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42 U.S.C. § 1985 (3)—A Private Action to Vindicate Fourteenth Amendment Rights: A Paradox Resolved

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42 U.S.C. § 1985(3) provides citizens with a cause of action against private conspiracies to violate constitutional rights. No state action prerequisite exists for such lawsuits. However, a paradox occurs when the citizen seeks to use this remedy to vindicate the fourteenth amendment right to equal protection of the laws because such rights do not exist in the absence of state involvement. This article seeks to resolve this paradox by suggesting that private conspiracies to violate equal protection rights do exist and that Congress had the authority to provide citizens with a remedy against such conspiracies.

The "Ku Klux Klan Act," enacted as part of the Civil Rights Act of 1871 and now codified as 42 U.S.C. § 1985(3) (1976),¹ continues

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1. The 1976 edition of the United States Code codifies the section which is the subject of this article as § 1985(c). The Revised Statutes refer to the relevant section as (3), not (c). This number and letter difference has generated some confusion as to proper designation of the section in recent cases and law review articles concerning the section. Because the Revised Statutes are primary laws, this article will consistently refer to the statute as § 1985(3). There is, however, no difference between § 1985(c) and § 1985(3). The complete text of 42 U.S.C. § 1985(3) (1976) (Rev. Stat. § 1980 (1878)) 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 au-
to present analytic challenges to lawyers and judges more than 100 years after its passage. The Act permits an aggrieved citizen to sue private individuals who have conspired to deprive the citizen of constitutional rights. Because of difficulties in interpretation, the statute had been infrequently used. This article seeks to clarify a central issue that has presented federal courts with particular difficulty in litigation arising under the statute: how to analyze whether section 1985(3) may be used against conspirators who seek to deny a citizen's right to equal protection of the laws under the fourteenth amendment. A clarification of this issue should increase the usefulness of the statute.

The issue arose following the United States Supreme Court's holding in Griffin v. Breckenridge that no showing of state action is required in order to sue under section 1985(3). This holding has created two problems concerning conspiracies to violate fourteenth amendment rights. The first problem is conceptual: Does the statutory language reach conduct by private individuals to deprive a citizen of equal protection of the laws as protected by the fourteenth amendment when that right to equal protection under 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.

2. See Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979). This article does not directly address the question left undecided by Novotny, whether a conspiracy to violate a federal statutory right can serve as the underlying basis of a § 1985(3) claim. However, the analysis of this article may provide a framework for addressing that issue.

3. Id. at 371. See also Collins v. Hardyman, 341 U.S. 651, 656 (1951).

4. Although this article focuses on conspiracies to deny constitutional rights protected by the fourteenth amendment, the analysis put forth here is also applicable to § 1985(3) conspiracies to deny constitutional rights protected by other amendments. See, e.g., Murphy v. Mount Carmel High School, 543 F.2d 1189, 1194 (7th Cir. 1976).


the fourteenth amendment does not exist in the absence of state involvement? Second, even if such a fourteenth amendment violation is possible and is reached by the statutory language of section 1985(3), a legal issue remains: Does Congress have the authority to enact legislation such as section 1985(3) to provide a remedy for such violations? Thus, if a citizen seeks to sue conspirators under section 1985(3) for violating the citizen's fourteenth amendment right to equal protection of the laws, a conceptual and legal paradox is created. The essence of the paradox is that, although the Griffin opinion implies that state action violating a plaintiff's constitutional right is not necessary to sue under section 1985(3), the constitutional right allegedly violated—the right to equal protection of the laws under the fourteenth amendment—does not exist in the absence of state involvement. This issue did not arise until Griffin was decided because the statute had not been interpreted as providing citizens with a remedy against acts by private individuals.7

It is the thesis of this article that a private action to vindicate fourteenth amendment rights that are violated by private conspiracies is constitutional and was precisely the sort of remedy that Congress intended to create by enacting section 1985(3). The paradox is resolved conceptually because this type of action is clearly possible, and the paradox is resolved legally because this type of action is constitutional.

THE CONCEPTUAL PARADOX RESOLVED: A PRIVATE ACTION TO VINDICATE FOURTEENTH AMENDMENT RIGHTS VIOLATED BY PRIVATE CONSPIRACIES

A conceptual paradox is created by the notion of a private action by a citizen to vindicate fourteenth amendment rights which have been violated by a private conspiracy. One must examine the statutory language to determine whether this sort of conduct can be reached by the statute.

The statutory construction of section 1985(3) was not fully considered by the United States Supreme Court until 1951 in Collins 7. There are many examples of why a citizen might seek redress against private conspiracies to deprive the citizen of the equal protection of the laws. The Ku Klux Klan, after which the act was named, historically has been a private group that directed its activities against black citizens or citizens involved in civil rights work. See text accompanying notes 15-18 infra.
In that opinion the Court decided that the section protected citizens only from those conspiracies that impaired the plaintiff's right to equal protection of the laws. The Court reasoned that state action was required because the fourteenth amendment did not shield against "merely private conduct." This holding was interpreted as imposing a state action requirement on suits brought under the section.

Justice Burton, joined in dissent by Justices Black and Douglas, argued in *Collins*: "Congress certainly has the power to create a federal cause of action in favor of persons injured by private individuals through the abridgment of federally created constitutional rights." The dissenters also pointed out that when Congress intended to limit comparable civil rights statutes to require that a defendant had acted under color of state law, it did so in "unmistakable terms." The dissenters compared the color of law language that appeared explicitly in another section of the same civil rights act, the section now codified as 42 U.S.C. § 1983, with the absence of such language in section 1985(3).

Twenty years later, this dissenting view of section 1985(3) was vindicated in *Griffin v. Breckenridge*, when the Court decided that section 1985(3) did provide a remedy for damages caused by private conspiracies that did not operate under color of state law. The *Griffin* court set out these elements to guide judges in determining whether a complaint stated a cause of action under section 1985(3):

To come within the legislation a complaint must allege that the defendants did (1) 'conspire or go in disguise on the highway or on the premises of another' (2) 'for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.' It must then assert that

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8. 341 U.S. 651 (1951). See also Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 371 n.8 (1979), which mentions two earlier cases that stated claims based on predecessors of the section but that were not fully considered by the Court. For a discussion of the early history of the statute, see Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1355-57 (1952).
9. Collins v. Hardyman, 341 U.S. 651, 658 (1951) (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)) (emphasis added). In *Collins*, plaintiffs, members of a political club planning to meet and oppose the Marshall plan, claimed that defendants conspired to deprive them of constitutional rights by interfering with their meeting.
10. 341 U.S. at 663-64 (Burton, J., dissenting).
11. Id. at 664.
12. Id.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
one or more of the conspirators (3) did, or caused to be done, 'any act in
furtherance of the object of [the] conspiracy,' whereby another was (4a)
'injured in his person or property' or (4b) 'deprived of having and exercis-
ing any right or privilege of a citizen of the United States.'\(^{14}\)

The Court's description of elements (1), (3), and (4) of the cause
of action are taken directly from the statutory language. The first
element is simply the allegation that a conspiracy existed; the
third requires an allegation of the act in furtherance of that con-
spiracy; and the fourth is a recitation of those damages or injuries
caused by the conspiracy.

It is the second or "purpose" element of the conspiracy cause of
action that is the source of the paradoxical concept of a private
conspiracy to deprive a citizen of the equal protection of the laws
as protected by the fourteenth amendment. In characterizing the
second element of the cause of action, the Court ignored this pas-
sage in the statutory language: "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 Terri-
tory the equal protection of the laws."\(^{15}\) The omitted statutory
language suggests a partial resolution of the paradox, at least con-
ceptually, by describing a possible manner in which private indi-
viduals may conspire so that a citizen's right to equal protection
would be infringed.

The legislative history of section 1985(3) supports the notion
not only that conspiracies by private individuals to deprive citi-
zens of the fourteenth amendment right to equal protection of the
laws were conceptually possible but also that the statute was en-
acted to protect citizens against precisely such a deprivation. At
the time the statute was passed, the Ku Klux Klan and private indi-
viduals had acted to subvert state law enforcement mechanisms
and to insure unequal application of state laws. The response by
Congress to this unlawfulness, officially entitled "Act to Enforce
the Provisions of the Fourteenth Amendment to the Constitution
of the United States, and for Other Purposes," was necessary be-
cause state governments were unwilling or unable to enforce
their own laws equally on behalf of all classes of citizens.\(^{16}\) The


\(^{16}\) See Frank & Munro, The Original Understanding of "Equal Protection of
the Laws," 50 COLUM. L. REV. 131, 163-65 (1950); Frantz, Congressional Power to En-
force the Fourteenth Amendment Against Private Acts, 73 YALE L.J. 1353, 1354-56
(1964).
members of Congress believed it was the proper and constitutionally mandated role of the federal government to assure that the states applied their laws equally.

Congress was faced with the situation in which classes of citizens were systematically deprived of their rights under state law by private individuals, and the states were not protecting their citizens against these violations. As Representative Coburn emphasized, the governors of eight states had invoked the aid of the federal government to repress the Klan between 1868 and 1870.\textsuperscript{17} He stated:

\begin{quote}
[T]here is a pre-concerted and effective plan by which thousands of men are deprived of the equal protection of the laws. 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. This condition of affairs extends to counties and States; it is, in many places, the rule, and not the exception.\textsuperscript{18}
\end{quote}

To the majority in Congress, the failure or neglect of a state to enforce its laws on behalf of classes of its citizens amounted to a denial of equal protection of the laws. As Representative Garfield commented:

\begin{quote}
[I]t appears that in some of the southern States there exists a widespread secret organization whose members are bound together by solemn oaths to prevent certain classes of citizens of the United States from enjoying these new rights conferred upon them by the Constitution and laws; that they are putting into execution their design of preventing such citizens from enjoying the free right of the ballot box and other privileges and immunities of citizens, and from enjoying the equal protection of the laws.
\end{quote}

\begin{quote}
... [T]he chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.\textsuperscript{19}
\end{quote}

The legislators recognized that the constitutional guarantee of equal protection of the laws was an assurance not only against the passage of discriminatory laws, but also against the inequitable enforcement of facially neutral statutes. Congress believed that this \textit{unequal application} of state law caused by private individuals tampering with the states' enforcement mechanisms justified remedial legislation. Otherwise, the guarantees of the fourteenth amendment would be ineffectual, as Representative Wilson maintained:

\begin{quote}
A refusal to legislate equally for the protection of all would unquestionably be a denial [of equal protection]. This conceded, upon what ground can it be pretended that a refusal to execute, or a failure to do so, through inability, equally with reference to all persons, is not also a denial? I maintain, therefore, that the true meaning of this constitutional provision
\end{quote}

\begin{itemize}
\item \textsuperscript{17} CONG. GLOBE, 42d Cong., 1st Sess. 456-57 (1871).
\item \textsuperscript{18} Id. at 459.
\item \textsuperscript{19} Id. at 153 app.
\end{itemize}

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is that the State shall afford equal protection to all persons within its jurisdic-

tion.

Failing to do this, whether that failure is the result of inaction or inability on the part of the one or the other of the coordinate branches of the State government, the remedy lies with Congress. .... Whenever it appears that any State has failed to discharge this high constitutional obligation to all of its citizens, it is not only within the power, but it is the solemn duty of Congress to enforce the protection which the State withholds.

Having concluded that federal enforcement legislation was justified and necessary, Congress decided that the remedy should operate directly against the individuals who interfered with the constitutional rights of citizens. By enforcing the laws directly against these individuals, the federal government would assist the states in meeting their constitutional obligations, rather than interfere with the states' attempts to enforce their own laws. Again the legislative history reflects congressional concern:

Shall we deal with individuals, or with the State as a State? If we can deal with individuals, that is a less radical course, and works less interference with local governments. To punish a particular individual is less troublesome than to set aside a whole State government, declare martial law, suspend the writ of habeas corpus, and substitute, generally, national for State authority.

It appears that Congress determined that private action was interfering with enjoyment of fourteenth amendment rights and that it would be better to provide a remedy against the private action than to disrupt the state governments' own processes. Congress enacted the predecessor of title 42 U.S.C. § 1985(3), which prohibited private conspiratorial conduct. Congress recognized that men who "go in disguise upon the public highway, or upon the premises of another" are not likely to be acting in official capacities. The Forty-second Congress believed it had both the constitutional power and the obligation to prevent private conduct from interfering with the guarantees of the fourteenth amendment.

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20. Id. at 482 (emphasis added).
21. Id. at 459.
Even though the Forty-second Congress clearly intended to enact a statute that would reach private conspiracies to deprive citizens of fourteenth amendment rights, the question remains whether Congress has the constitutional power to reach private conduct. The fact that the private conduct regulated is a conspiracy rather than individual-action makes no difference for constitutional purposes.

In *Griffin v. Breckenridge*, the Court articulated a clear position that section 1985(3) was a remedial statute that was constitutional on its face and that reached private conspiracies to deprive citizens of civil rights. The Court stated: "That § 1985(3) reaches private conspiracies to deprive others of legal rights can, of itself, cause no doubts of its constitutionality." Thus according to *Griffin*, state action is not required in order to bring a suit under section 1985(3). Yet if the constitutional right that is violated is the right to equal protection of the laws, section 1 of the fourteenth amendment indicates that those rights are violated only if a state "shall make or enforce any law [which denies] to any person within its jurisdiction the equal protection of the laws." It would appear that the state must be involved in order to find a fourteenth amendment violation. The question then becomes: what is the nature of this state involvement?

The Court in *Griffin* recognized that a conceptual problem was created by its ruling that no state action was required under section 1985(3):

A century of Fourteenth Amendment adjudication has... made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State. Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of *all* deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' whatever their source.

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25. The relevant text of § 1 of the fourteenth amendment provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The Court emphasized that the violation of a fourteenth amendment right by private conduct could serve as the basis of a section 1985(3) suit or at least that it was conceptually possible. The Court declined, however, to consider the constitutionality of such a section 1985(3) action.

As to the source of congressional authority to reach this private conduct, the legal aspect of this paradox, the Court indicated that the constitutionality of the statute would best be decided on a case-by-case basis: "Consequently, we need not find the language of § 1985(3) now before us constitutional in all its possible applications in order to uphold its facial constitutionality and its application to the complaint in this case."27 The Court proceeded to identify the source of congressional power to reach the private conspiracy by white defendants to assault black plaintiffs alleged in the Griffin complaint as the thirteenth amendment and the constitutional right of interstate travel.28 These rights are not premised on a requirement of state action or involvement.29 Thus, in Griffin, the Court did not have to consider the constitutional question of whether Congress had the power to reach private conspiratorial conduct that violated fourteenth amendment rights.

There are three possible analytic positions relating to the resolution of this paradox and to Congress' power under section 5 of the fourteenth amendment30 to reach private conspiratorial conduct to deny fourteenth amendment rights following Griffin. Essentially, they are that under the Constitution, section 1985(3) covers no such conduct, all such conduct, or something in between.

The first position, the most narrow interpretation, would be that Congress cannot constitutionally reach, by means of section 1985(3), private conspiracies to violate fourteenth amendment rights. Adherents of this position would argue that section

27. Id. at 104. This position by the Court at first glance appears counter intuitive—how can the constitutional basis for enacting a statute change depending on the set of facts alleged in a particular case? However, the cases have made clear that § 1985(3) is a remedial statute; it does not create any rights that are not already in existence. It merely provides a vehicle for vindicating those rights that already exist. Thus it is only a constitutional vehicle to remedy violations of constitutional rights, if Congress could reach the prohibited conduct under the Constitution.
28. See id. at 105-06. Justice Harlan concurred specially to say that he did not rely on the right to travel to reach the result that the statute was constitutional.
29. Id.
30. For the text of § 5, see note 25 supra.
1985(3) can be used to reach fourteenth amendment rights only if there has been state action. This interpretation appears to be precluded by some of the language of the *Griffin* opinion itself.31

At the opposite extreme, one could argue that section 1985(3) provides a remedy against *all* private conduct in which individuals have conspired to violate a citizen's constitutional right to equal protection. This argument is based upon the theory that Congress is authorized to create substantive statutory rights in furtherance of the goals of the fourteenth amendment.32 Although this is an attractive civil libertarian position, it is of dubious constitutional merit based on decisions at this time.33

Finally, a middle position between these two extremes is possible. Section 1985(3) provides a remedy against private conduct to violate constitutional rights if an element of state involvement is present to trigger the fourteenth amendment violation. There would be no fourteenth amendment violation unless the state were involved, but this involvement need not necessarily be at a level that would constitute state action for other fourteenth amendment litigation purposes, such as a suit filed under section 1983.34

This middle position can be illustrated by example. Suppose, first, that a group of private individuals conspire to prevent a victim from attending a private school. This conduct would be an example of a private conspiracy that violates no constitutional right.


33. There have been decisions that reached private conduct that interfered with constitutional rights. In relation to a state constitution, see Gay Law Students v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 116 Cal. Rptr. 14 (1979).

Although this conduct is socially undesirable, the fourteenth amendment is not offended by this private behavior.\textsuperscript{35}

Suppose that this same group of private individuals conspires to prevent the victim from attending a public school. The fourteenth amendment protects the individual's right to attend the school from infringement by the state. The state is also involved in the creation of the right that is being infringed—the state has created the school for the purpose of allowing all citizens equal access to the school. The manipulation of and interference with the state purpose by private persons, who would conspire to frustrate the citizens' enjoyment of these rights, is precisely the type of conduct that Congress sought to protect citizens against by enacting section 1985(3). Thus the state must be involved in creating the right that has been infringed for a section 1985(3) violation to exist, but it is not necessary that the state \textit{by its action} interfere with the citizen's enjoyment of the right.

Notice that the state's involvement in the latter example is probably not at a level that would be called "state action" for other fourteenth amendment litigation purposes.\textsuperscript{36} The citizen could not sue the state for violating the individual's fourteenth amendment right. This is appropriate because the state has done no wrong. It has been, in a sense, a victim of the private conspiracy along with the citizen because one of its citizens is not receiving equal treatment under the law. The state is duped by the existence of the conspiracy.

Congress has broad enforcement power under section 5 of the fourteenth amendment\textsuperscript{37} and is "chiefly responsible"\textsuperscript{38} for implementing the rights which the amendment guarantees. Under section 5, Congress is authorized to "exercise its discretion in determining whether and what legislation is needed to secure the

\textsuperscript{35} In Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971), the court found that Congress constitutionally could remedy under the fourteenth amendment an alleged private conspiracy by militant black organizations to prevent whites from attending a church, where they would not admit blacks to services. It is difficult to avoid the conclusion that the court's eagerness to find that Congress had the constitutional power to reach this private conduct was motivated by a political view of the fact situation. However, several other circuits have held that § 1985(3) suits may reach private conduct. See Westberry v. Gilman Paper Co., 507 F.2d 206 (5th Cir.), \textit{vacated}, 507 F.2d 216 (5th Cir. 1975); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971).

\textsuperscript{36} \textit{See} note 34 \textit{supra}.

\textsuperscript{37} For the text of § 5, see note 25 \textit{supra}.

\textsuperscript{38} South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966).
guarantees of the Fourteenth Amendment.\textsuperscript{39} Great deference is to be accorded to the congressional determination of what measures are appropriate in order to secure the constitutional objective.\textsuperscript{40}

Thus, the power of Congress under section 5 to enact legislation is not limited to the language of the amendment, which when read literally appears to apply only to states. The enumerated powers in the Constitution specify the permissible goals or ends of congressional legislation. Congress may select the method or means that will most effectively achieve the constitutional objective. The classic formulation of the test by Chief Justice Marshall appeared in \textit{McCulloch v. Maryland}: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."\textsuperscript{41} It seems that in exercising the enforcement powers provided under section 5, "Congress is not limited to remedying inequalities which the courts would determine to be violative of the Constitution. It may prohibit conduct which would not otherwise be unlawful in order to secure the guarantees of the Fourteenth Amendment."\textsuperscript{42}

Several cases shed light on this problem of congressional power to bypass the state action requirement of the fourteenth amendment and to reach directly to private conspiracies to deprive a citizen of the equal protection of the laws. These cases suggest that as long as the state has been involved somehow with the right that is being denied, Congress may constitutionally act to protect the citizen from the deprivation of the right by private individuals.

In \textit{United States v. Guest},\textsuperscript{43} a criminal case brought under 42 U.S.C. \textsection 241, described as "the closest remaining criminal analogue to \textsection 1985(3),"\textsuperscript{44} the Court had the opportunity to construe an allegation of a private conspiracy to deprive blacks of equal utilization of public facilities.\textsuperscript{45} Commenting that this allegation was

\textsuperscript{40} Id. at 653. Many cases support the notion that congressional determinations are presumptively constitutional. See, e.g., \textit{Leary v. United States}, 395 U.S. 6, 36 (1969); \textit{Adkins v. Children's Hosp.}, 261 U.S. 525, 544 (1923).
\textsuperscript{41} \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 421 (1819).
\textsuperscript{43} 383 U.S. 745 (1966).
\textsuperscript{44} Griffin v. Breckenridge, 403 U.S. 88, 98 (1971).
\textsuperscript{45} United States v. Guest, 383 U.S. 745, 753 (1966). The entire indictment appears in footnote 1 of the opinion.
“embracing rights protected by the Equal Protection Clause of the Fourteenth Amendment,” the Court found that Congress had the power to remedy, in this instance by means of criminal punishment, the violation of these constitutional rights.

The Court did not accept the argument that the indictment should be dismissed because it contained no allegation that anyone acted under color of state law. The Court noted that although rights under the equal protection clause arise only where there has been involvement of the state or someone acting under color of its authority, the involvement of the state need not be either exclusive or direct. Although the Court declined to address the issue of the level of state involvement required to create rights under the equal protection clause, it seems clear from the four opinions filed in *Guest* that direct state action is not required by section 5 of the fourteenth amendment. Rather, it was sufficient that there was some state involvement, which would be necessary in order to create the fourteenth amendment right. In *Guest* the state had provided the facility to which the victims of the conspiracy were denied equal access.

This state involvement analysis has been followed by several circuit courts. In the Seventh Circuit case of *Dombrowski v. Dowling*, a white lawyer engaged in the practice of criminal law brought a section 1985(3) suit against the managers of a building in which he sought to rent office space, alleging discrimination based on the race of his clients. The court, in denying the existence of a section 1985(3) claim, found that arbitrary business discrimination against lawyers is not an equal protection violation “if there is no state involvement whatsoever in the discrimination.” Here, the Seventh Circuit looked for state involvement, rather than state action, as a necessary basis for a section 1985(3) suit involving a fourteenth amendment violation.

46. *Id.* No allegation of state involvement had been made in *Griffin*, so the Court could not easily have based the constitutionality of § 1985(3) on the fourteenth amendment in that case.

47. 383 U.S. at 755.

48. The concurrence by Justice Clark in *Guest* lends credence to the argument that § 5 empowers Congress to enact laws punishing all conspiracies with or without state action—the second analytic alternative discussed in the text.


50. 459 F.2d 190 (7th Cir. 1972).

51. *Id.* at 196. See also *Murphy v. Mount Carmel High School*, 543 F.2d 1189, 1194 (7th Cir. 1976).
The affirmance by the Fourth Circuit of the dismissal of plaintiff's section 1985(3) cause of action in *Bellamy v. Mason's Stores, Inc.* was also supported by a "state involvement" analysis of the requirement for bringing a cause of action under the section. The court wrote: "Although it is clear that state action is not necessarily an essential ingredient under this statute, nevertheless we think that some state involvement is necessary in this particular application of the statute in order to maintain a cause of action." The plaintiff in that case had alleged a deprivation of his first amendment right to free association, arguing he had been fired from his employment because he was a member of the Ku Klux Klan. The court found no involvement of the government in this deprivation of free association and held that the suit could not be brought under section 1985(3).

In both *Dombrowski* and *Bellamy*, the plaintiffs' section 1985(3) claims were dismissed because they had made no showing of state involvement in the deprivation of their constitutional rights. There are few examples of section 1985(3) cases that allege sufficient state involvement to support the claimed deprivation of the fourteenth amendment right to equal protection of the laws that do not also have the additional component of state action that would be sufficient for a section 1983 suit.

An example of a section 1985(3) suit against defendants for a private conspiracy to deprive a citizen-plaintiff of the fourteenth amendment right to the equal protection of the laws, which usually requires state involvement, is illustrated in a modern context by *Life Insurance Co. of North America v. Reichardt*. *Reichardt* suggests a new frontier upon which the struggle by citizens to secure their constitutional rights may occur.

Plaintiff Ms. Reichardt alleged a conspiracy by insurance companies under section 1985(3) to discriminate against women in

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52. 508 F.2d 504 (4th Cir. 1974).
53. Id. at 506.
54. See, e.g., *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975), where the plaintiff, who was waiting to see a presidential motorcade and was carrying a sign critical of the president, sued the police who forcibly took the sign from her under both §§ 1985(3) and 1983.
55. 591 F.2d 499 (9th Cir. 1979). The first district court opinion in the case is reported sub nom. *Reichardt v. Payne*, 396 F. Supp. 1010 (N.D. Cal. 1975). On December 14, 1979, after this article had been accepted for publication, the district court issued an opinion sub nom. *Reichardt v. Life Ins. Co. of America*, 485 F. Supp. 56 (N.D. Cal. 1979), granting defendants' motion to dismiss. The court found that plaintiff's claim about unequal enforcement of the state insurance act, which had been argued in the briefs opposing the motion to dismiss, was "far from the plain gravamen of the [original] complaint..." 485 F. Supp. at 63. In dismissing the case, the court noted that plaintiff could pursue her claim in the California state courts where she had a similar action pending.
the sale of disability insurance as to the terms, conditions, and rates of that insurance. She also alleged a section 1983 claim against the state insurance commissioner which the Ninth Circuit dismissed, holding that there was insufficient state action to support a section 1983 cause of action.\textsuperscript{56} The Ninth Circuit retained the section 1985(3) claim.

In analyzing the existence of a section 1985(3) claim against insurance companies, the Ninth Circuit focused on the second prong of the \textit{Griffin v. Breckenridge} test which, according to the Court’s analysis, required two elements: (1) the violation of a protected right and (2) an invidiously discriminatory class-based animus motivating the violation.\textsuperscript{57}

The Ninth Circuit acknowledged that “what might constitute a deprivation of equal protection by private persons” was not clearly articulated by the Court in \textit{Griffin},\textsuperscript{58} but found such a deprivation of equal protection in the denial to plaintiff Reichardt of her entitlement to be free from private acts of discrimination as guaranteed by the state through the California Civil Rights Act.\textsuperscript{59}

It would appear that this separate state civil rights statute prohibiting discrimination is not necessary to the analysis in order for a section 1985(3) conspiracy suit to be constitutional because state involvement exists regardless of the civil rights statute. The State of California had established an insurance commission for reviewing insurance policy forms. The Ninth Circuit held that the mere approval by the Commissioner of the policy forms did not constitute state action for purposes of the section 1983 cause of action. But this state involvement, although

\textsuperscript{56} Life Ins. Co. of America v. Reichardt, 591 F.2d 499, 502 (9th Cir. 1979).
\textsuperscript{57} Id. at 502-03. Critics, opposing the interpretation of § 1985(3) to provide re

dress for private conspiracies to violate fourteenth amendment rights in cases of state involvement, argue that such a view will open the floodgates, swamping the federal courts with enforcing a general federal tort remedy. The requirement that the conspiracy be motivated by a class animus should insure that the section will be used only in those situations where federal intervention is warranted to vindicate the constitutional rights of the powerless. See Comment, \textit{A Construction of Section 1985(c) in Light of Its Original Purpose}, 46 U. Chi. L. Rev. 402, 429-32 (1979).

\textsuperscript{58} 591 F.2d at 503.

\textsuperscript{59} Id. at 504-05. \textsc{Cal. Cmws. & Cods} § 51 (West Supp. 1979) provides: “All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”
not sufficient for section 1983, is sufficient as state involvement for purposes of a section 1985(3) suit.

In the Reichardt case, the state, by creating the Insurance Commission and the set of regulatory laws, had the obligation to see that the Commission operated equally in relation to all its citizens. No disability insurance policy could issue until the Commissioner had approved the rates and form of the policy. Plaintiff alleged in her complaint that because of defendant's conspiracy, the state was being hindered in operating equally in relation to all its citizens. This type of problem, translated into a modern context, is precisely the sort of conspiratorial conduct for which Congress sought to provide a federal remedy. The state again is the dupe of the conspiracy and that federal remedy is constitutional, as long as the state was involved in creating the right that has been infringed. The state is allegedly being manipulated by a private conspiracy, here of insurance companies, which is frustrating the state's ability to ensure that a citizen receives equal protection of the laws. The operation of the State Insurance Commissioner is impaired. Creation of this federal remedy to protect this constitutional right from violation is

60. As the district court noted in Reichardt v. Payne:

Section 10291.5 of the California Insurance Code deals with the Commissioner's power to disallow disability policies. The section provides in pertinent part, as follows: "Policies not to be approved: Rules and Regulations: Withdrawal of approval: Review: Construction of section: When effective: Presumption: Application of section. (a) The purpose of this section is to prevent, in respect to disability insurance, fraud, unfair trade practices, and insurance economically unsound to the insured. (b) The commissioner shall not approve any disability policy for issuance or delivery in this state:

(13) If it fails to conform in any respect with any law of this state."


61. Id. The opinion goes on to describe the responsibilities of the State Insurance Commissioner as follows:

Section 10290 provides that no disability policy can issue until the Commissioner has approved the rates and the form of the policy. Section 10291.5(b) (13) provides that the Commissioner shall not approve a disability policy that fails to conform in any respect with any law of the State of California. Section 10291.5(g) makes it clear that the code section is to be applied liberally and Section 10401 makes it a misdemeanor for any disability insurer to permit discrimination between insureds of the same class. This section provides that: "Any incorporated insurer admitted for disability insurance and any agent of such insurer, that makes or permits discrimination between insureds of the same class in any manner whatsoever with relation to such insurance, is guilty of a misdemeanor ...." Although the Commissioner is prohibited from fixing or regulating rates for disability policies under Section 10291.5(g), the Commissioner still has the power and the duty under Sections 10291.5(b) (13) and 10401 of the Insurance Code to disapprove altogether a discriminatory disability policy.

Id. at 1014-15 (footnotes omitted) (emphasis added by the court).
Although the equal protection clause commands no state to deny its citizens the equal protection of the laws, private individuals, groups of private individuals, or nongovernmental bodies, such as corporations, all potentially may hinder a state’s effort to assure rights under the fourteenth amendment to its citizens. Section 1985(3) provides a remedy to citizens for infringement of the right to equal protection of the laws in all but the first situation in which one individual attempts to hinder state efforts and in which there is no conspiracy.63

Conspiracies by groups of individuals or by corporations may potentially invade a citizen’s constitutional rights in a far more serious way than direct action by government to infringe those rights. The treatment of corporations as individuals,64 rather than as the powerful entities that they are, makes the task of developing a jurisprudence of civil rights that affords human individuals the protections envisioned by the Constitution an urgent one.

Congress had used its power as early as 1871 to enact a federal remedy for conspiracies to deny citizens their fundamental rights. It remains the challenge of the twentieth century to see that this remedy is utilized.

62. See text accompanying notes 37-51 infra.