CONSTITUTIONAL LAW—STATE ACTION NO LONGER A REQUISITE UNDER 42 U.S.C. § 1985(3)—*Griffin v. Breckenridge*, 403 U.S. 88 (1971).

Plaintiffs, black citizens of Mississippi, filed an action for damages against certain white citizens who allegedly conspired to deprive them of their right to equal protection of the laws by force, violence and intimidation. The plaintiffs, together with R.G. Grady, were traveling upon the federal, state and local highways in and about De Kalb, Mississippi, when the defendants, believing Grady to be a civil rights worker, forced plaintiffs to stop by driving a truck across their path. They then forced Grady and the other plaintiffs out of the car, held them at gunpoint and seriously injured each by clubbing them with pipes and blackjacks.[1]

The plaintiffs brought their action in federal court based on 42 U.S.C. § 1985(3) (1970) which provides in part:

> If two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action . . . against . . . the conspirators.[2]

The district court, relying on *Collins v. Hardyman*,[3] dismissed the complaint for failure to state a claim upon which relief could be granted, deciding that section 1985(3) did not encompass private

1 Griffin v. Breckenridge, 403 U.S. 88, 90-91 (1971).

2 42 U.S.C. § 1985(3) (1970) provides in full:

> 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 engage 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.

3 341 U.S. 651 (1951).

conspiracies, and the court of appeals affirmed.[4] The Supreme Court granted certiorari[5] and reversed the lower court's decision,[6] holding that section 1985(3) does not require state action but reaches private conspiracies aimed at invidiously discriminatory deprivations of the equal enjoyment of rights secured to all.[7] Thus *Griffin v. Breckenridge*, by dispensing with the "state action" requirement previously deemed essential in *Collins*, has greatly expanded the protection afforded by 42 U.S.C. § 1985(3).

Section 1985(3) was originally enacted as part of the Civil Rights Act of 1871[8] and was an attempt to insure protection of the rights afforded by the Constitution to the newly freed slaves. It was popularly known as the Ku Klux Klan Act and was a response to a message sent to Congress on March 23, 1871, by President Grant,[9] asking for additional legislation to curb violence in the South because of the inability of state authorities to control it. The congressional supporters of the Act asserted that the Klan was a multi-state conspiracy of a military nature whose mode of operation was to commit murder and other acts of violence.[10]

> When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy. Full force and effect is therefore given to section five [of the fourteenth amendment] which declares that "Congress shall have power to enforce by appropriate legislation the provisions of this article."[11]

Through these actions, the Ku Klux Klan effectively neutralized law enforcement officials and created an atmosphere of lawlessness which was so prevalent that it resulted in a denial of equal protection.

The failure to afford protection equally to all is a denial of it.

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4 410 F.2d 817 (5th Cir. 1969).

5 397 U.S. 1074 (1970).

6 403 U.S. at 107.

7 *Id.* at 102-04.

8 Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13.

9 CONG. GLOBE, 42d Cong., 1st Sess. 236 (1871).

10 *Id.* at 153-54 (remarks of Senator Sherman).

11 *Id.* at 322 (remarks of Representative Stoughton). For a discussion of state inaction as constituting a denial of equal protection, *see* Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 412-17 (1958); Barnett, *What Is "State" Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?*, 24 ORE. L. REV. 227, 232-33 (1945).

> Affirmative action or legislation is not the only method of a denial of protection by a State, State action not being always legislative action. A State may by positive enactment cut off from some the right to vote . . . and many other such things. This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his persecutor, and treat the one as a nonentity and the other as a good citizen. . . . A systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection in the eye of reason and the law, and justifies, yes, loudly demands, the active interference of the only power that can give it.[12]

In *Collins* the Court held that section 1985(3) only applied to situations involving state action.[13] In that case the plaintiffs had formed a political club for the purpose of engaging in public meetings for the discussion of national issues. Such a meeting had been planned for November 14, 1947 when a resolution opposing the Marshall Plan was to be adopted and forwarded to appropriate federal officials.[14] At this meeting, the defendants, private individuals, assaulted and intimidated plaintiffs, thus interfering with their right to petition the government for the redress of grievances and depriving them, as citizens, of equal privileges and immunities under the laws of the United States. Their complaint, however, made no claim that the conspiracy, or the overt acts, involved any action by state officials, or that the defendants acted under color of state law.[15] The Court assumed, without deciding, that plaintiffs had been deprived of some federal right, but distinguished this from being deprived of the equal protection of the laws or of equal privileges and immunities under the laws, as required by the Act. Because there was no showing that the conspiracy was for the purpose of depriving plaintiffs of such protection, or of such privileges and immunities, the Court held that defendants' conduct did not come within the ambit of 42 U.S.C. § 1985(3).[16]

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12 CONG. GLOBE, *supra* note 9, at 459 (remarks of Representative Coburn). For a more detailed discussion of the congressional debates preceding the passage of the Ku Klux Klan Act, see Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U.L.J. 331 (1967).

13 341 U.S. at 661.

14 *Id.* at 653.

15 *Id.* at 654-55.

16 *Id.* at 661-62.

The controversy over the applicability of section 1985(3) to private conspiracies is brought into focus by a comparison of the *Griffin* and *Collins* cases. In *Collins*, the purpose of the Act was found to be the enforcement of the fourteenth amendment in the South during Reconstruction, and therefore required state action;[17] whereas *Griffin* found that Congress intended the Act to reach private conspiracies, free from any state action requirement.[18]

The Court in *Collins* relied upon the language of the Act which incorporates language from the fourteenth amendment together with the official title of the Act—An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes—as indicating that the bill was designed to reach state action and not private conspiracies.[19] Although it recognized that private action might come within the purview of the Act, such activities would have to be so massive and widespread that they were tantamount to state action.

> We do not say that no conspiracy by private individuals could be of such magnitude and effect as to work a deprivation of equal protection of the laws, or of equal privileges and immunities under laws. Indeed, the post-Civil War Ku Klux Klan, against which this Act was fashioned, may have, or may reasonably have been thought to have, done so. It is estimated to have had a membership of around 550,000 . . . . It may well be that a conspiracy, so far-flung and embracing such numbers . . . was able effectively to deprive Negroes of their legal rights and to close all avenues of redress or vindication . . . . But here nothing of that sort appears. We have a case of a lawless political brawl, precipitated by a handful of white citizens against other white citizens.[20]

This view is supported in *United States v. Harris*[21] where REV. STAT. § 5519,[22] the criminal section of the Klan Act, was declared unconstitutional. At that time (1882) the Court could find no basis in either the fourteenth amendment or the privileges and immunities clause of article IV[23] of the Constitution for federal legislation punish-

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17 *Id.* at 656.

18 403 U.S. at 101.

19 341 U.S. at 656-58.

20 *Id.* at 662.

21 106 U.S. 629 (1882).

22 As a result of the compilation of the Revised Statutes in 1878, Act of March 9, 1878, ch. 26, 20 Stat. 27, the Ku Klux Klan Act was separated into REV. STAT. §§ 1977 *et seq.* (1878) and REV. STAT. §§ 5506 *et seq.* (1878). The provisions of both were substantially the same except that the latter created criminal sanctions while the former provided for civil liability.

ing private conspiracies,[24] since both provisions require state action.[25]

Griffin, however, in analyzing the other provisions of the Act and the congressional debates preceding its passage, concluded that it did reach private conspiracies aimed at depriving citizens of the equal protection of the laws.[26] After noting that other sections of the Act dealt explicitly with (1) action under color of state law, (2) interference with state authorities, and (3) a massive conspiracy supplanting the authority of the state; the Court found that to impose these same limitations on section 1985(3) would be to make the section superfluous.[27] Additionally, the Court pointed out that "going in disguise" is an activity which is rarely associated with official action and commonly connected with the activities of private marauders.[28]

Assuming that Congress intended the Act to apply to private individuals, the question remains whether, given the circumstances surrounding the passage of the Act, Congress intended it to apply to the type of private conspiracy alleged in *Griffin* and *Collins*. However, in light of the *Griffin* Court's determination that section 1985(3) does apply to these conspiracies, the problem then became one of locating a constitutional basis on which to uphold the section.

One of the constitutional sources the Court utilized to sustain the validity of section 1985(3) was the thirteenth amendment,[29] which

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23 U.S. CONST. art. IV, § 2 provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

24 106 U.S. at 639, 643.

25 The proposition that a denial of equal protection must come from the state was settled in the Civil Rights Cases, 109 U.S. 3, 11 (1883), where the Court said:

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [fourteenth] amendment. . . . It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.

Accord, Adickes v. Kress & Co., 398 U.S. 144, 169 (1970); Garner v. Louisiana, 368 U.S. 157, 177-78 (1961) (Douglas, J., concurring); Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961); Shelley v. Kraemer, 334 U.S. 1, 13 (1948); United States v. Cruikshank, 92 U.S. 542, 554 (1875).

The privileges and immunities which are guaranteed by art. IV § 2 are guaranteed only against oppressive state action. United States v. Guest, 383 U.S. 745, 766 (1966) (Harlan, J., concurring in part and dissenting in part); Hague v. CIO, 307 U.S. 496, 511 (1939); United States v. Wheeler, 254 U.S. 281, 295 (1920).

26 403 U.S. at 99-101.

27 *Id.* at 98-99. Specifically the Court referred to 42 U.S.C. § 1983 (1970) which expressly requires that the deprivation must be inflicted under color of state law.

28 *Id.* at 96.

29 *Id.* at 105. U.S. CONST. amend. XIII, § 1 provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime

has been liberally interpreted to give Congress broad power to abolish all forms of slavery and involuntary servitude.[30] In *Clyatt v. United States*,[31] the Supreme Court established that this amendment does not require state action; it applies to the acts of private individuals as well as those of the federal and state governments. In that case the Court upheld a statute abolishing peonage in New Mexico acknowledging that the thirteenth amendment "names no party or authority" and condemns the institution of slavery regardless of the "manner or authority by which it is created."[32]

The applicability of the thirteenth amendment to legislation which forbids private discrimination in the use and enjoyment of inns, public conveyances, theatres, and places of public amusement was discussed in 1883 in the *Civil Rights Cases*.[33] Although this type of discrimination was found not to inflict any manner of servitude or a form of slavery,[34] the Court recognized that this amendment is not strictly limited to nullifying state laws establishing or upholding slavery, but

> it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States . . . .[35]

In *Jones v. Mayer Co.*,[36] the Supreme Court found—inherent in the amendment—the power of Congress to determine what these badges and incidents are.[37] In upholding the constitutionality of 42 U.S.C. § 1982 (1970), which guarantees to Negroes the right to purchase real property, the Court affirmed the assertion that "the badges and inci-

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whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

30 Jones v. Mayer Co., 392 U.S. 409, 439 (1968).

31 197 U.S. 207 (1905).

32 *Id.* at 216.

33 109 U.S. 3 (1883).

34 *Id.* at 24-25.

35 *Id.* at 20. In his dissent, Justice Harlan went even further than the majority by stating that:

> [T]he power of Congress under the Thirteenth Amendment . . . may be exerted to the extent, at least, of protecting the liberated race against discrimination, in respect of legal rights belonging to freemen, where such discrimination is based upon race.

Id. at 37.

36 392 U.S. 409 (1968).

37 *Id.* at 439-40.

dents of slavery . . . [include] 'those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.' "[38] To this list, *Griffin* has now indicated there must be included acts of physical violence if engendered by a racial purpose and with the design to deprive Negro citizens "of the basic rights that the law secures to all free men."[39]

Another basis on which the Court relied in upholding section 1985(3) was the right of interstate travel. In addition to being one of the "rights and privileges of National citizenship,"[40] the right to unrestricted interstate travel is "assertable against private as well as governmental interference."[41]

Although the Court failed to indicate the constitutional origin of this right, prior cases have suggested two possible sources—the privileges and immunities clause of article IV and the commerce clause.[42]

The rationale for designating this right as a privilege and immunity of national citizenship was explained by Justice Harlan in his separate opinion in *United States v. Guest*.[43] He asserted that the right of interstate travel has long been declared a privilege and immunity of national citizenship "[b]ecause of the close proximity of the right of ingress and regress to the Privileges and Immunities Clause of the Articles of Confederation . . . ."[44] He suggests that the reason this right was not explicitly mentioned in the Constitution was because "it was so obviously an essential part of our federal structure that it was necessarily subsumed under more general clauses of the Constitution."[45] However, the difficulty in designating this clause as the source of this right, and therefore one of the bases of section 1985 (3), is the same difficulty which is encountered by using the fourteenth amendment. Both provisions require state action[46] and therefore could not support a private conspiracy like the one alleged in *Griffin*.

By utilizing the commerce clause as the genesis for the right of interstate travel, there is no difficulty with a "state action" requirement

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38 *Id.* at 441.

39 403 U.S. at 105.

40 *Id.* at 106 (quoting from Twining v. New Jersey, 211 U.S. 78, 97 (1908)).

41 *Id.* at 105.

42 U.S. CONST. art. I, § 8 provides:

> The Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

43 383 U.S. 745, 762 (1966) (concurring in part and dissenting in part).

44 *Id.* at 764.

45 *Id.*

46 *See* cases cited note 25 *supra*.

since Congress' power under this clause is plenary.[47] This clause not only includes commercial intercourse with foreign nations and among the several states,[48] but also encompasses interstate travel by private persons regardless of the non-existence of a commercial purpose.[49]

> The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.[50]

The breadth of Congress' power under this clause is not limited to situations involving direct interference with interstate commerce.[51] As was enunciated in *Katzenbach v. McClung*,[52] an activity comes within the power of Congress under the commerce clause if it has a substantial effect on interstate commerce even if it be intrastate in nature.[53]

By finding a constitutional basis for section 1985(3) in both the thirteenth amendment and the commerce clause, the Court has apparently solved the problem of a state action requirement in that statute. The power of Congress to punish conspiracies depriving citizens of thirteenth amendment rights or the right of interstate travel is incontestable. However, the Court failed to meet squarely the problem of the fourteenth amendment language of section 1985(3): how can private individuals deprive other private individuals of equal protection of the laws? Assuming that defendants have deprived plain-

47 *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964), both upholding title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1970) which prohibits discrimination in places of public accommodation.

48 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-90 (1824).

49 *E.g.*, Edwards v. California, 314 U.S. 160 (1941) (statute making it a misdemeanor to bring a nonresident "indigent person" held invalid as an unconstitutional burden on interstate commerce); Covington & Cincinnati Bridge Co. v. Kentucky, 154 U.S. 204 (1894) (state law fixing rate of tolls on bridge between two states is unconstitutional); Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196 (1885) (state tax on ferry company held to be unconstitutional interference with interstate commerce); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) (state tax on persons leaving state by common carrier held unconstitutional).

50 Caminetti v. United States, 242 U.S. 470, 491 (1917); *accord*, United States v. Hoke, 227 U.S. 308 (1913) (act proscribing transportation of persons for immoral purposes held to be constitutional exercise of congressional power to regulate commerce).

51 *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 123-24 (1942); United States v. Darby, 312 U.S. 100, 119-20 (1941); Railroad Comm'n of Wis. v. Chicago, Burlington & Quincy R.R., 257 U.S. 563, 588 (1922); Zabel v. Tabb, 430 F.2d 199, 203-04 (5th Cir. 1970); Deyo v. United States, 396 F.2d 595, 599 (9th Cir. 1968).

52 379 U.S. 294 (1964).

53 *Id.* at 297.

tiffs of thirteenth amendment rights and the right of interstate travel, have plaintiffs, in fact, been deprived of the equal protection of the laws? This problem was plainly recognized in *Collins*, where the Court stated that even if plaintiffs had been deprived of a federally guaranteed right, such a deprivation did not constitute a denial of the equal protection of the laws.[54]

> What we have here is not a conspiracy to affect in any way these plaintiffs' equality of protection by the law, or their equality of privileges and immunities under the law. . . . The only inequality suggested is that the defendants broke up plaintiffs' meeting and did not break up meetings of others with whose sentiments they agreed. To be sure, this is not equal injury, but it is no more a deprivation of "equal protection" or of "equal privileges and immunities" than it would be for one to assault one neighbor without assaulting them all . . . . Plaintiffs' rights were certainly invaded, disregarded and lawlessly violated, but neither their rights nor their equality of rights under the law have been, or were intended to be, denied or impaired. Their rights *under the laws* and to *protection of the laws* remain untouched and equal to . . . those of any other citizen who suffers violence at the hands of a mob.[55]

In rejecting the idea that private individuals cannot deprive a person of the equal protection of the laws and adopting the position that "there is nothing inherent in the phrase that requires the action working the deprivation to come from the State,"[56] the *Griffin* Court cited the case of *United States v. Harris*.[57] Although *Harris* discussed this proposition,[58] its reasoning and ultimate holding are exactly opposite to that in *Griffin*. In finding unconstitutional a criminal statute identical to section 1985(3), the Court in *Harris* recognized the serious difficulties which would arise if such a statute were upheld.[59] It determined that "[t]he *only* way . . . one private person can deprive another of the equal protection of the laws is by the commission of some offense against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault, or murder."[60] Under this definition, *any offense* which invades a person's rights protected by either state or federal law deprives a person of equal protection. Recognizing the scope of this phrase and its implications on the federal-state juris-

54 341 U.S. at 660-61.
55 *Id.* at 661-62.
56 403 U.S. at 97.
57 *Id.* (citing 106 U.S. 629 (1882)).
58 106 U.S. at 643.
59 *Id.* at 639-44.
60 *Id.* at 643 (emphasis added).

dictional system, the Court found no constitutional provision on which it could be upheld,[61] and specifically determined that the statute was broader than the coverage of the thirteenth amendment[62]—one of the constitutional provisions on which the *Griffin* Court now relies.

The *Griffin* Court has both divorced the phrase "equal protection of the laws" from the framework of the fourteenth amendment, where it has been construed as a federal guarantee "against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society,"[63] and conferred upon it its own definition:

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.[64]

In doing so, the Court has accorded the words "equal protection of the laws" a scope potentially as broad as that of the thirteenth amendment and commerce clause (or perhaps any right guaranteed by the Constitution or laws of the United States). This marks a significant encroachment by the federal government into areas previously reserved to the states. Although the Court ostensibly rejects the possibility of using this section as a general federal tort law,[65] anyone who subscribes to the reasoning in *Harris,* cannot doubt that that is exactly what they have done.

John F. Shoosmith, Jr.

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61 *Id.* at 644.

62 *Id.* at 641.

63 United States v. Cruikshank, 92 U.S. 542, 554 (1875).

64 403 U.S. at 102.

65 *Id.*