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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.¹ The Klan attempted to overturn the Reconstruction policy of Congress² through acts of violence and terrorism directed toward blacks, Union sympathizers and government officials.³ Against a backdrop of threatened anarchy, the forty-second Congress enacted the Ku Klux Klan Act in 1871⁴ to reassert federal supremacy and to provide a remedy to those injured by civil rights violations.⁵

1. J. Randall & D. Donald, *The Civil War and Reconstruction* 682-83 (rev. 2d ed. 1969); *see Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1334-35 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977); A. McLaughlin, *A Constitutional History of the United States* 685-86, 688-89 (Students ed. 1935); 50 U. Cin. L. Rev. 158, 159 (1981).

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.

3. *See District of Columbia v. Carter*, 409 U.S. 418, 425 (1973); *Monroe v. Pape*, 365 U.S. 167, 174 (1961), *overruled on other grounds*, *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978); *McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Shaw v. Garrison*, 391 F. Supp. 1353, 1359 (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); Cong. Globe, 42d Cong., 1st Sess. 247-48 (1871) (statement of Rep. Kelley) [hereinafter cited as Cong. Globe]; *id.* at 320-21 (statement of Rep. Stoughton); *id.* at 369 (statement of Rep. Sheldon); *id.* at 374 (statement of Rep. Lowe); *id.* at 428 (statement of Rep. Beatty); *id.* at 436 (statement of Rep. Cobb); J. Randall & D. Donald, *supra* note 1, at 683; 50 U. Cin. L. Rev. 158, 159 (1981).

4. Ch. 22, § 2, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1985 (Supp. III 1979)). The Act's official title was "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes." *Id.* It has also been referred to as the "Ku Klux Act," *Monroe v. Pape*, 365 U.S. 167, 172 (1961), *overruled on other grounds*, *Monell v. Department of Social Servs.*, 436 U.S. 658, 663 (1978), the "Antilynching Act," 1 T. Emerson & D. Haber, *Political and Civil Rights in the United States* 19 (2d ed. 1958), the "Act of April 20, 1871," *Monroe v. Pape*, 365 U.S. 167, 174 (1961), *overruled on other grounds*, *Monell v. Department of Social Servs.*, 436 U.S. 658, 663 (1978); 1 T. Emerson & D. Haber, *supra*, at 19, the "Civil Rights Act of 1871," Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. Chi. L. Rev. 402, 402 n.1 (1979) [hereinafter cited as *Original Purpose*], the "Force Act of 1871," *id.*, and the "third 'force bill.'" *Monroe v. Pape*, 365 U.S. 167, 174 (1961) (quoting J. Randall, *The Civil War and Reconstruction* 857 (1937)), *overruled on other grounds*, *Monell v. Department of Social Servs.*, 436 U.S. 658, 663 (1978). This Note will refer to the statute as the Ku Klux Klan Act.

5. *See McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 932 (5th

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.⁶ Subsection 1 proscribes conspiracies to thwart United States officials engaged in the discharge of their duties;⁷ subsection 2 prohibits conspiracies to obstruct justice in a state or federal court;⁸ and

Cir. 1977) (en banc); *Brawer v. Horowitz*, 535 F.2d 830, 839 (3d Cir. 1976). "Three facts combine to show the necessity for [the Ku Klux Klan bill]. First, the violence and lawlessness, for which it is proposed to provide a remedy, occur in many widely separated districts; second, the character of the victims selected and the methods of outrage, indicate a common source and purpose, an organized conspiracy; and, third, the organization to which they are traced is political in its origin and aims, and is military in form." Cong. Globe, *supra* note 3, at 412-13 (statement of Rep. Roberts).

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 reinstated 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 Act¹¹ 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, 661 (1951); *Original Purpose*, *supra* note 4, at 636-37.

11. Case Comment, *Private Conspiracies to Violate Civil Rights: McLellan v. Mississippi Power & Light Co.*, 90 Harv. L. Rev. 1721, 1721-22 (1977) [hereinafter cited as *Private Conspiracies*]; see Comment, *Private Actions Under 42 U.S.C. § 1985(b) for Conspiracies to Impede the Due Course of Justice*, 27 U. Kan. L. Rev. 621, 622 (1979) [hereinafter cited as *Private Actions*].

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 1985.¹³

Modern attempts to apply this ancient and untested law to situations probably unforeseen by the forty-second Congress¹⁴ 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.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-

13. See, e.g., *McCord v. Bailey*, 636 F.2d 606, 618 (D.C. Cir. 1980) (clause one of § 1985(2)), *cert. denied*, 451 U.S. 983 (1981); *Phillips v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 556 F.2d 939, 941 & n.1 (9th Cir. 1977) (clause two of § 1985(2)); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1339 (7th Cir.) (§ 1985(1)), *cert. denied*, 434 U.S. 975 (1977); *Askew v. Bloemker*, 548 F.2d 673, 678 (7th Cir. 1976) (clause one of § 1985(3)); *Brawer v. Horowitz*, 535 F.2d 830, 839 (3d Cir. 1976) (clause one of § 1985(2)); *Barnes v. Dorsey*, 480 F.2d 1057, 1061 (8th Cir. 1973) (clause two of § 1985(2)); *Local No. 1 (ACA) v. International Bhd. of Teamsters*, 419 F. Supp. 263, 275 (E.D. Pa. 1976) (same).

14. Plaintiffs attempting to invoke subsection 2 have alleged a variety of fact patterns: conspiracies by lawyers to represent their clients incompetently, e.g., *McCord v. Bailey*, 636 F.2d 606, 608 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Brown v. Chaffee*, 612 F.2d 497, 500-01 (10th Cir. 1979), conspiracies by prosecuting officials to tamper with jurors, e.g., *Jones v. United States*, 536 F.2d 269, 270 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *Bergman v. Stein*, 404 F. Supp. 287, 291 (S.D.N.Y. 1975); *Kelly v. Foreman*, 384 F. Supp. 1352, 1353 (S.D. Tex. 1974), conspiracies by prosecuting officials to procure perjured testimony or conceal exculpatory evidence, e.g., *Brawer v. Horowitz*, 535 F.2d 830, 832 (3d Cir. 1976); *Shaw v. Garrison*, 391 F. Supp. 1353, 1357 (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), conspiracies to harass parties or witnesses in order to forestall litigation, e.g., *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1348 (9th Cir. 1981); *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 703 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972); *Kelly v. Foreman*, 384 F. Supp. 1352, 1353 (S.D. Tex. 1974), or conspiracies by employers or unions to blacklist workers who had sued previous employers. E.g., *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 343 (5th Cir.) (en banc), *cert. denied*, 102 S. Ct. 687 (1981); *Seeley v. Brotherhood of Painters, Decorators & Paper Hangers*, 308 F.2d 52, 55 (5th Cir. 1962).

15. Compare *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1354-55 (9th Cir. 1981) (clause one of § 1985(2) does not require an equal protection denial), and *McCord v. Bailey*, 636 F.2d 606, 617 (D.C. Cir. 1980) (same), *cert. denied*, 451 U.S. 983 (1981), and *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1340-42 (7th Cir.) (§ 1985(1) does not require equal protection denial), *cert. denied*, 434 U.S. 975 (1977), and *Paynes v. Lee*, 377 F.2d 61, 64 (5th Cir. 1967) (dictum) (voting provision of § 1985(3) does not require equal protection denial), with *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 346-47 (5th Cir.) (en banc) (clause one of § 1985(2) requires equal protection denial), *cert. denied*, 102 S. Ct. 687 (1981), and *Jones v. United States*, 536 F.2d 269, 271 (8th Cir. 1976) (same), *cert. denied*, 429 U.S. 1039 (1977), and *Means v. Wilson*, 522 F.2d 833, 839-40 (8th Cir. 1975) (voting provision of § 1985(3) requires equal protection denial), *cert. denied*, 424 U.S. 958 (1976).

ings.¹⁶ 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.¹⁷ 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.¹⁸

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.¹⁹ In *McCord v. Bailey*,²⁰ 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.²¹ Moreover, the court found that an analysis of the legislative history, although unnecessary, supported such a conclusion;²² the court reasoned that clause one evinced a congressional desire to protect the integrity of the

16. *Kimble v. D.J. McDuffy, Inc.*, 102 S. Ct. 687, 687-88 (1981) (White, J., dissenting from denial of certiorari); *Private Actions*, *supra* note 11, at 625-27; 50 U. Cin. L. Rev. 158, 161 (1981).

17. *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 346-47 (5th Cir.) (en banc), *cert. denied*, 102 S. Ct. 687 (1981); *see Jones v. United States*, 536 F.2d 269, 271 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

18. *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1354-55 (9th Cir. 1981); *McCord v. Bailey*, 636 F.2d 606, 617 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Brawer v. Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976); *accord Kelly v. Foreman*, 384 F. Supp. 1352, 1354-55 (S.D. Tex. 1974). Several courts have stated, in dictum, that clause one of § 1985(2) does not require an allegation of discriminatory animus. *Brown v. Chaffee*, 612 F.2d 497, 502 (10th Cir. 1979); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1341-42 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977); *Phillips v. Fisher*, 445 F. Supp. 552, 555 (D. Kan. 1977); *Bergman v. Stein*, 404 F. Supp. 287, 295 (S.D.N.Y. 1975); *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).

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

20. 636 F.2d 606 (D.C. Cir. 1980), *cert. denied*, 102 S. Ct. 687 (1981).

21. *Id.* at 614-15; *accord Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1355 (9th Cir. 1981); *Brawer v. Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976).

22. 636 F.2d at 615; *accord Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1354-55 (9th Cir. 1981); *Brawer v. Horowitz*, 535 F.2d 830, 839-40 (3d Cir. 1976).

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. Breckenridge*²⁶ controlling.²⁷ In *Griffin*, plaintiffs brought suit under subsection 3,²⁸ claim-

23. 636 F.2d at 615; *accord* *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1354-55 (9th Cir. 1981); *Brawer v. Horowitz*, 535 F.2d 830, 839-40 (3d Cir. 1976).

24. 636 F.2d at 616-17; *accord* *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1355 (9th Cir. 1981).

25. 636 F.2d at 617; *accord* *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1355 (9th Cir. 1981).

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

27. *Jones v. United States*, 401 F. Supp. 168, 173-74 (E.D. Ark. 1975) (*Griffin* analysis applicable to clause one of § 1985(2)), *aff'd*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *see* *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 345-47 (5th Cir.) (en banc) (*Griffin* analysis generally applicable to all subsections of § 1985), *cert. denied*, 102 S. Ct. 687 (1981). Some courts have indicated, in dictum, that the animus requirement applies to § 1985(2) in general, e.g., *Slavin v. Curry*, 574 F.2d 1256, 1262, *modified on other grounds per curiam*, 583 F.2d 779 (5th Cir. 1978); *McIntosh v. Garofalo*, 367 F. Supp. 501, 505 (W.D. Pa. 1973); *Phillips v. Singletary*, 350 F. Supp. 297, 302-03 (D.S.C. 1972), or to all actions under § 1985. E.g., *Swietlowich v. County of Bucks*, 610 F.2d 1157, 1164 (3d Cir. 1979); *Crowe v. Lucas*, 595 F.2d 985, 990 (5th Cir. 1979); *Boulware v. Battaglia*, 327 F. Supp. 368, 371 (D. Del. 1971). Courts have uniformly used the discriminatory animus requirement as a limiting device in cases brought under clause two of § 1985(2), because equal protection language expressly appears in that part. *Slavin v. Curry*, 574 F.2d 1256, 1262, *modified on other grounds per curiam*, 583 F.2d 779 (5th Cir. 1978); *Dacey v. Dorsey*, 568 F.2d 275, 277 (2d Cir.), *cert. denied*, 436 U.S. 906 (1978); *Phillips v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 556 F.2d 939, 941 (9th Cir. 1977); *Smith v. Yellow Freight Sys., Inc.*, 536 F.2d 1320, 1322-23 (10th Cir. 1976); *Brawer v. Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976); *Phillips v. Fisher*, 445 F. Supp. 552, 555 (D. Kan. 1977); *Cartolano v. Tyrrell*, 421 F. Supp. 526, 531-32 (N.D. Ill. 1976); *Davis v. Sprouse*, 405 F. Supp. 45, 47-48 (E.D. Va. 1975); *Bergman v. Stein*, 404 F. Supp. 287, 295 (S.D.N.Y. 1975); *Kelly v. Foreman*, 384 F. Supp. 1352, 1354 (S.D. Tex. 1974); *Kerckhoff v. Kerckhoff*, 369 F. Supp. 1165, 1166 (E.D. Mo.), *aff'd mem.*, 505 F.2d 735 (8th Cir. 1974); *McIntosh v. Garofalo*, 367 F. Supp. 501, 505-06 (W.D. Pa. 1973); *Johnston v. National Broadcasting Co.*, 356 F. Supp. 904, 909-10 (E.D.N.Y. 1973); *Phillips v. Singletary*, 350 F. Supp. 297, 302-03 (D.S.C. 1972); *Boulware v. Battaglia*, 327 F. Supp. 368, 371 (D. Del. 1971); *see* *McCord v. Bailey*, 636 F.2d 606, 614 (D.C. Cir. 1980) (dictum), *cert. denied*, 451 U.S. 938 (1981).

28. 403 U.S. at 92. Subsection 3 provides a cause of action for damages to individuals injured by conspiracies to deprive them of equal protection of the laws.

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. Gannon*, 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*, 657 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. 1973); *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.*,³² 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.³³ 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.³⁴ Because the design of section 1985(3) is similar to that of

616 F.2d 256, 266 (6th Cir. 1980) (union members); *Carchman v. Korman Corp.*, 594 F.2d 354, 356 (3d Cir.) (tenant organizers), *cert. denied*, 444 U.S. 898 (1979); *Lessman v. McCormick*, 591 F.2d 605, 608 (10th Cir. 1979) (debtors); *Blevins v. Ford*, 572 F.2d 1336, 1338 (9th Cir. 1978) (nonlawyers); *Bova v. Pipefitters & Plumbers Local 60*, 554 F.2d 226, 228 (5th Cir. 1977) (nonunion employees); *Morgan v. Odem Co.*, 552 F.2d 147, 149 (5th Cir. 1977) (newcomers to parish); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 932-33 (5th Cir. 1977) (en banc) (debtors); *Lopez v. Arrowhead Ranches*, 523 F.2d 924, 926-27 (9th Cir. 1975) (legal aliens and citizens); *Bricker v. Crane*, 468 F.2d 1228, 1232-33 (1st Cir. 1972) (physicians who had testified in malpractice suits), *cert. denied*, 410 U.S. 930 (1973); *Cartolano v. Tyrrell*, 421 F. Supp. 526, 532 (N.D. Ill. 1976) (fireworks manufacturers); *Arnold v. Tiffany*, 359 F. Supp. 1034, 1036 (C.D. Cal.) (newspaper distributors), *aff'd*, 487 F.2d 216, 218 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); see *Murphy v. Mount Carmel High School*, 543 F.2d 1189, 1192 n.1 (7th Cir. 1976) (dictum) (nonunion employees). Some liberal courts, however, have been satisfied if the plaintiff is merely associated with some identifiable group. *E.g.*, *Azar v. Conley*, 456 F.2d 1382, 1386 & n.5 (6th Cir. 1972) (dictum) (middle-class white family); *Harrison v. Brooks*, 519 F.2d 1358, 1359-60 (1st Cir. 1971) (residential property owners); *Scott v. Moore*, 461 F. Supp. 224, 230 (E.D. Tex. 1978) (nonunion workers and their employers), *modified on other grounds*, 640 F.2d 708 (5th Cir. 1981); *Selzer v. Berkowitz*, 459 F. Supp. 347, 350 (E.D.N.Y. 1978) (professors who cooperate with the CIA); *Britt v. Suckle*, 453 F. Supp. 987, 997 (E.D. Tex. 1978) (employees prevented from asserting worker's compensation claims in state courts); *Local No. 1 (ACA) v. International Bhd. of Teamsters*, 419 F. Supp. 263, 277 (E.D. Pa. 1976) (local unions); *Pendrell v. Chatham College*, 386 F. Supp. 341, 348 (W.D. Pa. 1974) (persons advocating the rights of a racial or class-based group); *Brown v. Villanova Univ.*, 378 F. Supp. 342, 344-45 (E.D. Pa. 1974) (demonstrators); *Franceschina v. Morgan*, 346 F. Supp. 833, 837-38 (S.D. Ind. 1972) (furnishers of information and services to migrant workers in agricultural labor camps). For a summary of lower court interpretations of the *Griffin* class-based animus requirement, see *Class-Based Animus*, *supra* note 10, at 642-53; *Private Conspiracies*, *supra* note 11, at 1728 & nn.45-47.

32. 648 F.2d 340 (5th Cir.) (en banc), *cert. denied*, 102 S. Ct. 687 (1981).

33. *Id.* at 345-47; *accord Jones v. United States*, 401 F. Supp. 168, 172-74 (E.D. Ark. 1975), *aff'd*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

34. 648 F.2d at 346-47; *accord Jones v. United States*, 401 F. Supp. 168, 174 (E.D. Ark. 1975), *aff'd*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). 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),³⁵ 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.³⁶

Reliance on *Griffin* to find discriminatory animus applicable to clause one, however, is misplaced.³⁷ 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.³⁸ A superficial examination of the syntax of section 1985(2) reveals that there are two basic clauses separated by a semicolon.³⁹ The presence of the two clauses

(8th Cir. 1975) (discriminatory animus required under voting provision of § 1985(3)), *cert. denied*, 424 U.S. 958 (1976).

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, *see id.* at 996-97, 997 n.17, and the "language requiring intent to deprive of equal protection," *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (emphasis in original), is similar in both § 1985(3) and (2). *See* 42 U.S.C. § 1985(2), (3) (Supp. III 1979), *quoted supra* notes 8-9.

36. 648 F.2d at 346-47.

37. *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 350 (5th Cir.) (en banc) (Johnson, J., dissenting and concurring), *cert. denied*, 102 S. Ct. 687 (1981); *see Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1355 (9th Cir. 1981).

38. *E.g.*, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 (1977); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *Blue Chips Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring); *Zerilli v. Evening News Ass'n*, 628 F.2d 217, 220 (D.C. Cir. 1980).

39. 42 U.S.C. § 1985(2) (Supp. III 1979), *quoted supra* note 8.

together in a separate subsection indicates a common theme—the subsection deals overall with interferences with judicial proceedings.⁴⁰ The first clause creates four distinct causes of action pertaining to interference with federal court proceedings.⁴¹ The second creates two causes of action for obstruction of justice in state courts.⁴² 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.⁴³ 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.”⁴⁴ Additionally, both the use of semicolons⁴⁵ to di-

40. *Id.*

41. *Id.*; see *Kimble v. D.J. McDuffy, Inc.*, 445 F. Supp. 269, 274 (E.D. La. 1978), *aff'd en banc*, 648 F.2d 340 (5th Cir.), *cert. denied*, 102 S. Ct. 687 (1981); see, e.g., *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1353-54 (9th Cir. 1981) (conspiracy to deter witnesses and parties from attending or testifying); *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 343 (5th Cir.) (en banc) (conspiracy to injure party on account of having attended or testified), *cert. denied*, 102 S. Ct. 687 (1981); *McCord v. Bailey*, 636 F.2d 606, 608 (D.C. Cir. 1980) (conspiracy to influence the verdict of a juror), *cert. denied*, 451 U.S. 983 (1981); *Brawer v. Horowitz*, 535 F.2d 830, 832-33 (3d Cir. 1976) (same); *Jones v. United States*, 536 F.2d 269, 269-70 (8th Cir. 1976) (same), *cert. denied*, 429 U.S. 1039 (1977); *Local No. 1 (ACA) v. International Bhd. of Teamsters*, 419 F. Supp. 263, 275 (E.D. Pa. 1976) (conspiracy to injure party on account of having attended or testified); *Kelly v. Foreman*, 384 F. Supp. 1352, 1353 (S.D. Tex. 1974) (conspiracy to influence verdict of a juror); *Pennsylvania v. Local Union No. 542*, 347 F. Supp. 268, 271-72, 290 (E.D. Pa. 1972) (conspiracy to deter party from attending or testifying). No case has been uncovered dealing with a conspiracy to injure a juror on account of a verdict, presentment or indictment.

42. 42 U.S.C. § 1985(2) (Supp. III 1979), *quoted supra* note 8; see *Kimble v. D.J. McDuffy, Inc.*, 445 F. Supp. 269, 274 (E.D. La. 1978), *aff'd en banc*, 648 F.2d 340 (5th Cir.), *cert. denied*, 102 S. Ct. 687 (1981); see, e.g., *Phillips v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 556 F.2d 939, 940-41 (9th Cir. 1977) (conspiracy to obstruct justice in a state court); *Seeley v. Brotherhood of Painters, Decorators & Paper Hangers*, 308 F.2d 52, 58 (5th Cir. 1962) (conspiracy to injure a person for attempting to enforce the equal protection of the laws); *Bergman v. Stein*, 404 F. Supp. 287, 294-95 (S.D.N.Y. 1975) (conspiracy to obstruct justice in a state court); *Crawford v. City of Houston*, 386 F. Supp. 187, 192 (S.D. Tex. 1974) (conspiracy to injure a person for attempting to enforce the equal protection of the laws).

43. *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 350 n.1 (5th Cir.) (en banc) (Johnson, J., dissenting & concurring), *cert. denied*, 102 S. Ct. 687 (1981).

44. *Marshall v. Western Union Tel. Co.*, 621 F.2d 1246, 1251 (3d Cir. 1980); *accord Bott v. American Hydrocarbon Corp.*, 458 F.2d 229, 233 (5th Cir. 1972); *J. Ray McDermott & Co. v. Vessel Morning Star*, 457 F.2d 815, 818 (5th Cir.) (en banc), *cert. denied*, 409 U.S. 948 (1972); *City of Burbank v. General Elec. Co.*, 329 F.2d 825, 832 (9th Cir. 1964); *Pennsylvania Agric. Coop. Mktg. Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 570 (M.D. Pa. 1980); see *Feldman v. Philadelphia Nat'l Bank*, 408 F. Supp. 24, 34 (E.D. Pa. 1976) (“all omissions should be taken as exclusions, and this is especially so where other sections include the thing omitted”).

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"⁴⁶ 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.⁴⁷ The implication of this legislative design is that Congress intended the equal protection limitation in the second clause to refer to that clause only.⁴⁸

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.⁴⁹ 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).

47. *Cf.* *Tyrrell v. Mayor of New York*, 159 N.Y. 239, 241-43, 53 N.E. 1111, 1112-13 (1899) (where statute bifurcated by semicolon, language following semicolon does not apply to language preceding semicolon).

48. *See* *McCord v. Bailey*, 636 F.2d 606, 616-17 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1340-41 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977).

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*, 102 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), *rev'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 the authority of the government of the United States, or 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

States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such juror, or shall conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, or by 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 or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States, or as a member of the Congress of the United States, or to injure any such citizen in his person or property on account of such support or advocacy, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States or district or supreme court of any Territory of the United States having jurisdiction of similar offenses, shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the persons so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication.'" Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13-14 (1871) (emphasis added).

50. For the language of the original act, see *supra* note 49. Clause one is the first italicized portion; clause two is the second italicized portion.

51. Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13 (1871), *quoted supra* note 49; see *Private Actions*, *supra* note 11, at 630-31. It should be noted that the voting provision of 42 U.S.C. § 1985(3) (Supp. III 1979), although it deals with a federal issue and does not contain equal protection language, is located at the end of § 2 of the original Act rather than with the other federal provisions. Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13 (1871), *quoted supra* note 49.

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.⁵² 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.⁵³

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 2.⁵⁴ Such an analysis, however, is attenuated at best. In addition to misconstruing the *Griffin* opinion,⁵⁵ 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.⁵⁶ These clauses appear together solely because of the reorganization of the Ku Klux Klan Act,⁵⁷ which occurred when all federal laws were consolidated into the Revised Statutes of the United States.⁵⁸ At that time, section 2 of the Ku Klux Klan Act was

52. Ku Klux Klan Act ch. 22, § 2, 17 Stat. 13 (1871), *quoted supra* note 49; *see* *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 350 n.1 (5th Cir.) (en banc) (Johnson, J., dissenting and concurring), *cert. denied*, 102 S. Ct. 687 (1981).

53. Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13 (1871), *quoted supra* note 49; *see* *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 350 n.1 (5th Cir.) (en banc) (Johnson, J., dissenting & concurring), *cert. denied*, 102 S. Ct. 687 (1981).

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*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 429 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. Breckenridge*, 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).

56. *See* Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13 (1871), *quoted supra* note 49; *Private Actions*, *supra* note 11, at 630.

57. *See* *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 344 (5th Cir.) (en banc), *cert. denied*, 102 S. Ct. 687 (1981); *Brawer v. Horowitz*, 535 F.2d 830, 837-39 (3d Cir. 1976).

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 1980 of the Revised Statutes of the United States⁵⁹ with the current three subsections and only minor grammatical changes.⁶⁰ The reorganization was clearly not intended to make any substantive changes in the meaning of the original Act.⁶¹ 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.⁶² The initial framework of section 1985 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.⁶³

the consolidation and publication of all statutes in effect on December 1, 1873 into the Revised Statutes of the United States. Act of June 20, 1874, ch. 333, 18 Stat. 113.

59. U.S. Rev. Stat. tit. 24, § 1980, [18 pt. 1] Stat. 347 (2d ed. 1878); see *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 344-45 (5th Cir.) (en banc), *cert. denied*, 102 S. Ct. 687 (1981). Section 1980 of the Revised Statutes consolidated both the Conspiracy Act of 1861, ch. 33, 12 Stat. 284, and the Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871). *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 344, 345 n.6 (5th Cir.) (en banc), *cert. denied*, 102 S. Ct. 687 (1981); see U.S. Rev. Stat. tit. 24, § 1980, [18 pt.1] Stat. 347 (2d ed. 1878).

60. See *Brawer v. Horowitz*, 535 F.2d 830, 838 (3rd Cir. 1976). It is clear that the consolidation resulted in no substantive change in language. *Id. Compare* 42 U.S.C. § 1985 (Supp. III 1979), *quoted supra* notes 7-9, with Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13 (1871), *quoted supra* note 49.

61. When construing the Revised Statutes, "it is to be presumed that [Congress] intended to transfer the sense" of the original laws. *Pott v. Arthur*, 104 U.S. 735, 736 (1881), *quoted in Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 345 n.6 (5th Cir.) (en banc), *cert. denied*, 102 S. Ct. 687 (1981); *accord Brawer v. Horowitz*, 535 F.2d 830, 838 n.16 (3d Cir. 1976).

62. Act of Mar. 9, 1878, ch. 26, 20 Stat. 27, *construed in Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 345 n.6 (5th Cir.) (en banc), *cert. denied*, 102 S. Ct. 687 (1981).

63. *McCord v. Bailey*, 636 F.2d 606, 615-17 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Private Actions, supra* note 11, at 630-31; see *Brawer v. Horowitz*, 535 F.2d 830, 837-40 (3d Cir. 1976). A broad reading of § 1985(2) is further supported by the oft-quoted Supreme Court pronouncements that Reconstruction civil rights acts are to be "accord[ed] a sweep as broad as [their] language." *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)), *quoted in Robertson v. Wegmann*, 436 U.S. 584, 590 (1978); *accord Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968). In introducing the bill, Representative Shellabarger, Chairman of the House Select Committee that drafted the Ku Klux Klan Act, stated: "This act is remedial . . . [T]he largest latitude consistent with the words employed [should be] given in construing such statutes and constitutional provisions . . ." Cong. Globe, *supra* note 3, app. at 68. There is widespread agreement that civil rights acts should be liberally construed so as to carry out fully their beneficial objectives. *E.g.*, *Hamm v. City of Rock Hill*, 379 U.S. 306, 313-14 (1964) (construing Civil Rights Act of 1964, § 201, 42 U.S.C. § 2000a (1976)); *Miller v. Amusement Enters., Inc.*, 394 F.2d 342, 349 (5th Cir. 1968) (same); *Birnbaum v. Trussell*, 371 F.2d 672, 676 (2d Cir. 1966) (construing 42 U.S.C. § 1983 (1976)); *Valle v. Stengel*, 176 F.2d 697, 702 (3d Cir. 1949) (construing 42 U.S.C. § 1981 (1976)). Correlatively, exceptions and limitations restricting the operation of such statutes are to be strictly construed. *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 232 (5th Cir. 1969).

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. Breck-enridge*,⁶⁴ 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.⁶⁵ 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.⁶⁶

The essential purpose of section 1985(2), however, was to ensure the effective operation of the state and federal judiciary,⁶⁷ as well as to provide an unhindered avenue of redress to those injured by Klan conspiracies.⁶⁸ To effectuate these goals within the federal court system, discriminatory intent was neither necessary nor desirable.⁶⁹

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-

64. 403 U.S. 88 (1971).

65. *Id.* at 99-101.

66. See *supra* notes 32-36 and accompanying text.

67. *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1355 (9th Cir. 1981); *McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); see *Brawer v. Horowitz*, 535 F.2d 830, 839 (3d Cir. 1976); 1 *Civil Rights* 591 (B. Schwartz ed. 1970) [hereinafter cited as *Civil Rights*].

68. See *McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Brawer v. Horowitz*, 535 F.2d 830, 839 (3d Cir. 1976); see *Civil Rights*, *supra* note 67, at 591.

69. See *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1355 (9th Cir. 1981); *McCord v. Bailey*, 636 F.2d 606, 617 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Brawer v. Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976).

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, 615 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); A. McLaughlin, *supra* note 1, at 686, 689.

phy,⁷¹ its ultimate objective was to sabotage the Reconstruction policy of Congress.⁷² Murders, assaults, rapes, arson and other acts of violence committed by the Klan were frequently reported.⁷³ The Klan's system of protecting its members through secrecy and perjury on the witness stand, however, was a nearly insurmountable prosecutorial obstacle.⁷⁴ Moreover, state and local governments were unable or unwilling to quell the violence.⁷⁵

In March of 1871, President Grant asked for legislation giving him authority to control the increasing chaos in the southern states.⁷⁶ In response, Representative Shellabarger of Ohio sponsored the Ku Klux Klan bill,⁷⁷ which was officially entitled "An Act to enforce the Provi-

71. See *District of Columbia v. Carter*, 409 U.S. 418, 425 (1973); *McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Cong. Globe*, *supra* note 3, at 374 (statement of Rep. Lowe); *id.* at 428 (statement of Rep. Beatty); J. Randall & D. Donald, *supra* note 1, at 683.

72. *Original Purpose*, *supra* note 4, at 404-05; see *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1334 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977); A. McLaughlin, *supra* note 1, at 686, 689; J. Randall & D. Donald, *supra* note 1, at 683; see, e.g., *Cong. Globe*, *supra* note 3, app. at 195 (statement of Rep. Buckley) ("[the Klan] seeks to strike down your reconstruction laws"); *id.* app. at 201 (statement of Rep. Snyder) (the Klan's objective is the "overthrow of the whole system of reconstruction").

73. E.g., *Cong. Globe*, *supra* note 3, at 248 (statement of Rep. Hoar); *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 436 (statement of Rep. Cobb).

74. H.R. Rep. No. 1, 42d Cong., 1st Sess. xxx-xxxi, *reprinted in Civil Rights*, *supra* note 67, at 599-600; cf. M. Berger, *Equality by Statute* 9 (rev. ed. 1967) (few convictions under the "enforcement acts" due to difficulty of proving conspiracy and intent, and to lack of sympathy of the predominantly white juries and judges toward testimony by blacks).

75. *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973); *Monroe v. Pape*, 365 U.S. 167, 174 (1961), *overruled on other grounds*, *Monell v. Department of Social Servs.*, 436 U.S. 658, 663 (1978); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1334 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 932 (5th Cir. 1977) (en banc). "That the state courts . . . have been unable to enforce the criminal laws of their respective States or to suppress the disorders . . . is a sufficient reason why Congress should . . . enact the laws necessary for the protection of citizens of the United States." *Cong. Globe*, *supra* note 3, at 653 (statement of Sen. Osborn); *accord id.* at 334 (statement of Rep. Hoar); *id.* app. at 179 (statement of Rep. Voorhees); *id.* app. at 226 (statement of Sen. Boreman); *id.* app. at 315 (statement of Rep. Burchard); see M. Konvitz, *A Century of Civil Rights* (1961) [hereinafter cited as M. Konvitz I].

76. *Cong. Globe*, *supra* note 3, at 244 (statement of President Grant); see *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973); *Monroe v. Pape*, 365 U.S. 167, 172-73 (1961), *overruled on other grounds*, *Monell v. Department of Social Servs.*, 436 U.S. 658, 663 (1978).

77. *Cong. Globe*, *supra* note 3, at 317 (statement of Rep. Shellabarger); see *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973). The Ku Klux Klan Act was the third of a series of "enforcement acts" designed by Congress to outlaw the Klan and other vigilante organizations. The first two "enforcement acts" proscribed interferences with the voter and the polls in enforcement of the fifteenth amendment.

sions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes."⁷⁸ 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.⁷⁹ 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.⁸⁰

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.⁸¹ Concern was expressed that Republican voters were being terrorized at the polls in order to ensure a Democratic victory.⁸² Moreover, acts of violence toward federal officials were becoming commonplace.⁸³ Several revenue officers and United States mail agents had been murdered or driven from their posts.⁸⁴ Republican officials, such as United States Senators and

Civil Rights Act of May 31, 1870, ch. 114, 16 Stat. 140 (current version at 42 U.S.C. § 1981 (1976)); Civil Rights Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (repealed 1909); see A. McLaughlin, *supra* note 1, at 687; J. Randall & D. Donald, *supra* note 1, at 683; Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Colum. L. Rev. 131, 163 (1950). For a discussion of why the "enforcement acts" and the Reconstruction measures were, in general, ineffective, see M. Berger, *supra* note 74, at 8-9, 12-13; M. Konvitz, *The Constitution and Civil Rights 103-06* (1947) [hereinafter cited as M. Konvitz II].

78. H.R. 320, 42d Cong., 1st Sess., Cong. Globe, *supra* note 3, at 317 (1871).

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 Buckley 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).

82. *E.g.*, Cong. Globe, *supra* note 3, at 321 (statement of Rep. Stoughton) (quoting H.R. Rep. No. 1, 42d Cong., 1st Sess. 345 (1871)); *id.* at 517 (statement of Rep. Shellabarger); *id.* at 654 (statement of Sen. Osborn); see *Original Purpose*, *supra* note 4, at 409-10.

83. See, *e.g.*, Cong. Globe, *supra* note 3, at 247 (statement of Rep. Kelley); *id.* at 248 (statement of Rep. Buckley); *id.* at 321 (statement of Rep. Stoughton); *id.* at 654 (statement of Sen. Osborn).

84. *E.g.*, Cong. Globe, *supra* note 3, at 247-48 (statement of Rep. Kelley); *id.* at 519 (statement of Rep. Shellabarger).

federal court clerks, had been attacked or assassinated.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.⁸⁶

Against this backdrop, it becomes apparent that the Klan was primarily a political organization and a threat to federal authority.⁸⁷ 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.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.⁸⁹

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

85. Cong. Globe, *supra* note 3, at 654 (statement of Sen. Osborn); *id.* app. at 200 (statement of Sen. Nye).

86. H.R. Rep. No. 1, 42d Cong., 1st Sess. xxx-xxxi, *reprinted in* Civil Rights, *supra* note 67, at 599-600; Cong. Globe, *supra* note 3, at 653 (statement of Sen. Osborn); see *McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Brawer v. Horowitz*, 535 F.2d 830, 839 (3d Cir. 1976). "The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes free, the persecuted citizen looks in vain for redress." Civil Rights, *supra* note 67, at 618 (quoting congressional hearings).

87. *Original Purpose*, *supra* note 4, at 403, 409. The contemporary Klan is generally classified as a racist organization. *Id.* at 403; 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).

88. See, e.g., Cong. Globe, *supra* note 3, at 320-22 (statement of Rep. Stoughton); *id.* at 333 (statement of Rep. Hoar); *id.* at 412-13 (statement of Rep. Roberts); *id.* at 443 (statement of Rep. Butler); *id.* at 484 (statement of Rep. Wilson); *id.* at 487 (statement of Rep. Tyner); *id.* at 653-54 (statement of Sen. Osborn); *id.* at 702 (statement of Rep. Edmunds); *id.* app. at 72 (statement of Rep. Blair); *id.* app. at 78 (statement of Rep. Perry); *id.* app. at 196 (statement of Rep. Snyder); *id.* app. at 252 (statement of Sen. Morton); see also *Original Purpose*, *supra* note 4, at 409-11, 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, *reprinted in* Civil Rights, *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, intimidation 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. *Id.*, *reprinted in* Civil Rights, *supra* note 67, at 599-600.

89. *McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Original Purpose*, *supra* note 4, at 403; see *Rutledge 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 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 sympathizers⁹⁰ and that state laws were not being enforced with an equal hand.⁹¹ Thus, in conjunction with the intent to preserve orderly government, Congress sought to prohibit concerted discriminatory conduct.⁹² Although the Supreme Court in *Griffin v. Breckenridge*⁹³ focused on the latter objective in its analysis of the legislative history,⁹⁴ that objective clearly was not the sole force behind the Act.

The problems facing Congress in 1871 threatened many aspects of federal authority,⁹⁵ and the Ku Klux Klan bill, as originally proposed, was designed to give Congress sweeping power to remedy the situation.⁹⁶ 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.⁹⁷ Only after

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

91. E.g., Cong. Globe, *supra* note 3, at 459 (statement of Rep. Coburn); *id.* app. at 153 (statement of Rep. Garfield); see McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 932 (5th Cir. 1977) (en banc).

92. Cong. Globe, *supra* note 3, at 412-13 (statement of Rep. Roberts); see M. Konvitz I, *supra* note 75, at 63 (Reconstruction statutes sought to obtain equal protection of the laws for blacks). For a discussion on why blacks gained little from Reconstruction legislation, see M. Berger, *supra* note 74, at 8-9, 12-13; M. Konvitz II, *supra* note 77, at 103-06.

93. 403 U.S. 88 (1971).

94. *Id.* at 99-101.

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

96. McCord v. Bailey, 636 F.2d 606, 615 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981).

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.⁹⁸ Evidently, Congress intended to reach attacks on governmental operations to the extent the Constitution permitted.⁹⁹

The *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.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.¹⁰¹ The extensive debates on this issue¹⁰² are perhaps the most illustrative for interpreting section 1985(2), because they explain the rationale for the strategic placement of equal protection language in

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

99. *McCord v. Bailey*, 636 F.2d 606, 615 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981).

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 *Stern* pointed out that to do so would deprive § 1985(1) of its independent effect. *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(3) cause of action in his § 1985(1) lawsuit." *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 *Griffin* requirement to clause two of § 1985(2) brings it within the broader language of § 1985(3). *But see Britt v. Suckle*, 453 F. Supp. 987, 995-96 (E.D. Tex. 1978) (imposing a less stringent discrimination requirement under § 1985(2), clause two actions than that required under § 1985(3) actions).

101. See *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); see *Frank & Munro*, *supra* note 77, at 164-65.

102. See, e.g., Cong. Globe, *supra* note 3, at 222 (statement of Sen. Thurman); *id.* at 485 (statement of Rep. Cook); *id.* at 514 (statement of Rep. Poland); *id.* app. at 187 (statement of Rep. Willard); *id.* app. at 252 (statement of Sen. Morton); *id.* app. at 313 (statement of Rep. Burchard); see *Original Purpose*, *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.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.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."¹⁰⁵

The Ku Klux Klan bill was amended in response to these objections.¹⁰⁶ Essentially, the new bill¹⁰⁷ deleted the enumeration of specific felonies, added civil penalties¹⁰⁸ and stated with greater specificity the violations traditionally within federal jurisdiction, including those pertaining to the judicial system.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.¹¹⁰ The drafters of the new bill, however, did not attach equal protection language to those provisions dealing with federal functions.¹¹¹ The debates demonstrate that Congress never questioned its authority to impose sanctions for interfering with federal institutions.¹¹² For example, Senator

103. See Frank & Munro, *supra* note 77, at 164-65.

104. Cong. Globe, *supra* note 3, at 485 (statement of Rep. Cook); see *Hughes v. Ranger Fuel Corp.*, 467 F.2d 6, 9-10 (4th Cir. 1972).

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.

106. Cong. Globe, *supra* note 3, at 477 (statement of Rep. Shellabarger); see *McCord v. Bailey*, 636 F.2d 606, 616 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981).

107. H.R. 320, 42d Cong., 1st Sess., Cong. Globe, *supra* note 4, at 477 (1871).

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).

109. *McCord v. Bailey*, 636 F.2d 606, 616 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981).

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.

111. See H.R. 320, 42d Cong., 1st Sess., Cong. Globe, *supra* note 3, at 477 (1871).

112. *McCord v. Bailey*, 636 F.2d 606, 617 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *accord Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1355

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

(9th Cir. 1981) ("No constitutional doubt with respect to the power of the federal government to protect [its judicial system] existed in 1871 nor does any exist today.").

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.*

116. *Kimble v. D.J. McDuffy, Inc.*, 102 S. Ct. 687, 689 (1981) (White, J., dissenting from denial of certiorari); *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1355 (9th Cir. 1981); *McCord v. Bailey*, 636 F.2d 606, 615-17 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981).

117. *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); Joint Memorandum of Appellees at 5, *McCord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980).

118. Cong. Globe, *supra* note 3, at 478 (statement of Rep. Shellabarger).

original Act in its entirety.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."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 2.¹²¹ Only then did he use the language mentioned above describing the "object of the amendment."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.¹²³ Clause one of section 1985(2) was relatively noncontroversial¹²⁴ and is clearly "sustainable by the old provisions of the Constitution."¹²⁵

119. *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); Joint Memorandum of Appellees at 5, *McCord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980).

120. Cong. Globe, *supra* note 3, at 478 (statement of Rep. Shellabarger).

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. *Id.* It is probable that, because Representative Shellabarger had only 10 minutes to present his argument, *id.*, he erred and intended to begin at clause two.

122. *Id.*

123. *Monroe v. Pape*, 365 U.S. 167, 180-81 (1961), *overruled on other grounds*, *Monell v. Department of Social Servs.*, 436 U.S. 658, 663 (1978); *see supra* notes 101-10 and accompanying text.

124. *See supra* notes 111-16 and accompanying text. In *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir.), *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 noncontroversial provisions which remained in Section 2." *Id.* at 1337 (citations omitted).

125. Cong. Globe, *supra* note 3, at 478 (statement of Rep. Shellabarger); *cf.* *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1339, 1341 & n.18 (7th Cir.) (Rep.

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 *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), *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, *supra* note 3, at 478 (Statement of Rep. Shellabarger). This further indicates that the section made other remedies available.

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

127. *McCord v. Bailey*, 636 F.2d 606, 614 n.12 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981).

128. U.S. Const. art. I, § 8, cl. 9.

129. *Id.* cl. 18.

130. *McCulloch v. Maryland*, 17 U.S. 159, 163, 4 Wheat. 315, 324-25 (1819); *accord Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976); *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966).

131. 17 U.S. 159, 4 Wheat. 316 (1819).

132. *Id.* at 163, 4 Wheat. at 324-25; *accord Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966); *James Everard's Breweries v. Day*, 265 U.S. 545, 558-59 (1924).

133. *McCord v. Bailey*, 636 F.2d 606, 614 n.12 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); see *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1341 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977); *Brawer v. Horowitz*, 535 F.2d 830, 839 (3d Cir. 1976); *Kelly v. Foreman*, 384 F. Supp. 1352, 1354-55 (S.D. Tex. 1974).

134. U.S. Const., art. I, § 4.

vote for federal officials, even if such conduct is not motivated by racial discrimination.¹³⁵ As the Supreme Court stated in *Ex Parte Yarbrough*,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.¹³⁷ This inherent governmental "power of self-preservation" has been extolled in a variety of other contexts.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,¹³⁹ the Supreme Court in *Griffin v. Breckenridge*¹⁴⁰ found other constitutional support for the statute.¹⁴¹ In *Griffin*, the Court deemed it unnecessary to find the first part of section 1985(3) facially constitutional in all its possible applications.¹⁴² Rather, the Court stated that a source of congressional power can be located on a case-by-case basis.¹⁴³ Authority to reach the particular injury in *Griffin* was found in the thirteenth amendment and the right to interstate travel.¹⁴⁴ The Court warned, how-

135. Fraenkel, *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); *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); *Ex parte Siebold*, 100 U.S. 371, 381-83 (1879) (same).

136. 110 U.S. 651 (1884).

137. *Id.* at 662.

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).

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).

140. 403 U.S. 88 (1971).

141. *Id.* at 104-07.

142. *Id.* at 104.

143. *Id.*; see *id.* at 107. The *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.

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

ever, that these sources of congressional power were not exclusive, and given a different set of facts, other constitutional provisions could be drawn upon.¹⁴⁵ 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.¹⁴⁶

identified as a source or congressional authority for § 1985(3). See *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1255 (3rd Cir. 1978) (en banc), *vacated on other grounds and remanded*, 442 U.S. 366 (1979).

145. *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. 987, 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*, 341 U.S. 651, 658, 661 (1951); *Shelly 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.*, 524 F.2d 818, 828-29 (7th Cir. 1975) (§ 1985(3) does not reach private conspiracies grounded on the fourteenth 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.*, 637 F.2d 743, 748 (10th Cir. 1980) (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. Bloemker*, 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*, 480 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. Cannon*, 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*¹⁴⁷ and numerous lower federal courts have reiterated the concern,¹⁴⁸ 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.¹⁴⁹ Although Congress has authority to regulate conduct in the federal courts,¹⁵⁰ it has been argued that clause one, by proscribing traditional state torts, has the potential to transgress the federalist policies¹⁵¹ embodied in the tenth amendment.¹⁵²

Clause one, however, cannot expand into a general federal tort law due to the inherent limitations of the federal court provisions.¹⁵³ The four causes of action created by clause one of section 1985(2) are quite specific¹⁵⁴ and have been strictly construed. To be actionable, a conspiracy¹⁵⁵ to deter parties or witnesses must be carried out by force,

giving full effect to the congressional purpose—by requiring . . . the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.” *Id.* at 101-02.

148. *E.g.*, *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 346-47 (5th Cir.) (en banc), *cert. denied*, 102 S. Ct. 687 (1981); *Jackson v. Cox*, 540 F.2d 209, 210 (5th Cir. 1976) (per curiam); *Hughes v. Ranger Fuel Corp.*, 467 F.2d 6, 9-10 (4th Cir. 1972); *Puentes v. Sullivan*, 425 F. Supp. 249, 252 (W.D. Tex. 1977); *Brainerd v. Potratz*, 421 F. Supp. 836, 839 (N.D. Ill. 1976), *aff'd mem.*, 566 F.2d 1177 (7th Cir. 1977); *Western Telecasters, Inc. v. California Fed'n of Labor*, 415 F. Supp. 30, 31 (S.D. Calif. 1976); *Jones v. United States*, 401 F. Supp. 168, 172 (E.D. Ark. 1975), *aff'd*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *Phillips v. Singletary*, 350 F. Supp. 297, 302 (D.S.C. 1972).

149. *See supra* notes 101-05 and accompanying text.

150. *See supra* notes 127-29 and accompanying text.

151. *See Taylor v. Nichols*, 409 F. Supp. 927, 933 (D. Kan. 1976), *aff'd*, 558 F.2d 561 (10th Cir. 1977); *Egan v. City of Aurora*, 174 F. Supp. 794, 798 (N.D. Ill. 1959), *aff'd*, 275 F.2d 377 (7th Cir. 1960), *modified on other grounds*, 365 U.S. 514 (1961).

152. U.S. Const. amend. X; *see Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 345-46 (5th Cir.) (en banc), *cert. denied*, 102 S. Ct. 687 (1981); *Taylor v. Nichols*, 409 F. Supp. 927, 933 (D. Kan. 1976), *aff'd*, 558 F.2d 561 (10th Cir. 1977); *Jones v. United States*, 401 F. Supp. 168, 172-73 (E.D. Ark. 1975), *aff'd*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *Egan v. City of Aurora*, 174 F. Supp. 794, 798 (N.D. Ill. 1959), *aff'd*, 275 F.2d 377 (7th Cir. 1960), *modified on other grounds*, 365 U.S. 514 (1961).

153. *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1355 (9th Cir. 1981); *see Brown v. Chaffee*, 612 F.2d 497, 502 (10th Cir. 1979); *Britt v. Suckle*, 453 F. Supp. 987, 995-96 (E.D. Tex. 1978). In contrast, an equal protection denial purpose is required in clause two of § 1985(2) and clause one of § 1985(3) because the broad coverage of those provisions potentially creates a general federal tort law. *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1355 (9th Cir. 1981); *Britt v. Suckle*, 453 F. Supp. 987, 996 (E.D. Tex. 1978); *see Phillips v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 556 F.2d 939, 940-41 (9th Cir. 1977).

154. *See 42 U.S.C. § 1985(2)* (Supp. III 1979), *quoted supra* note 8. Clause one requires a conspiracy a) undertaken in a particular manner—by force, intimidation or threat; b) directed only at particular persons—parties, witnesses or jurors; c) to deter them from engaging in particular activities—attending, testifying or rendering a verdict; or d) to injure them on account of their having engaged in those activities. *Id.*

155. The existence of a conspiracy is a *sine qua non* to a cause of action under any part of § 1985. *See Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971); *Dacey v. Dorsey*, 568 F.2d 275, 277 (2d Cir.), *cert. denied*, 436 U.S. 906 (1978); *Serzysko v.*

intimidation, or threat.¹⁵⁶ Thus, it has been held that covert retaliatory conduct such as employment discrimination is not within the scope of the Act.¹⁵⁷ 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.¹⁵⁸ Finally, the individual must

Chase Manhattan Bank, 461 F.2d 699, 703 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972); *Croy v. Skinner*, 410 F. Supp. 117, 126 (N.D. Ga. 1976). Some courts have narrowly construed the conspiracy requirement by holding that a business entity, when all defendants are employed therein, cannot conspire with itself. *See, e.g.*, *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1370 (W.D. Pa. 1977); *Girard v. 94th St. & Fifth Ave. Corp.*, 396 F. Supp. 450, 455-56 (S.D.N.Y.), *aff'd*, 530 F.2d 66 (2d Cir. 1975), *cert. denied*, 425 U.S. 974 (1976). *Contra* *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1256-59 (3d Cir. 1978), *vacated and remanded*, 442 U.S. 366 (1979). For a discussion of this issue, see Note, *Intracorporate Conspiracies Under 42 U.S.C. § 1985(c)*, 92 Harv. L. Rev. 470 (1978). The existence of a conspiracy is a factual question, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 176 (1970) (Black, J., concurring), but an allegation that two or more defendants agreed to perform the proscribed act is generally sufficient. *E.g.*, *Crawford v. Houston*, 386 F. Supp. 187, 192 n.2 (S.D. Tex. 1974). Additionally, an overt act in furtherance of the conspiracy must be alleged under any subsection of § 1985. 42 U.S.C. § 1985(3) (Supp. III 1979), *quoted supra* notes 7-9; *see* *Griffin v. Breckenridge*, 403 U.S. 88, 103 (1971); *Kitchen v. Crawford*, 326 F. Supp. 1255, 1262 (N.D. Ga. 1970), *aff'd per curiam*, 442 F.2d 1345 (5th Cir.), *cert. denied*, 404 U.S. 956 (1971).

156. 42 U.S.C. § 1985(2) (Supp. III 1979), *quoted supra* note 8.

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 publicizing 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.¹⁵⁹ The paucity of cases that have arisen under clause one is a further indication of the narrowness of its scope.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 1985.¹⁶¹

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

absent), *cert. denied*, 434 U.S. 975 (1977); *Kelly v. Foreman*, 384 F. Supp. 1352, 1355 (S.D. Tex. 1974) (direct effect requirement not applied). Thus, the "direct inducement" element announced in *Brawer* seems to require that the juror be aware of the inducement and affirmatively change his verdict because of it.

159. *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 348 (5th Cir.) (en banc), *cert. denied*, 102 S. Ct. 687 (1981); see *Brown v. Chaffee*, 612 F.2d 497, 502 (10th Cir. 1979). The Fifth Circuit in *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 *physically* attend or testify in federal court. *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." *Id.* at 354. Further, a party is present in federal court when his attorney, as agent or substitute for the client, files a claim. *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. *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), *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. 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.").

160. Research has uncovered only seven reported cases brought under clause one of § 1985(2). *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345 (9th Cir. 1981); *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340 (5th Cir.) (en banc), *cert. denied*, 102 S. Ct. 687 (1981); *McCord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Jones v. United States*, 536 F.2d 269 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *Brawer v. Horowitz*, 535 F.2d 830 (3d Cir. 1976); *Local No. 1 (ACA) v. International Bhd. of Teamsters*, 419 F. Supp. 263 (E.D. Pa. 1976); *Kelly v. Foreman*, 384 F. Supp. 1352 (S.D. Tex. 1974).

161. 42 U.S.C. § 1985(3) (Supp. III 1979), *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.¹⁶² The nexus between the proscribed activities and the federal courts is sufficient to justify the regulation.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.

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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162. See *McCord v. Bailey*, 636 F.2d 606, 614 (D.C. Cir. 1980) (clause one "does not demand a denial of 'equal protection of the laws' . . . to avoid constitutional shoals" (footnote omitted)), *cert. denied*, 451 U.S. 983 (1981).

163. *Brawer v. Horowitz*, 535 F.2d 830, 840 (3d Cir. 1976).