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### The Support-or-Advocacy Clauses

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*Protect Democracy*

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## ARTICLE

### THE SUPPORT-OR-ADVOCACY CLAUSES

*Richard Primus\* & Cameron O. Kistler\*\**

*Two little known clauses of a Reconstruction-era civil rights statute are potentially powerful weapons for litigators seeking to protect the integrity of federal elections. For the clauses to achieve their potential, however, the courts will need to settle correctly a contested question of statutory interpretation: do the clauses create substantive rights, or do they merely create remedies for substantive rights specified elsewhere? The correct answer is that the clauses create substantive rights.*

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#### INTRODUCTION

Civil rights lawyers know 42 U.S.C. § 1985(3) as the statutory provision creating a cause of action for conspiracies to deny the equal protection of the laws.<sup>1</sup> But § 1985(3) also contains two mostly forgotten clauses that are about to become better known. These two clauses aim to protect the integrity of federal elections. They create causes of action for people who are victimized by conspiracies to prevent citizens from supporting federal political candidates or to injure citizens on account of their political advocacy.<sup>2</sup>

These “support-or-advocacy” clauses were enacted in 1871, and they were all but forgotten during the twentieth century.<sup>3</sup> In the twenty-first century, however, the rise of new threats to democratic elections has brought the support-or-advocacy clauses back into view. Some lawyers have dusted off the support-or-advocacy clauses as a way to respond to new forms of voter intimidation.<sup>4</sup> The clauses have also been used by lawyers seeking to deter the sorts of electoral interference that the Russian government and WikiLeaks practiced during the 2016 presidential campaigns.<sup>5</sup> As contemporary conditions raise new and potent threats to the integrity of American elections, the support-or-advocacy clauses can be important tools of redress.

For the clauses to play that role, however, the courts must settle a basic question that has divided them so far. That question is whether the support-or-advocacy clauses create substantive legal rights, rather than merely

1. See 42 U.S.C. § 1985(3) (“If two or more persons . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws . . . the party so . . . deprived may have an action for the recovery of damages . . .”).

2. See *id.* (“[I]f two or more persons conspire to prevent . . . any citizen . . . 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 . . . or to injure any citizen in person or property on account of such support or advocacy . . . the party so injured or deprived may have an action for the recovery of damages . . .”).

3. As of this writing, there may be as few as three reported cases since 1900 in which a federal appellate court clearly adjudicated a question under the support-or-advocacy clauses. See *Federer v. Gephardt*, 363 F.3d 754 (8th Cir. 2004); *Gill v. Farm Bureau Life Ins. Co. of Mo.*, 906 F.2d 1265 (8th Cir. 1990); *Paynes v. Lee*, 377 F.2d 61 (5th Cir. 1967). Many more cases have been adjudicated under § 1985(3)’s clauses covering conspiracies to deny equal protection, though even those clauses lay essentially dormant during the first half of the twentieth century. See *Collins v. Hardyman*, 341 U.S. 651, 656 (1951) (describing the statute’s equal protection clauses as having “long been dormant” until that time).

4. See generally *League of United Latin Am. Citizens–Richmond Region Council 4614 v. Pub. Int. Legal Found. (LULAC)*, No. 18-CV-00423, 2018 WL 3848404 (E.D. Va. Aug. 13, 2018). One of the authors (Kistler) served as counsel for the plaintiffs in this case.

5. See generally *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652 (E.D. Va. 2019). Both authors served as counsel for the plaintiffs in this case.

remedies for rights specified elsewhere. Some civil rights statutes are of the former kind, and some are of the latter. For example, the prohibition on racial discrimination in employment contained in Title VII of the Civil Rights Act of 1964<sup>6</sup> (“Title VII”) is *substantive*.<sup>7</sup> When a plaintiff sues for race discrimination under Title VII, she sues to vindicate a right that Title VII itself created. In contrast, 42 U.S.C. § 1983 is *remedial*.<sup>8</sup> It provides a cause of action for plaintiffs whose federal rights are violated, but it does not determine the content of those rights. A plaintiff suing under § 1983 must allege a violation of his rights under some other source of federal law.<sup>9</sup> In that scenario, it is the other federal law that creates substantive rights, and § 1983 is a vehicle for suits seeking relief.

In 2018 and 2019, two federal courts gave different answers to the question of whether the support-or-advocacy clauses of § 1985(3) are substantive or remedial. According to the district court in *League of United Latin American Citizens v. Public Interest Legal Foundation*<sup>10</sup> (*LULAC*), the clauses are substantive legislation.<sup>11</sup> On that view, any person injured by a conspiracy to use intimidation to prevent them<sup>12</sup> from supporting a federal political candidate can sue. But according to the district court in *Cockrum v. Donald J. Trump for President, Inc.*,<sup>13</sup> the support-or-advocacy clauses are remedial only.<sup>14</sup> On that view, no plaintiff can maintain a suit under the support-or-advocacy clauses without showing that the conspiracy of which she complains violated some right created by a different source of federal law—like a First Amendment<sup>15</sup> speech right or a right to vote under the Fifteenth Amendment.<sup>16</sup>

6. See 42 U.S.C. § 2000e–2000e-17.

7. See *id.* § 2000e-2(a).

8. See *id.* § 1983 (creating a cause of action for persons subjected, under color of law, to the “deprivation of any rights, privileges, or immunities secured by the Constitution and laws”).

9. See, e.g., *Wright v. City of Roanoke*, 479 U.S. 418, 423 (1987) (“[I]f there is a state deprivation of a ‘right’ secured by a federal statute, § 1983 provides a remedial cause of action . . .”).

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

11. *Id.* at \*6 (“[T]he Court finds that . . . a claim under the ‘support and advocacy’ clause of Section 1985(3) . . . does not require allegations of a . . . violation of a separate substantive right.”). The district court in *Arizona Democratic Party v. Arizona Republican Party*, No. CV-16-03752-PHX, 2016 WL 8669978 (D. Ariz. Nov. 4, 2016), also treated the clauses in this way.

12. At the encouragement of the *Fordham Law Review*, this Article uses the words “they,” “them,” and “their” as both singular and plural pronouns.

13. 365 F. Supp. 3d 652 (E.D. Va. 2019).

14. *Id.* at 664 (“§ 1985(3) is purely remedial. Therefore, in order to plead a viable claim [under the support-or-advocacy clauses], Plaintiffs must allege the violation of a substantive constitutional right . . .”). By coincidence, both cases were decided in the Eastern District of Virginia. Neither case generated an appeal, so the law of that district remains divided.

15. U.S. CONST. amend. I.

16. U.S. CONST. amend. XV. A right to vote under the Voting Rights Act (VRA) might not qualify as supplying a necessary predicate right, because the VRA has its own detailed remedial scheme. See *Great Am. Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 375–76 (1979) (holding that § 1985(3) cannot be used as a vehicle for asserting statutory rights under

The resolution of this issue is critical to the support-or-advocacy clauses' capacity to deter unlawful interference with elections. If the clauses are merely remedial, they add little to the universe of civil rights law. Plaintiffs alleging violations of the First and Fifteenth Amendments can sue under other remedial statutes like § 1983. But if the support-or-advocacy clauses are substantive, they offer separate and powerful weapons for defending the integrity of elections. On the substantive reading, many attempts to prevent citizens from participating in the democratic process are actionable even though they do not come within the First or Fifteenth Amendments. And unlike the Voting Rights Act of 1965<sup>17</sup> (VRA), the support-or-advocacy clauses authorize suits for damages.<sup>18</sup> That potential remedy means that suits under the support-or-advocacy clauses might deter interference with political activity more effectively. It also means that support-or-advocacy litigants might be more able than VRA litigants to defray the costs of litigation.

There is a reason why the question of how to read the support-or-advocacy clauses is being posed now, after more than a century during which the clauses lay largely dormant. The Reconstruction Congress originally enacted the clauses in an attempt to protect democratic elections from white supremacist violence in the post-Civil War South.<sup>19</sup> After Reconstruction ended, the federal government backed away from that cause,<sup>20</sup> and the support-or-advocacy clauses faded into obscurity. When the federal government recommitted to voting rights after World War II, a great deal of litigation occurred under the Civil Rights Act of 1957<sup>21</sup> and the VRA, which were designed to address a set of problems associated with Jim Crow segregation.<sup>22</sup> But now, when new conditions are threatening elections in ways that the VRA was not designed to address, some litigators have discovered an older tool that is once again useful—provided, of course, that it is understood as substantive legislation.

As this Article explains, the question of whether the support-or-advocacy clauses are substantive or remedial has a legally correct answer. The clauses are substantive. Before long, it will fall to the U.S. Supreme Court to confront the question and, one hopes, give that correct answer. As of today, there is only one federal circuit—the Eighth—that has squarely decided the issue.<sup>23</sup> And unfortunately, the Eighth Circuit got it wrong, construing the

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Title VII because Congress created a different remedial scheme for Title VII rights). Full resolution of this question is beyond the scope of this Article.

17. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 and 52 U.S.C.).

18. See Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 207–08 (2015).

19. See *infra* Part I.A.

20. See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

21. Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of the U.S.C.).

22. See generally Cady & Glazer, *supra* note 18.

23. See generally *Federer v. Gephardt*, 363 F.3d 754 (8th Cir. 2004); *Gill v. Farm Bureau Life Ins. Co. of Mo.*, 906 F.2d 1265 (8th Cir. 1990). Half a century ago in *Paynes v. Lee* (*Paynes II*), 377 F.2d 61 (5th Cir. 1967), the Fifth Circuit reversed the dismissal of a claim

clauses as remedial only.<sup>24</sup> Now that two federal district courts have confronted the issue in relatively high-profile cases and given opposite answers,<sup>25</sup> it is only a matter of time before another circuit hears a support-or-advocacy case and decides it correctly. There will then be a split in authority among the circuits on the meaning of a Reconstruction statute—indeed, a Reconstruction statute that could easily emerge as the subject of a fair amount of litigation as public interest lawyers struggle with new challenges to electoral integrity. Once the circuits split, the Supreme Court will need to resolve the question. This Article explains why the right answer is that the clauses are substantive.

The relevant legal terrain is unusually complicated—complicated enough that an adequate analysis requires an Article the length of this one.<sup>26</sup> The statute is long and it is mostly unfamiliar, even to people who work in civil rights and election law. The statute is also old, and it has been codified in three different ways during different historical periods, which increases the challenges involved in parsing the cases decided under it. There is also a nonobvious constitutional dimension to the problem: although the support-or-advocacy clauses were passed as part of a Reconstruction statute, they were not passed under the Reconstruction Amendments, and the failure to see this point will send the analysis off in the wrong directions. The three sources of complexity just described all interact, such that it is hard to understand any part of the puzzle clearly without thoroughly understanding the entire picture at once.

But the fact that a legal issue is *complicated* does not always mean that the question is *close*. This one is not. Once all parts of the puzzle are clearly in view, it is easy to see that the support-or-advocacy clauses are substantive legislation. That is good news given the important role the clauses can play under current conditions. The project of this Article, therefore, is to take

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under the support-or-advocacy clauses. The opinion below can be read as viewing the clauses as vehicles for asserting a preexisting right to vote that is protected solely from state interference. *See Paynes v. Lee (Paynes I)*, 239 F. Supp. 1019, 1022–23 (E.D. La. 1965), *rev'd* 377 F.2d 61 (5th Cir. 1967). So *Paynes II* is likely best read as supporting the view that the clauses are substantive and create an enforceable right against private interference with the right to vote. *See Paynes II*, 377 F.2d at 63–64 (“The Fourteenth Amendment is only a protection against the encroachment upon enumerated rights by or with the sanction of a State. The interference with a Federally protected right to vote is something more and something different. Moreover, it has had the specific attention of Congress which has provided a specific remedy for interference by private individuals. By the sometimes called Ku Klux Act, a Federal right was created to recover damages for interfering with Federal voting rights . . .”). But because the court in *Paynes II* was writing before the Eighth Circuit got the issue wrong in *Gill and Federer*, it did not explicitly consider and reject the Eighth Circuit’s view.

24. *See Federer*, 363 F.3d at 758; *Gill*, 906 F.2d at 1270–71.

25. *See Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 664 (E.D. Va. 2019) (finding the clauses remedial); *LULAC*, No. 18-CV-00423, 2018 WL 3848404, at \*4–5 (E.D. Va. Aug. 13, 2018) (finding the clauses substantive).

26. Another analysis, written essentially at the same time as this one, contains a more general treatment of the support-or-advocacy clauses, looking at several different legal issues that might arise under the clauses rather than going as deeply into this one. *See Note, The Support or Advocacy Clause of § 1985(3)*, 133 HARV. L. REV 1382 (2020).

some complicated material and lay it out systematically, thus enabling the courts that will soon confront the issue to find their way through the thicket.

In Part I of this Article, we present the Reconstruction statute of which the support-or-advocacy clauses were originally a part. We begin with the statute's text as enacted.<sup>27</sup> Then, we trace the recodification of the support-or-advocacy clauses, from the Revised Statutes of 1874 to their current form in 42 U.S.C. § 1985.<sup>28</sup> In Part II, we turn to the question of whether the clauses are substantive or remedial. We show that the clauses' original statutory context strongly supports a substantive construction.<sup>29</sup> We also show that a remedial construction cannot be right because there are no preexisting federal rights that Congress could have been trying to vindicate with the clauses.<sup>30</sup> For reasons we explain, the clauses are not comprehensible as a vehicle for protecting First Amendment rights. And if the clauses protect the right to vote, they do not protect it in any way that supports the conclusion that the clauses are only remedial rather than also substantive.<sup>31</sup> Part II ends by explaining that the support-or-advocacy clauses are not legislation enacted under Congress's power to enforce the Reconstruction Amendments—in which case it might make sense to think of them as remedial—but rather under Congress's Article I power to protect federal elections.<sup>32</sup> That power is a power to enact substantive legislation.

We next turn to showing why some courts have mistakenly concluded that the support-or-advocacy clauses are merely remedial. The answer lies in misreadings of Supreme Court opinions, so in Parts III and IV, we show how some courts have gone wrong in reading the relevant case law. In Part III, we unpack the Court's opinion in *Ex parte Yarbrough*,<sup>33</sup> an 1884 decision that one court recently misread as holding that the support-or-advocacy clauses are vehicles for vindicating Fifteenth Amendment rights.<sup>34</sup> In fact, *Ex parte Yarbrough* establishes that the clauses are substantive.<sup>35</sup> Then, in Part IV, we show how some courts have misconstrued the support-or-advocacy clauses based on a misreading of twentieth-century Supreme Court decisions adjudicating claims under other portions of § 1985(3). In the relevant cases, the Court described the portions of § 1985(3) covering

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27. See *infra* Part I.A.

28. See *infra* Parts I.B–C.

29. See *infra* Part II.A.

30. See *infra* Part II.B.

31. See *infra* Part II.B.

32. That power is rooted in Article I, Section 4 for congressional elections and in the Necessary and Proper Clause for presidential elections. See *infra* Part II.C. More specifically, the power as it pertains to presidential elections is rooted in what John Mikhail has usefully termed the “third Necessary and Proper Clause,” which authorizes Congress to make laws for carrying into execution the powers vested in any branch or officer of the government of the United States. See John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1047 (2014); see also *infra* Part II.C.

33. 110 U.S. 651 (1884).

34. See *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 663–64 (E.D. Va. 2019).

35. See *infra* Part III.

conspiracies to deny equal protection as remedial only.<sup>36</sup> Perhaps because the equal protection portions of § 1985(3) are familiar and the support-or-advocacy clauses are not, some courts have interpreted the Court's pronouncements that the equal protection clauses are remedial as if they applied to the support-or-advocacy clauses as well.<sup>37</sup> But as we show, that inference makes sense of neither the case law nor the statute itself.<sup>38</sup> The equal protection clauses are one thing, and the support-or-advocacy clauses are another. And although the equal protection clauses are remedial, the support-or-advocacy clauses are substantive. Finally, in a brief Part V, we explain why giving the support-or-advocacy clauses their proper substantive meaning comports with appropriate conceptions of the role of federal courts in federal elections.

## I. THE STATUTE

The support-or-advocacy clauses have been recodified more than once since their initial enactment. As the Supreme Court has made clear, the recodifications have not changed the meaning of the statutory language.<sup>39</sup> Moreover, it is not necessary to trace the clauses through every twist and turn of their recodification history to understand the law they embody. It is useful, however, to understand the clauses in two of the forms they took prior to appearing in 42 U.S.C. § 1985(3). The first is their original form in the Civil Rights Act of 1871, also called the Enforcement Act or the Ku Klux Klan Act (the "Klan Act").<sup>40</sup> The second is their recodified form in the Revised Statutes of 1874. Accordingly, in this part, we situate the support-or-advocacy clauses in their original context, then in the Revised Statutes, and then in their modern form in 42 U.S.C. § 1985.

### A. *The Origin: Section 2 of the Civil Rights Act of 1871*

The statutory language that now constitutes the support-or-advocacy clauses of § 1985(3) was originally enacted as part of the Klan Act. As the last alternative title suggests, Congress passed the Klan Act to try to address the problem posed by white Southerners who used organized violence to perpetuate white supremacy in the South during Reconstruction. One year earlier, the ratification of the Fifteenth Amendment had officially disestablished race as a criterion for voting.<sup>41</sup> The Ku Klux Klan functioned as a paramilitary organization with a mission of, among other things,

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36. *See, e.g.*, *United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825 (1983); *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 336 (1979).

37. *See infra* Part IV.D.

38. *See infra* Parts IV.C–D.

39. *See* *Kush v. Rutledge*, 460 U.S. 719, 724 (1983).

40. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended in scattered sections of 18 and 42 U.S.C.).

41. *See* U.S. CONST. amend. XV, § 1.

preventing African Americans and their white Republican allies from gaining political power in the South.<sup>42</sup>

Section 1 of the Klan Act created a civil cause of action for persons whose federal constitutional rights were abridged by state actors.<sup>43</sup> That section survives today, with amendments, as 42 U.S.C. § 1983. Section 2 of the Klan Act was much longer.<sup>44</sup> It contained roughly two dozen clauses,<sup>45</sup> most of which created both criminal and civil liability for persons who conspired to interfere with federal governance.<sup>46</sup> Among other things, section 2 contained the support-or-advocacy clauses, which covered conspiracies to injure citizens on account of their support or advocacy for federal political candidates.<sup>47</sup> Section 2 also covered conspiracies to overthrow the federal government, to levy war against the United States, to prevent the execution of federal law, to steal federal property, to impede the work of federal officers, to interfere with witnesses in federal court proceedings, or to deprive people of the equal protection of the laws.<sup>48</sup> Several clauses of the civil liability portion of section 2, including the equal protection clauses and the support-or-advocacy clauses, are now codified at 42 U.S.C. § 1985.

As the statutory language reflects, sections 1 and 2 differed in a fundamental respect. Like the modern § 1983, the original section 1 was a vehicle for asserting rights specified elsewhere. The statutory language expressly limited section 1's coverage to "the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States."<sup>49</sup> Section 2, by contrast, could not possibly be read as only providing a vehicle for the vindication of constitutional rights specified elsewhere. One who steals federal property does not violate anyone's constitutional rights, but any person injured as a result of a conspiracy to steal federal property would have

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42. According to perhaps the leading historian on Reconstruction, the Ku Klux Klan physically attacked as many as 10 percent of all the African Americans who served as delegates to the conventions drafting new constitutions for the former Confederate states in 1867–1868. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 426 (1988); *see also* ALEXANDER KEYSSAR, THE RIGHT TO VOTE 84 (2009).

43. § 1, 17 Stat. at 13 (codified as amended at 42 U.S.C. § 1983) ("That any person who, under color of any law . . . of any state, shall subject . . . any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured . . .").

44. *See id.* § 2, 17 Stat. at 13–14 (codified as amended at 42 U.S.C. § 1985(3) and in scattered sections of 18 U.S.C.).

45. It is hard to establish the precise number of clauses. Section 2 contained two long sentences totaling roughly 800 words, and the statutory text did not number the clauses. Deciding where one clause ends and another begins within each of the two long sentences sometimes requires exercises of contestable judgment. For present purposes, nothing turns on this indeterminacy.

46. *See* § 2, 17 Stat. at 13–14 (codified as amended at 42 U.S.C. § 1985(3) and in scattered sections of 18 U.S.C.).

47. *Id.* (covering conspiracies to use "force, intimidation, or threat to prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards [a candidate in a federal election], or to injure any such citizen in his person or property on account of such support or advocacy").

48. *Id.*

49. *Id.* § 1, 17 Stat. at 13 (codified as amended at 42 U.S.C. § 1983).

an action under section 2. There is no constitutional right to be a federal officer, but any person injured as a result of a conspiracy to deter someone from acting as a federal officer would have an action under section 2. So, section 2, unlike section 1, was not merely a vehicle for asserting preexisting constitutional rights.

*B. The First Recodification: The Revised Statutes of 1874*

In 1874, with the intent of making federal law more transparent and better organized, Congress approved a general recodification of existing federal statutes. The resulting publication, called the Revised Statutes of the United States, became for a time the standard source for identifying and citing federal statutes, much as the U.S. Code is today. In the Revised Statutes, the Klan Act's long section 2 was broken up into more manageable pieces, which were then sorted into half a dozen different statutory sections.<sup>50</sup>

The disaggregation occurred in two ways. The first was a function of the Revised Statutes' general architecture, in which criminal laws were systematically set apart from all others.<sup>51</sup> That method of organization required a significant change to the language of the Klan Act's section 2, which created both civil and criminal liability using the same set of substantive clauses.<sup>52</sup> In other words, the structure of section 2 had been "Anyone who does A, or B, or C, or D, or E . . . shall be both civilly and criminally liable." Accordingly, the language describing each civilly actionable conspiracy was exactly the same as the language describing each criminal conspiracy: each substantive sort of conspiracy was articulated just one time, with two kinds of consequences attached. To make the recodified law fit within a system where civil and criminal law were separate, the Revised Statutes had to include most of the language of section 2 twice, once with a civil liability clause attached and once with a criminal liability clause. For civil liability purposes, the Revised Statutes codified most of the substantive language of the Klan Act's section 2 at section 1980, with the civil liability provision attached.<sup>53</sup> Then, for criminal liability purposes, the Revised Statutes assigned the substantive clauses of the Klan Act's section 2 to six different and nonconsecutively numbered sections of the criminal code.<sup>54</sup> So, within this system, the substantive language of each support-or-advocacy clause appeared twice. As clauses creating civil liability, they appeared in section 1980(3) of the Revised Statutes. As clauses specifying crimes, they appeared in section 5520 of the Revised Statutes.

As noted above, the Supreme Court has made clear that this recodification did not alter the meaning of the law.<sup>55</sup> But familiarity with this restructuring

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50. See 24 Rev. Stat. § 1980; 70 Rev. Stat. §§ 5336, 5406–5507, 5518–5520.

51. Title 70 of the Revised Statutes was titled "Crimes," and all criminal statutes were codified within that title. 70 Rev. Stat. §§ 5323–5330.

52. See ch. 22, 17 Stat. at 13–14 (codified as amended at 42 U.S.C. § 1985(3) and in scattered sections of 18 U.S.C.).

53. See 24 Rev. Stat. § 1980.

54. See 70 Rev. Stat. §§ 5336, 5406–5507, 5518–5520.

55. See *Kush v. Rutledge*, 460 U.S. 719, 724 (1983).

is crucial for understanding how early courts construed the relevant clauses because most of the major cases were decided when the Revised Statutes were in force. Rather than speaking of section 2 or of § 1985(3) when describing cases under the support-or-advocacy clauses, courts in the 1870s and 1880s spoke of section 1980(3) and section 5520.<sup>56</sup> Their constructions of section 5520 are particularly helpful in understanding the distinctive content of the support-or-advocacy clauses because in section 5520 the support-or-advocacy clauses stood alone. Everywhere else—in section 2 of the Klan Act, in section 1980 of the Revised Statutes, and in § 1985 today—the support-or-advocacy clauses are bundled with other clauses carrying other legal meanings. That bundling sometimes muddies judicial analysis, as explained below, making it hard for later readers to see when a court is describing the support-or-advocacy clauses or something else. But section 5520 housed the support-or-advocacy clauses and nothing else. Courts deciding cases under section 5520 accordingly gave clear indications of the distinctive meanings of those clauses.

In 1894, at a time when the federal government lacked the appetite for vigorous enforcement of the rights endangered by organizations like the Ku Klux Klan, Congress repealed section 5520.<sup>57</sup> Conspiracies to harm people on account of their support or advocacy for candidates for political office would no longer expose the conspirators to the risk of federal prosecution. But Congress did not repeal the portion of section 1980 creating civil liability for those same conspiracies. The substantive language of the support-or-advocacy clauses in section 1980 was, of course, exactly the same as the substantive language of section 5520—the civil and criminal versions of the clauses created by the Revised Statutes were both taken from the initial language of the Klan Act, where civil and criminal liability attached to the same original clauses. Nothing differentiated section 1980's support-or-advocacy clauses from section 5520, except for the difference between civil suit and criminal prosecution. As a result, judicial interpretations of section 5520—except on matters of punishment—are equally valid as interpretations of the support-or-advocacy clauses in their civil forms.<sup>58</sup> It is the same statutory language, taken from a unified original source.

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56. See, e.g., *Ex parte Yarbrough*, 110 U.S. 651, 654 (1884).

57. See Act of Feb. 8, 1894, ch. 25, § 1, 28 Stat. 36, 37.

58. Except, of course, to the extent that principles of statutory construction like the rule of lenity might require the language to be read more narrowly in the criminal context. But that wrinkle need not detain us here. If such a factor were present—and it might not be—it would argue for construing the language more broadly in the civil context than in the criminal. As this Article shows, the support-or-advocacy clauses are substantive even when interpreted as criminal statutes. Any broader construction would also yield the conclusion that the clauses are substantive.

C. *The Law Today: 42 U.S.C. § 1985(3)*

The modern U.S. Code (the “Code”) dates from 1926.<sup>59</sup> In its first edition, what had been section 1980 of the Revised Statutes became 8 U.S.C. § 47. Then, in the 1952 edition of the Code, the provision was relabeled 42 U.S.C. § 1985 and so it has remained ever since.<sup>60</sup>

Section 1985 has three subsections specifying actionable conspiracies and, like the Klan Act’s original section 2, a single liability clause applicable to all of the covered conspiracies, albeit one that imposes only civil rather than criminal liability.<sup>61</sup> All of the clauses of § 1985 originally appeared

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59. Charles S. Zinn, *Revision of the United States Code*, 51 LAW LIBR. J. 388, 389–90 (1958).

60. 42 U.S.C. § 1985. There has been one minor change in labeling since 1952. In the 1976 edition of the Code, the subsections of § 1985 were labeled (a), (b), and (c), rather than (1), (2), and (3). The prior labeling, using numbers, was restored in the 1982 edition of the code and has since remained stable.

61. The entire text of § 1985 is as follows:

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; 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; or if 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; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United

somewhere in the Klan Act's section 2.<sup>62</sup> And as was true of section 2, § 1985 mostly addresses conspiracies to interfere with the processes of federal governance. Section 1985(1) covers conspiracies to interfere with federal officers.<sup>63</sup> Section 1985(2) covers conspiracies to interfere with federal judicial proceedings.<sup>64</sup> And § 1985(3), in the support-or-advocacy clauses, covers conspiracies to interfere with federal elections.<sup>65</sup>

Section 1985(3) is not drafted for maximum clarity. Its four substantive clauses and its complex liability clause are all written as part of a single sentence that is more than 250 words long. Given this Article's project of treating a complex statutory question comprehensively enough to make matters clear, it seems wise to produce the full text of the subsection here:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, [1] 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 [2] 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; or if two or more persons conspire [3] 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 [4] to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.<sup>66</sup>

The third and fourth substantive clauses above are, of course, the support-or-advocacy clauses. The first and second clauses are § 1985(3)'s equal

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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.

*Id.*

62. Compare 42 U.S.C. § 1985, with ch. 22, § 2, 17 Stat. 13, 13–14 (1871) (codified as amended at 42 U.S.C. § 1985(3) and in scattered sections of 18 U.S.C.).

63. See 42 U.S.C. § 1985(1) (covering conspiracies “to prevent, by force, intimidation, or threat, any person from accepting or holding any office . . . under the United States, or from discharging any duties thereof . . . or to injure him . . . on account of his lawful discharge of the duties of his office”).

64. See *id.* § 1985(2) (covering conspiracies “to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying”).

65. *Kush v. Rutledge*, 460 U.S. 719, 724 (1983) (describing the support-or-advocacy clauses as aimed at “conspiracies that interfere with . . . the right to support candidates in federal elections”).

66. 42 U.S.C. § 1985(3).

protection clauses. Like everything else in § 1985, those equal protection clauses are taken from section 2 of the Klan Act. But their substance, which pertains to equal protection rather than federal governance, differentiates them from most of § 1985 (and most of section 2). In the Supreme Court’s formulation, these equal protection clauses differ from most of § 1985 in that they cover “activity that is not institutionally linked to federal interests and that is usually of primary state concern.”<sup>67</sup>

The problem of legal interpretation to which this Article is addressed arises mostly from some later courts’ failure to appreciate this difference between most of § 1985’s clauses, which protect federal governance functions, and § 1985’s equal protection clauses, which address a different concern. The equal protection clauses are remedial legislation—they act as vehicles for the assertion of rights specified elsewhere. In contrast, the clauses that protect federal governance—including the support-or-advocacy clauses—are independently substantive. That was true of the support-or-advocacy clauses as originally enacted in section 2 of the Klan Act, and it was true of the support-or-advocacy clauses when they existed as section 5520 of the Revised Statutes. It remains true under § 1985(3).

## II. THE CASE FOR A SUBSTANTIVE CONSTRUCTION

### A. *The Language and Structure of Section 2*

As noted above, one reason why some courts have regarded the support-or-advocacy clauses as remedial is that the equal protection clauses of § 1985(3) are remedial. If the first two clauses of § 1985(3) are not independently substantive, one might infer that the last two are also not substantive.<sup>68</sup>

One problem with this line of reasoning, though, is that it is a mistake to treat § 1985(3) as a meaningful unit. As explained above, the combining of the four substantive clauses that now appear in § 1985(3) is a matter of administrative happenstance.<sup>69</sup> As enacted, those four clauses were four out of twenty or so substantive clauses of section 2 of the Klan Act. Within that larger set, the four clauses that now appear in § 1985(3) did not comprise a natural subunit. They did not even appear consecutively.<sup>70</sup>

They are also addressed to different topics: some address equal protection and others address federal elections. As the Supreme Court has recognized, the support-or-advocacy clauses have more in common topically with the portions of section 2 of the Klan Act that now appear at § 1985(1) and at the

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67. *Kush*, 460 U.S. at 725. This is true of the two equal protection clauses of § 1985(3) and also of the equal protection clauses that close § 1985(2). *Id.*

68. *See generally* *Federer v. Gephardt*, 363 F.3d 754 (8th Cir. 2004); *Gill v. Farm Bureau Life Ins. Co. of Mo.*, 906 F.2d 1265 (8th Cir. 1990); *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652 (E.D. Va. 2019).

69. *See supra* Part I.B.

70. *See* ch. 22, § 2, 17 Stat. 13, 13–14 (1871) (codified as amended at 42 U.S.C. § 1985(3) and in scattered sections of 18 U.S.C.).

start of § 1985(2) than they have in common with the equal protection clauses of § 1985(3).<sup>71</sup> Section 1985(1), the first clauses of § 1985(2), and the support-or-advocacy clauses of § 1985(3) all protect federal governance functions: federal officers in subsection 1, federal judicial proceedings in subsection 2, and federal elections in subsection 3. As the Supreme Court has recognized, the concern with conspiracies to deny equal protection is of a different kind.<sup>72</sup>

To be sure, the brute fact that statutory recodification has grouped the four clauses of § 1985(3) together seems at first blush to suggest that the support-or-advocacy clauses are meaningfully grouped with the equal protection clauses. But that reading cannot be valid if it would not make sense as an interpretation of the original statute. If the legal force of the support-or-advocacy clauses depended on a fact about the recodification that was not true of the initial statute, then the recodification would have changed the meaning of the law. And the Supreme Court has made clear that recodification did not change the meaning of section 2.<sup>73</sup>

It is not at all clear, therefore, why the support-or-advocacy clauses should be interpreted to be like the equal protection clauses, rather than being interpreted to be like the portions of § 1985 with which they actually have more in common. And if the support-or-advocacy clauses are read in light of other § 1985 clauses protecting federal governance, the natural inference is that the clauses are independently substantive. As noted above, § 1985(1) creates a cause of action against people who conspire to prevent people from holding federal office.<sup>74</sup> Apart from § 1985, there is no right to be a federal officer. Section 1985(1) therefore cannot be understood as merely creating a cause of action to vindicate federal rights specified elsewhere. Similarly, § 1985(2) creates a cause of action against people who conspire to deter witnesses from testifying in federal court.<sup>75</sup> Apart from § 1985, there is no federal right to testify in court, except of course in one's own case. So, § 1985 does not merely provide a remedy for vindicating rights specified by other sources of law. In many of its clauses, § 1985 is substantive legislation.

The point grows even stronger if we situate the support-or-advocacy clauses in their original context. Just as there is no legal justification for treating the clauses that are grouped together as § 1985(3) as more of an interpretive unit than § 1985 as a whole, there is no legal justification for treating the clauses that are grouped together as § 1985 as more of an interpretive unit than the larger group of clauses that made up section 2 of the Klan Act. Congress created only the section 2 grouping; the others are artifacts of administrative recodifications that did not change statutory meaning. And it is not plausible to read section 2 as creating a series of causes of action for vindicating rights specified elsewhere rather than as

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71. *See Kush*, 460 U.S. at 725.

72. *See id.*

73. *See id.* at 724.

74. *See supra* Part I.C.

75. 42 U.S.C. § 1985(2).

substantive legislation. Section 2 prohibited conspiracies to destroy the federal government, to levy war against the United States, and to steal federal property.<sup>76</sup> Many bad things might flow from such conspiracies. But no source of law outside section 2 created an individual right, held by private persons, against other people's attempting to destroy the government, levy war against it, or steal its property.

Indeed, the difference between a statute creating a cause of action to vindicate rights specified elsewhere and a statute making substantive law is one of the striking differences between the Klan Act's section 2 and the immediately preceding section 1. Section 1 was expressly remedial. It created a cause of action for persons subjected "to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States."<sup>77</sup> Section 2 contained no comparable language and for a straightforward reason: as its substance indicates, section 2 contained substantive legislation.

It does not follow that *every* clause of section 2, or every clause of section 1985, must be understood as substantive legislation. The equal protection clauses of § 1985(3) are not read that way<sup>78</sup> and for understandable reasons. The language of the equal protection clauses does not describe any freestanding or substantive legal rights that those clauses could be applied to protect. Instead, those clauses cover conspiracies to deprive people of "the equal protection of the laws, or of equal privileges and immunities under the laws."<sup>79</sup> The entitlement so specified is to the equal enjoyment of whatever legal rights people happen to have. Given that the text of the clauses refers to other sources of law, it makes sense to read the equal protection clauses as remedies for rights specified elsewhere. But within section 2 as a whole, the equal protection clauses are outliers in this respect. Most of the other clauses in section 2 are straightforwardly understood—indeed, only comprehensible—as substantive legislation. Given that there is no tighter connection between the support-or-advocacy clauses and the equal protection clauses than there is between the support-or-advocacy clauses and the rest of section 2, there is no reason to think that something true of only a small subset of section 2's clauses must be true of the support-or-advocacy clauses.

Moreover, and like most of section 2 other than the equal protection clauses, the text of the support-or-advocacy clauses is naturally understood as substantive. The language of the clauses specifies everything necessary to support a cause of action: a person who conspires to harm another on account of support or advocacy given to a candidate for federal office is

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76. ch. 22, § 2, 17 Stat. 13, 13–14 (1871) (codified as amended at 42 U.S.C. § 1985(3) and in scattered sections of 18 U.S.C.).

77. *Id.* § 1, 17 Stat. at 13 (codified as amended at 42 U.S.C. § 1983).

78. *See infra* Part IV.C (describing the Supreme Court's decisions in *Great Am. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979), and *United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825 (1983), both of which hold that an allegation of a denial of equal protection under § 1985(3) must allege the violation of a substantive right created by a different source of law).

79. 42 U.S.C. § 1985(3).

liable.<sup>80</sup> The clauses do not say that there is a cause of action when someone is denied equal treatment under some other law. They say that there is a cause of action when someone is injured as a result of a defined course of conduct, namely a conspiracy to prevent support or advocacy for, or to harm citizens on account of support or advocacy given to, candidates for federal office.

### *B. What Rights Would the Support-or-Advocacy Clauses Remedy?*

There is also a further problem with trying to read the support-or-advocacy clauses as merely creating remedies for rights specified elsewhere: what preexisting rights, exactly, could those clauses have been enacted to vindicate? Modern courts construing the clauses as remedial have given two answers. On one theory, the support-or-advocacy clauses can be vehicles for asserting the rights of speech and advocacy protected by the First Amendment.<sup>81</sup> On another, the support-or-advocacy clauses are vehicles for protecting the right to vote.<sup>82</sup> But as we explain below, neither of these approaches makes sense of the statute. And if it is not possible to identify preexisting rights that the support-or-advocacy clauses might be meant to vindicate, then it makes little sense to read those clauses as merely vindicating preexisting rights—especially given that neither the statutory language nor the original statutory context points in that direction.

#### 1. Not First Amendment Rights

The intuition that the support-or-advocacy clauses could operate as vehicles for asserting First Amendment rights is easy to understand. A citizen's support or advocacy for a political candidate is a form of political expression, and the right to engage in political expression is a right associated with the First Amendment.<sup>83</sup> But upon even a moment's reflection, the idea that Congress enacted the support-or-advocacy clauses to give citizens vehicles for asserting First Amendment rights collapses. Congress enacted the support-or-advocacy clauses in 1871 as part of a statute intended to fight the Ku Klux Klan's campaign to maintain white supremacy and impede federal governance. Congress's effort entailed increased protection for Americans in the South who wanted to promote political agendas that the Klan opposed.<sup>84</sup> But a cause of action to vindicate First Amendment rights would not have been any part of such an effort because in 1871, rights under

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80. To be sure, there is a trivial sense in which even that language cannot be operationalized without reference to other statutes. Some other source of law is needed in order to determine, for example, what a federal office is and who is a candidate for it. But those other sources of law are not the source of the right that the support-or-advocacy clauses create causes of action to vindicate.

81. See *Federer v. Gephardt*, 363 F.3d 754, 758 (8th Cir. 2004); *Gill v. Farm Bureau Life Ins. Co. of Mo.*, 906 F.2d 1265, 1270 (8th Cir. 1990).

82. See *Gill*, 906 F.2d at 1270; *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 663–64 (E.D. Va. 2019).

83. See *Gill*, 906 F.3d at 1270 (articulating this line of thought).

84. See *supra* note 40 and accompanying text.

the First Amendment could be asserted only against the federal government.<sup>85</sup>

The Reconstruction Congress was not concerned that Americans interested in advocating the election of candidates for federal office needed protection *against the federal government*. The worry was that pro-Reconstruction activists, in particular, Republican Party activists, both Black and white, were being threatened by local actors and mostly by nonstate actors like the Klan.<sup>86</sup> If a person harmed on account of their political advocacy could state a claim under the support-or-advocacy clauses only if the harm amounted to a violation of the First Amendment, then those clauses would have been of no use to citizens who, in 1872, were beaten by Klansmen for advocating the election of Republicans. Even today, plaintiffs have no First Amendment claim when nonstate actors interfere with their political advocacy.<sup>87</sup> Whether the Klan itself was at times tantamount to a state actor is a subtle question.<sup>88</sup> But even if it were, it would have been a *state* actor and not a federal one, and First Amendment rights ran only against the federal government until well into the twentieth century.<sup>89</sup> So, in sum, construing the support-or-advocacy clauses as vehicles for asserting First Amendment rights would mean that those clauses had no application to cases involving Klan violence in the 1870s. An interpretation of the Klan Act on which the support-or-advocacy clauses do not reach Klan violence against 1870's Republican Party activists cannot be right.

Not surprisingly, nineteenth-century courts recognized that the support-or-advocacy clauses had force even in the absence of First Amendment violations. Those courts imposed liability under the support-or-advocacy clauses against private actors<sup>90</sup> and, as noted earlier, private actors cannot violate First Amendment rights.<sup>91</sup> In sum, it is clearly possible to state a valid

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85. See generally *Stromberg v. California*, 283 U.S. 359 (1931) (holding, for the first time, that the First Amendment's right of free speech is incorporated in the Fourteenth Amendment and thus applicable to state actors).

86. See, e.g., FONER, *supra* note 42; see also *supra* note 42 and accompanying text.

87. See, e.g., *Cohen v. Cowles Media*, 501 U.S. 663, 668 (1991) (stating that the First Amendment is not triggered in the absence of state action).

88. Cf. *Collins v. Hardyman*, 341 U.S. 651, 662 (1951) (describing the Ku Klux Klan as powerful enough, at certain times and for some purposes, to be much like a state actor).

89. See RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 68–70 (1999) (analyzing the application of First Amendment rights against state governments as a twentieth-century innovation). See generally GERARD M. MAGLIOCCA, *THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS* (2017) (describing this process).

90. See generally *Ex parte Yarbrough*, 110 U.S. 651 (1884) (concerning the prosecution of private parties under 70 Rev. Stat. § 5520); *United States v. Goldman*, 25 F. Cas. 1350, 1352 (C.C.D. La. 1878) (No. 15,225) (concerning a similar situation).

91. See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019) (“[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor.”); *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976) (“[A]bove all else, the First Amendment means that *government* has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” (alteration in original) (emphasis added) (quoting *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972))); *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972) (“The First

claim under the support-or-advocacy clauses without a predicate right under the First Amendment, and there is no reason to think that the clauses were designed to vindicate First Amendment rights at all.

## 2. Not the Right to Vote

Given the connection between political advocacy and voting, it is also easy to understand the intuition that the support-or-advocacy clauses might be vehicles for vindicating the right to vote. Without question, it is possible to imagine cases in which the same conduct would violate the right to vote and also give rise to a cause of action under the support-or-advocacy clauses. A vote in favor of a candidate is a form of support for that candidate, so a conspiracy to prevent a citizen from voting in a federal election could be actionable under the support-or-advocacy clauses.<sup>92</sup> But the fact that a conspiracy to deny the right to vote can give rise to a support-or-advocacy claim does not mean that the support-or-advocacy clauses are merely vehicles for asserting claims based on the right to vote. The language of the statute, the statutory context, and the case law all indicate that the support-or-advocacy clauses protect something broader.

Consider the statutory language first. The support-or-advocacy clauses cover conspiracies to prevent “any citizen of the United States lawfully entitled to vote from giving his support or advocacy . . . in favor of” candidates for federal office.<sup>93</sup> If Congress had meant to create a remedy for violations of the right to vote, it could have written a statute proscribing conspiracies to prevent “any citizen who is lawfully entitled to vote from *voting*” or “from exercising his right to vote.” But that is not what Congress wrote in the support-or-advocacy clauses. Congress wrote these clauses more broadly, to reach *support* and *advocacy* for candidates, rather than only voting.<sup>94</sup>

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and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes.”); Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 234 (2d Cir. 2019) (“No one disputes that the First Amendment restricts government regulation of private speech but does not regulate purely private speech.”).

92. We use the language “could be actionable,” rather than “would be actionable” because a claim under the support-or-advocacy clauses arising from a conspiracy to prevent a citizen from giving support or advocacy in favor of a candidate for political office must show that the defendants conspired to achieve their aim “by force, intimidation or threat.” See 42 U.S.C. § 1985(3). Not every conspiracy to deny the right to vote satisfies this requirement.

93. *Id.*

94. To judge by the current version of § 1985(3), there would also seem to be a second reason of this kind for thinking that the statute was written more broadly than a statute aimed specifically at protecting the right to vote would have been written. In the current version, the second support-or-advocacy clause—that is, the fourth clause of § 1985(3)—covers conspiracies “to injure any citizen in person or property on account of such support or advocacy.” *Id.* The language “any citizen” in this clause contrasts with the language “any citizen who is lawfully entitled to vote” in the previous clause, suggesting that the statute protects both the political activity of citizens eligible to vote (in the third clause) and citizens who are not eligible to vote (in the fourth clause). A statute that protects the advocacy of nonvoters is not easily understood as a statute aimed at protecting the right to vote in particular

Indeed, the Reconstruction Congress had already enacted a statute protecting the right to vote one year before it enacted the support-or-advocacy clauses. The Civil Rights Act of 1870, also called the Enforcement Act of 1870, was formally titled “An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes” (the “1870 Enforcement Act”).<sup>95</sup> Section 4 of the 1870 Enforcement Act established both civil and criminal liability for people who conspired “to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote or from voting at any election.”<sup>96</sup>

Given that Congress in 1870 chose language protecting voting in particular but in 1871 chose language referring to support and advocacy, it makes little sense to read the clauses enacted in 1871 as vehicles for asserting a predicate right to vote: First, clearly Congress knew how to write a statute specifically aimed at protecting the right to vote if it wanted to. Second, a cause of action for violations of the right to vote in the 1871 Klan Act would have been superfluous in light of the 1870 Enforcement Act’s section 4. Contemporary courts accordingly understood that in the support-or-advocacy clauses Congress had protected something broader than the right to vote.<sup>97</sup> This

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rather than something broader. But this feature of the statute is more apparent than real. As originally enacted, the second support-or-advocacy clause protected not “any citizen” but “any such citizen,” with the word “such” referring back to the reference to citizens in the first support-or-advocacy clause. See ch. 22, § 2, 17 Stat. 13, 13–14 (1871) (codified as amended at 42 U.S.C. § 1985(3) and in scattered sections of 18 U.S.C.). So understood, “any such citizen” in the second support-or-advocacy clause means “any citizen lawfully entitled to vote.” The word “such” disappeared from the statute in the transition from the original 1871 text to the Revised Statutes, perhaps inadvertently. Both the civil version of the second support-or-advocacy clause at 24 Rev. Stat. § 1980 and the criminal version at 70 Rev. Stat. § 5520 read “any citizen,” rather than “any such citizen.” Given that the recodification did not change the meaning of the statute, the present language must be read to carry the same meaning as the original language. See *Kush v. Rutledge*, 460 U.S. 719, 724 (1983).

95. ch. 114, 16 Stat. 140, 140–146 (1870).

96. *Id.* § 4, 16 Stat. at 141. Section 3 of the 1870 Enforcement Act dealt with voting rights as well, using the word “vote” four different times. *Id.* § 3, 16 Stat. at 140–41.

97. For an example of a court’s adjudicating a criminal indictment brought against private parties under section 5520 (that is, the support-or-advocacy clauses), see *United States v. Goldman*, 25 F. Cas. 1350, 1352 (C.C.D. La. 1878) (No. 15,225). In assessing the sufficiency of the indictment, the court wrote as follows:

Now, as the support and advocacy which the alleged conspirators sought to prevent were, as stated in the first and second counts, to be given in the future, it is clearly not necessary to allege what shape that support and advocacy were to take. The defendants could conspire to prevent the advocacy and support, in a lawful manner, by the voters, of the election to congress of the person named, without knowing by what means that advocacy and support were to be carried on, and even before the means were agreed upon by the persons by whom the support and advocacy were to be given.

*Id.* “Support and advocacy” in this passage must mean something different than just “voting,” because the court says that “support and advocacy” can take different shapes and can be carried on by different means. See *id.* If the statute reached only the specific form of support and advocacy that is voting, the passage would make no sense. Consider also *United States v. Butler*, 25 F. Cas. 213 (Waite, Circuit Justice, C.C.D. S.C. 1877) (No. 14,700). The defendants in that case were accused of intimidating and trying to stifle the political activity

construction required no creativity: the statute *says* that it protects support and advocacy, not just voting. And in more modern times, several courts have similarly read the support-or-advocacy clauses as doing exactly what they say—that is, as creating a cause of action not merely to vindicate the right to vote but also to redress injuries caused by conspiracies to prevent *support* or *advocacy* for political candidates.<sup>98</sup>

### C. Article I Versus the Reconstruction Amendments

That Congress intended the support-or-advocacy clauses to be substantive rather than remedial legislation is a good reason to read them that way. But it is also necessary to be sure of Congress's authority to enact the clauses as substantive legislation. Indeed, it is partly because courts have misunderstood the constitutional basis of the support-or-advocacy clauses that those courts have misread the clauses as remedial.

Because the support-or-advocacy clauses were originally enacted as part of the Klan Act, it is easy to assume that Congress's authority to enact those clauses comes from the enforcement provisions of the Reconstruction Amendments. Congress's power to enforce those amendments is generally understood as a power to protect rights guaranteed by those amendments, not a power to enact substantive legislation with a broader scope.<sup>99</sup> So if the support-or-advocacy clauses are exercises of congressional power under the Reconstruction Amendments, they might need to be understood as remedial, even if Congress intended them to be substantive. But as we explain here, the support-or-advocacy clauses are not legislation enacted under the Reconstruction Amendments. As nineteenth-century courts recognized, the clauses are exercises of Congress's powers to make rules for federal elections.<sup>100</sup> Those powers predate Reconstruction. As a textual matter, they

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of an African American citizen who was a political supporter of Robert Smalls, an African American member of Congress then running for reelection. The indictment recited separate counts under section 5520 (that is, the support-or-advocacy clauses) and section 5508, which prohibited conspiracies to “injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.” 70 Rev. Stat. § 5508. The counts under section 5508 specified that the defendants were accused of acting against the victim's right to vote. *Butler*, 25 F. Cas. at 213. The jury instructions specified that conviction under the two statutes required the prosecution to prove different elements. *Id.* at 223–24. In so doing, it reflected the understanding that the support-or-advocacy clauses cover something different than the right to vote. *See also Goldman*, 25 F. Cas. at 1352 (discussing, in a case under the support-or-advocacy clauses, the defendants' conduct as a conspiracy aimed at “support and advocacy” and “advocacy and support” rather than voting).

98. *See, e.g., LULAC*, No. 18-CV-00423, 2018 WL 3848404 (E.D. Va. Aug. 13, 2018); *Ariz. Democratic Party v. Ariz. Republican Party*, No. CV-16-03752-PHX, 2016 WL 8669978 (D. Ariz. Nov. 4, 2016); *see also Kush*, 460 U.S. at 724 (describing the support-or-advocacy clauses as protecting “the right to support candidates in federal elections,” rather than “the right to vote”).

99. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997).

100. *See Ex parte Yarbrough*, 110 U.S. 651, 657–61 (1884); *Goldman*, 25 F. Cas. at 1354 (holding that the support-or-advocacy clauses were “plainly warranted by section 4, art. I, of the constitution”).

are rooted in Elections Clause of Article I, Section 4<sup>101</sup> and in the Necessary and Proper Clause.<sup>102</sup>

To be sure, much of the Klan Act was enacted under Congress's power to enforce the Reconstruction Amendments. Indeed, the statute was formally titled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes."<sup>103</sup> But not *everything* in the Klan Act was enacted to enforce the Fourteenth Amendment. The words "and for other purposes" appear in the formal title,<sup>104</sup> and those words are not empty. As noted earlier, section 2 of the Klan Act began by proscribing conspiracies to destroy the government, to levy war on the United States, to oppose the government by force, to steal federal property, and to prevent people from holding federal offices.<sup>105</sup> Congress would have the power to prohibit those conspiracies even if the Reconstruction Amendments had never existed. Like section 2's clauses prohibiting conspiracies to destroy the government, its clauses prohibiting conspiracies to prevent citizens from giving support or advocacy in favor of candidates for federal office are not—or at least, not only<sup>106</sup>—legislation enacted under Congress's power to enforce the Reconstruction Amendments.

In its 1884 decision in *Ex parte Yarbrough*, the Supreme Court recognized that the support-or-advocacy clauses are exercises of Congress's power to make rules for the conduct of federal elections.<sup>107</sup> *Ex parte Yarbrough* upheld the constitutionality of a criminal prosecution of eight white men

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101. U.S. CONST. art. I, § 4, cl. 1 (stating that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the Places of chusing Senators").

102. U.S. CONST. art. I, § 8, cl. 18 (stating that Congress has the power "[t]o make all laws which shall be necessary and proper for carrying into Execution . . . Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof"). We think that the proposition stated above—that the clauses are exercises of Congress's powers under Article I rather than Congress's powers under the Reconstruction Amendments—reflects the best reading of the materials. It is worth noting, however, that the conclusions of the present analysis would be the same if the support-or-advocacy clauses were exercises of *both* Congress's powers under Article I *and* Congress's powers under the Reconstruction Amendments—that is, if each set of powers were independently sufficient to authorize the legislation. For reasons explained in Parts II.A and II.B, above, the clauses should be read as substantive if it is constitutionally permissible to read them that way. If Congress's Article I powers suffice to authorize the clauses as substantive legislation, then the clauses should be read as substantive (as Congress intended), whether or not some other set of congressional powers would also authorize the clauses as remedial legislation.

103. ch. 22, 17 Stat. 13 (1871) (codified as amended in scattered sections of 42 and 18 U.S.C.).

104. *Id.*

105. *Id.* § 2, 17 Stat. at 13–14 (codified as amended at 42 U.S.C. § 1985 and in scattered sections of 18 U.S.C.).

106. *See supra* note 102 and accompanying text (explaining that if both Article I and the Reconstruction Amendments were independently sufficient to authorize the support-or-advocacy clauses, the clauses should be read as substantive because Congress intended them as substantive and sufficient authority for enacting the clauses as substantive legislation exists under Article I).

107. *Ex parte Yarbrough*, 110 U.S. 651, 657–61 (1884); *see also* *United States v. Goldman*, 25 F. Cas 1350, 1354 (C.C.D. La. 1878) (No. 15,225).

accused of violently preventing a Black man named Berry Saunders from voting in a congressional election.<sup>108</sup> The prosecution proceeded in part under section 5520 of the Revised Statutes—that is, the support-or-advocacy clauses.<sup>109</sup> Had section 5520 been enacted as legislation enforcing the Fourteenth Amendment, the prosecution would have had to fail. The defendants in *Ex parte Yarbrough* were private parties,<sup>110</sup> and the Supreme Court had held one year earlier that legislation enforcing the Fourteenth Amendment could reach state actors only.<sup>111</sup> But as the Court explained, section 5520 was warranted by constitutional authority predating the Reconstruction Amendments—that is, by Congress’s broad power “to protect the elections on which its existence depends from violence and corruption.”<sup>112</sup>

The Court’s unanimous opinion in *Ex parte Yarbrough* supports two different and independently sufficient accounts of the constitutional basis for that power: one tied to the Elections Clause of Article I, Section 4 and one tied to the Necessary and Proper Clause. The argument from the Elections Clause is entirely straightforward: that clause authorizes Congress to make rules for the manner of its own elections.<sup>113</sup> Surveying the history of legislation structuring federal elections, the *Ex parte Yarbrough* Court acknowledged that during the Constitution’s first decades, Congress had not much availed itself of its power under Section 4.<sup>114</sup> But in the years since 1842, the Court continued, Congress had exercised its power under the Elections Clause by creating several important pieces of substantive legislation, including by requiring single-member district elections for the House of Representatives and by fixing a uniform national Election Day.<sup>115</sup> It could not be doubted, the Court wrote, that the same power also authorized Congress to “protect . . . the man who votes, from personal violence or intimidation, and the election itself from corruption and fraud.”<sup>116</sup>

The account tied to the Necessary and Proper Clause requires a bit more explication. The *Ex parte Yarbrough* Court wrote that the national government would have implicit authority to protect the integrity of its own elections even if no clause of the Constitution expressly enumerated such a power.<sup>117</sup> As the Court explained, Congress has the power to do what is

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108. *Ex parte Yarbrough*, 110 U.S. at 658.

109. *Id.* at 655.

110. *Id.* at 655–56, 665–66 (naming the defendants and rejecting a defense based on the defendants’ status as private parties rather than state actors).

111. *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

112. *Ex parte Yarbrough*, 110 U.S. at 658.

113. *See* U.S. CONST. art. I, § 4, cl. 1.

114. *Ex parte Yarbrough*, 110 U.S. at 660 (observing that Congress “[has] been slow to exercise the powers expressly conferred upon it in relation to elections by the fourth section of the first article of the Constitution”).

115. *Id.* at 660–61.

116. *Id.* at 661; *see also* *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (noting that Article I, Section 4 gives Congress the authority to legislate for the “protection of voters”).

117. *Ex parte Yarbrough*, 110 U.S. at 658, 666. The proposition that the power of the government to protect its own elections is inherent has been affirmed by the Supreme Court on other occasions as well. *See, e.g.,* *Burroughs v. United States*, 290 U.S. 534 (1934) (holding

necessary for operating the government. That power is recognized by the Necessary and Proper Clause, which states that Congress has the power to make laws necessary and proper “for carrying into execution . . . all other Powers vested by this Constitution in the Government of the United States, or any Department or officer thereof.”<sup>118</sup> And the government cannot execute *any* of its powers if it cannot carry out the elections on which its existence depends. Therefore, Congress is entitled under the Necessary and Proper Clause to pass legislation securing the integrity of federal elections. This rationale is one way of explaining Congress’s authority to apply the support-or-advocacy clauses not just to congressional elections, which are the subject of the Elections Clause, but to presidential elections as well.<sup>119</sup>

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that Congress has inherent power to protect the integrity of presidential elections). Note that this understanding does not make the Elections Clause surplusage. It merely means that the function of the Elections Clause is to give the regulation of congressional elections to the states in the absence of federal regulation. Without the Elections Clause, Congress and only Congress could make rules for the conduct of congressional elections.

118. See U.S. CONST. art. I, § 8, cl. 18; *Ex parte Yarbrough*, 110 U.S. at 658.

119. A second way proceeds from the practical reality that registration and voting in congressional elections occurs at the same times and places as registration and voting in presidential elections. Given that reality, some legislation regulating presidential elections is warranted as necessary and proper for executing the powers that Congress has over congressional elections under the Elections Clause. Suppose, for example, that Congress wants to ensure that voters in congressional elections can go to the polls without being physically intimidated for voting or trying to vote. Under the Elections Clause, which authorizes Congress to make rules for congressional elections, Congress could enact a criminal statute reading: “No person shall intimidate another for the purpose of preventing that other person from voting in a congressional election.” But if Congress could not legislate for presidential elections as well, then people who wanted to intimidate voters could exploit a loophole. When prosecuted for violating the hypothetical statute described above, a defendant could protest that he had no intent to prevent the victim of intimidation from voting in a congressional election. He only intended to prevent the voter from voting in the *presidential* election that was occurring at the same time and place. More generally, it might not be possible to prevent wrongful behavior aimed at presidential elections from having deleterious spillover effects on congressional elections. So, to ensure the effectiveness of rules protecting congressional elections, Congress might need to make laws covering presidential elections as well. On this understanding, the support-or-advocacy clauses of § 1985(3), in their application to presidential elections, are exercises of Congress’s power under the Necessary and Proper Clause to execute one of Congress’s “foregoing powers”—that is, its power under the Elections Clause of Article I. This rationale matches a standard explanation for Congress’s authority to enact § 10307(a) and (b) of the VRA, which prohibit voter intimidation in state as well as federal elections. See 52 U.S.C. § 10307(a)–(b). Again, the Elections Clause itself reaches only congressional elections. But as a practical matter, state and federal elections occur as single events, such that rules protecting voters from intimidation in congressional elections could not be effective if would-be intimidators were free to intimidate people voting in state elections. A law prohibiting voter intimidation in state elections can thus be warranted as necessary and proper for carrying Congress’s power to protect its own elections into execution. See Cady & Glazer, *supra* note 18, at 212 (“If a voter is harassed at the polls voting for their local officials, that voter is unlikely to feel safe at the same polling place on a different day voting for their congressman. Similarly, those who are permitted to intimidate voters at the polls in state and local elections may be emboldened to do the same in federal elections.”). The House of Representatives’s own report on § 10307(b) made the same point. See STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1502–03 (Bernard Schwarz ed., 1970). This rationale also makes sense of the fact that § 10307(c), which prohibits vote buying, is—in contrast to the statute’s voter intimidation provisions—applicable only to federal elections. See 52 U.S.C. § 10307(b)–(c). Voter intimidation has spillover effects: an

Whether under the Elections Clause, the Necessary and Proper Clause, or both, *Ex parte Yarbrough* thus identified the support-or-advocacy clauses as valid exercises of Congress's powers under Article I. And the fact that the support-or-advocacy clauses are valid under Congress's Article I powers<sup>120</sup> bears directly on whether the clauses are substantive legislation or merely vehicles for the assertion of preexisting rights. If no congressional power other than the power to enforce the Reconstruction Amendments authorized Congress to enact the support-or-advocacy clauses, then those clauses would need to be interpreted as legislation protecting only rights guaranteed by those amendments. But Congress's power to regulate federal elections is not merely a power to protect preexisting rights. Like its other Article I powers, Congress's power to regulate federal elections is a power to make substantive law.<sup>121</sup> Exercising its power under the Elections Clause, Congress has established single-member districting for the House of Representatives,<sup>122</sup> set a uniform date for federal elections,<sup>123</sup> and regulated the financing of political campaigns.<sup>124</sup> All of that legislation is substantive. So, Congress in 1871 did have the power to enact the support-or-advocacy clauses as substantive legislation on the basis of Article I. As a result, the constitutional limits on congressional action furnish no reason to construe the support-or-advocacy clauses as remedial only.

In short, by all indications the support-or-advocacy clauses are substantive legislation. The language is most naturally read as substantive. Most of the statutory section in which the clauses were enacted is substantive. The Supreme Court long ago treated the clauses as substantive, explaining that they rest on Congress's substantive legislative power under Article I. What's more, it is not easy to give any coherent account of how they could have been

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act of violence against a single voter at a polling place can deter many voters from voting at that location and perhaps even elsewhere. In contrast, the consequences of vote buying are limited in scope by the number of voters who specifically choose to participate in the practice.

120. In some of their applications, the support-or-advocacy clauses can *also* be exercises of Congress's power to enforce the Reconstruction Amendments. Suppose, for example, that the members of a local sheriff's department conspired to use force to prevent Black citizens from voting. That conspiracy would violate the support-or-advocacy clauses, and the acts required to carry out the conspiracy would also violate the Fifteenth Amendment. But the fact that the clauses can sometimes be justified by the Reconstruction Amendments as well as by Article I in no way diminishes the sufficiency of Article I. What matters for present purposes is that Article I, by itself, is a sufficient source of authority for the support-or-advocacy clauses and that legislation under Article I need not be limited to the enforcement of rights specified elsewhere.

121. *See Smiley*, 285 U.S. at 366 (holding that the Elections Clause authorizes Congress "to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns"); *United States v. Carmichael*, 685 F.2d 903, 908-09 (4th Cir. 1982) (holding that Congress may regulate any activity that potentially corrupts federal elections).

122. *See* 2 U.S.C. § 2(c); *see also Ex parte Yarbrough*, 110 U.S. at 660-61 (recognizing this legislation as an exercise of power under the Elections Clause).

123. *See* 2 U.S.C. §§ 1, 7; *see also Ex parte Yarbrough*, 110 U.S. at 660-61 (recognizing this legislation as an exercise of power under the Elections Clause).

124. *See, e.g.*, 52 U.S.C. §§ 30101-30126.

intended to function as remedial—neither a First Amendment account nor a right-to-vote account makes sense. The courts that have held otherwise have simply made a mistake. The next two Parts explain how that mistake happened.

### III. UNPACKING *EX PARTE YARBROUGH*

*Ex parte Yarbrough* held that the support-or-advocacy clauses are valid legislation under Congress’s powers to protect federal elections.<sup>125</sup> But some aspects of the Court’s opinion require effort to parse. *Ex parte Yarbrough* was a complex case. It concerned prosecutions under two different statutory provisions, and its analysis touched on several different constitutional clauses. Moreover, as is true of many nineteenth-century Supreme Court opinions, the *Ex parte Yarbrough* opinion is not organized in the clean, clause-by-clause and count-by-count way in which most modern lawyers are taught to write. As a result, the reader of *Ex parte Yarbrough* sometimes has to pay attention and understand the big picture in order to grasp what the Court is doing with any given piece of its analysis. In that vein, in *Cockrum*, one of the recent support-or-advocacy cases, the district court failed to understand part of *Ex parte Yarbrough*’s analysis, and its misunderstanding led it astray on the question of whether the support-or-advocacy clauses are substantive or remedial.<sup>126</sup> This Part accordingly does the work of reading *Ex parte Yarbrough* slowly and carefully, thus giving future courts a clear map of the opinion.

In the *Cockrum* decision the district court understood that *Ex parte Yarbrough* associated the support-or-advocacy clauses with Article I, Section 4.<sup>127</sup> But it could not quite get beyond the intuition that the clauses must rest on the Reconstruction Amendments. The district court thus took *Ex parte Yarbrough* to mean that the clauses are an exercise of a hybrid congressional power, one that involves Article I, Section 4 but also requires the Fifteenth Amendment.<sup>128</sup> On that reading, the valid application of section 5520 in *Ex parte Yarbrough* depended on the fact that the conspiracy at issue aimed at preventing Saunders, a Black man, from exercising his Fifteenth Amendment right to vote. And, having concluded that *Ex parte Yarbrough* treated Congress’s power to enforce the Fifteenth Amendment as a necessary part of Congress’s authority to enact the support-or-advocacy clauses, the *Cockrum* court concluded that the clauses are merely remedial.<sup>129</sup>

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125. See *supra* note 107 and accompanying text.

126. See *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 663–64 (E.D. Va. 2019).

127. *Id.* at 663.

128. *Id.* at 663–64 (describing *Ex parte Yarbrough* as upholding the support-or-advocacy clauses as exercises of “Congress’s Article I, Section 4 powers *and* the Fifteenth Amendment’s substantive right to vote”).

129. See *id.* at 664 (“This effectively undercuts Plaintiffs’ position that the support or advocacy clauses create a stand-alone substantive right of action . . .”).

It is certainly true, as the *Cockrum* court noted, that the Supreme Court in *Ex parte Yarbrough* discussed the Fifteenth Amendment.<sup>130</sup> But *Ex parte Yarbrough* did not hold that Congress's power to enforce the Fifteenth Amendment was a necessary basis for the enactment of the support-or-advocacy clauses, nor that the section 5520 prosecution before it was predicated on the violation of a Fifteenth Amendment right. Indeed, as we explain in Part III.A, *Ex parte Yarbrough* could not possibly have so held given the Court's understanding of the Fifteenth Amendment. Therefore, it should not be surprising that a careful reading of the Court's opinion reveals that *Ex parte Yarbrough*'s discussion of the Fifteenth Amendment was not part of its analysis of the support-or-advocacy prosecution *at all*. As we explain in Part III.B, that discussion was part of the Court's analysis of a different question presented in the case about the constitutionality of a different section of the federal criminal code.

#### A. *Race and Reese*

The Fifteenth Amendment does not create a general right to vote. It creates a more specific right against discrimination in voting "on account of race, color, or previous condition of servitude."<sup>131</sup> According to prevailing doctrine at the time of *Ex parte Yarbrough*, it followed that a federal statute could only be justified as Fifteenth Amendment legislation if it was worded as a prohibition on those specific kinds of discrimination.<sup>132</sup> The support-or-advocacy clauses make no reference to race, color, or previous condition of servitude. The *Ex parte Yarbrough* Court therefore could not have been saying—and did not say—that those clauses were valid legislation under Congress's power to enforce the Fifteenth Amendment.

The Supreme Court case establishing this point was *United States v. Reese*,<sup>133</sup> which was decided in 1876 and expressly discussed in *Ex parte Yarbrough*.<sup>134</sup> *Reese* concerned the prosecution of Kentucky election inspectors who refused to receive the votes of Black voters on the same terms as white voters.<sup>135</sup> The inspectors were prosecuted under the 1870 Enforcement Act,<sup>136</sup> which, as discussed above, prohibited conspiracies to prevent people from voting.<sup>137</sup> The question in the case was whether Congress could constitutionally enact that legislation.<sup>138</sup> Because the election in question was for local officials,<sup>139</sup> the statute as applied could not

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130. See *Ex parte Yarbrough*, 110 U.S. 651, 664 (1884).

131. See U.S. CONST. amend. XV, § 1.

132. See *United States v. Reese*, 92 U.S. 214, 220–21 (1876). For reasons explained below, it is possible that this proposition applied only to criminal statutes. But that wrinkle makes no difference here, because the support-or-advocacy clauses as adjudicated in *Ex parte Yarbrough* were criminal provisions.

133. 92 U.S. 214 (1876).

134. See 110 U.S. at 665.

135. *Reese*, 92 U.S. at 224.

136. *Id.* at 220.

137. See *supra* Part II.A.

138. *Reese*, 92 U.S. at 218.

139. *Id.* at 223–24.

be justified as an exercise of Congress's power under the Elections Clause of Article I, which gives Congress the power to make rules for the election of members of *Congress*.<sup>140</sup> Instead, the case was argued solely on the question of whether the relevant statutory provisions were valid exercises of Congress's power to enforce the Fifteenth Amendment.<sup>141</sup>

The answer to that question was no. The Fifteenth Amendment, the Court explained, conferred a right against discrimination in voting, not a right to vote as such.<sup>142</sup> Congress's power to enforce the Fifteenth Amendment was therefore not a power to protect the right to vote in general but only a power to protect the right not to be discriminated against in the voting context on the basis of race, color, or previous condition of servitude.<sup>143</sup> The language of the 1870 Enforcement Act, the Court noted, was not limited to such cases of discrimination.<sup>144</sup> It purported to reach any conspiracies to deny the right to vote.<sup>145</sup> In so doing, the 1870 Enforcement Act went beyond Congress's power to enforce the Fifteenth Amendment. And the Court specifically refused to narrow the statute by judicial construction or to hold the statute valid as applied, because the particular facts before it did involve racial discrimination.<sup>146</sup> To sustain the prosecution in that way, the Court explained, would permit Congress to cast a wide net, putatively criminalizing behavior regardless of whether it actually had the authority to do so and to leave it to the courts to say who could actually be punished.<sup>147</sup> That, the Court wrote, would be inappropriate.<sup>148</sup> The Court concluded that the necessary solution to the problem of statutory overbreadth was to hold the provisions flatly unconstitutional.<sup>149</sup>

The holding of *Reese*, then, was that a criminal statute not worded in terms of discrimination on the basis of race, color, or previous condition of servitude could not be justified as an enforcement of Fifteenth Amendment rights, even as applied to cases of racial discrimination.<sup>150</sup> It follows that the support-or-advocacy clauses could not have been upheld in *Ex parte Yarbrough* as legislation enforcing the Fifteenth Amendment. Like the voting rights provisions of the 1870 Enforcement Act, the support-or-advocacy clauses of the Klan Act make no reference to race, color, or previous condition of servitude. If the support-or-advocacy clauses rested on the power to enforce the Fifteenth Amendment, they would have been overbroad in exactly the way that the statute in *Reese* was overbroad. Like *Reese*, *Ex parte Yarbrough* reviewed a criminal conviction, so the overbreadth would have been exactly as intolerable in *Reese* as it was in *Ex*

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140. *Id.* at 218.

141. *Id.* at 215, 218.

142. *Id.* at 217.

143. *Id.* at 218.

144. *Id.* at 220.

145. *Id.*

146. *Id.* at 221.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 220–21.

*parte Yarbrough*.<sup>151</sup> The *Ex parte Yarbrough* Court was fully aware of *Reese* and discussed it explicitly,<sup>152</sup> and there is no indication that *Ex parte Yarbrough* took issue with the analysis in *Reese* on this point. It is accordingly not possible to construe *Ex parte Yarbrough* as treating the support-or-advocacy clauses as legislation enforcing the Fifteenth Amendment.<sup>153</sup> Nor is there any need to, because Article I is a fully sufficient source of authority for the purpose.

### B. A Tale of Two Statutes

The *Ex parte Yarbrough* Court did discuss the Fifteenth Amendment but it did so in connection with a separate issue.<sup>154</sup> As noted above, *Ex parte Yarbrough* upheld the constitutionality of *two* statutory provisions under which defendants had been prosecuted. One was section 5520 of the Revised Statutes—that is, the support-or-advocacy clauses.<sup>155</sup> The other was section 5508—originally section 6 of the 1870 Enforcement Act—which prohibited conspiracies to “injure, oppress, threaten, or intimidate any citizen in the free exercise . . . of any right or privilege secured . . . by the Constitution or laws of the United States.”<sup>156</sup> As that language indicates, section 5508 was a remedial provision rather than a substantive one. A valid prosecution under section 5508 required a showing that the victim had been injured for exercising some “right or privilege so secured . . . by the Constitution or laws of the United States.”<sup>157</sup> So, to uphold the prosecution under section 5508, the *Ex parte Yarbrough* Court needed to conclude that the defendants had

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151. *Ex parte Yarbrough*, 110 U.S. 651, 652 (1884).

152. *Id.* at 665.

153. Other indications point in the same direction. For example, one year before *Ex parte Yarbrough*, the Supreme Court rejected the argument that the Fifteenth Amendment authorized Congress to pass section 5519 of the Revised Statutes. *United States v. Harris*, 106 U.S. 629, 637 (1883). In so doing, the Court identified two other statutory sections—sections 5506 and 5507—as enforcing the Fifteenth Amendment. *Id.* The Court made no suggestion that section 5520 enforced the Fifteenth Amendment. Given that section 5520 was nearer in the statute book to the section at issue than sections 5506 and 5507 and given also that section 5520 (unlike sections 5506 and 5507) was originally part of the same statute and statutory section as section 5519, it would have been odd for the Court to pass over section 5520 in this discussion if section 5520 was in fact legislation enforcing the Fifteenth Amendment.

154. *Ex parte Yarbrough*, 110 U.S. at 655.

155. *Id.*

156. *See* 70 Rev. Stat. § 5508; *Ex parte Yarbrough*, 110 U.S. at 654–55. This scenario, where the same events gave rise to prosecutions under both sections 5520 and 5508, was not unique in *Ex parte Yarbrough*. *See, e.g.*, *United States v. Butler*, 25 F. Cas. 213 (Waite, Circuit Justice, C.C.D. S.C. 1877) (No. 14,700) (featuring a prosecution under both statutes). The lower court’s treatment of the prosecutions in *Butler* reinforces the point that the two statutes criminalized different things and that in a case in which defendants were prosecuted under both statutes, the prosecution under section 5508 required a showing about a right established under some other source of federal law—thus necessitating a showing of discriminatory purpose on the section 5508 counts—while the prosecution under section 5520 merely required a showing of a conspiracy to engage in the conduct described in section 5520 itself. *See supra* note 97 and accompanying text (discussing *Butler*).

157. *See* 70 Rev. Stat. § 5508.

conspired to prevent the victim from exercising some preexisting federal right.

The relevant right in this case, the Court wrote, was the right to vote.<sup>158</sup> But *Ex parte Yarbrough* did not locate this right to vote in the Fifteenth Amendment. Instead, *Ex parte Yarbrough* held that the section 5508 prosecution was valid because the defendants had violated the victim's right to vote under Article I, Section 2 of the Constitution, which provides that all persons who are eligible under state law to vote in elections for the most numerous house of the state legislature are also eligible to vote for members of the House of Representatives.<sup>159</sup> Under Georgia law at the time, Saunders formally had the right to vote in state legislative elections.<sup>160</sup> So, under

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158. *Ex parte Yarbrough*, 110 U.S. at 662.

159. *Id.* at 663; *see also* U.S. CONST. art. I, § 2, cl. 1 (specifying that in elections for the House of Representatives, “the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislatures”). The mention of a constitutional right to vote that is not race-specific might (but should not) raise questions about whether this Article's prior discussion of the relationship between the support-or-advocacy clauses and the right to vote has been adequate. Above, we explained why the Court in *Ex parte Yarbrough* could not have regarded the support-or-advocacy clauses as legislation enforcing the Fifteenth Amendment: the support-or-advocacy clauses are race-neutral, and *Reese* held that a facially race-neutral statute could not create criminal liability for violations of the Fifteenth Amendment. *See supra* Part III.A. One might wonder, though, whether *Ex parte Yarbrough* could have considered the support-or-advocacy clauses legislation enforcing not the Fifteenth Amendment's right against discrimination in voting but Article I, Section 2's right to vote in congressional elections. That right to vote is race-neutral, and it runs against private parties as well as state actors. *See, e.g.*, *United States v. Classic*, 313 U.S. 299 (1941). The support-or-advocacy clauses are similar in those two respects. So even if the support-or-advocacy clauses should not be understood as legislation protecting the Fifteenth Amendment right to vote, one might wonder whether they are legislation protecting the Article I, Section 2 right to vote—and, if so, whether they might be remedial rather than substantive after all. For several reasons, however, nothing about Article I, Section 2 affects the support-or-advocacy clauses' status as substantive legislation. For one, nothing about *Ex parte Yarbrough*'s discussion of Article I, Section 2 was relevant to the support-or-advocacy clauses. Article I, Section 2 was relevant only to the portion of *Ex parte Yarbrough* that arose under section 5508. More broadly, even if the support-or-advocacy clauses were designed to protect the right to vote guaranteed by Article I, Section 2, it would not follow that the clauses were remedial only. If Congress legislates to protect the right guaranteed by Article I, Section 2, it does so with its power to regulate congressional elections under Article I, Section 4. Article I, Section 4 names a power to enact substantive legislation, not—like the enforcement clauses of the Reconstruction Amendments—a power to enact remedial legislation only. *See* U.S. CONST. art. I, § 4. To be sure, Congress acting under Article I, Section 4 *could* enact a statute that was remedial only. It could, for example, enact a statute with the following text: “Any person who suffers a violation of the right to vote as guaranteed by Article I, Section 2 shall have a cause of action for damages.” But that is not what the support-or-advocacy clauses say. As explained in Part II.A above, Congress enacted a statutory provision expressly and specifically protecting the right to vote in 1870, one year before it enacted the support-or-advocacy clauses. To think that the support-or-advocacy clauses are no more than legislation vindicating the substantive right to vote conferred by Article I, Section 2 is thus to make those clauses superfluous in light of a statute passed the previous year, as well as to give them a much narrower scope than their language indicates.

160. *See* tit. 14, 1 GA. CODE § 1276 (1882) (providing that all male citizens of the United States, regardless of race, aged twenty-one or older, who satisfied residency and taxpaying requirements, and did not come within exceptions here relevant, were qualified to vote for the Georgia General Assembly). Prior to 1868, Georgia's constitution limited the franchise to white male citizens. *See* GA. CONST. of 1865, art. V. In 1868, Georgia adopted a new

Article I, Section 2, he had a federal right to vote in congressional elections as well.

In contrast, it is not at all clear that the *Ex parte Yarbrough* Court could have identified the Fifteenth Amendment as the source of the right underlying the section 5508 prosecution—let alone the section 5520 prosecution—because it is not at all clear that any violation of Fifteenth Amendment rights had occurred. True, the victim in the case was Black, and he was attacked, inter alia, to prevent him from voting.<sup>161</sup> But the Fifteenth Amendment is addressed to government officials,<sup>162</sup> and the defendants in *Ex parte Yarbrough* were private actors.<sup>163</sup> In contrast, the Article I, Section 2 right to vote in congressional elections has no state action component. The constitutional clause contains no state action language, and the Supreme Court has clearly identified the Article I, Section 2 right to vote as one that the Constitution protects against interference by private parties.<sup>164</sup> So even if the defendants had violated no Fifteenth Amendment right, the prosecution under section 5508 could proceed on the ground that the defendants had conspired to prevent Saunders from exercising a right to vote that he held under Article I, Section 2.<sup>165</sup>

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constitution that removed the racial qualification. See GA. CONST. of 1868, art. II, § 2. Section 1276 of the 1882 Georgia Code was written to conform to the relevant provisions of a yet later constitution, adopted in 1877, which also had no racial limitation. See GA. CONST. of 1877, art. I, §§ 1–2.

161. *Ex parte Yarbrough*, 110 U.S. at 655–56.

162. See U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”) (emphasis added); see also *James v. Bowman*, 190 U.S. 127, 139 (1903) (“[A] statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the 15th Amendment upon Congress . . .”).

163. See *supra* note 110 and accompanying text.

164. See, e.g., *Classic*, 313 U.S. at 315 (“And since the constitutional command [of Article I, Section 2] is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states.” (citing *Ex parte Yarbrough*, 110 U.S. at 663–64)).

165. We do not claim that this state action point is completely dispositive. As Ellen Katz has explained, there is room to argue that the post-Reconstruction Court left open the possibility that Congress’s power to enforce the Fifteenth Amendment might authorize legislation against private parties who interfered with voting rights. See Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2357–59 (2003). On that view, § 10307(b) of the VRA might be understood as Fifteenth Amendment enforcement legislation that reaches private parties. See 52 U.S.C. § 10307(b) (barring any person, “whether acting under color of law or otherwise,” from intimidating actual or prospective voters); *Nipper v. Smith*, 39 F.3d 1494, 1549 n.2 (11th Cir. 1994) (en banc) (Hatchett, J., dissenting) (stating that the constitutionality of § 10307(b) is “questionable” for this reason). We take no position on this question here. We do mean to point out, of course, that if Fifteenth Amendment enforcement legislation is valid only against state actors, the prosecution in *Ex parte Yarbrough* could not have been predicated on a violation of Fifteenth Amendment rights. But for present purposes, this point is not necessary. Even without reference to the state action problem, *Reese* indicates that the support-or-advocacy clauses could not have been Fifteenth Amendment legislation because they make no mention of race, color, or previous condition of servitude. See *supra* Part III.A.

The Court then defended the proposition that Article I, Section 2 confers a predicate right to vote against the objection that the Constitution actually creates no right to vote at all.<sup>166</sup> That objection had some basis in the Court's prior discussions of suffrage. In *Minor v. Happersett*,<sup>167</sup> which rejected the claim that the Fourteenth Amendment entitled women to vote on the same terms as men, the Court had written that "the Constitution of the United States does not confer the right of suffrage on any one."<sup>168</sup> According to that way of thinking, the right to vote is allocated by state law, and the Constitution simply prohibits certain kinds of discrimination in the allocation. The relevance of this idea in *Ex parte Yarbrough* was straightforward: if the Constitution did not confer a right of suffrage on anyone, it could not confer one on Saunders, so the *Ex parte Yarbrough* defendants could not be prosecuted for conspiring to prevent Saunders from exercising his constitutional right to vote. To meet that objection, the *Ex parte Yarbrough* Court explained that the proposition that the Constitution does not confer the right to vote means that the Constitution is not *independently sufficient* to establish anyone's right to vote.<sup>169</sup> Given certain background conditions of state law, however, the Constitution does create a right to vote. Under Article I, Section 2, a person who has the right to vote in state legislative elections under state law has a federal constitutional right to vote in elections for Congress.<sup>170</sup> A conspiracy to prevent the exercise of that right would be criminal under section 5508.

Only after all of that was established did the *Ex parte Yarbrough* Court begin to discuss the Fifteenth Amendment. To buttress its argument that Congress could protect the right to vote, the Court pointed to the Fifteenth Amendment as "clearly show[ing] that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States."<sup>171</sup> Then, just as the Court's argument about Article I, Section 2 had to contend with language from *Minor* saying that the Constitution confers no right to vote, this invocation of the Fifteenth Amendment required the Court to parry similar language from *Reese*, according to which the "Fifteenth Amendment does not confer the right of suffrage upon any one."<sup>172</sup> That proposition, the *Ex parte Yarbrough* Court acknowledged, was "quite true."<sup>173</sup> But just as Article I, Section 2 conferred a constitutional right to vote on every person qualified to vote in state legislative elections, the Fifteenth Amendment

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166. *Ex parte Yarbrough*, 110 U.S. at 662–63.

167. 88 U.S. 162 (1875).

168. *Id.* at 178.

169. *Ex parte Yarbrough*, 110 U.S. at 664 ("[T]he right is not definitely conferred on any person or class of persons *by the Constitution alone*, because you have to look to the law of the state for the description of the class.") (emphasis added).

170. *Id.* (stating that once a person qualifies under state law as a voter in state legislative elections, "his right to vote for a member of congress [is] . . . fundamentally based upon the Constitution").

171. *Id.*

172. *United States v. Reese*, 92 U.S. 214, 217 (1875).

173. *Ex parte Yarbrough*, 110 U.S. at 665.

conferred a constitutional right to vote on any Black person (“whether they be men or women,” the Court said) who would have the right to vote but for laws purporting to restrict voting to white people.<sup>174</sup>

That discussion was dictum. Once the Court identified Article I, Section 2 as the source of the right on which the section 5508 prosecution validly rested, no further constitutional authority needed to be adduced. Moreover, the discussion of the Fifteenth Amendment could not supply the legal authority for the Court’s holding unless the Court was willing to say that congressional enforcement of the Fifteenth Amendment could reach beyond state actors. As noted above, the defendants in *Ex parte Yarbrough* were private parties.<sup>175</sup> And even if the Fifteenth Amendment had been material to the Court’s holding with respect to the prosecution under section 5508, it would have had no bearing on the prosecution under section 5520—that is, the support-or-advocacy clauses. With respect to the support-or-advocacy clauses, *Ex parte Yarbrough* did not discuss the Fifteenth Amendment at all.

Indeed, the Court expressly denied that *any* showing about the right to vote was relevant to the support-or-advocacy prosecution, as opposed to the prosecution under section 5508.<sup>176</sup> Even if the “proposition . . . that the right to vote . . . is not dependent upon the constitution or laws of the United States . . . were conceded,” the Court wrote—that is, even if there were no showing of a relevant preexisting federal right, “the importance to the general government of having the general election . . . free from force and fraud is not diminished.”<sup>177</sup> In other words, even if the absence of a preexisting right defeated the constitutional application of section 5508 in the case at hand, the application of section 5520 would remain valid because section 5520 was rooted in the congressional power to protect federal elections, rather than the congressional power to enforce preexisting rights.

*Ex parte Yarbrough* thus recognized what all other indications about the statute also suggest: the question of preexisting rights is not material to a claim under the support-or-advocacy clauses. Those clauses, like most of section 2 of the Klan Act, are substantive legislation. Nothing about the case’s discussion of the Fifteenth Amendment suggests otherwise.

#### IV. SUPPORT-OR-ADVOCACY VERSUS EQUAL PROTECTION

The misreading of *Ex parte Yarbrough* is one of two routes through which courts have mistakenly taken the support-or-advocacy clauses to be remedial rather than substantive. The other route runs through a conflation of the support-or-advocacy clauses with the two clauses that precede them in § 1985(3)—the ones that cover conspiracies to deny the equal protection of the laws.

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174. *Id.*

175. *See supra* note 110 and accompanying text.

176. *See Ex parte Yarbrough*, 110 U.S. at 662–63.

177. *Id.*

Most courts have less experience with § 1985(3)'s support-or-advocacy clauses than with its equal protection clauses.<sup>178</sup> And it is well established that those equal protection clauses *are* remedial.<sup>179</sup> They provide causes of action to vindicate federal rights created elsewhere, notably, if not exclusively, by the Reconstruction Amendments.<sup>180</sup> Courts familiar with the equal protection clauses have found it intuitive that the less familiar support-or-advocacy clauses should be treated the same way.<sup>181</sup> After all, the equal protection clauses and the support-or-advocacy clauses today make up a single statutory codification—the one we call § 1985(3). Other things being equal, it is reasonable to think that if the first two clauses of a statutory subsection are remedial, so are the next two clauses.

But that way of thinking does not make sense as applied to § 1985(3). The premise of this interpretive move is that the grouping of the equal protection clauses and the support-or-advocacy clauses together in a single statutory subsection—§ 1985(3)—is interpretively significant. But as explained above, no interpretive significance can be given to the grouping of four clauses in something called § 1985(3) because § 1985(3) is not a meaningful unit of legislation.<sup>182</sup> It is an artifact of a recodification that the Supreme Court has made clear has no interpretive significance.<sup>183</sup> If one wanted to make inferences about whether the support-or-advocacy clauses were substantive or remedial by looking to the nature of the other clauses with which the support-or-advocacy clauses are meaningfully grouped, one would have to ask not about the clauses that appear in § 1985(3) but about the clauses that appeared in section 2 of the Klan Act—almost all of which were substantive.<sup>184</sup>

The courts that have construed the support-or-advocacy clauses in *pari materia* with the equal protection clauses on this point have done so under the influence of misreadings of two Supreme Court cases: *Great American Federal Savings & Loan Ass'n v. Novotny*,<sup>185</sup> decided in 1979, and *United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*,<sup>186</sup> decided in 1983. In *Novotny*, a case arising under § 1985(3)'s first equal protection clause, the Court wrote that “[s]ection 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates.”<sup>187</sup> In *Carpenters*, which also arose under § 1985(3)'s first equal protection clause, the Court wrote that “[t]he rights, privileges, and immunities that § 1985(3)

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178. As noted earlier, there may be no more than three federal appellate opinions deciding questions arising under the support-or-advocacy clauses from any time in the last one hundred years. *See supra* note 3 and accompanying text.

179. *See infra* Part IV.C.

180. *See infra* Part IV.C.

181. *See, e.g.,* Gill v. Farm Bureau Life Ins. Co. of Mo., 906 F.2d 1265 (8th Cir. 1990); Cockrum v. Donald J. Trump for President, Inc., 365 F. Supp. 3d 652 (E.D. Va. 2019).

182. *See supra* Part II.A.

183. *See* Kush v. Rutledge, 460 U.S. 719, 724 (1983).

184. *See supra* Part II.A.

185. 442 U.S. 366 (1979).

186. 463 U.S. 825 (1983).

187. *Novotny*, 442 U.S. at 372.

vindicates must be found elsewhere.”<sup>188</sup> Some courts have taken this language to mean that *no clause* of § 1985(3) provides any substantive rights.<sup>189</sup>

If the words quoted from *Novotny* and *Carpenters* were read in isolation, that interpretation would be understandable. The quoted language speaks of “§ 1985(3),”<sup>190</sup> not of the equal protection clauses in particular, and the support-or-advocacy clauses are part of § 1985(3). But if one remembers that § 1985(3) is an administrative recodification whose grouping of clauses has no substantive significance, rather than a deliberate grouping of clauses by Congress,<sup>191</sup> one might be cautious about language that seems to treat the four clauses of § 1985(3) as an undifferentiated whole. And in context, it is clear that the Supreme Court’s statements about § 1985(3)’s not providing substantive rights referred only to the first clause, or perhaps the first two clauses, of § 1985(3). They have no bearing on the support-or-advocacy clauses.

To explain the proper reading of the language from *Novotny* and *Carpenters*, we provide below relevant background about the career of § 1985(3)’s equal protection clauses before those two decisions. We then explicate *Novotny* and *Carpenters* themselves.

#### A. 1871–1971: *Harris*, *Collins*, and *Griffin*

As noted earlier, the equal protection clauses of § 1985(3) were originally enacted as two clauses of section 2 of the Klan Act.<sup>192</sup> In the Revised Statutes, they appeared in two locations: as civil liability provisions in section 1980 of the Revised Statutes and as criminal provisions in section 5519 of the Revised Statutes.<sup>193</sup> In *United States v. Harris*,<sup>194</sup> decided in 1883, the Supreme Court held section 5519 unconstitutional on the ground that Congress had no authority to prohibit denials of equal protection beyond those perpetrated by state actors.<sup>195</sup> As in *Reese*, the Court in *Harris* ruled that a criminal law with unconstitutional applications had to fall in its entirety.<sup>196</sup> So section 5519—the criminal liability incarnation of the equal protection clauses—became a dead letter. The separately codified civil incarnation remained formally valid but, like a great deal of Reconstruction legislation, it fell into disuse. Not until 1951, in *Collins v. Hardyman*,<sup>197</sup> did

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188. *Carpenters*, 463 U.S. at 833.

189. See *Federer v. Gephardt*, 363 F.3d 754, 758 (8th Cir. 2004) (first citing *Carpenters*, 463 U.S. at 833; and then citing *Novotny*, 442 U.S. at 376); *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 661 (E.D. Va. 2019) (first citing *Carpenters*, 463 U.S. at 833; and then citing *Novotny*, 442 U.S. at 372).

190. See *Carpenters*, 463 U.S. at 833; *Novotny*, 442 U.S. at 372.

191. See *Kush v. Rutledge*, 460 U.S. 719, 724 (1983).

192. See *supra* Part I.A.

193. See *supra* Part I.B.

194. 106 U.S. 629 (1883).

195. *Id.* at 641–42.

196. *Id.* at 642–43.

197. 341 U.S. 651 (1951).

the Supreme Court adjudicate a civil claim under the statute's equal protection clauses.<sup>198</sup>

The plaintiffs in *Collins* were California communists who alleged a conspiracy to use violence and the threat of violence to disrupt one of their political meetings.<sup>199</sup> According to the complaint, the defendants' conduct was actionable under the statute<sup>200</sup> as a conspiracy to deprive them "of equal privileges and immunities under the laws."<sup>201</sup> The Supreme Court rejected the claim.<sup>202</sup> The defendants were private actors, and the Court concluded that their conspiracy did not aim to deny the equal protection of the laws.<sup>203</sup> That said, the *Collins* Court did not categorically hold that only state actors could be proper defendants in claims under the relevant statutory provision. Noting that the original target of the statute was the Ku Klux Klan, the Court allowed that a conspiracy massive and powerful enough to deny people the possibility of legal or political protection could come within the statute, even if the conspirators were not formally state actors.<sup>204</sup> But to construe the statute as reaching garden-variety private conspiracies, the Court said, would raise serious constitutional problems, including problems about the basis of congressional authority to enact the statute.<sup>205</sup> After all, *any* conspiracy to injure particular people unlawfully might be described as a conspiracy to deny the equal protection of the laws. So, a federal cause of action that broad might be tantamount to a federal cause of action for tortious conspiracy in general.

*Collins* was decided in 1951. Twenty years later, after a significant invigoration of the judicial commitment to racial equality<sup>206</sup> and a recognition of robust congressional authority to legislate for that purpose,<sup>207</sup> the Court in *Griffin v. Breckenridge*<sup>208</sup> held that private conspiracies to deny equal protection, even on a small scale, are indeed actionable under the first clause of § 1985(3).<sup>209</sup> The plaintiffs in *Griffin*, who were Black, alleged that the defendants, who were white, blocked their car and then physically

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198. *Id.* at 656 (explaining that the provisions had "long been dormant"). This is not to say that the Court had never previously come into contact with what are now the equal protection provisions of § 1985(3) at all. Claims under those provisions were asserted in two prior Supreme Court cases. *See* *Snowden v. Hughes*, 321 U.S. 1 (1944); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939). But in neither case did the Court engage in any substantive construction of the statute. *See* *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 371 n.8 (1979) (tracing this history).

199. *Collins*, 341 U.S. at 653.

200. At the time of *Collins*, the relevant statutory provision was codified at 8 U.S.C. § 47(3), not 42 U.S.C. § 1985(3).

201. *Collins*, 341 U.S. at 654.

202. *Id.* at 663.

203. *Id.* at 661, 665.

204. *Id.* at 662.

205. *Id.* at 659.

206. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

207. *See, e.g.*, *Jones v. Alfred A. Meyer Co.*, 392 U.S. 409 (1968); *Heart of Atlanta Hotel v. United States*, 379 U.S. 241 (1964).

208. 403 U.S. 88 (1971).

209. *Id.* at 96–97.

assaulted them, motivated by the belief that the owner of the car was a civil rights organizer.<sup>210</sup> The plaintiffs sued under the first clause of § 1985(3), alleging a conspiracy to deny them equal protection.<sup>211</sup> Taking its cue from *Collins*, the district court dismissed the complaint on the ground that the conspirators were not state actors.<sup>212</sup>

The Supreme Court reversed, rejecting the spirit of *Collins* without formally overruling it.<sup>213</sup> The statutory language, the *Griffin* Court noted, was clearly written to reach private conspiracies and not just conspiracies by state actors.<sup>214</sup> That was why the Court in *Harris* struck down the criminal incarnation of the provision, after all.<sup>215</sup> And in light of constitutional developments since *Collins*, the *Griffin* Court was less worried about congressional power to reach private conspiracies.<sup>216</sup>

Still, *Griffin* took seriously the concern that the wording of § 1985(3)'s first clause, read for all it could be worth, might make a tremendous amount of conduct actionable in the federal courts.<sup>217</sup> To address this problem, *Griffin* imposed a limiting construction. The legislative history and the language of "equal protection," the Court wrote, implied "that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."<sup>218</sup> A racially motivated conspiracy against Black victims, like the one in the case at hand, would qualify, but a conspiracy to perpetrate a similarly violent assault that arose out of, say, a financially motivated intention to rob the victims or out of a purely personal hatred would not.

This requirement of class-based animus has been a core part of § 1985(3) doctrine ever since *Griffin*.<sup>219</sup> And it fully establishes that what is true of that subsection's equal protection clauses need not be true of its support-or-advocacy clauses. As the Supreme Court has recognized, the requirement of class-based animus applies only in cases alleging conspiracies under those clauses of § 1985 that are worded in terms of equal protection.<sup>220</sup> It does not apply in cases arising under the support-or-advocacy clauses.<sup>221</sup> The reasons for the difference are not obscure. Formally, the Supreme Court in *Griffin* grounded the requirement of class-based animus in the statutory language

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210. *Id.* at 89–91.

211. *Id.* at 89–92.

212. *Id.* at 92–93.

213. *Id.* at 95–96.

214. *Id.* at 96–97, 100–02.

215. *Id.* at 97 (discussing *United States v. Harris*, 106 U.S. 629, 629 (1883)).

216. *See id.* at 95–96 ("Whether or not *Collins v. Hardyman* was correctly decided on its own facts is a question with which we need not here be concerned. But it is clear, in the light of the evolution of decisional law in the years that have passed since that case was decided, that many of the constitutional problems there perceived simply do not exist. Little reason remains, therefore, not to accord to the words of the statute their apparent meaning.").

217. *Id.* at 101–02.

218. *Id.* at 102.

219. *See, e.g., United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 829, 837 (1983); *Kush v. Rutledge*, 460 U.S. 719, 726 (1983).

220. *Kush*, 460 U.S. at 726.

221. *Id.*

about equal protection—language that distinguishes the first two clauses of § 1985(3) from the last two.<sup>222</sup> As a matter of policy, requiring class-based animus prevents the broadly worded equal protection clauses from creating something like a general federal law of tort conspiracy.<sup>223</sup> But the rationale for such a narrowing construction is inapplicable to the support-or-advocacy clauses because their language does not threaten to create a federal cause of action for tortious conspiracies in general. It reaches only a specified kind of conduct, one straightforwardly suitable for federal protection because of its direct connection to federal elections. The Supreme Court has accordingly recognized that plaintiffs suing under the support-or-advocacy clauses, like plaintiffs suing under the portions of § 1985(1) and (2) covering conspiracies against federal officers and federal witnesses, need not show class-based animus.<sup>224</sup> In short, the class-based animus requirement reinforces the point that § 1985(3) is not a single unit. Its separate clauses need to be interpreted on their own terms.

### B. Equal Protection Language as Remedial Legislation

Like the requirement of class-based animus, the status of § 1985(3)'s equal protection clause as remedial rather than substantive legislation is a function of those clauses' particular language. There are two ways to understand why. First, a statutory provision providing a cause of action in cases of conspiracies to deny “the equal protection of the laws, or of equal privileges and immunities under the laws” expressly refers to other laws that provide protection, privileges, and immunities.<sup>225</sup> The language makes the provision parasitic on the substance of other laws. Whether a conspiracy aims to deny someone the equal protection of the laws depends, within this framework, on what protections the substantive law offers.

Second, a federal law creating a substantive right of equal treatment in general might be beyond Congress's power to enact, even after the Second Reconstruction. Neither Section 5 of the Fourteenth Amendment nor any other constitutional provision has been understood to give Congress the authority to legislate a requirement that all people, as a general matter, must be treated equally by private and public actors alike.<sup>226</sup> But Congress does have the power to create a cause of action to vindicate people's equal right to enjoy whatever rights Congress has the authority to protect. If a right is

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222. See *Griffin*, 403 U.S. at 102 (“The language requiring intent to deprive of *equal* protection . . . means that there must be some racial, or perhaps otherwise class-based, individually discriminatory animus behind the conspirators' action.”); see also *Kush*, 460 U.S. at 725 (explaining that the requirement of class-based animus does not apply to those portions of § 1985 that “contain no language requiring that the conspirators act with intent to deprive their victims of the equal protection of the laws”).

223. *Griffin*, 403 U.S. at 101–02 (explaining that the requirement of class-based animus functions to prevent § 1985(3) from functioning “as a general federal tort law”).

224. *Kush*, 460 U.S. at 726.

225. 42 U.S.C. § 1985(3).

226. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (reaffirming that federal legislation enforcing the Fourteenth Amendment is limited by the state action requirement).

validly established by some substantive federal law, Congress can create causes of action to remedy violations of that right.<sup>227</sup> So the broad equal protection language of § 1985(3)'s first two clauses gives rise to the understanding that those clauses are remedial rather than substantive—and sensibly so.

Consider some examples: a conspiracy by state actors to engage in racial discrimination in violation of the Fourteenth Amendment's Equal Protection Clause would be validly actionable under § 1985(3). So would a conspiracy by state actors to deny rights protected under the Due Process Clause or a conspiracy by state actors to deny the freedom of speech described in the First Amendment as incorporated within the Fourteenth Amendment. In each of those contexts, Congress's creation of a cause of action to vindicate the relevant right would be a straightforward exercise of its enforcement authority under Section 5 of the Fourteenth Amendment. Congress has similar authority to enforce the Thirteenth and Fifteenth Amendments, so Congress can also validly create causes of action against people who conspire to deprive people of their Thirteenth or Fifteenth Amendments rights. To put the point generally, § 1985(3)'s equal protection clauses can be validly applied to protect any right that Congress has the constitutional authority to protect. But those clauses cannot be the source of a general substantive right to equal treatment, because Congress has no authority to create such a right. Hence the formulation that the equal protection clauses of § 1985(3) are vehicles for the assertion of rights specified elsewhere and not independently substantive.

Plaintiffs bringing suit under the equal protection clauses of § 1985(3) must accordingly identify the underlying federal rights that they seek to vindicate. In *Griffin*, the Court identified two such rights at issue in the case before it. The first was the right to be free of badges and incidents of slavery, as guaranteed by the Thirteenth Amendment.<sup>228</sup> The other was the right to interstate travel, which was implicated because the defendants allegedly conspired to impede the movement of their victims, one of whom was from a different state, on a public highway near an interstate border.<sup>229</sup> Both of these rights, the Court noted, run against private parties as well as state actors.<sup>230</sup> So when the plaintiffs in *Griffin* brought suit under § 1985(3), the statute gave them a cause of action for vindicating those underlying rights, both of which Congress has the authority to enforce.

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227. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) (explaining that “[s]ection 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation”); see also Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (explaining that Congress can “provid[e] a cause of action for individuals who have been injured by the conduct Congress wishes to proscribe”).

228. *Griffin*, 403 U.S. at 105.

229. *Id.* at 105–06.

230. *Id.*

### C. *Novotny and Carpenters*

The misconception that plaintiffs suing under the support-or-advocacy clauses must identify substantive federal rights specified elsewhere arises partly from misreadings of two Supreme Court cases—*Novotny* and *Carpenters*—decided in the wake of *Griffin*. In these decisions, the Court reaffirmed that the equal protection clauses of § 1985(3) are vehicles for the assertion of rights created elsewhere. But the analysis of these cases concerned the equal protection clauses only. It carries no implications for the support-or-advocacy clauses.

The plaintiff in *Novotny* argued that he had been fired from his job in consequence of a conspiracy to deny the equal enjoyment of workplace rights guaranteed by Title VII.<sup>231</sup> Because Title VII is federal legislation, the rights it guarantees are rights that Congress has the authority to protect. Congress validly created those rights, and Congress can create remedies to vindicate them. The *Novotny* Court held, however, that Title VII could not supply the predicate rights for the plaintiff's putative action under § 1985(3).<sup>232</sup> As the Court explained, Congress had enacted a detailed administrative scheme for the specific purpose of enforcing Title VII.<sup>233</sup> So, Congress can protect Title VII rights, but Congress has opted to provide that protection by means other than § 1985(3). Accordingly, the plaintiff in *Novotny* could not predicate his § 1985(3) claim on a Title VII violation.<sup>234</sup> And without some predicate right to assert, his § 1985(3) claim would not lie. As the Court wrote, “[s]ection 1985(3) provides no substantive rights itself; it merely provides a remedy” for the violation of rights created elsewhere.<sup>235</sup>

*Carpenters* is to the same effect. The plaintiffs in that case were employees at a nonunion workplace who alleged that they had been physically assaulted by a labor union mob.<sup>236</sup> They brought suit under the equal protection clauses of § 1985(3).<sup>237</sup> Quoting *Novotny*, the Supreme Court in *Carpenters* noted that “§ 1985(3) . . . ‘provides no substantial rights itself’ to the class conspired against. The rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere.”<sup>238</sup> To have a successful claim, therefore, the plaintiffs would have to have been able to characterize the assault they suffered as the denial of the equal enjoyment of a substantive right created by a different source of law, one that Congress had the authority to vindicate with a cause of action. The Supreme Court accordingly construed the plaintiffs’ claim as contending that the defendant mob had conspired to deny the plaintiffs their First Amendment rights of association—

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231. *Great Am. Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 368–69 (1979).

232. *Id.* at 375–76.

233. *Id.* at 376.

234. *See id.* at 378.

235. *Id.* at 372.

236. *United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 827 (1983).

237. *Id.* at 827.

238. *Id.* at 833 (citations omitted) (quoting *Novotny*, 442 U.S. at 372).

a characterization that, if successful, would have let the plaintiffs proceed.<sup>239</sup> Unfortunately for the plaintiffs, the Court concluded that the complaint alleged no actual violation of First Amendment rights because the defendants were private parties and the First Amendment runs only against state actors.<sup>240</sup> Without a predicate right to assert, the plaintiffs' § 1985(3) claim had to fail.

We come now to the critical point. Read out of context, the language of *Novotny* and *Carpenters* on these points could seem to say that *all* of § 1985(3) is merely remedial, even though those cases concerned only § 1985(3)'s first equal protection clause. The language from *Novotny* is as follows: "Section 1985(3) provides no substantive rights itself; it merely provides a remedy . . ." <sup>241</sup> *Carpenters* says that "§ 1985(3) . . . 'provides no substantial rights itself' to the class conspired against. The rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere."<sup>242</sup> Some lower courts have read this language to mean that *no part of* § 1985(3) creates substantive rights.<sup>243</sup> If no part of § 1985(3) created substantive rights, then the support-or-advocacy clauses would not be substantive. They would be remedial only. And no matter how compelling a substantive interpretation of those clauses might be based on the statutory language and history, clear statements to the contrary by the Supreme Court would settle the question the other way—at least in the lower courts.

But any lower court inclined to think that the Supreme Court has deemed the support-or-advocacy clauses remedial only should be fully deterred by a long-standing fact about the Court's own jurisprudence—that *Ex parte Yarbrough* treated the clauses as substantive.<sup>244</sup> *Novotny* and *Carpenters* contain not a word suggesting that *Ex parte Yarbrough* is mistaken. There is a straightforward reason why: *Novotny* and *Carpenters* were not engaging in the construction of the support-or-advocacy clauses at all. When the Court in *Novotny* and *Carpenters* wrote that "§ 1985(3)" is remedial only, it used "§ 1985(3)" as a shorthand for "the first clause of § 1985(3)." To think otherwise—to read the Court's statements as applying to *all* of § 1985(3)—is simply to misread the cases.

#### D. The Shorthand

An attentive reader of *Novotny* and *Carpenters* would notice that the Court in those cases pervasively deploys the shorthand of writing "§ 1985(3)" to refer to the particular part of § 1985(3) under discussion, rather than to the whole multiclausal subsection. Consider the following: the opening

239. *Id.* at 829–30.

240. *Id.* at 830, 833.

241. *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 336, 372 (1979).

242. *Carpenters*, 463 U.S. at 833 (citations omitted) (quoting *Novotny*, 442 U.S. at 372).

243. *See Federer v. Gephardt*, 363 F.3d 754, 758 (8th Cir. 2004) (first citing *Carpenters*, 463 U.S. at 833; and then citing *Novotny*, 442 U.S. at 376); *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 661 (E.D. Va. 2019) (first citing *Carpenters*, 463 U.S. at 833; and then citing *Novotny*, 442 U.S. at 372).

244. *See supra* Parts II.B, III.

paragraph of *Novotny* says “[i]n the case now before us, we consider the scope of 42 U.S.C. § 1985(3),”<sup>245</sup> not “we consider the scope of *the first clause* of 42 U.S.C. § 1985(3),” even though nothing in the case analyzes any clause of § 1985(3) beyond the first one.<sup>246</sup> Introducing the plaintiff’s complaint, *Novotny* says that “[h]e claimed damages under 42 U.S.C. § 1985(3), contending that he had been injured as the result of a conspiracy to deprive him of equal protection of and equal privileges and immunities under the laws.”<sup>247</sup> The Court simply did not bother to write that the plaintiff “claimed damages under *the first clause* of 42 U.S.C. § 1985(3),” even though the allegation clearly comes under that clause and no other. *Novotny* describes *Collins* as the first Supreme Court case in which “[t]he provisions of what is now § 1985(3) were . . . fully considered,”<sup>248</sup> even though *Collins* expressly limited its analysis to the first clause of § 1985(3).<sup>249</sup> *Collins* did not consider the support-or-advocacy provisions at all, let alone consider them “fully.” And in describing the necessary elements of a § 1985(3) claim, *Novotny* invoked *Griffin* as follows:

The Court’s opinion in *Griffin* discussed the following criteria for measuring whether a complaint states a cause of action under § 1985(3):

“To come within the legislation a complaint must allege that the defendants did (1) ‘conspire or go in disguise on the highway or on the premises of another’ (2) ‘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.’ It must then assert that one or more of the conspirators (3) did, or caused to be done, ‘any act in furtherance of the object of [the] conspiracy,’ whereby another was (4a) ‘injured in his person or property’ or (4b) ‘deprived of having and exercising any right or privilege of a citizen of the United States.’”

Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates.<sup>250</sup>

This passage cannot possibly describe the requirements for causes of action under *all four clauses* of § 1985(3). The second criterion says that a complaint under § 1985(3) must allege a conspiracy to deprive someone of

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245. *Novotny*, 442 U.S. at 368.

246. In much the same vein, *Novotny* describes § 1985(3) as “the surviving version of § 2 of the Civil Rights Act of 1871,” even though § 1985(3) contains only a part of what survives from section 2. *Id.* at 368. *Novotny* also describes *Harris* as having held “the criminal provisions of the statute unconstitutional.” *Id.* at 370–71 (citing *United States v. Harris*, 106 U.S. 629 (1883)). In fact, *Harris* held only the criminal analogue of the equal protection clauses invalid. *See generally* *United States v. Harris*, 106 U.S. 629 (1883) (adjudicating a question arising under section 5519 of the Revised Statutes, which imposed criminal liability only).

247. *Novotny*, 442 U.S. at 369 (citation omitted).

248. *Id.* at 371.

249. *Collins v. Hardyman*, 341 U.S. 651, 660 (1951) (specifying that the issue in that case arose only under the language now codified as the first equal protection clause of § 1985(3)).

250. *Novotny*, 442 U.S. at 372 (alteration in original) (quoting *Griffin v. Breckinridge*, 403 U.S. 88, 102–03 (1971) (internal citation omitted)).

equal protection. That is not a general requirement of complaints under § 1985(3). It is required only of complaints under the first clause of § 1985(3), which deals with equal protection. Nothing whatsoever is said in this passage about the criteria for valid complaints under the other clauses of § 1985(3). The omission is understandable—in both *Griffin* and *Novotny*, the Court adjudicated claims under clause one only.<sup>251</sup> But it should be clear, and clear beyond doubt, that when the *Novotny* Court in the passage above spoke of *Griffin*'s discussion of “a cause of action under § 1985(3),”<sup>252</sup> it could only mean “a cause of action under *the first clause* of § 1985(3).” The Court simply did not bother to write the sentence in the more specific and more cumbersome way.

The language from *Novotny* that some courts have taken to mean that all of § 1985(3) is remedial only is, of course, the last line in the passage quoted above—the one in which the *Novotny* Court returned to its own voice after producing the text from *Griffin*. And it is clear, as just explained, that throughout this discussion “§ 1985(3)” must refer only to that subsection's first equal protection clause, rather than to the entire subsection. Seen in this context, there is no reason to think that *Novotny* meant to say anything at all about the remedial or substantive nature of parts of § 1985(3) that were not under discussion—including the support-or-advocacy clauses. As it did throughout its opinion, the Court in its sentence about remedial legislation used “§ 1985(3)” to mean “the portion of § 1985(3) that is at issue in this case.”

The analysis is the same for *Carpenters*. Like the *Novotny* Court, the *Carpenters* Court had before it only a claim brought under the first clause of § 1985(3), alleging a conspiracy to deny equal protection.<sup>253</sup> But the Court described the relevant cause of action as “made available by 42 U.S.C. § 1985(3),”<sup>254</sup> rather than specifying that it was made available by *the first clause* of § 1985(3). Like *Novotny*, *Carpenters* quoted the long passage from *Griffin* to establish the elements needed to make out a claim, thus stating that “to make out a violation of § 1985(3),” a plaintiff must show, inter alia, a conspiracy “for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws.”<sup>255</sup> Again, the showing that a conspiracy aims to deny equal protection is a required element of a claim under the first clause of § 1985(3). It is not required under the support-or-advocacy clauses. So, the statement that this showing is a required element “to make out a violation of § 1985(3)”<sup>256</sup> can only mean

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251. *See id.* at 368–69 (stating that a claim arises from an alleged conspiracy to deny equal protection by discriminating on the basis of sex); *Griffin v. Breckenridge*, 403 U.S. 88, 90 (1971) (stating that a claim arises from alleged conspiracy to deny equal protection by inflicting injuries for reasons of racial animus).

252. *Novotny*, 442 U.S. at 372.

253. *See United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 827 (1983).

254. *Id.*

255. *Id.* at 829 (quoting *Griffin*, 403 U.S. at 102–03).

256. *Id.* at 828.

that it is required to make out a violation of *the clause of § 1985(3) here under discussion*. Next, in analyzing whether animus against nonunion employers fulfilled the class-based animus requirement established in *Griffin, Carpenters* wrote of “the kind of animus that § 1985(3) requires,”<sup>257</sup> not “the kind of animus that *the equal protection clauses* of § 1985(3) require,” even though the class-based animus requirement applies only to the equal protection clauses.<sup>258</sup> So, when *Carpenters* (in partial reliance on *Novotny*) wrote that “§ 1985(3) . . . ‘provides no substantial rights itself’ to the class conspired against,”<sup>259</sup> it should be understood to have used the term “§ 1985(3)” in the same way it did throughout the opinion: to refer to the statutory language under analysis, rather than to all of § 1985(3).<sup>260</sup>

In short, to think that the description of “§ 1985(3)” in *Novotny* and *Carpenters* as merely remedial describes *all* of § 1985(3) is to think that two Supreme Court opinions that persistently used “§ 1985(3)” as a shorthand for “the first clause of § 1985(3)” deviated from that use in order to say, without explanation, that two clauses not under discussion, which have a different constitutional basis from the clause that was under discussion,<sup>261</sup> which are associated with the clause under discussion only by virtue of a recodification that does not affect statutory meaning,<sup>262</sup> whose language is substantive,<sup>263</sup> and which cannot be plausibly understood as written to vindicate any particular substantive rights specified elsewhere,<sup>264</sup> are remedial rather than substantive—and sub silentio to overrule a prior Supreme Court case that held to the contrary.<sup>265</sup> That seems extravagant. It makes much more sense to think that *Novotny* and *Carpenters* were simply using “§ 1985(3)” as a shorthand for the clause under discussion.

To be sure, things would be clearer if the Court in *Novotny* and *Carpenters* had taken care to write “the first clause of § 1985(3)” rather than using the shorthand. But courts do use this shorthand on a regular basis. For example, *Griffin* described *Harris* as having construed “the exact criminal counterpart of § 1985(3),”<sup>266</sup> even though the provision construed in *Harris* was the

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257. *Id.* at 831.

258. *Kush v. Rutledge*, 460 U.S. 719, 726 (1983).

259. *Carpenters*, 463 U.S. at 833 (quoting *Great Am. Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366, 372 (1979)).

260. Note too that the *Carpenters* language saying that “§ 1985(3)” provides no substantial rights says that it provides no substantial rights “to the class conspired against.” *Id.* And the requirement that plaintiffs demonstrate a conspiracy that victimizes a class applies only in actions under the first clauses of § 1985(3). See *Kush*, 460 U.S. at 726. Continuing the thought, the next sentence in *Carpenters* says that “[t]he rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere.” *Carpenters*, 463 U.S. at 833. The language of “rights, privileges, and immunities” again tracks the language of the first clause.

261. See *supra* Part II.C.

262. See *supra* Parts I.B–C.

263. See *supra* Part II.A.

264. See *supra* Part II.B.

265. See generally *Ex parte Yarbrough*, 110 U.S. 651 (1884) (upholding a prosecution under section 5520 of the Revised Statutes and treating the provision as substantive legislation).

266. *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971).

criminal counterpart only of § 1985(3)'s equal protection clauses, not the criminal counterpart of all of § 1985(3).<sup>267</sup> Lower courts routinely speak of “§ 1985(3)” as requiring a showing of class-based animus,<sup>268</sup> despite the

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267. The *Harris* Court considered only the constitutionality of section 5519. The criminal support-or-advocacy clauses were codified at section 5520. *See id.* at 104 (“The constitutionality of § 1985(3) might once have appeared to have been settled adversely by *United States v. Harris*, which held unconstitutional its criminal counterpart, then § 5519 of the Revised Statutes.” (citations omitted)).

268. *See, e.g.*, *Dolan v. Connolly*, 794 F.3d 290, 296 (2d Cir. 2015) (reading the class-based animus requirement of *Griffin* as applying to “Section 1985(3)”; *Keefe v. City of Minneapolis*, 785 F.3d 1216, 1224 (8th Cir. 2015) (“[P]er § 1985(3), [the plaintiff] is required to show . . . class-based, invidiously discriminatory animus.” (quoting *McDonald v. City of St. Paul*, 679 F.3d 698, 706 (8th Cir. 2012))); *McDonald v. City of St. Paul*, 679 F.3d 698, 706 (8th Cir. 2012) (“To establish a conspiracy under § 1985(3), [the plaintiff] must prove . . . some ‘class-based, invidiously discriminatory animus.’” (quoting *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 268 (1993))); *A Soc’y Without A Name v. Virginia*, 655 F.3d 342, 346 (4th Cir. 2011) (identifying “class-based, invidiously discriminatory animus” as an element of “a claim under 42 U.S.C. § 1985(3)” (quoting *Simmons v. Poe*, 47 F.3d 1370, 1376 (4th Cir. 1995))); *Estate of Oliva ex rel. McHugh v. New Jersey*, 604 F.3d 788, 802 (3d Cir. 2010) (“[T]he reach of section 1985(3) is limited to private conspiracies predicated on ‘racial, or perhaps otherwise class based, invidiously discriminatory animus.’” (alteration in original) (quoting *Lake v. Arnold*, 112 F.3d 682, 685 (3d Cir. 1997))); *Estate of Smithers ex rel. Norris v. City of Flint*, 602 F.3d 758, 765 (6th Cir. 2010) (“To sustain a claim under section 1985(3), a claimant must prove both membership in a protected class and discrimination on account of it. In other words, there must be proof of ‘some racial, or perhaps otherwise class-based, invidiously discriminatory animus.’” (quoting *Bartell v. Lohiser*, 215 F.3d 550, 559–60 (6th Cir. 2000))); *Bryant v. Mil. Dep’t*, 597 F.3d 678, 687 (5th Cir. 2010) (speaking of “the class-based animus requirement of § 1985(3)”; *Atherton v. D.C. Off. of Mayor*, 567 F.3d 672, 689 (D.C. Cir. 2009) (“The statute does not apply to *all* conspiratorial tortious interferences with the rights of others, but only those motivated by some class-based, invidiously discriminatory animus.” (quoting *Martin v. Malhoit*, 830 F.2d 237, 258 (D.C. Cir. 1987))); *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 832 (6th Cir. 2007) (“A § 1985(3) complaint must ‘allege both a conspiracy and some class-based discriminatory animus behind the conspirators’ action.” (quoting *Newell v. Brown*, 981 F.2d 880, 886 (6th Cir. 1992))); *Farber v. City of Paterson*, 440 F.3d 131, 136 (3d Cir. 2006) (stating that it is among “the requirements of a § 1985(3) claim[] that the conspirators be motivated by class-based invidiously discriminatory animus”); *Dornheim v. Sholes*, 430 F.3d 919, 924 (8th Cir. 2005) (“[T]o prove a private conspiracy in violation of . . . § 1985(3), a plaintiff must show, *inter alia*, . . . that some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators’ action.” (first, second, and fourth alterations in original) (quoting *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 267–68 (1993))); *Torres-Rosado v. Rotger-Sabat*, 335 F.3d 1, 14 (1st Cir. 2003) (“Under § 1985(3), a conspiracy must be motivated by some ‘racial, or perhaps otherwise class-based, invidiously discriminatory animus.’” (quoting *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 268–69 (1993))); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1056 (9th Cir. 2002) (“To bring a cause of action successfully under § 1985(3), a plaintiff must demonstrate a deprivation of a right motivated by ‘some racial, or perhaps otherwise class-based, invidiously discriminatory animus . . .’” (quoting *Sever v. Alaska Pulp Corp.*, 978 F.2d 1259, 1536 (9th Cir. 1992))); *United States v. Nelson*, 277 F.3d 164, 180 (2d Cir. 2002) (characterizing *Griffin* as holding that “the Thirteenth Amendment authorizes the application of 42 U.S.C. § 1985(3) when there is ‘some racial, or perhaps otherwise class-based, invidiously discriminatory animus’” (quoting *Griffin*, 403 U.S. at 102)); *Orin v. Barclay*, 272 F.3d 1207, 1217 (9th Cir. 2001) (“To prove a violation of § 1985(3), [the plaintiff] must show ‘some racial, or perhaps otherwise class-based, behind the conspirators’ action.” (quoting *Griffin*, 403 U.S. at 102)); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 989 (9th Cir. 2001) (stating that “[a]n indispensable element of a claim under 42 U.S.C. § 1985(3) is some racial, or perhaps otherwise class-based, invidiously discriminatory animus” (alteration in

Supreme Court's clearly established rule that the class-based animus requirement applies only in cases under § 1985's equal protection clauses.<sup>269</sup> These courts are not purporting to contradict the settled proposition that plaintiffs proceeding under the support-or-advocacy clauses need not show class-based animus. They are simply not bothering to note that point; they use “§ 1985(3)” as a shorthand to mean “the portion of § 1985(3) now at issue.” Perhaps that usage is common because it is cumbersome to write “the equal protection clauses of § 1985(3).” Or perhaps it is common because the vast majority of § 1985(3) cases arise under the first clause, such that judges might by habit think of that first clause as tantamount to § 1985(3) in general. But whatever the reason for this judicial shorthand, it is standard practice.

Every indication, therefore, is that in writing that “§ 1985(3)” provides no substantive rights, *Carpenters* and *Novotny* were merely engaging in the common practice of using “§ 1985(3)” to refer only to the first clause, or maybe both equal protection clauses, of that subsection. To read those cases as holding or even suggesting that the support-or-advocacy clauses are remedial legislation only is to misread them, plain and simple.

#### V. THE ROLE OF THE FEDERAL COURTS

A final note is in order about the practical implications of recognizing the support-or-advocacy clauses as substantive legislation. Good judges are mindful of the institutional limits under which courts operate, and federal courts are supposed to be forums for only certain kinds of lawsuits. One might accordingly wonder whether a federal cause of action for all conspiracies to injure citizens because of their political views might bring into federal court a great deal of litigation that does not really belong there. Pointing to language in *Carpenters*, one defendant in recent § 1985(3) litigation has argued, in this vein, that federal courts should be loath to give the support-or-advocacy clauses a substantive construction, lest they overstep their appropriate role.<sup>270</sup> But on a bit of reflection, this concern becomes insubstantial. Properly read, *Carpenters* has no bearing on this question. As already explained, that case says nothing at all about the

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original) (quoting *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000)); *Horaist v. Dr.'s Hosp. of Opelousas*, 255 F.3d 261, 270 (5th Cir. 2001) (“To state a cognizable claim under § 1985(3), [the plaintiff] must allege that . . . class-based discriminatory animus lay behind the conspiracy.”); *Bartell v. Lohiser*, 215 F.3d 550, 559 (6th Cir. 2000) (“The Supreme Court has emphasized that § 1985(3) requires *inter alia* that a claimant establish ‘some racial, or perhaps otherwise class-based, invidiously discriminatory animus.’” (quoting *United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 829 (1983))).

269. See *Kush v. Rutledge*, 460 U.S. 719, 726 (1983) (holding that a class-based animus requirement applies only to clauses worded in terms of equal protection); cf. *United States v. Butler*, 25 F. Cas. 213, 223–24 (Waite, Circuit Justice, C.C.D. S.C. 1877) (No. 14,700) (containing jury instructions from Chief Justice Morrison Waite, given while he was riding circuit, that do not require a showing of class-based animus on charges brought under section 5520 of the Revised Statutes).

270. See Opening Brief in Support of Defendant Donald J. Trump for President, Inc.'s Motion to Dismiss at 19, *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652 (E.D. Va. 2019) (No. 18 Civ. 484), ECF No. 23 [hereinafter Motion to Dismiss].

support-or-advocacy clauses.<sup>271</sup> On the merits, it is true that a substantive construction of the support-or-advocacy clauses would task the federal courts with adjudicating claims that they would otherwise not adjudicate. But that is true of any federal statute creating causes of action. In the present instance, where the subject matter is federal elections, the involvement of the federal judiciary is entirely appropriate.

The concern about the scope of cases potentially arising under the support-or-advocacy clauses stems mostly from the fact that under § 1985, any person who “is injured in his person or property” as a result of a covered conspiracy is entitled to sue for damages.<sup>272</sup> That language casts a wide net. In *Haddle v. Garrison*,<sup>273</sup> the Supreme Court explained that a plaintiff can suffer an injury sufficient to satisfy this statutory requirement even if he suffers no harm that would count as an injury to a constitutionally recognized property interest.<sup>274</sup> Albeit without so holding, the Court suggested that as a general matter injuries traditionally recognized in common-law tort would count as injuries under § 1985.<sup>275</sup>

If any injury (or even most injuries) traditionally cognizable in tort constitutes injury for the purposes of § 1985, it follows that a broad range of harms, some of them seemingly trivial, would suffice to support claims under the support-or-advocacy clauses. Suppose, for example, that a United States citizen who supports the Smith for Congress campaign places a yard sign reading “Smith for Congress” on her front lawn. If two supporters of the rival Jones campaign surreptitiously remove the sign, they would be liable in damages under the second support-or-advocacy clause. Quite straightforwardly, the Jones supporters would be two people who had conspired to injure a citizen in her property on account of her support or advocacy for a candidate for Congress. Indeed, there would be two cognizable injuries: one for trespass and one for the theft (or conversion) of the sign, which was the plaintiff’s property.

Few would contest that the Jones supporters behaved poorly in this hypothetical case. But politics is not always a clean business, and one might wonder whether the resources of the federal courts should be marshaled to police the behavior described. Tort law is generally state law, and under the

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271. See *supra* Part IV.C.

272. 42 U.S.C. § 1985(3).

273. 525 U.S. 121 (1998).

274. *Id.* at 125.

275. *Id.* at 127. The Court was careful to note, however, that a § 1985 claim can proceed even if the plaintiff in the action tries to recover on a cognate state law claim and does not prevail. *Id.* at 127 n.4. More broadly, *Haddle* did not purport to *confine* the injury requirement of § 1985 to common-law injury—it merely said that injuries cognizable at common-law would likely be cognizable under § 1985. Finally, it should be clear that the Court in *Haddle* had in mind a view of traditional common law in general, rather than suggesting that what qualifies as injury under § 1985 is a function of the actual positive tort law of any given state at the time a case arises. On the latter model, a state could nullify the effect of § 1985 by legislating exceptions to its own tort law. A federal statute designed to protect federal rights and federal governance from local actors bent on impeding federal governance is not sensibly construed to permit that sort of work-around.

Constitution, the responsibility for regulating elections—even federal elections—lies as a default matter with the states.<sup>276</sup> In *Carpenters*, which concerned a brawl over unionization, the Court noted its concern with the prospect of overpolicing the rough-and-tumble of politics as follows:

[W]e 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. To accede to that view would go far toward making the federal courts, by virtue of § 1985(3), the monitors of campaign tactics in both state and federal elections, a role that the courts should not be quick to assume.<sup>277</sup>

According to at least one set of litigants in recent § 1985(3) cases, that discussion in *Carpenters* reflects appropriate hesitation about constructions of the support-or-advocacy clauses that would require federal courts to take an aggressive posture toward policing political shenanigans.<sup>278</sup>

In fact, however, neither the passage from *Carpenters* nor anything else supports the idea that the support-or-advocacy clauses should be read narrowly due to any concern about the proper role of the courts. Indeed, the discussion in *Carpenters* is not about the support-or-advocacy clauses at all. *Carpenters* arose only under the first equal protection clause of § 1985(3) and, as discussed earlier, its analysis of the statute looked at that clause only.<sup>279</sup> When the *Carpenters* Court expressed hesitation about construing “§ 1985(3)” to provide a remedy for political elbow throwing, it had in mind the possibility that a political group’s incursions on its rivals might be deemed conspiracies to deny *equal protection*. Indeed, the Court’s expression of hesitancy about making federal courts “monitors of campaign tactics in *both state and federal elections*”<sup>280</sup> is comprehensible only on the understanding that the “difficult . . . question”<sup>281</sup> at issue was about the scope of something in § 1985(3) other than the support-or-advocacy clauses (i.e., the equal protection clauses). By their terms, the support-or-advocacy clauses apply to federal elections only. So, a concern about the wisdom of making federal courts monitor campaign tactics in state elections cannot be a concern about the scope of the support-or-advocacy clauses.

Whatever validity the *Carpenters* concern might have in cases arising under § 1985(3)’s equal protection clauses, there are two reasons why it has no application in the support-or-advocacy context. First, the concern in *Carpenters* is best understood as a matter of federalism. As the Court’s language worrying about federal policing of “both state and federal elections”<sup>282</sup> reflects, the *Carpenters* Court’s concern was animated by the specter of federal judicial involvement not in the limited world of federal

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276. See U.S. CONST. art. I, § 4; *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991).

277. *United Brotherhood of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 836 (1983).

278. See Motion to Dismiss, *supra* note 270, at 19.

279. See *supra* Part IV.C.

280. *Carpenters*, 463 U.S. at 836 (emphasis added).

281. *Id.*

282. *Id.*

elections but in the far vaster universe of state elections as well. It is one thing for a cause of action to be available in connection with congressional and presidential elections and quite another for that cause of action to be available in connection with every election for state legislature, city council, school board, or water district commission. The idea that federal courts would closely supervise every state and local election might well give the Supreme Court pause. But the idea that federal courts have a mandate to preserve fair play in federal elections raises no problems of federalism whatsoever.

Second, to the extent that the *Carpenters* Court's worry is understood not in terms of federalism but simply in terms of the advisability of creating causes of action to remedy political hijinks, it is a concern that makes much more sense when a court is construing general statutory language than when it applies a statute whose terms speak clearly to the specific question. The claim in *Carpenters* arose under § 1985(3)'s equal protection language. That language is famously susceptible of many different constructions, and the judiciary cannot avoid questions of structure and practicality when applying it. In that setting, it makes sense for interpreters to contemplate questions about the institutional capacity of courts. But the support-or-advocacy clauses embody a judgment by Congress that the federal courts are to do a particular thing, specifically, to entertain claims for damages by citizens who are injured on account of the support or advocacy they give in favor of federal political candidates. The statutory language leaves no room for asking whether courts should do that. Indeed, if (per *Carpenters*) whether to read the *equal protection* clauses of § 1985(3) as directing the federal courts to monitor campaign tactics in *state* elections is a "difficult . . . question,"<sup>283</sup> the question of whether the *support-or-advocacy* clauses direct the federal courts to play that role in *federal* elections must be surpassingly easy.

It remains true that the complete apparatus of a case in federal court might be a bit much to gin up every time Jones supporters swipe a "Smith for Congress" sign. But this worry is more notional than real. Litigation is not free, and a citizen whose only damage is the loss of a five-dollar placard is unlikely to go through the effort of hunting down the thieves, retaining counsel, and bringing suit. As is true under most federal statutes providing private rights of action, the brute logic of resource calculation will keep most small cases out of court. But when a case qualifying under the statutory language does come before a federal court, adjudication in that court will do no more than carry out Congress's instructions, given to a branch of the federal government, to play a role in ensuring the integrity of federal elections. For all these reasons, concerns about federalism furnish no reason to give the support-or-advocacy clauses a narrower scope than their language directs.

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283. *Id.*

## CONCLUSION

The integrity of democratic elections must be actively protected rather than taken for granted. Some threats to democratic elections in the next decade will look like traditional threats, and some will be genuinely new. The statute discussed in this Article is only one piece of the legal arsenal that will be needed to place American elections on a more secure footing. Without new legislation and a robust governmental commitment, the law we inherit from previous times will not be enough. But the law we inherit does furnish useful tools. The support-or-advocacy clauses are such tools. They should become part of the standard tool kit of lawyers who seek to protect voters and elections. And courts should recognize the function for which the clauses were designed, giving them the full substantive content that the Reconstruction Congress intended. This Article is intended to help courts see their way through when the question comes before them.