 1985(1)–(2) (2012).

137 This conclusion is based upon a Westlaw search of the "Notes of Decision" of § 1985.

138 Griffin v. Breckenridge, 403 U.S. 88, 96 (1971).

139 *Id.* The Court found this point convincing *despite* the similarity between the "equal protection of the laws" language and the Fourteenth Amendment, which applies only to state action. *Id.* at 96–97. The Support or Advocacy Clause has no such similarity.

140 *Id.* at 97–98; *see also* United States v. Williams, 341 U.S. 70, 76, 78 (1951); United States v. Harris, 106 U.S. 629, 637–39 (1883). Notably, while the Court concluded that the criminal counterpart of the equal protection provision was unconstitutional, it held the opposite for the criminal counterpart of the Support or Advocacy Clause. *See supra* pp. 1392–93.

141 *See Ex parte* Yarbrough, 110 U.S. 651, 665–66 (1884).

142 *Griffin*, 403 U.S. at 98–99.

143 *Id.* at 100; *see id.* at 100–01.

the Support or Advocacy Clause's floor debate.[144] Unlike the discriminatory animus and substantive rights issues discussed above, the Court's reasoning regarding the equal protection provision's relationship to state action applies equally well to the Support or Advocacy Clause.

There is a subset of cases in which a plaintiff bringing a claim under the equal protection provision of § 1985(3) must allege state action. This occurs when the plaintiff claims injury to a right that is guaranteed only *against the state* — for example, the First Amendment's guarantee against *state* interference with free speech. As the Supreme Court explained in *United Brotherhood of Carpenters, Local 610 v. Scott*,[145] a purely private conspiracy cannot deprive someone of the equal protection of the First Amendment.[146] Therefore, the state must have been involved in some way for the First Amendment to be implicated at all.[147] This wrinkle does not arise for claims brought under the Support or Advocacy Clause because, as was discussed above, the clause does not require the plaintiff to allege violations of a separate substantive right.[148] Rather, the substantive right is conferred by the statute itself and is guaranteed to the citizen against other citizens, rather than against the state.

B. Lower Court Confusion

Despite the Supreme Court's focus on the equal protection provision in the above cases, lower courts soon divided on whether the Court's reasoning should also apply to the Support or Advocacy Clause. Several circuit and district courts have since analyzed voting-related claims under the framework of the equal protection provision,[149] while the Fifth Circuit has instead applied the Support or Advocacy Clause.[150]

The Eighth Circuit has considered voting-related conspiracies under both the equal protection provision and the Support or Advocacy Clause. In *Means v. Wilson*,[151] the court allowed a claim under the equal

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144 *See supra* p. 1391.

145 463 U.S. 825 (1983).

146 *Id.* at 831.

147 *Id.* at 831–32.

148 *See supra* pp. 1397–98.

149 *See* Keating v. Carey, 706 F.2d 377, 386–88 (2d Cir. 1983) (holding that Republicans are a protected class under the equal protection provision); Cameron v. Brock, 473 F.2d 608, 610 (6th Cir. 1973) (allowing claim under the equal protection provision because supporters of a political candidate constituted a clearly defined class, defendants acted under color of office, and the case concerned a First Amendment right); Richardson v. Miller, 446 F.2d 1247, 1249 (3d Cir. 1971) (holding that a conspiracy to prevent the expression of political support satisfied *Griffin*'s test for the equal protection clause); Puentes v. Sullivan, 425 F. Supp. 249, 252–53 (W.D. Tex. 1977) (same).

150 Paynes v. Lee, 377 F.2d 61, 64 (5th Cir. 1967). Still other courts suggested that § 1985(3) could remedy violations of the right to vote, without specifically locating that conclusion in either the equal protection provision or the Support or Advocacy Clause. *See* Cal. Republican Party v. Mercier, 652 F. Supp. 928, 936 (C.D. Cal. 1986).

151 522 F.3d 833 (8th Cir. 1975).

protection provision, but its reasoning also supports a robust interpretation of the Support or Advocacy Clause. The court stated that "[t]he right to vote is fundamental to representative government," and "Congress has the power to guarantee that right by statute."[152] Congress can therefore regulate private conspiracies that impinge upon the right to vote.[153] Statutory protection of that specific federal right does not raise the specter of a general federal tort law, as was the Court's concern in *Griffin*.[154]

Despite this precedent, the Eighth Circuit undermined the Support or Advocacy Clause fifteen years later in *Gill v. Farm Bureau Life Insurance Co*.[155] The court refused to consider the plaintiff's late-raised Support or Advocacy Clause claim because, it held, "[t]he independent constitutional right relating to federal elections . . . is limited . . . to cast[ing] a ballot and hav[ing] it honestly counted."[156] The court instead focused on the equal protection provision, holding that the plaintiff had alleged a First Amendment violation that was subject to *Carpenters*'s state action requirement.[157]

The Eighth Circuit then misapplied *Gill* in 2004. In *Federer v. Gephardt*,[158] the court quoted *Gill* for the proposition that the "essence" of a Support or Advocacy Clause claim "is the assertion of a First Amendment type right vindicating advocacy and association."[159] The court did not acknowledge that the quoted material came from the portion of *Gill* that discussed the equal protection provision. The Eighth Circuit thus improperly conflated the remedial nature of the equal protection provision with the Support or Advocacy Clause, which instead confers a substantive right.

In contrast, the Fifth Circuit has recognized the Support or Advocacy Clause as providing a freestanding substantive right. In *Paynes v. Lee*,[160] the plaintiff was permitted to seek damages against defendants who had allegedly attempted to intimidate the plaintiff from registering to vote.[161] The Fifth Circuit distinguished the Support or Advocacy Clause from the equal protection provision, explaining that "[t]he interference with a Federally protected right to vote . . . had the specific attention of Congress," as demonstrated by the Ku Klux Klan Act's creation of a "Federal *right* . . . to recover damages for interfering with

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152 *Id.* at 838.

153 *Id.*

154 *See id.* at 840 n.5 ("[W]here the complaint alleges a conspiracy motivated by intent to deprive plaintiffs [supporting a particular candidate] of their right to vote, the 'constitutional shoals' of interpreting the statute as a general federal tort law have been circumnavigated." (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971))).

155 906 F.2d 1265 (8th Cir. 1990).

156 *Id.* at 1270.

157 *Id.* (citing United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 831 (1983)).

158 363 F.3d 754 (8th Cir. 2004).

159 *Id.* at 760 (quoting *Gill*, 906 F.2d at 1270).

160 377 F.2d 61 (5th Cir. 1967).

161 *Id.* at 63, 64–65.

Federal voting rights."[162] This right to vote was to be construed broadly: "The right to be free from threatened harm and the right to be protected from violence for an attempted exercise of a voting right are no less protected than the right to cast a ballot on the day of the election."[163]

Lower courts should adopt the Fifth Circuit's approach. The Supreme Court's requirements related to the equal protection provision have been incorrectly extended to the Support or Advocacy Clause by lower federal courts. Courts should acknowledge the distinct nature of the Support or Advocacy Clause in order to preserve its utility.

IV. THE SUPPORT OR ADVOCACY CLAUSE TODAY

Members of Congress recently noted that despite the elimination of many formal barriers to voting, "the integrity of today's elections is threatened by newer tactics aimed at suppressing voter turnout," such as efforts to "intimidate the electorate."[164] New legislation could help to tackle the myriad problems facing voting rights, including racially discriminatory voter suppression. In the absence of such legislation, however, the Support or Advocacy Clause can be a useful existing tool.

Modern voter intimidation and suppression efforts are often driven by private actors, including political campaigns and their affiliates. For example, just before the 2018 midterm election, flyers were distributed in Milwaukee, Wisconsin, "falsely informing residents that U.S. Immigration and Customs Enforcement (ICE) would actively patrol polling stations and detain anyone without ID."[165] During the 2016 presidential election, voter intimidation occurred at various scales. On one end of the spectrum, private actors reportedly pulled hijab-wearing voters out of line to vote in Michigan[166] and used bullhorns to yell at

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[162] *Id.* at 64 (emphasis added).

[163] *Id.* Sometimes courts purported to analyze a claim under the Support or Advocacy Clause, but instead imposed requirements related to the equal protection provision. In *Pierce v. Montgomery County Opportunity Board, Inc.*, 884 F. Supp. 965, 978 (E.D. Pa. 1995), for example, a Pennsylvania district court held that the plaintiff failed to state a claim under the Support or Advocacy Clause because she failed to assert discrimination based on an immutable characteristic. In so holding, the court essentially ignored the Supreme Court's warning in *Kush v. Rutledge*, 460 U.S. 719, 724–26 (1983), that the class-based animus requirement applied to only the equal protection provision.

[164] Deceptive Practices and Voter Intimidation Prevention Act of 2019, H.R. 3281, 116th Cong. § 2(4) (2019). The Act would create criminal penalties and a private right of action against those who engage in deceptive practices in federal elections. *Id.* § 3.

[165] Danielle Root & Aadam Barclay, *Voter Suppression During the 2018 Midterm Elections*, CTR. FOR AM. PROGRESS (Nov. 20, 2018, 9:03 AM), https://www.americanprogress.org/issues/democracy/reports/2018/11/20/461296/voter-suppression-2018-midterm-elections [https://perma.cc/S6E6-WRHP].

[166] Samuel Osborne, *Voter Intimidation Reported in Michigan After Man Allegedly Tries to Stop Muslim Women from Voting*, THE INDEPENDENT (Nov. 9, 2016, 1:23 AM), https://www.independent.co.uk/news/world/americas/michigan-man-stop-muslim-women-from-voting-donald-trump-hillary-clinton-a7405891.html [https://perma.cc/LR24-PMW9].

voters waiting at a polling place in Florida.[167] On the other, political consultant Roger Stone's organization Stop the Steal was sued in Ohio for an alleged "coordinated campaign of vigilante voter intimidation."[168]

The contemporary history of voter intimidation stretches further back, with reports of poll watchers photographing voters' license plates in Wisconsin in 2012,[169] of protestors "hover[ing] near voters" and "block[ing] and disrupt[ing] lines of voters" in Texas in 2010,[170] and of a state committeeman hiring a private investigator to interrogate Hispanic residents about their right to vote in New Mexico in 2008.[171] From 1982 until 2018, the Republican National Committee (RNC) was subject to a consent decree due to, among other offenses, the RNC's alleged enlistment of "off-duty sheriffs and police officers to intimidate voters by standing at polling places in minority precincts during voting with 'National Ballot Security Task Force' armbands," and, in some cases, firearms.[172]

Many of these efforts have racial overtones, but might not result in the sort of evidence that could support a finding of discriminatory animus in court.[173] Furthermore, there is no guarantee that the federal government will prioritize criminal prosecution or civil sanctions against violators. Therefore, it is useful to have a private cause of action, like the Support or Advocacy Clause, that enables suit against private conspirators without the need to allege class-based animus.

Unfortunately, confusion over the exact requirements of the Support or Advocacy Clause, as opposed to the equal protection provision of § 1985(3), continue to plague judicial analysis. Should the Support or Advocacy Clause allow suit only in cases involving discriminatory, class-based animus? Does the clause confer a substantive right, or is it purely remedial? Must a plaintiff seeking relief under the clause allege some

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167 Mark Berman & William Wan, *Democrats Sue Trump, Republicans in Four States and Allege "Campaign of Vigilante Voter Intimidation,"* WASH. POST (Nov. 1, 2016, 5:42 PM), https://www.washingtonpost.com/news/post-nation/wp/2016/11/01/democrats-sue-trump-republicans-in-four-states-and-allege-campaign-of-vigilante-voter-intimidation [https://perma.cc/F6SH-YKVY].

168 *Id.*

169 WEISER & GITLIN, *supra* note 22, at 5.

170 *Id.*

171 Zachary Roth, *Did New Mexico GOP Lawyer Hire P.I. to Intimidate Minority Voters?*, TALKING POINTS MEMO (Oct. 24, 2008, 9:20 AM), https://talkingpointsmemo.com/muckraker/img-src-http-www-talkingpointsmemo-com-images-pat-rogers-muck-jpg-vspace-5-hspace-5-align-left-did-new-mexico-gop-lawyer-hire-p-i-to-intimidate-minority-voters [https://perma.cc/LB7T-F5P8].

172 Democratic Nat'l Comm. v. Republican Nat'l Comm., 673 F.3d 192, 196 (3d Cir. 2012); *see* Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 18-1215, 2019 WL 117555, at *2 (3d Cir. Jan. 7, 2019) (reflecting decree's expiration in 2018).

173 For example, in *Arizona Democratic Party v. Arizona Republican Party*, No. CV-16-03752, 2016 WL 8669978 (D. Ariz. Nov. 4, 2016), the plaintiff claimed that the Trump campaign and state Republican Party had encouraged supporters to take photos of the license plates of voters suspected of voting illegally. *Id.* at *5. While the circumstances suggest issues of race or nationality may have been involved, the court did not address such issues because they were irrelevant to the Support or Advocacy Clause claim. *See id.* at *5 n.4.

form of state action? There is no present consensus, as demonstrated by the divergent outcomes in *League of United Latin American Citizens (LULAC) v. Public Interest Legal Foundation (PILF)*[174] and *Cockrum v. Donald J. Trump for President, Inc.*,[175] both decided in the Eastern District of Virginia.

LULAC v. PILF involved claims against an organization that published reports in 2016 and 2017 claiming that registered Virginia voters were committing voting-related felonies.[176] The 2017 report included the names, home addresses, and telephone numbers of the plaintiffs and other private individuals.[177] The court denied a motion to dismiss the plaintiff's Support or Advocacy Clause claim, explaining that unlike the equal protection provision, the Support or Advocacy Clause "does not require allegations of a race or class-based, invidiously discriminatory animus or violation of a separate substantive right."[178]

The *Cockrum* court took a different approach. In that case, several individuals sued then–presidential candidate Donald Trump's campaign committee, alleging that the Trump campaign had conspired with Russian intelligence operatives who had obtained the plaintiffs' personal information through a hack of the Democratic National Committee's servers.[179] The *Cockrum* court stated that all of § 1985(3) is "purely remedial" and that the plaintiffs were alleging a First Amendment violation that could not succeed without a showing of state action.[180] The court justified this conclusion by pointing to *Yarbrough*, which upheld the criminal version of the Support or Advocacy Clause as constitutional based on the Elections Clause and the Fifteenth Amendment.[181] The court claimed that *Yarbrough* proved the Support or Advocacy Clause did not create a substantive right, but rather provided a remedy for a separate constitutional violation.[182]

The *Cockrum* court misinterpreted *Yarbrough*. That case held that Congress's creation of a substantive right in the Support or Advocacy Clause was necessary and proper pursuant to Congress's constitutional powers under Article I, Section 4 of the Constitution[183] and the Fifteenth Amendment.[184] Passing a statute on the basis of a constitutional

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174 No. 18-cv-00423, 2018 WL 3848404 (E.D. Va. Aug. 13, 2018).

175 365 F. Supp. 3d 652 (E.D. Va. 2019).

176 *LULAC*, 2018 WL 3848404, at *1.

177 *Id.*

178 *Id.* at *6. The case later settled. *See* Justin Levitt, LULAC v. PILF *Settle Two Different Lawsuits*, ELECTION L. BLOG (July 17, 2019, 5:17 PM), https://electionlawblog.org/?p=106405 [https://perma.cc/SG97-ANLA].

179 *Cockrum*, 365 F. Supp. 3d at 654–55.

180 *Id.* at 663; *see id.* at 664 & n.14.

181 *Id.* at 663–64 (citing *Ex parte* Yarbrough, 110 U.S. 651, 665 (1884)).

182 *Id.* at 664.

183 *See Yarbrough*, 110 U.S. at 660–62.

184 *See id.* at 664–65.

power — as Congress did with the Support or Advocacy Clause — is distinct from creating a solely remedial statute only to enforce a constitutional right. Without this distinction, Congress could never be understood to have created standalone statutory rights; instead, every statute would merely be framed as a remedy for an underlying constitutional right.[185]

The *Cockrum* court's interpretation makes even less sense given the Ku Klux Klan Act's history. Congress passed the Act in 1871, decades before the First Amendment was incorporated against the states.[186] It is highly unlikely that the Reconstruction Congress would have included, in an act otherwise responding to the Ku Klux Klan, a provision remedying First Amendment violations by the federal government. Regarding the Support or Advocacy Clause as a remedy for First Amendment violations is ahistorical and unnecessarily limiting.

After more than a century of litigation, then, the correct meaning and application of the Support or Advocacy Clause is still unsettled. Much of the confusion can and must be clarified by distinguishing, as the Supreme Court has, between the equal protection provision and the Support or Advocacy Clause of § 1985(3). The history and early adjudication of the clause indicate that it (1) protects all citizens, not only victims of class-based discriminatory animus, (2) confers a substantive right to be free of injury caused by conspiratorial threat, coercion, or intimidation due to one's support or advocacy of a federal candidate, and (3) permits action against purely private actors. Subsequent judicial opinions on other portions of § 1985(3) do not change this analysis; instead, they suggest that the Support or Advocacy Clause ought to be understood as distinct from the equal protection provision of the statute. The clause was created to protect voters from private intimidation and can still be used for that purpose today.

CONCLUSION

As the Supreme Court has observed, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."[187] Congress, in a time of national crisis, created a federally guaranteed right to support or advocate for federal candidates. It provided citizens with a robust cause of action: to bring suit for damages against those who conspired to violate that right. Congress's guarantee is urgently important today, as electoral freedom is threatened by ever more insidious forms of intimidation. Civil rights advocates have correctly recognized that the Support or Advocacy Clause is a useful tool to safeguard voting rights. Federal courts should do the same.

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[185] The court also distinguished *LULAC* by emphasizing a difference between the "right to vote" and the "right to give 'support or advocacy' to [a] preferred candidate." *Cockrum*, 365 F. Supp. 3d at 665 n.15 (emphasis omitted).

[186] *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

[187] Reynolds v. Sims, 377 U.S. 533, 560 (1964) (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).