Conspiracies to Obstruct Justice in the Federal Courts: Defining the Scope of Section 1985(2)

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CONSPIRACIES TO OBSTRUCT JUSTICE IN THE FEDERAL COURTS: DEFINING THE SCOPE OF SECTION 1985(2)

INTRODUCTION

The Ku Klux Klan was one of the more infamous manifestations of southern white reluctance to concede political rights to newly freed slaves following the Civil War. The Klan attempted to overturn the Reconstruction policy of Congress through acts of violence and terrorism directed toward blacks, Union sympathizers and government officials. Against a backdrop of threatened anarchy, the forty-second Congress enacted the Ku Klux Klan Act in 1871 to reassert federal supremacy and to provide a remedy to those injured by civil rights violations.


2. Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1334 (7th Cir.), cert. denied, 434 U.S. 975 (1977); J. Randall & D. Donald, supra note 1, at 682-83; see A. McLaughlin, supra note 1, at 686, 688-90.


Section 2 of the Ku Klux Klan Act is presently codified at section 1985 of Title 42 of the United States Code and contains three subsections. Subsection 1 proscribes conspiracies to thwart United States officials engaged in the discharge of their duties; subsection 2 prohibits conspiracies to obstruct justice in a state or federal court; and

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6. 42 U.S.C. § 1985 (Supp. III 1979). Section 1985 was originally codified with three subsections, designated as (1), (2) and (3). U.S. Rev. Stat. tit. 24, § 1980, [18 pt. 1] Stat. 347 (2d ed. 1878). In 1976, the subsections were redesignated as (a), (b) and (c). 42 U.S.C. § 1985 (1976). Congress re instituted the numbering of the subsections as (1), (2) and (3) when it again recodified the statute in 1979. 42 U.S.C. § 1985 (Supp. III 1979). As a result, some of the cases and secondary sources cited in this Note utilize the letter subsection headings. This Note, however, will use the present numerical designations to identify the subsections of § 1985.

7. 42 U.S.C. § 1985(1) (Supp. III 1979). Subsection 1 provides: "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." Id.

8. Id. § 1985(2). Subsection 2 provides: "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." Id. As defined in 28 U.S.C. § 451 (1976), the phrase "court of the United States" in § 1985(2) refers only to article III courts and certain federal courts created by act of Congress, but not to state courts. Cartolano v. Tyrrell, 421 F. Supp. 526, 531 n.3 (N.D. Ill. 1976); Shaw v. Garrison, 391 F. Supp. 1353, 1370 (E.D. La. 1975), aff'd, 545 F.2d 980 (5th Cir. 1977), rev'd on other grounds sub nom. Robertson v. Wegmann, 436 U.S. 584 (1978); cf. Seeley v. Brotherhood of Painters, Decorators & Paper Hangers, 308 F.2d 52, 58 (5th Cir. 1962) (NLRB not a court of the United States).
subsection 3 outlaws conspiracies to deprive others of equal protection of the laws or to interfere with the federal election process.\(^9\)

Although section 1985 remained dormant for many years after its enactment, during the past ten years it has generated a wave of litigation.\(^{10}\) The rediscovery of the Ku Klux Klan Act\(^{11}\) followed the Supreme Court's ruling in 1971 that section 1985(3) reaches private conspiracies, thus obviating a showing of state action.\(^{12}\) Lower fed-

9. 42 U.S.C. § 1985(3) (Supp. III 1979). Subsection 3 provides: "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 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.

10. See Note, The Class-Based Animus Requirement of 42 U.S.C. § 1985(c): A Suggested Approach, 64 Minn. L. Rev. 635, 636 (1980) [hereinafter cited as Class-Based Animus]; Original Purpose, supra note 4, at 405; 50 U. Cin. L. Rev. 158, 161 (1981). The dormancy of many civil rights statutes was probably due to the Supreme Court's tendency, for many years after their enactment, to construe them narrowly. Class-Based Animus, supra, at 636-37. This included declaring the criminal counterpart to § 1985(3) unconstitutional, United States v. Harris, 106 U.S. 629, 641-42 (1882), and imposing a state action requirement in § 1985(3). Collins v. Hardyman, 341 U.S. 651, 681 (1951); Original Purpose, supra note 4, at 636-37.


12. Griffin v. Breckenridge, 403 U.S. 88, 101 (1971). In Griffin, the Supreme Court considered both the literal language and statutory history of § 1985(3) in concluding that "all indicators . . . point unwaveringly to § 1985(3)'s coverage of private conspiracies." Id. The provision speaks of conspiracies by "two or more persons" and of "go[ing] in disguise on the highway or on the premises of another," conduct which must include private action. Id. at 96. In addition, the congressional debates indicate an intent to cover private conspiracies "irrespective of the act of the State." Id. at 101 (quoting Cong. Globe, supra note 3, app. at 141 (statement of Rep. Shanks)). The Court distinguished but did not overrule United States v. Harris, 106 U.S. 629 (1882), which had struck down the criminal analogue of § 1985(3) as unconstitutionally regulating private conduct. Id. at 104.
eral courts have extended this holding to other subsections of section 1985.\textsuperscript{13}

Modern attempts to apply this ancient and untested law to situations probably unforeseen by the forty-second Congress\textsuperscript{14} have created problems of statutory construction. Whether Congress intended to require an intent to deny equal protection throughout the Act has been a particularly problematic question.\textsuperscript{15} Specifically, the federal courts have disagreed on whether the requirement of an "intent to deny... equal protection of the law," which expressly appears in the second clause of section 1985(2) protecting state court proceedings, also applies to the first clause dealing with federal court proceed-

\begin{itemize}
Some courts have concluded that the equal protection denial requirement applies to both clauses, and the absence of equal protection language in one is not crucial. A better reasoned line of cases contends that no such requirement is compelled by a provision whose main purpose is to protect the integrity of the federal judicial system.

This Note maintains that an intent to deny equal protection is not required for a cause of action under clause one of section 1985(2). An examination of the language of the Ku Klux Klan Act and the history surrounding its passage demonstrates that Congress deliberately attached an equal protection requirement only to those provisions dealing with state institutions. This Note further asserts that such an interpretation is constitutionally supportable and does not create a general federal tort law. In conclusion, it emphasizes that acceptance of the recommended interpretation is in the interests of both the federal judiciary and the individual claimant.

I. Recent Court Interpretations of Section 1985(2)

Courts construing clause one of subsection 2 have produced different interpretations of its language and legislative history. In McCord v. Bailey, the Court of Appeals for the District of Columbia held that the absence of equal protection language is sufficient reason not to apply a discriminatory animus requirement. Moreover, the court found that an analysis of the legislative history, although unnecessary, supported such a conclusion; the court reasoned that clause one evinced a congressional desire to protect the integrity of the


19. See supra notes 15-18 and accompanying text.


federal judiciary, and not merely to deter equal protection denials.23 In addition, the congressional debates surrounding passage of the Ku Klux Klan Act demonstrated that Congress attached equal protection language to only the broadest provisions of section 1985 to prevent them from infringing on state sovereignty and creating a general federal tort law.24 As the first clause of section 1985(2) posed no such constitutional problems, the court concluded that equal protection language was intentionally not attached.25

Although the majority in McCord engaged in an independent analysis of the legislative history behind subsection 2, those courts applying the equal protection limitation to clause one have considered the Supreme Court's pronouncement in Griffin v. Breckenridge26 controlling.27 In Griffin, plaintiffs brought suit under subsection 3,28 claim-
ing that two white defendants had conspired to assault them on a public highway with the intention of preventing them "from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens under the laws."29 Focusing on the statutory language of section 1985(3) and the enacting Congress's desire to prevent equal protection denials without creating a general federal tort law,30 the Supreme Court held the presence of equal protection language means there must be some racial or class-based discriminatory animus motivating the conspirators' actions.31

42 U.S.C. § 1985(3) (Supp. III 1979), quoted supra note 9. The Fifth Circuit interpreted Griffin and the "equal protection of the laws" language to mean that a defendant's conduct, to fall within the statute, must be illegal independent of § 1985(3). McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 925-27 (5th Cir. 1977) (en banc). The court reasoned that private persons can deprive others of equal protection of the laws only by violating a law already in existence. Id. at 924-26. One commentator has noted that the McLellan independent illegality requirement is untenable in light of § 1985(3)’s history and case law. See Private Conspiracies, supra note 11, at 1724-27. In Britt v. Suckle, 453 F. Supp. 987 (E.D. Tex. 1978), the court found the McLellan independent illegality requirement inapplicable to § 1985(2), because subsection 2 confers a substantive right to be free from conspiracies to obstruct justice, regardless of whether they are illegal under state law. Id. at 992 & n.8. The substantive offense in § 1985(3) is the deprivation of equal protection of the law. Id. As this Note maintains that the "equal protection of the laws" language does not refer to clause one of § 1985(2), the McLellan requirement is, therefore, inapplicable to suits under that clause.

29. 403 U.S. at 90.

30. Id. at 101-02.

31. Id. The Griffin Court expressly refrained from deciding what type of class was sufficient, or whether anything other than racial bias would be actionable under the first portion of § 1985(3). Id. at 102 n.9. Lower federal courts defining this animus requirement have produced diverse interpretations. For the most part, courts have been satisfied if the plaintiff is a member either of a class envisioned by the framers of the Ku Klux Klan Act, such as race, e.g., Fisher v. Shamburg, 624 F.2d 156, 158 (10th Cir. 1980); Hampton v. Hanrahan, 600 F.2d 600, 623 (7th Cir. 1979), cert. granted in part and rev'd on other grounds per curiam, 446 U.S. 754 (1980); Action v. Cannon, 450 F.2d 1227, 1232 (8th Cir. 1971), or political groups, e.g., Means v. Wilson, 522 F.2d 833, 839-40 (8th Cir. 1975), cert. denied, 424 U.S. 958 (1976); Glasson v. City of Louisville, 518 F.2d 899, 911-12 (6th Cir.), cert. denied, 423 U.S. 930 (1975); Cameron v. Brock, 473 F.2d 608, 610 (6th Cir. 1973); Richardson v. Miller, 446 F.2d 1247, 1249 (3d Cir. 1971), or of a class akin to race, such as religion, e.g., Ward v. Connor, 675 F.2d 45, 48 (4th Cir. 1981), cert. denied, 50 U.S.L.W. 3570 (Jan. 18, 1982); Marlowe v. Fisher Body, 489 F.2d 1057, 1059, 1064 (6th Cir. 1979); Baer v. Baer, 450 F. Supp. 481, 491 (N.D. Cal. 1978), or gender. E.g., Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979); Conroy v. Conroy, 575 F.2d 175, 177 (8th Cir. 1978); Weise v. Syracuse Univ., 522 F.2d 397, 406 (2d Cir. 1975); Curran v. Portland Super. School Comm., 435 F. Supp. 1063, 1085 (D. Me. 1977). Courts adhering to a strict interpretation of the Griffin requirement have denied relief under § 1985(3) to a number of classes. Kimble v. D.J. McDuffy, Inc., 648 F.2d 340, 347 (5th Cir.) (en banc) (persons having filed personal injury or worker's compensation claims), cert. denied, 102 S. Ct. 687 (1981); Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 711, 720 (9th Cir.) (policemen), cert. denied, 102 S. Ct. 510 (1981); Taylor v. Brighton Corp.,
In reliance on a broad interpretation of the Griffin decision, courts requiring class-based discrimination under clause one engaged in a two-step analysis to extend the scope of Griffin's holding. For example, in Kimble v. D.J. McDuffy, Inc.,\(^3\) the Fifth Circuit construed the Court's discussion of the legislative history, and accordingly the equal protection limitation, as pertaining to section 1985 in its entirety, not just to one subsection.\(^3\) The court then read Griffin as imposing an animus requirement on all section 1985(3) actions, including the voting provision, which lacks equal protection language.\(^3\) Because the design of section 1985(3) is similar to that of


32. 648 F.2d 340 (5th Cir.) (en banc), cert. denied, 102 S. Ct. 687 (1981).
35. Other courts have stated that discriminatory animus is not a requirement under those clauses of § 1985 lacking equal protection language. E.g., Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1340-42 (7th Cir.) (§ 1985(1)), cert. denied, 434 U.S. 975 (1977); Paynes v. Lee, 377 F.2d 61, 63-64 (5th Cir. 1967) (dictum) (voting provision of § 1985(3)). Contra Means v. Wilson, 522 F.2d 833, 840
section 1985(2), the court reasoned that a discriminatory animus requirement could also be imposed on clause one of subsection 2, even absent an express equal protection requirement.

Reliance on Griffin to find discriminatory animus applicable to clause one, however, is misplaced. Such an analysis ignores both the plain meaning of the statutory language of subsection 2 and the objective of the forty-second Congress when it enacted that portion of the Ku Klux Klan Act.

II. STATUTORY CONSTRUCTION OF SECTION 1985(2)

A. The Language

It is an oft-stated maxim that an analysis of statutory law must begin with the language of the statute itself. A superficial examination of the syntax of section 1985(2) reveals that there are two basic clauses separated by a semicolon. The presence of the two clauses


35. 648 F.2d at 346-47. In Britt v. Suckle, 453 F. Supp. 987 (E.D. Tex. 1978), however, the court drew a distinction between the degree of equal protection denial required under § 1985(3) and that required in an action under clause two of § 1985(2). Id. at 995-97. Whereas the second clause of § 1985(2) prohibits only conspiracies undertaken to obstruct the due course of justice in state courts, the first clause of § 1985(3) broadly prohibits any conspiracy to deprive persons of equal protection of the laws. Id. at 995-96. Because the denial of equal protection in § 1985(2) is limited to the state court system, an area of particular congressional concern, the district court found that the discriminatory animus required under clause two should be less stringent. Id. at 996-97. Conversely, in § 1985(3), when no particular congressional interest is involved, the class-based animus should be based on some immutable trait, such as race or sex. Id. The court analogized this distinction to the traditional two-tiered test under the fourteenth amendment equal protection clause. Id. at 996. When no particular fundamental right is threatened, discrimination against a suspect classification is required to invalidate a law. Id. When a fundamental right is implicated, however, all discrimination, whether or not against a traditionally suspect class, is subject to strict judicial scrutiny. Id. at 996-97 (citing San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973)). The analysis by the Britt court poses some problems because the right to sue in state court is not a fundamental right.


together in a separate subsection indicates a common theme—the subsection deals overall with interferences with judicial proceedings. The first clause creates four distinct causes of action pertaining to interference with federal court proceedings. The second creates two causes of action for obstruction of justice in state courts. The language of the two clauses differs in that the second contains "equal protection" language as an element of both causes of action while the first includes no such requirement. As a matter of statutory construction, "where Congress . . . has carefully employed a term in one place and excluded it in another it should not be implied where excluded." Additionally, both the use of semicolons to di-


45. The Supreme Court has stated that although matters such as punctuation are not decisive of the construction of the statute, "where they reaffirm conclusions
vide the two clauses of subsection 2, and the repetition of the disjunctive “or” with the introductory language “if two or more persons” beyond the semicolon, signify that each clause was meant to stand alone as a separate and complete thought. The implication of this legislative design is that Congress intended the equal protection limitation in the second clause to refer to that clause only.

The independence of the two clauses is further illustrated by the original organization of section 1985(2). The present wording derives from section 2 of the Ku Klux Klan Act, which was enacted as a single, continuous paragraph with no subdivisions. In the original

drawn from the words themselves they provide useful confirmation." United States v. Naftalin, 441 U.S. 763, 774 n.5 (1979); see 2A C. Sands, Sutherland’s Statutes and Statutory Construction § 47.15, at 98 (4th ed. 1973). But see United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 82-83 (1932) (punctuation is no part of the law and will be disregarded when interpreting a statute); Hammock v. Loan & Trust Co., 105 U.S. 77, 84-85 (1881) (same); Andrew Dossett Imp., Inc. v. United States, 273 F. Supp. 908, 911 (Cust. Ct. 1967) (same).

46. Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1336 (7th Cir.), cert. denied, 434 U.S. 975 (1977); cf. Flora v. United States, 362 U.S. 145, 149-50 (1960) (the normal grammatical significance of the disjunctive “or” is to give each of the phrases set off by it independent effect).


49. Ch. 22, § 2, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1985 (1976 & Supp. III 1979)); see Kimble v. D.J. McDuffy, Inc., 648 F.2d 340, 346 (5th Cir.) (en banc), cert. denied, 103 S. Ct. 687 (1981); Shaw v. Garrison, 391 F. Supp. 1353, 1359 (E.D. La. 1975), aff’d, 545 F.2d 980 (5th Cir. 1977), reo’d on other grounds sub nom. Robertson v. Wegmann, 436 U.S. 584 (1978). Section 2 of the Ku Klux Klan Act provided: “That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the government of the United States, or to levy war against the United States, or to oppose by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, or by force, intimidation, or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or to injure his person while engaged in the lawful discharge of the duties of his office, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duty, or by force, intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United
legislation, the two clauses of section 1985(2) were not even remotely connected, but instead were separated by the lengthy first clause of what is now subsection 3.50 Consequently, the equal protection language in clause two could not possibly have related back to clause one.

Moreover, section 2 of the Ku Klux Klan Act was logically as well as structurally arranged into two parts: a federal portion and a non-federal portion.51 The first half of the original section 2 encompassed...
section 1985(1) and the first clause of section 1985(2), both of which deal with conspiracies aimed at obstructing federal institutions and officers and lack equal protection language. The latter half of the original section 2 encompassed the second clause of section 1985(2) and the first clause of section 1985(3), both of which proscribe conspiracies directed at non-federal institutions and contain equal protection language.

As previously stated, courts requiring discriminatory animus as an element of clause one actions reason that because *Griffin* can be read as imposing an animus requirement on the voting provision of subsection 3, which lacks equal protection language, this requirement can be similarly imposed on clause one of subsection 2. Such an analysis, however, is attenuated at best. In addition to misconstruing the *Griffin* opinion, the syllogism utilized by these courts is valid only if the two clauses of section 1985(2) can be interpreted as a common unit. Yet, it is evident from the original Act that clauses one and two were not enacted as a unit. These clauses appear together solely because of the reorganization of the Ku Klux Klan Act, which occurred when all federal laws were consolidated into the Revised Statutes of the United States. At that time, section 2 of the Ku Klux Klan Act was

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54. Kimble v. D.J. McDuffy, Inc., 648 F.2d 340, 346-47 (5th Cir.) (en banc), cert. denied, 102 S. Ct. 687 (1981); Jones v. United States, 401 F. Supp. 168, 174 (E.D. Ark. 1975), aff'd, 386 F.2d 369 (8th Cir. 1969), cert. denied, 409 U.S. 1039 (1977). The Kimble court further stated that the Supreme Court had not conducted a "hypertechnical analysis of the structure and grammar" of § 1985(3) to conclude that racial or class-based animus was required under that section. Rather, the Court had examined the overall purpose of Congress. 648 F.2d at 347. Clearly, a "hypertechnical analysis" of § 1985(3) was unnecessary in *Griffin* as equal protection language expressly appeared in the clause at issue. See 42 U.S.C. § 1985(3) (Supp. III 1979), quoted supra note 9.

55. Kimble v. D.J. McDuffy, Inc., 648 F.2d 340, 351-52 (5th Cir.) (en banc) (Johnson, J., dissenting & concurring), cert. denied, 102 S. Ct. 687 (1981). The Court in *Griffin* v. Breckinridge, 403 U.S. 88 (1971), was merely interpreting the meaning of the equal protection language in clause one of § 1985(3), when they held: "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or . . . class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102 (emphasis in original).


58. See An Act to provide for the Revision and Consolidation of the Statute Laws of the United States, ch. 140, 14 Stat. 74 (1866). Congress subsequently provided for
reorganized into section 1890 of the Revised Statutes of the United States with the current three subsections and only minor grammatical changes. The reorganization was clearly not intended to make any substantive changes in the meaning of the original Act. In fact, Congress expressly provided that any conflict between the revised statute and the original Act must be resolved in favor of the original language. The initial framework of section 1895 is persuasive evidence that Congress intended the equal protection requirement to limit the statute's application to conspiracies involving state court proceedings, but as to conspiracies to interfere with the federal judicial system, no such limitation was desired.
B. The Legislative History

The function of the equal protection language in the Ku Klux Klan Act becomes clear when examined in light of the concerns plaguing the forty-second Congress in 1871. The Court in Griffin v. Breckenridge,\(^4\) when analyzing the legislative history of section 1985(3), emphasized the desire of the forty-second Congress to prevent discriminatory animus against classes of people and to limit the coverage of the broader provisions to conspiracies undertaken with that intent.\(^5\) Courts requiring animus under clause one of section 1985(2) have concluded that all of section 1985 evinces the same purpose and thus all provisions should be limited to equal protection denials.\(^6\)

The essential purpose of section 1985(2), however, was to ensure the effective operation of the state and federal judiciary,\(^7\) as well as to provide an unhindered avenue of redress to those injured by Klan conspiracies.\(^8\) To effectuate these goals within the federal court system, discriminatory intent was neither necessary nor desirable.\(^9\)

That Congress's goal in passing the Ku Klux Klan Act was not solely to safeguard the rights of the newly freed blacks, but also to maintain the authority of the federal government, is evidenced by the political and social climate in which the Act was passed. Furthermore, the congressional debates preceding the amendment of the originally proposed bill illustrate that not every clause, particularly not the first clause of section 1985(2), was intended to be limited by equal protection language.

1. Historical Background: The Genesis of the Ku Klux Klan Act

Following the Civil War, the Ku Klux Klan conspired to disrupt governmental operations by intimidation and terrorism.\(^70\) Although racial violence was the most evident manifestation of Klan philoso-

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\(^4\) 403 U.S. 88 (1971).
\(^5\) Id. at 99-101.
\(^6\) See supra notes 32-36 and accompanying text.
\(^70\) Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1334 (7th Cir.), cert. denied, 434 U.S. 975 (1977); J. Randall & D. Donald, supra note 1, at 683; Original Purpose, supra note 4, at 409; see McCord v. Bailey, 636 F.2d 606, 618 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981); A. McLaughlin, supra note 1, at 686, 689.
phy, its ultimate objective was to sabotage the Reconstruction policy of Congress. Murders, assaults, rapes, arson and other acts of violence committed by the Klan were frequently reported. The Klan's system of protecting its members through secrecy and perjury on the witness stand, however, was a nearly insurmountable prosecutorial obstacle. Moreover, state and local governments were unable or unwilling to quell the violence.

In March of 1871, President Grant asked for legislation giving him authority to control the increasing chaos in the southern states. In response, Representative Shellabarger of Ohio sponsored the Ku Klux Klan bill, which was officially entitled "An Act to enforce the Provi—
sions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes."\(^7\) The bill provided penalties for conspiracies to overthrow the United States government, to prevent the execution of the laws, or to deprive persons of their rights under the laws or Constitution of the United States.\(^8\) Under extreme circumstances, "the acts of conspirators were declared tantamount to rebellion" and the President was authorized to suspend the habeas corpus privilege and use military force.\(^8\)

The floor debates on the Ku Klux Klan Act discussed at length the state of "anarchy" caused by Klan tactics and the consequent disruption to governmental operations.\(^8\) Concern was expressed that Republican voters were being terrorized at the polls in order to ensure a Democratic victory.\(^8\) Moreover, acts of violence toward federal officials were becoming commonplace.\(^8\) Several revenue officers and United States mail agents had been murdered or driven from their posts.\(^8\) Republican officials, such as United States Senators and

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79. Id.; see 1 T. Emerson & D. Haber, supra note 4, at 19; J. Randall & D. Donald, supra note 1, at 683-84; Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323, 1334 (1952).
80. H.R. 320, 42d Cong., 1st Sess., Cong. Globe, supra note 3, at 317 (1871); see 1 T. Emerson & D. Haber, supra note 4, at 19; J. Randall & D. Donald, supra note 1, at 683-84; Gressman, supra note 79, at 1334.
81. E.g., Cong. Globe, supra note 3, at 245-48 (floor debate); id. at 320-21 (statement of Rep. Stoughton); id. at 369 (statement of Rep. Monroe); id. at 374 (statement of Rep. Lowe); id. at 428 (statement of Rep. Beatty); id. at 437 (statement of Rep. Cobb); id. at 518 (statement of Rep. Shellabarger); id. at 830 (statement of Rep. Stewart). The South was characterized as being in a "condition of war." Id. at 339 (statement of Rep. Kelly). Representative Buckel warned that the spirit of terrorism existing in the South "still defies the national authority, sets at naught the laws of the country, and tramples upon the natural and political rights of our fellow citizens." Id. app. at 190; see McCord v. Bailey, 636 F.2d 606, 615 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981).
federal court clerks, had been attacked or assassinated.\textsuperscript{85} Additionally, Congress was concerned that concerted attempts to undermine federal and state judicial systems were being effectuated by perjury, concealment of evidence and intimidation of witnesses, parties or jurors.\textsuperscript{86}

Against this backdrop, it becomes apparent that the Klan was primarily a political organization and a threat to federal authority.\textsuperscript{67} Moreover, the Republican majority that eventually passed the Act was well aware that the Klan was endeavoring to weaken the power base of Republican state governments and place control in the hands of the Democrats.\textsuperscript{88} Significantly, therefore, the Ku Klux Klan Act was enacted not just to deter discrimination but also "for other purposes"—to quash the Klan and restore political authority.\textsuperscript{59}

This is not to suggest that Congress was not desirous of safeguarding the rights of the newly freed slaves; it was keenly aware that the Klan


\textsuperscript{87} \textit{Original Purpose}, \textit{supra} note 4, at 403, 409. The contemporary Klan is generally classified as a racist organization. \textit{Id.} at 403; \textit{see} H.R. Rep. No. 648, 90th Cong., 1st Sess. 4 (1967) (reprint of the House Un-American Activities Committee concerning the Ku Klux Klan and other organized conspiracies).

\textsuperscript{88} \textit{See}, \textit{e.g.}, Cong. Globe, \textit{supra} note 3, at 320-22 (statement of Rep. Stoughton); \textit{id.} at 333 (statement of Rep. Hoar); \textit{id.} at 412-13 (statement of Rep. Roberts); \textit{id.} at 443 (statement of Rep. Butler); \textit{id.} at 484 (statement of Rep. Wilson); \textit{id.} at 487 (statement of Rep. Tyner); \textit{id.} at 653-54 (statement of Sen. Osborn); \textit{id.} at 702 (statement of Rep. Edmunds); \textit{id.} app. at 72 (statement of Rep. Blair); \textit{id.} app. at 78 (statement of Rep. Perry); \textit{id.} app. at 196 (statement of Rep. Snyder); \textit{id.} app. at 252 (statement of Sen. Morton); \textit{see also} \textit{Original Purpose}, \textit{supra} note 4, at 403-11, 419-20. By 1871, Congress was so concerned about Klan violence and its political overtones that it appointed a joint committee to investigate the Klan. H.R. Rep. No.1, 42d Cong., 1st Sess. xxx-xxxi, \textit{reprinted in} Civil Rights, \textit{supra} note 67, at 599-600. The Senate Select Committee to Investigate Alleged Outrages in the Southern States concluded: that the Ku Klux Klan organization does exist and has a political purpose; that murders, whippings, intimidations and violence are methods used to accomplish its purpose; and that secrecy and perjury on the witness stand and in the jury box are techniques utilized to protect its members from conviction and punishment. \textit{Id.}, \textit{reprinted in} Civil Rights, \textit{supra} note 67, at 599-600.

\textsuperscript{89} McCord \textit{v. Bailey}, 636 F.2d 606, 615 (D.C. Cir. 1980), \textit{cert. denied}, 451 U.S. 983 (1981); \textit{Original Purpose}, \textit{supra} note 4, at 403; \textit{see} Rutledge \textit{v. Arizona Bd. of Regents}, 660 F.2d 1345, 1355 (9th Cir. 1981) (clause one of § 1985(2) designed to protect the federal government's interest in its courts); Brawer \textit{v. Horowitz}, 535 F.2d 830, 839 (3d Cir. 1976) (debates on the Ku Klux Klan Act "bespeak a Congressional intent to insulate witnesses, parties and . . . jurors from conspiracies to pressure or intimidate them").
targeted blacks and Union sympathizers and that state laws were not being enforced with an equal hand. Thus, in conjunction with the intent to preserve orderly government, Congress sought to prohibit concerted discriminatory conduct. Although the Supreme Court in *Griffin v. Breckenridge* focused on the latter objective in its analysis of the legislative history, that objective clearly was not the sole force behind the Act.

The problems facing Congress in 1871 threatened many aspects of federal authority, and the Ku Klux Klan bill, as originally proposed, was designed to give Congress sweeping power to remedy the situation. Section 2 of the original bill made it a federal crime to commit murder, arson, assault, robbery or perjury, regardless of whether it occurred in connection with a state or federal function or whether it related to an intent to deny equal protection of the laws. Only after

90. See *supra* note 3 and accompanying text.


94. Id. at 99-101.

95. See *supra* notes 81-89 and accompanying text.


97. H.R. 320, 42d Cong., 1st Sess., Cong. Globe, *supra* note 3, at 317 (1871); *see* McCord v. Bailey, 636 F.2d 606, 615-16 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981). Section 2 of the original bill provided: "That if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subordination of perjury, criminal obstruction of legal, process or resistance of officers in discharge of official duty, arson, or larceny, and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony, and upon conviction thereof shall be liable to a penalty of not exceeding $10,000, or to imprisonment not exceeding ten years, or both, at the discretion of the court; provided, that if any party or parties to such conspiracy or combination shall, in furtherance of such common design, commit the crime of murder, such party or parties so guilty shall, upon conviction thereof, suffer death; and provided also, that any offense punishable under this act, begun in one judicial district of the United States and completed in another, may be dealt with, inquired of, tried, determined, and punished in either district. H.R. 320, 42d Cong., 1st Sess., Cong. Globe, *supra* note 3, at 317 (1871).
this broad remedy was attacked as exceeding congressional authority was the equal protection language attached to the more controversial provisions.\textsuperscript{98} Evidently, Congress intended to reach attacks on governmental operations to the extent the Constitution permitted.\textsuperscript{99}

The \textit{Griffin} Court was correct in finding that clause one of section 1985(3) was intended to prevent "invidiously discriminatory animus" against classes of people; the language and history plainly admit of this interpretation. It is extremely doubtful, however, that the unnecessary burden of proving discriminatory animus would have been imposed on a plaintiff whose right to a fair trial in federal court had been violated.\textsuperscript{100}

2. Historical Background: The State Sovereignty Issue

Both Representatives and Senators of the forty-second Congress seriously questioned whether the federal government could legislate with regard to common-law crimes traditionally under state jurisdiction.\textsuperscript{101} The extensive debates on this issue\textsuperscript{102} are perhaps the most illustrative for interpreting section 1985(2), because they explain the rationale for the strategic placement of equal protection language in

\textsuperscript{98} See McCord v. Bailey, 636 F.2d 606, 616-17 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981); \textit{infra} notes 101-10 and accompanying text.


\textsuperscript{100} Significantly, if the more specific provisions of § 1985(2) were drafted purely to prevent equal protection denials, they would have been subsumed by the broader provision of § 1985(3), explicitly proscribing equal protection denials of any kind. Cf. Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1340 (7th Cir.) (similar argument adopted in rejecting an animus requirement for § 1985(1)), cert. denied, 434 U.S. 975 (1977). In speaking against imposing a discriminatory animus requirement on § 1985(1) actions, the court in \textit{Stern} pointed out that to do so would deprive § 1985(1) of its independent effect. \textit{Id.} "[T]he effect of imposing the invidious animus requirement on § 1985(1) would be to require a plaintiff to plead and prove a complete § 1985(1) cause of action in his § 1985(1) lawsuit." \textit{Id.} at 1340. Similarly, requiring discriminatory animus in a § 1985(2), clause one action requires a plaintiff to plead and prove a complete § 1985(3) cause of action. Cf. Griffin v. Breckenridge, 403 U.S. 88, 99 (1971) ("it is almost impossible to believe that Congress intended . . . § 1985(3) . . . simply to duplicate [other statutes]"). It is also apparent that applying the \textit{Griffin} requirement to clause two of § 1985(2) brings it within the broader language of § 1985(3). \textit{But see} Britt v. Suckle, 453 F. Supp. 987, 395-96 (E.D. Tex. 1978) (imposing a less stringent discrimination requirement under § 1985(2), clause two actions than that required under § 1985(3) actions).


\textsuperscript{102} See, e.g., Cong. Globe, \textit{supra} note 3, at 222 (statement of Sen. Thurman); \textit{id.} at 485 (statement of Rep. Cook); \textit{id.} at 514 (statement of Rep. Poland); \textit{id.} app. at 187 (statement of Rep. Willard); \textit{id.} app. at 252 (statement of Sen. Morton); \textit{id.} app. at 313 (statement of Rep. Burchard); see Original \textit{Purpose}, \textit{supra} note 4, at 411-17 (comparing radical Republican view with moderate Republican view).
the Act. The essence of the problem was the scope of congressional power under the fourteenth amendment.\textsuperscript{103} It was argued that to render a "simple assault and battery" committed within a state actionable in federal court both exceeded this power and infringed on state sovereignty.\textsuperscript{104} The original expansive bill was criticized as giving "to the United States courts jurisdiction of every criminal offense that could be committed anywhere within the limits of the United States; [thus] practically abolishing the criminal jurisdiction of the State, absorbing it all into the United States courts."\textsuperscript{105}

The Ku Klux Klan bill was amended in response to these objections.\textsuperscript{106} Essentially, the new bill\textsuperscript{107} deleted the enumeration of specific felonies, added civil penalties\textsuperscript{108} and stated with greater specificity the violations traditionally within federal jurisdiction, including those pertaining to the judicial system.\textsuperscript{109} Jurisdiction over those offenses traditionally under state authority, such as obstruction of justice in state courts, was limited to conduct committed with an intent to deny equal protection of the laws.\textsuperscript{110} The drafters of the new bill, however, did not attach equal protection language to those provisions dealing with federal functions.\textsuperscript{111} The debates demonstrate that Congress never questioned its authority to impose sanctions for interfering with federal institutions.\textsuperscript{112} For example, Senator

\begin{itemize}
  \item 103. See Frank & Munro, supra note 77, at 164-65.
  \item 105. Cong. Globe, supra note 3, app. at 188 (statement of Rep. Willard); accord id. at 337 (statement of Rep. Whitthorne); id. at 366 (statement of Rep. Arthur); id. at 396 (statement of Rep. Rainey); id. at 514 (statement of Rep. Poland). The subsequent addition of an equal protection denial requirement to traditional state crimes apparently answered Representative Willard's objections, as he later announced that he would vote in favor of the bill. Id. app. at 188.
  \item 108. Jones v. United States, 401 F. Supp. 168, 173 (E.D. Ark. 1975), aff'd, 536 F.2d 269 (8th Cir. 1976), cert. denied, 429 U.S. 1039 (1977). As first enacted, the Ku Klux Klan Act provided both civil and criminal penalties. Ch. 22, 17 Stat. 13 (1871). In the late nineteenth century, however, the Supreme Court found the criminal provisions unconstitutional because, by prohibiting private conduct, they exceeded the scope of the fourteenth amendment. United States v. Harris, 106 U.S. 629, 639 (1883).
  \item 110. Id.; see Cong. Globe, supra note 3, at 334 (statement of Rep. Hoar); id. at 477 (statement of Rep. Dawes); id. at 567 (statement of Sen. Edmunds); Frank & Munro, supra note 77, at 166.
  \item 111. See H.R. 320, 42d Cong., 1st Sess., Cong. Globe, supra note 3, at 477 (1871).
\end{itemize}
Thurman, who questioned the logic of accepting traditionally state cases into the United States courts, unhesitatingly agreed that conspiracies to interfere with the federal judicial system should be under the jurisdiction of the federal courts.\(^{113}\)

Representative Cook, to illustrate the interest on which clause one of section 1985(2) is grounded, differentiated that clause from other parts of the bill.\(^{114}\) He posited that a conspiracy to prevent a witness from testifying in a federal court or to compel a false jury verdict in a federal court was

an offense against the United States; for the simple reason ... that it seeks to deprive a citizen of the United States of a right [guaranteed] by the Constitution of the United States .... If we have not a right to legislate for the defense of every right secured by the Constitution we have no authority to legislate for the security of any right. That seems to be perfectly plain.\(^{115}\)

Because the federal government already had a constitutional interest in protecting its own officials, courts and election processes, an equal protection denial requirement was irrelevant to these provisions,\(^{116}\) and one should not now be inferred.

Those maintaining that equal protection language is applicable to clause one have quoted Representative Shellabarger's statement describing the amended bill to buttress their position:\(^{117}\) "The object of the amendment is ... to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens."\(^{118}\) Taking his statement out of context, they have concluded that the Representative was referring to section 2 of the

\(^{113}\) Cong. Globe, supra note 3, app. at 220 (statement of Sen. Thurman). "I grant that as to those which are offenses against the United States they must be taken into the Federal courts; the State courts have no jurisdiction of them. For instance, to intimidate a witness so as to prevent his attending upon a Federal court, to tamper with a juror in a Federal court, are offenses, not against the State, but offenses the jurisdiction of which must be given to the Federal courts ...." Id.

\(^{114}\) Cong. Globe, supra note 3, at 486 (statement of Rep. Cook). Congressman Cook was responsible for presenting to Congress the limiting amendment ultimately adopted, id., and thus it may be assumed that he had knowledge of its intended meaning.

\(^{115}\) Id.


original Act in its entirety.\textsuperscript{119} The accompanying discussion, however, indicates that Representative Shellabarger's description of the amendment's function refers only to that portion of section 2 to which equal protection language was expressly attached. First, prior to making the above comment, he explained that the amendment was proposed to change only that part of section 2 which "relate[d] to disputed grounds, so far as it is not confined to infractions... which are clearly independent of the fourteenth amendment, referable to and sustainable by the old provisions of the Constitution."\textsuperscript{120} The portion to be amended, according to the Representative, began at approximately line twenty-five of the original bill, just after the language that would become clause one of subsection 2.\textsuperscript{121} Only then did he use the language mentioned above describing the "object of the amendment."\textsuperscript{122} This strongly suggests that Representative Shellabarger was referring only to the object of adding the equal protection language to the provisions attacked as unconstitutionally infringing on state sovereignty and requiring a federal nexus. Those provisions, particularly the ones broadly covering state common-law crime, were the focus of most of the debates concerning the amendment and were, therefore, the ones which related to disputed grounds.\textsuperscript{123} Clause one of section 1985(2) was relatively noncontroversial\textsuperscript{124} and is clearly "sustainable by the old provisions of the Constitution."\textsuperscript{125}


\textsuperscript{121} Id. Representative Shellabarger stated that the portion he was referring to was "contained in the part beginning at line twenty-five, I think; I cannot state exactly the place now," and then he began reading with "\{t\}o influence the verdict of a juror in any Court of the United States," language which appears toward the end of clause one. \textit{Id.} It is probable that, because Representative Shellabarger had only 10 minutes to present his argument, \textit{id.}, he erred and intended to begin at clause two.

\textsuperscript{122} \textit{Id.}


\textsuperscript{124} \textit{See supra} notes 111-16 and accompanying text. In Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir.), \textit{cert. denied}, 434 U.S. 975 (1977), the court made the same argument with regard to § 1985(1). The court stated that the reference to Representative Shellabarger's remarks concerning the modification of the original Ku Klux Klan bill "merely explains the purpose of the amendment offered, which substantially changed Section 2 by eliminating language that went a long way towards establishing such a general federal role in enforcing state criminal laws... We fail to see how an explanation of the reasons for eliminating those provisions sheds light on the meaning of the distinctly different and relatively non-controversial provisions which remained in Section 2." \textit{Id.} at 1337 (citations omitted).

III. Constitutional Grounds for Section 1985(2)

A. Constitutional Foundation

It is a basic constitutional principle that Congress's authority is that of enumerated powers: Every congressional enactment must derive from an explicit constitutional grant of authority.\(^{126}\) The constitutional foundation for the first clause of section 1985(2) is Congress's plenary power over the federal courts.\(^ {127}\) Article I, section 8 grants Congress the power "[t]o constitute Tribunals inferior to the supreme Court"\(^ {128}\) and to make any laws "necessary and proper" to effectively constitute those tribunals.\(^ {129}\) The Supreme Court has long stated that Congress's implied powers under the "necessary and proper" clause are to be liberally construed.\(^ {130}\) In \textit{McCulloch v. Maryland},\(^ {131}\) Chief Justice Marshall stated that the reach of those powers is not limited to such measures that are indispensably necessary; Congress may adopt any means appropriate and plainly adapted to achieving its goal, as long as those means are not expressly prohibited by the Constitution.\(^ {132}\) It cannot be doubted that punishing conspiracies to obstruct the free and truthful flow of testimony, whatever their motivation or target, is appropriate and plainly adapted to the goal of maintaining an effective judicial system.\(^ {133}\)

Congress's right to legislate with regard to its court system through the "necessary and proper clause" can be analogized to its power, under article I, section 4,\(^ {134}\) to punish interferences with the right to

Shellabarger's comments introducing the amendment to the Ku Klux Klan bill evidence that the provisions independent of the fourteenth amendment—§§ 1985(1) and (2)—were not to be limited by equal protection language, \textit{cert. denied}, 434 U.S. 975 (1977). In addition, Representative Shellabarger stated that those deprivations of equal protection "shall be within the scope of the remedies of this section." Cong. Globe, \textit{supra} note 3, at 478 (Statement of Rep. Shellabarger). This further indicates that the section made other remedies available.

\(^{126}\) \textit{See}, e.g., \textit{Monell v. Department of Social Servs.}, 436 U.S. 658, 676 (1978); \textit{United Farm Workers v. Arizona Agric. Employee Relations Bd.}, 669 F.2d 1249, 1257 (9th Cir. 1982); \textit{Camacho v. Civil Serv. Comm'n}, 666 F.2d 1257, 1263 (9th Cir. 1982); \textit{Bitt v. Suckle}, 453 F. Supp. 987, 998 (E.D. Tex. 1978).


\(^{128}\) \textit{Id.} cl. 18.


\(^{134}\) U.S. Const., art. I, § 4.
vote for federal officials, even if such conduct is not motivated by racial discrimination.\textsuperscript{135} As the Supreme Court stated in \textit{Ex Parte Yarbrough},\textsuperscript{136} this power arises from the government’s need to keep its services free from the influences of force and fraud, and to ensure that the officers chosen are the free and uncorrupted choice of their electors.\textsuperscript{137} This inherent governmental “power of self-preservation” has been extolled in a variety of other contexts.\textsuperscript{138} Certainly this power can be used to prevent corruption of the judicial system.

Although the forty-second Congress explicitly drew on fourteenth amendment powers when it enacted those provisions of section 1985 containing equal protection language,\textsuperscript{139} the Supreme Court in \textit{Griffin v. Breckenridge}\textsuperscript{140} found other constitutional support for the statute.\textsuperscript{141} In \textit{Griffin}, the Court deemed it unnecessary to find the first part of section 1985(3) facially constitutional in all its possible applications.\textsuperscript{142} Rather, the Court stated that a source of congressional power can be located on a case-by-case basis.\textsuperscript{143} Authority to reach the particular injury in \textit{Griffin} was found in the thirteenth amendment and the right to interstate travel.\textsuperscript{144} The Court warned, how-

\begin{itemize}
  \item\textsuperscript{135} Fraenkel, \textit{The Federal Civil Rights Laws}, 31 Minn. L. Rev. 301, 307 (1947); see United States v. Classic, 313 U.S. 299, 320 (1941) (Congress can regulate state primary elections when they control the result of a federal election); James v. Bowman, 190 U.S. 127, 142 (1903) (Congress can punish bribery of elected federal officials); \textit{Ex parte} Yarbrough, 110 U.S. 651, 661 (1884) (Congress can legislate to protect voters in federal elections from personal violence and intimidation and the election itself from corruption); \textit{Ex parte} Siebold, 100 U.S. 371, 381-83 (1879) (same).
  \item\textsuperscript{136} 110 U.S. 651 (1884).
  \item\textsuperscript{137} Id. at 662.
  \item\textsuperscript{138} E.g., United States Civil Serv. Comm’n v. National Ass’n of Letter Carriers, 413 U.S. 548, 564 (1973) (Congress can restrict political activities by federal employees to ensure the fair operation of government); United States v. Harriss, 347 U.S. 612, 625-26 (1954) (Congress can require the disclosure of federal lobbyists); United Public Workers v. Mitchell, 330 U.S. 75, 99 (1947) (Congress can restrict political activities by federal employees to ensure the fair operation of government); Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1338 (7th Cir.) (§ 1985(1) is constitutional as a derivation of the federal government’s inherent power of self-protection), cert. denied, 434 U.S. 975 (1977).
  \item\textsuperscript{139} See McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 932 (5th Cir. 1977) (en banc) (“the title of the bill itself, ‘An Act to enforce the Provisions of the Fourteenth Amendment . . .,’ demonstrates that the intent of the legislators was to put force behind the Civil War Amendments”); Britt v. Suckle, 453 F. Supp. 987, 998 (E.D. Tex. 1978) (similar language).
  \item\textsuperscript{140} 403 U.S. 88 (1971).
  \item\textsuperscript{141} Id. at 104-07.
  \item\textsuperscript{142} Id. at 104.
  \item\textsuperscript{143} Id.; see id. at 107. The \textit{Griffin} decision involved a two-step analysis. The Court considered whether the facts alleged fell within the terms of § 1985(3) as so construed, id. at 96-103, and identified the constitutional source of power to reach the conduct alleged. Id. at 104-07.
  \item\textsuperscript{144} Id. at 104-06; see Gillespie v. Civiletti, 629 F.2d 637, 641 (9th Cir. 1980) (§ 1985 is derived from the thirteenth amendment). The commerce power has also been
However, that these sources of congressional power were not exclusive, and given a different set of facts, other constitutional provisions could be drawn upon. In contrast to the clause at issue in *Griffin*, the constitutionality of the first clause of section 1985(2) can be upheld in all its possible applications under article I, section 8, thus obviating a case-by-case analysis.


45. *Id.* at 107; see *Ward v. Connor*, 657 F.2d 45, 48 (4th Cir. 1981) (finding right to interstate travel source of congressional power for § 1985(3)).

146. See *supra* notes 127-32 and accompanying text. Significantly, it was not equal protection language and a fourteenth amendment link that rendered the clause in *Griffin* constitutional. *Griffin v. Breckenridge*, 403 U.S. 88, 104-06 (1971). Because the Supreme Court found that § 1985(3) reached private conspiracies, *id.* at 101, a finding that the section is constitutionally grounded on § 1 and § 5 of the fourteenth amendment would have necessitated finding that the fourteenth amendment reaches private action. Although the Supreme Court has not yet answered this question, *Britt v. Suckle*, 453 F. Supp. 897, 998 (E.D. Tex. 1978); *Private Conspiracies, supra* note 11, at 1722 n.11; see *District of Columbia v. Carter*, 409 U.S. 418, 423-24 & n.8 (1973), it has often indicated that the fourteenth amendment refers exclusively to state action. E.g., *Collins v. Hardyman*, 311 U.S. 651, 658, 661 (1941); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Twining v. New Jersey*, 211 U.S. 78, 98 (1908); *Civil Rights Cases*, 109 U.S. 3, 13 (1883); *United States v. Harris*, 106 U.S. 629, 639-40 (1882); *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1875). Because the thirteenth amendment and the right to interstate travel provided the constitutional authority to reach the private conduct alleged in *Griffin*, 403 U.S. at 105, the Court reserved judgment on whether the fourteenth amendment alone could support a statute proscribing private conduct. *Id.* at 107. As a result, there is presently a split in the lower federal courts on whether § 1985(3) applies to private conspiracies that only violate the fourteenth amendment. Compare *Cohen v. Illinois Inst. of Tech.*, 324 F.2d 818, 828-29 (7th Cir. 1965) (§ 1985(3) does not reach private conspiracies grounded on the fourteen amendment alone), *cert. denied*, 425 U.S. 943 (1976), and *Bellamy v. Mason’s Stores, Inc.*, 508 F.2d 504, 506-07 (4th Cir. 1974) (Congress does not have the power to reach private conspiracies that violate the fourteenth amendment alone), and *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (some state involvement is required when a § 1985(3) suit is grounded solely on the fourteenth amendment), with *Silkwood v. Kerr-McGee Corp.*, 437 F.2d 743, 748 (10th Cir. 1970) (read literally, § 1985(3) has nearly unlimited applicability to private conspiracies designed to deprive plaintiffs of equal protection of the law), *cert. denied*, 102 S. Ct. 132 (1981), and *Askew v. Bloomker*, 548 F.2d 673, 678 (7th Cir. 1976) (absent state action, plaintiffs may use § 1985(3) if they show a denial of equal protection of the laws), and *Weise v. Syracuse Univ.*, 522 F.2d 397, 408 (2d Cir. 1975) (no state action requirement under § 1985(3)), and *Barnes v. Dorsey*, 460 F.2d 1057, 1061 (8th Cir. 1973) (plaintiffs need not prove state action under § 1985 provided a denial of equal protection of the law is shown), and *Action v. Gannon*, 450 F.2d 1227, 1233 (8th Cir. 1971) (§ 1985(3) applies to private conspiracies based only on §§ 1 and 5 of the fourteenth amendment). The commentators are also divided as to whether state action is required under the fourteenth amendment. Compare 3 C. Warren, *Supreme Court in United States History* 339 (1922) (fourteenth amendment guards against state action only), and *Original Purpose, supra* note 4, at 432 (§ 1985(3) should only apply to conspiracies backed by state action, as the fourteenth amendment covers only state action), with *Gressman, supra* note 79, at 1329-30.
B. Clause One Does Not Create a General Federal Tort Law

Griffin v. Breckenridge and numerous lower federal courts have reiterated the concern, originally expressed by the forty-second framers of the fourteenth amendment intended it to cover private action, and Private Conspiracies, supra note 11, at 1729-31 (after Griffin, state action should never be required for suits under § 1985(3)). Perhaps as a result of the state action issue, the Supreme Court in Griffin v. Breckenridge reserved judgment on whether § 1985(3) proscribes conspiracies motivated by discriminatory intent other than racial bias. 403 U.S. at 102 n.9. By refusing to confer blanket authority for the statute under the fourteenth amendment, the Court could go no further than the scope of thirteenth amendment powers, see id., and the thirteenth amendment is limited to racial bias. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968). The result is to effectively confine § 1985(3) actions to situations where a thirteenth amendment right or a right of national citizenship, like travel, is at stake. This has relevance in interpreting the reach of the second clause of § 1985(2). As Congress lacks authority over the state court system equivalent to its power over the federal courts, clause one cannot be supported by the same constitutional provision as clause two. McCord v. Bailey, 636 F.2d 606, 614 n.12 (D.C. Cir. 1980), cert. denied, 451 U.S. 938 (1981). Because the forty-second Congress added the equal protection language to clause two in order to ground it on the fourteenth amendment, conspiracies backed by state action are clearly covered. See id.; Britt v. Suckle, 453 F. Supp. 987, 998 (E.D. Tex. 1978). Relying on the fourteenth amendment enforcement clause to proscribe private conspiracies under clause two, however, remains problematic, just as it is under § 1985(3). There are two possible constitutional grounds for clause two of § 1985(2) where state action is not alleged. If the fourteenth amendment is found to reach private action, then clause two can also reach private conspiracies to obstruct justice and can be constitutionally upheld on its face under § 1 and § 5 of the fourteenth amendment. Alternatively, if the fourteenth amendment is found not to reach private action, then another source of congressional power must be found on a case-by-case basis. Thus, the two-step analysis of Griffin will be applicable to § 1985(2), clause two actions. See supra note 143. Where that source is the thirteenth amendment prohibition on slavery, racial discrimination will be required. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968). It is feasible, however, that state action will be found due to the state’s failure to prevent a conspiracy to obstruct justice in a state court system. Cf. Britt v. Suckle, 453 F. Supp. 987, 1003 (E.D. Tex. 1978) (§ 5 of the fourteenth amendment empowers Congress to proscribe private conspiracies to prevent the state itself from performing its constitutional duties). Apparently, some members of the forty-second Congress felt that the state’s failure to enforce its laws constituted state action. See Cong. Globe, supra note 3, app. at 315 (statement of Rep. Burchard) (“without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws”); id. at 334 (statement of Rep. Hoar) (similar language); id. at 428 (statement of Rep. Beatty) (similar language); id. at 653 (statement of Sen. Osborn) (similar language). The constitutionality of § 1985(2), clause two has apparently not arisen in the lower federal courts. But cf. Phillips v. International Ass’n of Bridge, Structural & Ornamental Iron Workers, 556 F.2d 939, 941 n.1 (9th Cir. 1977) (for suit under clause two of § 1985(2), state action is not required); Mullarkey v. Borglum, 323 F. Supp. 1218, 1228 (S.D.N.Y. 1970) (same).

147. 403 U.S. 88 (1971). “That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others . . . . The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by
Congress, that section 1985 could create a general federal tort law.\textsuperscript{149} Although Congress has authority to regulate conduct in the federal courts,\textsuperscript{150} it has been argued that clause one, by proscribing traditional state torts, has the potential to transgress the federalist policies\textsuperscript{151} embodied in the tenth amendment.\textsuperscript{152}

Clause one, however, cannot expand into a general federal tort law due to the inherent limitations of the federal court provisions.\textsuperscript{153} The four causes of action created by clause one of section 1985(2) are quite specific\textsuperscript{154} and have been strictly construed. To be actionable, a conspiracy\textsuperscript{155} to deter parties or witnesses must be carried out by force,
intimidation, or threat. Thus, it has been held that covert retaliatory conduct such as employment discrimination is not within the scope of the Act. Additionally, courts have held that the influence over a juror must be direct or overt and not the mere withholding of accurate information from the jury. Finally, the individual must


157. Kimble v. D.J. McDuffy, Inc., 648 F.2d 340, 348 (5th Cir.) (en banc), cert. denied, 102 S. Ct. 687 (1981). The plaintiff in Kimble alleged that he and other members of a class of people who had filed personal injury or worker's compensation claims in federal court had been blacklisted by employers to deter them from ever filing suit against a company. Id. at 342-43. The Fifth Circuit held that covert retaliatory conduct, such as employment discrimination, was not within the scope of the phrase "to deter, by force, intimidation or threat" in § 1985(2). Id. at 343.

158. Brawer v. Horowitz, 535 F.2d 830, 840 (3d Cir. 1976). The Third Circuit held a conspiracy to use perjured testimony and conceal exculpatory evidence does not come within the ambit of the phrase "to influence the verdict... of a juror" in subsection 2, because a more direct influence than the mere withholding of fully accurate evidence is required. Id. That "by force, intimidation or threat" language is absent where the clause speaks of influencing a juror was not considered crucial. Id. Those words existed in the original version of the Act and were removed merely to allow for more subtle inducements—such as money—but the inducement must still be direct. Id. The court stated that although these five words are not contained, with respect to influencing jurors, in the current § 1985(2), "we attach no talismanic significance to this difference. Rather, we believe it wholly logical and reasonable that, in enacting the modern § 1985, the] commission deleted the words, recognizing that juries can be 'influenced' as often... by positive inducements—such as money—as they can by negative inducements, including force, intimidation or threats." Id.; accord Brown v. Chaffee, 612 F.2d 497, 502 (10th Cir. 1979); cf. Bergman v. Stein, 404 F. Supp. 287, 294-95 (S.D.N.Y. 1975) (prejudicing future judges and jurors against the plaintiff by publishing adverse information about him insufficient to state a claim under clause one). But see Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1336-37 (7th Cir.) (in § 1985(1), force, intimidation or threat language does not modify the latter two clauses where such language is
be deterred from attending or testifying, or injured on account of having attended or testified, rather than having merely filed a claim.\textsuperscript{159} The paucity of cases that have arisen under clause one is a further indication of the narrowness of its scope.\textsuperscript{160} While the Griffin Court expressed the fear of creating a general federal tort law, and thus required discriminatory animus, it is important to note that it was interpreting subsection 3, by far the most general provision of section 1985.\textsuperscript{161}

Moreover, permitting actions under clause one of section 1985(2) absent proof of discriminatory animus does not federalize state tort

\textsuperscript{159} Kimble v. D.J. McDuffy, Inc., 648 F.2d 340, 348 (5th Cir.) (en banc), \textit{cert. denied}, 102 S. Ct. 687 (1981); see Brown v. Chaffee, 612 F.2d 497, 502 (10th Cir. 1979). The Fifth Circuit in \textit{Kimble} held the word "attended" was to be given its ordinary dictionary meaning which is to “be present at.” 648 F.2d at 348 (quoting Webster’s Third International Dictionary 140 (3d ed. 1961)). The statute, therefore, only forbids interference with a party’s right to \textit{physically} attend or testify in federal court. \textit{Id.} The dissent argued that the majority’s reading of § 1985(2), clause one is too narrow and effectively precludes plaintiffs “at the outset from having the opportunity to testify.” \textit{Id.} at 354. Further, a party is present in federal court when his attorney, as agent or substitute for the client, files a claim. \textit{Id.} at 353-54 & n.4. Moreover, even if the physical presence of the party were required, the party “attends” federal court upon delivering a complaint, attending a pre-trial conference, temporary restraining order hearing, or other pre-trial activities. \textit{Id.} at 354. The majority’s reasoning is also unpersuasive as the statute clearly forbids injury to a party on account of his having already attended or testified—possibly long after his physical attendance in court. See 42 U.S.C. § 1985(2) (Supp. III 1979), \textit{quoted supra} note 8. Rather, if any limitation was intended, it is more likely that Congress only desired to ensure a sufficient connection with the federal courts to render the statute clearly constitutional. \textit{See Cong. Globe}, supra note 3, at 486 (statement of Rep. Cook) (“A citizen... has a right to have his case tried within a United States Federal court where that court has jurisdiction of the case.”).


\textsuperscript{161} 42 U.S.C. § 1985(3) (Supp. III 1979), \textit{quoted supra} note 9. One commentator has argued that the Griffin discriminatory animus requirement has proven insufficient to narrow the scope of § 1985(3) and, indeed, a general federal tort law is developing. To forestall this, the commentator recommends that the statute should be interpreted as imposing a state action requirement. Original Purpose, supra note 4, at 430.
law because the interest at stake is purely federal.\textsuperscript{162} The nexus between the proscribed activities and the federal courts is sufficient to justify the regulation.\textsuperscript{163} The clear and substantial federal interest in maintaining an effective and just court system can be effectuated by preventing conspiracies, regardless of their genesis, to interfere with that system. The unhindered flow of claims, evidence and truthful testimony is the foundation upon which an effective judiciary is built.

\textbf{Conclusion}

Section 1985 provides litigants with an important means of protecting their right to a fair trial in federal court, while insulating the federal judiciary from conspiracies aimed at thwarting justice. It is illogical to impose a discriminatory animus requirement on a provision that, aside from its location in a Reconstruction era statute, has little to do with discrimination. Imposing such a limitation on this action unjustifiably restricts its scope, and effectively negates its remedial purpose. The forty-second Congress, desirous of ending conspiracies to impede federal justice, would not have thus crippled clause one's utility when there was no constitutional or practical reason to do so.

Moreover, the modern federal judiciary would certainly promote fair and effective justice by deterring conspiracies to disrupt the system, regardless of their motivation. As conspiracies by their very nature often go undetected, and the plaintiff is often the only one with full knowledge of the crime, permitting civil suit may be the most practical way to locate the wrongdoer and to deter future conspiracies.

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