RESURRECTING THE EQUAL PROTECTION CLAUSE THROUGH THE KU KLUX KLAN ACT OF 1871

Thomas E. Nielsen[*]

In 1871, the former Confederacy had descended into relentless violence committed by the Ku Klux Klan.[1] Murders, lynching, and other acts of brutality were commonplace, and with states unable—or unwilling—to enforce their own laws against the perpetrators, the South was in a state of anarchy.[2]

In response, Congress enacted the Ku Klux Klan Act in April of 1871 to enforce various portions of the recently ratified Fourteenth Amendment.[3] The law's most famous provision, section 1 (now codified as amended at 42 U.S.C. § 1983), provided a civil damages remedy for violations of constitutional rights committed "under color of any [state] law . . . [or] custom."[4] Section 2 created civil and criminal liability, inter alia, if "two or more persons . . . go in disguise upon the public highway or upon the premises of another for the purpose . . . of depriving any person or any class of persons of the equal protection of the laws."[5] And section 6 imposed civil liability for anyone who knew of a section 2 conspiracy and was in a position to stop it, but failed to do so.[6]

The Klan Act was largely forgotten in the decades following its passage,[7] especially after the criminal conspiracy component of section 2 was struck down by the Supreme Court in *United States v. Harris*.[8] Nonetheless, in the early 1960s, § 1983 experienced a revival after the Court held in *Monroe v. Pape* that any unconstitutional action taken by an officer "clothed with the authority of state law" could create damages liability, even if the action itself violated state law.[9] As § 1983 became the predominant means by which plaintiffs vindicated their constitutional rights, sections 2 and 6 of the Klan Act, now codified as amended at 42 U.S.C. §§ 1985–86, respectively,

[*] J.D., 2024, Harvard Law School. Thanks to Scott Michelman for enlightening conversations that shaped and improved this essay, and to Professors Nikolas Bowie and Lawrence Lessig for sparking my interest in "reconstruction originalism." Thanks also to Michelle Berger and Krista Stapleford for their helpful thoughts and comments, and to the editors of the *Texas Journal on Civil Liberties and Civil Rights* for their hard work on this piece. Finally, thanks to Luiza Leão—not just for the advice and feedback on this essay, but also for making everything I do better. All errors are my own.

[1] *See* CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 3 (2008).

[2] *See id.* at 4.

[3] Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. §§ 1983, 1985–1986). The statute is also referred to as the Third Enforcement Act.

[4] Ku Klux Klan § 1; *see also* 42 U.S.C. § 1983.

[5] Ku Klux Klan Act § 2; *see also* 42 U.S.C. § 1985(3).

[6] Ku Klux Klan Act § 6; *see also* 42 U.S.C. § 1986.

[7] *See* Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53, 53 (1986).

[8] *See* 106 U.S. 629, 644 (1883).

[9] 365 U.S. 167, 184 (1961).

languished.[10] This was partially due to the long shadow cast by *Harris*,[11] and partially due to the Court's development of the modern state action doctrine,[12] which provides that only action attributable to the state,[13] or private action that is "pervasive[ly] entwine[d]" with the state,[14] can violate the Fourteenth Amendment (and the amendments it incorporates). Applying those principles, the Court reasoned that § 1985's civil conspiracy provisions could only apply to conspiracies by state actors,[15] or the rare private conspiracy that involves a constitutional violation capable of being committed by a nonstate actor.[16] That profoundly narrow interpretation rendered § 1985, and by extension § 1986, largely nugatory.[17]

But the Court's interpretation of § 1985 raises a quandary: assuming only state actors can enter into a conspiracy to violate the Fourteenth Amendment, how could the same legislators who had drafted that Amendment draft a statute creating liability for private conspiracies entered into "for the purpose of depriving . . . any person or class of persons of the equal protection of the laws" or "preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons . . . the equal protection of the laws"?[18] A close reading of the legislative history of the Klan Act reveals that the Court's interpretation of § 1985 has, as a historical matter, gone seriously awry, in part because of the Court's ahistorical interpretation of the Equal Protection Clause itself.[19] In fact, the legislative history—as well as early circuit court and

[10] *See* Jack M. Beermann, *The Supreme Court's Narrow View on Civil Rights*, 1993 SUP. CT. REV. 199, 201 (1993); Linda E. Fisher, *Anatomy of an Affirmative Duty to Protect: 42 U.S.C. Section 1986*, 56 WASH. & LEE L. REV. 461, 518 (1999).

[11] *See* Beermann, *supra* note 100, at 201 n.11.

[12] *See id.* at 201–02.

[13] Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) ("Our cases have . . . insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State").

[14] *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 291 (2001).

[15] *See generally, e.g.*, United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 831–34 (1983) (citing Murphy v. Mount Carmel High School, 543 F.2d 1189, 1193 (7th Cir. 1976)) (rejecting claim under 42 U.S.C. § 1985 against private unions and their members for allegedly conspiring to deprive non-union employees of First Amendment rights on the ground that "a conspiracy to violate First Amendment rights is not made out without proof of state involvement").

[16] The freedoms protected by the Thirteenth Amendment and the freedom to travel interstate are two examples of constitutional rights that private persons cannot infringe. *See generally* Griffin v. Breckenridge, 403 U.S. 88, 105–06 (1971) (sustaining claim under 42 U.S.C. § 1985 against white private actors who conspired to assault Black travelers on Mississippi highways in violation of the Thirteenth Amendment and the right to interstate travel).

[17] *See* Beermann, *supra* note 100, at 203 (describing how the Court's narrow interpretation of § 1985 has left important constitutional rights, such as abortion, open to abuse from private entities).

[18] 42 U.S.C. § 1985(3).

[19] The Supreme Court has for some time been hostile to the use of legislative history as an interpretive device. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."). Nonetheless, in recent cases, the Court has expressed a willingness to consider legislative history as a source of the *original public meaning* of a given statutory provision. *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1750 (2020) ("[W]hile legislative history can never defeat unambiguous statutory text, historical sources can be useful . . . [t]o ferret out such shifts in linguistic usage [since the law's adoption] or subtle distinctions between literal and ordinary meaning . . . ."). This essay offers legislative history as precisely that—a source of potential original public meaning of the Equal Protection Clause and the Klan Act.

Supreme Court opinions interpreting the Equal Protection Clause—reveals that the Klan Act had, in important respects, a much broader reach than the Supreme Court has held.

The moderate Republicans who helped to enact the Fourteenth Amendment believed that in addition to racially discriminatory state laws and law enforcement, the systematic *nonenforcement* of state law in a manner that facilitated private acts of racial terrorism violated the Equal Protection Clause. These legislators theorized that both types of state action could trigger federal intervention under the Fourteenth Amendment. And they passed the Klan Act to facilitate such intervention. The result was a carefully calibrated statutory scheme covering those two distinct forms of state action. Section 1983 was engineered—and has correctly been interpreted—to provide a remedy against state officials who enforce discriminatory laws or facially neutral laws in a discriminatory manner. Sections 1985–86, conversely, were engineered to guard against the *nonenforcement* of state law, providing a remedy against (1) anyone who conspired to deprive Black individuals of their life, liberty, or property in the face of chronic failures by state law enforcement; and (2) anyone who allowed such deprivations to occur.

A historically sensitive reading of §§ 1985 and 1986, coupled with the Equal Protection Clause, could have significant advantages for civil rights plaintiffs. Using incarcerated individuals as a case study, this essay—building on important work by Professors Pamela Brandwein[20] and Linda Fisher,[21] among others—proposes a historical framework under which the Klan Act might be used to remedy inequitable law enforcement. Such a framework is important because *Monroe*'s gloss on § 1983 has, for some time, been under attack by those who believe it to be a misreading of the Klan Act's text and history.[22] For instance, dissenting in *Crawford-El v. Britton*, Justice Scalia justified the Court's notoriously ahistorical qualified immunity jurisprudence as a corrective mechanism for what he perceived to be the equally ahistorical opinion in *Monroe*.[23] More recently, Justice Thomas has critiqued the Court's approach to qualified immunity while simultaneously questioning the validity of *Monroe*.[24] In light of the Court's hostility towards its well-established civil rights precedents, an account of the Klan Act's original public meaning would likely be welcomed by jurists who contend that such meaning sheds light on how Reconstruction-era civil rights statutes should be used today.

This essay proceeds as follows. Part I provides a historical account of how the Equal Protection Clause was understood to protect against systemic state law enforcement failures that facilitated private acts of racial violence. Part II explains how § 1985 and (particularly) § 1986 worked to

[20] *See generally* PAMALA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011).
[21] *See generally* Fisher, *supra* note 100.
[22] *See, e.g.*, Eric H. Zagrans, *"Under Color of"* What *Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 502 (1985) (arguing that *Monroe* misinterpreted § 1983). *But see* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 63–66 (2018) (arguing that as a matter of historical understanding, *Monroe* interpreted § 1983 correctly).
[23] 523 U.S. 574, 611–12 (Scalia, J., dissenting).
[24] *See* Baxter v. Bracey, 140 S. Ct. 1862, 1864 n.2 (2020) (Thomas, J., dissenting from denial of certiorari).

implement the Clause's guarantees. Part III offers a brief account of racially motivated[25] violence in prisons, discusses how such violence might be remedied (or not) under current civil rights law, then explains how the historical framework set forth in Part II could help incarcerated plaintiffs vindicate their equal protection rights.

I. THE NONENFORCEMENT OF STATE LAW AS AN EQUAL PROTECTION VIOLATION

It is hornbook constitutional law that the Equal Protection Clause forbids facially discriminatory laws,[26] as well as the discriminatory enforcement of facially neutral laws.[27] But the framers of the Fourteenth Amendment also viewed the Equal Protection Clause as a guarantee that states would not willfully or negligently *refuse* to enforce their laws with respect to acts of terrorism committed against Black people. As Professors Randy Barnett and Evan Bernick explain, the text of the Clause "expressed a concept of equal protection . . . according to which state *in*action could constitute a denial of protection, and Republicans consistently expressed this understanding" at the time of enactment.[28]

In the wake of the Civil War, Southern states routinely and pervasively failed to enforce their criminal laws with respect to vigilante violence by the Ku Klux Klan against freedmen:

> Klan violence was often election-related though Klansmen also brutalized blacks who made good wages in railroad construction, driving them back to farming, where earnings were significantly lower. The failure of state authorities to protect blacks . . . was widespread. Eyewitness accounts "confirmed again and again the enormity of the problem and the complete failure of the state governments (*sic*) to restore order."[29]

The legislators who drafted the Fourteenth Amendment believed that a state's failure to protect its Black citizens from Klan violence triggered Congress's power to provide a federal remedy.[30] But unlike discriminatory law enforcement and adjudication, this notion—that the systemic

---

[25] This essay refers to racial dynamics only, even though the Court's equal protection jurisprudence has since developed to include other suspect classes, to provide as clear a pathway as possible to using the surviving Klan Act provisions to enforce a historically sensitive understanding of the Equal Protection Clause. The same arguments could then be extended to other suspect or quasi-suspect classes, such as national origin or sex.

[26] *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (holding that the Equal Protection Clause forbade a facially discriminatory jury eligibility statute); *see generally* NIKOLAS BOWIE, FEDERAL CONSTITUTIONAL LAW 1270–71 (2022) (discussing how the Equal Protection Clause forbids facially discriminatory laws).

[27] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding that the Equal Protection Clause forbade the discriminatory enforcement of a facially neutral law relating to the operation of laundromats); *see also* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 334 (2021) (explaining that there is "a wealth of [historical] evidence in support of an understanding of the equal protection of laws that encompassed (a) [equal] *executive* protection of one's life, liberty, and property and (b) equal enjoyment of the remedial processes of the *courts*") (emphasis added).

[28] BARNETT & BERNICK, *supra* note 27, at 336 (emphasis in original).

[29] BRANDWEIN, *supra* note 20, at 31–32 (quoting LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871–1872, at 43 (2004)) (citations omitted).

[30] *See* BRANDWEIN, *supra* note 20, at 38–39 (discussing the legislative history surrounding the drafting and enactment of the Fourteenth Amendment).

nonenforcement of laws with respect to racial violence can constitute an equal protection violation—has largely been lost to history.[31]

As Brandwein exhaustively shows in her book-length study of the subject,[32] early cases at both the circuit court and Supreme Court levels support the notion that the Equal Protection Clause guarded against the chronic nonenforcement (or underenforcement) of state law. For example, Judge (and future Justice) William Woods wrote in *United States v. Hall* that "[d]enying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection."[33] Justice Joseph Bradley, sitting as circuit justice, further developed a theory of state nonenforcement in *United States v. Cruikshank*, explaining that Congress could remedy "murders, robberies, assaults, thefts, and offenses" if "the state should deny to [Black] persons . . . the equal protection of the laws."[34]

Chief Justice Morrison Waite adopted this theory in an opinion for the Supreme Court upholding Justice Bradley's *Cruikshank* ruling, writing that "[e]very republican government is in duty bound to protect all its citizens in the enjoyment of [equal protection]," and that the "obligation resting upon the United States is to see that the States do not deny the right."[35] Finally, in the *Civil Rights Cases*, Justice Bradley again espoused a view of equal protection that encompassed both unequal enforcement and nonenforcement, writing that "civil rights . . . cannot be impaired by the wrongful acts of individuals, *unsupported by state authority*."[36] This language, which speaks in terms of state "support" as opposed to affirmative state *action*, stands for the principle that "a state can deny rights by shielding, excusing, or protecting individual race-based wrongs" as well as by engaging in discriminatory law execution and adjudication.[37]

As a matter of original understanding, then, the Equal Protection Clause empowered Congress to legislate pursuant to the Equal Protection Clause to remedy life, liberty, and property deprivations arising from: (1) racially discriminatory state laws or law enforcement; and (2) private

---

[31] *See* Pamela Brandwein, *A Lost Jurisprudence of the Reconstruction Amendments*, 41 J. SUP. CT. HIST. 329, 332 (2016) (describing the notion of nonenforcement as a "lost jurisprudence of rights . . . obscured by a host of anachronisms"). Brandwein calls the concept of nonenforcement "state neglect." BRANDWEIN, *supra* note 200, at 12. But the term is something of a misnomer, as state officials also refused to enforce their laws *due* to racial animus. As Congressman Job E. Stevenson explained, "the States have laws providing for equal protection, but they do not, because either they *will not or cannot*, enforce them equally; and hence a class of citizens have not the 'protection of the laws.'" BARNETT & BERNICK, *supra* note 27, at 336–37 (quoting CONG. GLOBE, 42d Cong., 1st Sess. App. 300 (1871) (statement of Rep. Stevenson)) (emphasis added). Congressman Stevenson's view was widely shared by his contemporaries. *See* BARNETT & BERNICK, *supra* note 27, at 336–37 (collecting legislative history). Thus, this essay opts to use the term "nonenforcement."

[32] *See generally* BRANDWEIN, *supra* note 20.

[33] 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871).

[34] 25 F. Cas. 707, 711–12 (C.C.D. La. 1874), *aff'd*, 92 U.S. 542 (1876).

[35] United States v. Cruikshank, 92 U.S. 542, 555 (1876).

[36] 109 U.S. 3, 17 (1883) (emphasis added).

[37] BRANDWEIN, *supra* note 20, at 164.

acts of racial violence tacitly permitted to go unpunished by states' willful or negligent failure to enforce their laws against the perpetrators.[38]

II. REMEDYING NONENFORCEMENT UNDER 42 U.S.C. §§ 1985 AND 1986

Section 1 of the Klan Act, now codified as § 1983, was understood by its framers to permit civil rights plaintiffs to vindicate their right to be free from racially discriminatory state laws or law enforcement[39]—and remains so understood today.[40] But the Klan Act also contained provisions—specifically, sections 2 and 6—geared at allowing plaintiffs to vindicate their right to be free of private acts of racial violence facilitated by chronic failures in state law enforcement.

A. The Scope of Sections 2 and 6.

Sections 2 and 6 of the Klan Act, now codified as amended at 42 U.S.C. §§ 1985 and 1986, targeted anyone who committed racially motivated violence with impunity due to the "breakdown

---

[38] This is, at minimum, what the Equal Protection Clause empowered Congress to do. Some more radical Republican legislators espoused what Brandwein calls a "plenary enforcement" theory, or the notion that state nonenforcement was not necessary for Congress to remedy racially motivated crimes and torts committed by private persons. *See id.* at 42–43. This view was not shared by moderates or the early judicial opinions interpreting the Equal Protection Clause. *See id.* at 44–45. Thus, though there is some historical nuance to the question, this essay considers the moderate view to be the prevailing "theory" of equal protection. *Cf.* Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.))).

[39] Though a detailed parsing of § 1983 is beyond the scope of this essay, the provision's text, which refers to acts taken under color of both state "statute[s]" and "custom[s]," contemplates that both discriminatory *laws* and a *custom* of discriminatory law *enforcement* could lead to § 1983 liability against the responsible state officials. 42 U.S.C § 1983. *See* Eric H. Zagrans, *"Under Color of"* What *Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 552–53 (1985) (citing the legislative history of the Klan Act to argue that it covered acts taken pursuant to facially discriminatory state laws). As to the latter, Senator Lyman Trumbull observed, discussing the similarly worded 18 U.S.C. § 242, that "[i]n some communities in the South a *custom* prevails by which *different punishment* is inflicted upon the blacks from that meted out to whites for the same offense." CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866) (statement of Sen. Trumbull) (emphasis added). Trumbull continued that "in all cases where a custom prevails in a State, or where there is a statute-law of the State discriminating against [a freedman]," Congress had the authority "to protect the freedman in his liberty" and "to allow him to come to the Federal courts." *Id.* at 1759. In other words, Trumbull viewed "under color of . . . law" and "custom" as working in tandem with respect to equal protection violations, covering both the administration of discriminatory state laws and the discriminatory execution of neutral laws. *See id.* at 1758 ("The assumption that State . . . officials are not to be held responsible for violations of United States laws, when done under color of State statutes or customs, is akin to the maxim of the English law that the King can do no wrong. It places officials above the law."). This view was echoed during the enactment debates of § 1983 several years later. *See* CONG. GLOBE, 42d. Cong., 1st Sess. App., at 217 (1871) (statement of Sen. Thurman) (arguing that § 1983 "refer[red] to a deprivation under color of law, either statute law or 'custom or usage' which has *become* common law" (emphasis added)). For a historical parsing of § 1983's text with a particular focus on the term "custom," see George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925, 951 (2003). *See also* Adickes v. S.H. Kress Co., 398 U.S. 144, 167 (1970) ("Congress included customs and usages within its definition of law in § 1983 because of the persistent and widespread discriminatory practices of state officials in some areas of the post-bellum South").

[40] For a recent and particularly famous example of a case proceeding on this ground, see *Floyd v. City of New York*, 813 F. Supp. 2d 417, 452–53 (S.D.N.Y. 2011), in which the court denied summary judgment on a § 1983 claim alleging that New York Police Department officers violated the Equal Protection Clause by engaging in racially discriminatory stop-and-frisks.

of law enforcement in the southern states."[41] Section 2 was "packed with provisions,"[42] but for present purposes, the relevant language created criminal or civil liability:

> if two or more persons . . . 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 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 . . . [and] 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.[43]

Section 6, in turn, created a civil damages remedy for the failure to stop a section 2 conspiracy, providing:

> [t]hat [if] any person or persons, having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall *neglect* or *refuse* so to do, and such wrongful act shall be committed, such person or persons shall be liable to the person injured[44]

Although some radical Republican legislators appear to have viewed the expansive language of sections 2 and 6 as reaching *all* persons who conspired to commit race-based wrongs, regardless of a state's nonenforcement,[45] the moderates who believed the Equal Protection Clause only allowed the federal government to remedy private racial violence in the wake of state nonenforcement also viewed sections 2 and 6 as the appropriate pathway through which to effectuate such a remedy. For instance, as then-Congressman and future President James A. Garfield—a moderate—explained, discussing section 2's civil and criminal conspiracy provisions:

> [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. Whenever such a state of facts is clearly made out, [the Equal Protection Clause] . . . empowers Congress to step in and provide for doing justice . . . .[46]

---

[41] BRANDWEIN, *supra* note 20, at 42.
[42] *Id.*
[43] Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13, 13–14 (1871) (codified as amended at 42 U.S.C. § 1985).
[44] *Id.* § 6 (codified as amended at 42 U.S.C. § 1986) (emphasis added).
[45] BRANDWEIN, *supra* note 20, at 42–43; *see also supra* note 38 (discussing this "plenary enforcement" theory).
[46] CONG. GLOBE, 42d Cong., 1st Sess. App. 153 (1871) (statement of Rep. Garfield).

Considering section 2 to be unconstitutionally overbroad as written, Congressman Garfield then argued that:

> if the second section of the pending bill can be so amended that it shall clearly define this offense . . . I shall give it my hearty support. These limitations will not impair the efficiency of the section, *but will remove the serious objections that are entertained by many gentlemen to the section as it now stands.*[47]

Congressman Aaron Perry, another moderate, addressed the expansive language of section 2 in a slightly different way: by reading an unwritten state nonenforcement predicate into it. He viewed section 2 as redressing deprivations inflicted by private "conspiracies and unlawful combinations with *at least* the tacit acquiescence of the State authorities."[48] Congressman John Farnsworth similarly described section 2's conspiracy provisions as reaching private wrongs in cases where the "constituted authorities" were prevented from "being able to afford protection to those persons who constitute a portion of the people."[49] In light of the idea that the Equal Protection Clause itself was triggered only when a state failed to protect its Black citizens from violence, these legislators' characterization of section 2 makes sense, as private individuals could not conspire to deprive someone of "equal protection" unless there was already a failure to protect by state officials.

Following Congressman Perry and Congressman Farnsworth, it appears that at least a handful of legislators viewed section 2 as constitutional precisely *because* the provision only reached conspiracies by two or more persons. In other words, the presence of individual acts of vigilante violence, without more, was not a good proxy for a chronic breakdown of state law enforcement. But the presence of unlawful *conspiracies* suggested a more widespread violence facilitated by systematic inability or refusal by state authorities to tamp down on Klan terrorism. In a revealing exchange between Congressman Farnsworth and the Klan Act's drafter, Senator Samuel Shellabarger, the latter stated that section 2 "would [not] have the same constitutional qualities if it [applied]" in cases of individual murder, manslaughter, and the like,[50] because it was the *combination* of persons that gave a given act of racial violence the sufficient "magnitude" to constitute an equal protection violation.[51] Senator Shellabarger then continued, "if, in case of unlawful combinations, the proper authorities" provided assistance, the Klan Act "would not touch the case at all."[52] This exchange suggests that section 2's drafter viewed the existence of

[47] *Id.* (emphasis added).
[48] *Id.* at 79 (statement of Rep. Perry) (emphasis added).
[49] *Id.* at 114 (statement of Rep. Farnsworth).
[50] *Id.* at 113 (statement of Sen. Shellabarger).
[51] *Id.* at 114.
[52] *Id.* It appears that Senator Shellabarger had, by this point, moved on to discussing section 3 of the Klan Act, which facilitated presidentially directed military intervention in the face of state nonenforcement, but the logic behind his statement applies to section 2 as well.

conspiracies as a sign of state nonenforcement in a way isolated, individual acts of violence were not.

Though there is significantly less discussion of section 6 in the legislative record, Senator Shellabarger told Congressman Garfield that "[section 6] reaches every species of mischief covered by the second section."[53] And the provision's language—of "neglect or refus[al]"[54]—mirrors legislators' characterizations of the what the Equal Protection Clause empowered Congress to remedy. To provide just one example, Congressman Ulysses Mercur explained that "if a State denies . . . equal protection, the United States Government must step in and give that protection which the State authorities *neglect or refuse* to give."[55] Interpreted in light of the comments by Congressmen Perry and Farnsworth and Senator Shellabarger about section 2, section 6 would have allowed civil damages in cases where states systemically failed to remedy acts of racial terror, against anyone (officials or otherwise) who knew about conspiracies to commit such acts and negligently (or recklessly, or willfully) failed to stop them.[56]

These debates reveal that the extent to which sections 2 and 6 were understood to apply to private individuals was contested. But amid this disagreement, a baseline consensus emerged: that sections 2 and 6 triggered when states allowed white people to commit race-based life, liberty, and property deprivations with impunity.

B. Early Caselaw Interpreting Sections 2 and 6.

Congressman Garfield's concerns about section 2 came to fruition in 1883, when the Supreme Court held the provision's criminal component unconstitutional in *United States v. Harris*.[57] As Brandwein explains, *Harris* is generally viewed as putting "sins of omission" outside the purview of the Fourteenth Amendment, rejecting the concept of state nonenforcement as an equal protection violation.[58] But the force of that view is undermined by the fact that *Harris* was written by Justice William Woods, who twelve years earlier had endorsed a theory of state nonenforcement as a circuit judge in *United States v. Hall*.[59] And indeed, Justice Woods's problem with section 2—like Congressman Garfield's—was that it was "not properly predicated."[60] He wrote that "[i]t

---

[53] CONG. GLOBE, 42d Cong., 1st Sess. 804 (1871) (statement of Sen. Shellabarger).
[54] Ku Klux Klan Act, ch. 22, § 6, 17 Stat. 13, 15 (codified as amended at 42 U.S.C. § 1985).
[55] CONG. GLOBE, 42d Cong., 1st Sess. App. 182 (1871) (statement of Rep. Mercur) (emphasis added).
[56] Such a reading effectively operationalizes the concept of state nonenforcement: it is conceptually impossible to seek damages from individual state officers for a systemic nonenforcement of the law, unless a particular official refuses to intervene in a rights deprivation. *Cf.* CONG. GLOBE, 42d Cong., 1st Sess., at 506 (1871) (statement of Sen. Pratt) (describing the conceptual difficulty of providing remedies against state officials for refusal to enforce the law). Section 6 provides for this remedy (though it is not limited to it). And section 2 provides a pathway to recovering from conspirator-assailants (state actors or otherwise) in more general cases of nonenforcement.
[57] United States v. Harris, 106 U.S. 629, 640–41 (1883).
[58] BRANDWEIN, *supra* note 200, at 154 (quoting WILLIAMS, *supra* note 29, at 142).
[59] *See* United States v. Hall, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) ("Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.").
[60] BRANDWEIN, *supra* note 20, at 157.

applies, *no matter how well the State may have performed its duty*," even when states "recognize and protect the rights of all persons."[61]

Harris, then, did not "slam[] the door on future [federal] legislation" regarding "sins of omission": it just made clear that Congress could only step in if states failed to enforce their own laws.[62] Today, the civil conspiracy component of section 2 survives codified at § 1985(3), as it was not tested before the nineteenth-century Court. But if one reads a state nonenforcement requirement into it, as Congressmen Perry and Farnsworth did, the *Harris* problem is solved and its constitutionality with respect to private conspiracies—as a historical matter—is clear. That same logic applies to section 6, which survives codified at § 1986.[63]

C. Squaring the Historical Understanding of Sections 2 and 6 with Modern Cases

Though the Supreme Court has rarely spoken as to the meaning of § 1985's civil conspiracy provision,[64] the few cases interpreting it do not foreclose, and may well support, using it to remedy racial violence committed by private actors and facilitated by state nonenforcement. In *Griffin v. Breckenridge*, the Court held that § 1985 could be used to remedy a private conspiracy by a group of white men to commit racial violence against two Black motorists traveling on Mississippi state highways.[65] Perplexingly, however, *Griffin* grounded its holding, not in the Fourteenth Amendment, but rather in the Thirteenth.[66]

From the outset, the *Griffin* Court struggled to explain why § 1985 contained language "similar to that of . . . the Fourteenth Amendment,"[67] but also why, by its plain text, § 1985 extended to purely private conspiracies, noting that "[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."[68] The Court made a curious allusion to *Harris*, noting that "there is nothing inherent in the phrase ['equal protection'] that requires the action working the deprivation to come from the State."[69] But instead of canvassing the enactment debates of the Klan Act and the precise language of early cases interpreting it to locate and define the concept of state nonenforcement as an equal protection violation actionable under § 1985,[70] the Court made the doctrinally easier decision to characterize the conspiracy at issue as a

---

[61] *Harris*, 106 U.S. at 639 (emphasis added).
[62] BRANDWEIN, *supra* note 200, at 157.
[63] *See* Robeson v. Fanelli, 94 F. Supp. 62, 68 (S.D.N.Y. 1950) ("To the extent that [§ 1985] is free of constitutional infirmities, [§ 1986] to the same extent, and for the same reasons, is likewise valid.").
[64] *See generally* Beermann, *supra* note 100, at 201–02, 202 nn.12–16.
[65] 403 U.S. 88, 106–07 (1971).
[66] *Id.* at 105.
[67] *Id.* at 96.
[68] *Id.* at 97.
[69] *Id.* (citing United States v. Harris, 106 U.S. 629, 643 (1883)).
[70] One problem justifying the result in *Griffin* under the Fourteenth Amendment would raise is that the case makes no mention of a failure by state law enforcement that enabled the private violence in question. Then again, given the fact that police in southern states routinely failed to protect Black travelers from white vigilante mobs in the civil rights era, see, e.g., *United States v. Guest*, 383 U.S. 745, 749 (1966), the *Griffin* Court might have been warranted in presuming the existence of state nonenforcement.

Thirteenth Amendment violation.[71] The *Griffin* Court then concluded that Congress could legislate under the Thirteenth Amendment to create a "statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men."[72]

For present purposes, what is most important about *Griffin* is not its somewhat anachronistic reasoning, but rather its result: the case permits Black plaintiffs to use § 1985 to seek damages for conspiracies to commit racial violence by white assailants, at least where that violence amounts to a denial of the "basic rights" protected by the Thirteenth Amendment.[73] In a future case, a court could build on *Griffin* to explain that even where the deprivation of "basic rights" is not at issue, *any* conspiracy to commit racial violence that is facilitated by a failure of state law enforcement is independently actionable under § 1985 as an equal protection violation.[74]

The Supreme Court has never interpreted § 1986. But a handful of lower-court cases have followed the plain meaning of its text: "[t]o set forth a violation of § 1986, a plaintiff must first prove a violation of § 1985"; then, the plaintiff must allege that "the defendant had actual knowledge of the § 1985 conspiracy," "the defendant had the power to prevent or aid in preventing the commission of the § 1985 violation," "the defendant neglected or refused to prevent" the conspiracy, and "a wrongful act was committed by the conspirators."[75] In other words, § 1985 and § 1986 require different levels of culpability: Section 1985 requires, at the very least, that a defendant "be a conspirator and . . . have joined in the illegal conspiracy by at least manifesting his or her agreement with the conspiratorial plan,"[76] while § 1986 "requires no such direct connection to the conspiratorial agreement" and merely attaches "liability for culpable inaction."[77] As a result, under a straightforward extension of *Griffin*, anyone (whether a private or state actor) who negligently fails to prevent a conspiracy to commit racial violence that denies a Black victim the basic rights protected by the Thirteenth Amendment can be held liable under § 1986. Moreover, if § 1985's civil conspiracy provision is read to encompass private acts of racial violence that do not implicate the Thirteenth Amendment but are facilitated by state *nonenforcement* (thus

---

[71] Just a few years earlier in *Jones v. Alfred H. Mayer Co.*, the Court had underscored that Congress had the power under the Thirteenth Amendment to wipe out the "badges and incidents" of slavery, including through the regulation of private conduct. 392 U.S. 409, 440 (1968).

[72] *Griffin*, 403 U.S. at 105. The Court bolstered this holding by noting that the conspiracy at issue in *Griffin* also infringed on the right of interstate travel, which did "not necessarily rest on the Fourteenth Amendment," and was "assertable against private as well as governmental interference." *Id.*

[73] *Id.* at 105.

[74] *Id.* To be sure, in *United Brotherhood of Carpenters, Local 610 v. Scott*, 463 U.S. 825 (1983), the Supreme Court held that § 1985's civil conspiracy provision did not reach purely private conspiracies to deprive individuals of constitutional rights that required the "involve[ment]" of a state. *Id.* at 831. But *Scott* does not undermine a historically informed reading of § 1985 because a private conspiracy to commit racial violence that is facilitated by state nonenforcement satisfies the Fourteenth Amendment's state action requirement: state nonenforcement is the "involve[ment]" of a state sufficient to trigger a federal remedy under the Equal Protection Clause. *Id.*

[75] Fisher, *supra* note 10, at 474.

[76] *Id.* at 479.

[77] *Id.*

implicating the *Fourteenth* Amendment), then § 1986 provides a cause of action against the state actors who failed to adequately enforce the law.

Clark v. Clabaugh,[78] which Fisher describes extensively in the only article-length study of §1986 to date,[79] lays out what a historically informed reading of the provision might look like in practice. *Clark* arose when a group of white supremacist bikers descended on Hanover, Pennsylvania to drive out an "interracial group" which "regularly congregated and socialized" in the town square.[80] Despite knowing of the potential for a hostile confrontation, the Hanover Police Department sent only six officers to guard the square.[81] During July 13th and 14th, 1991, the groups clashed multiple times, causing physical injuries and property damage.[82] A group of Black plaintiffs who were harmed in the melee brought a claim under § 1986 against the Hanover mayor and police leadership, alleging that they had "actual knowledge" of a § 1985 conspiracy involving the bikers and failed to take action to prevent the violence that occurred.[83] The Third Circuit reversed the district court's grant of summary judgment to the municipal defendants, concluding that the plaintiffs had adequately pled a § 1986 claim.[84]

Clark did not discuss the constitutional basis of the alleged § 1985 conspiracy beyond noting that "[t]he plaintiffs brought this action in the district court under the Fourth and Fourteenth Amendments to the United States Constitution . . . ."[85] The opinion did note, however, that the Hanover police had "failed to provide for proper training of . . . personnel to handle civil disobedience incidents," "failed to equip police personnel with appropriate riot control equipment," and suffered from "deficiencies in the police communication network established to coordinate police efforts."[86] Vacating the district court's summary judgment grant, the court held that these problems could have supported a finding of pervasive state nonenforcement which permitted the bikers to conspire to descend upon the town and commit racist violence—the sort of conduct that would have violated the Equal Protection Clause as it was historically understood.[87] Though the Third Circuit did not specify whether its analysis sounded in equal protection, the municipal officials' failures to enforce the law satisfied the Fourteenth Amendment's state action requirement. That, in turn, permitted the plaintiffs to sue the bikers directly under § 1985 for conspiring to deprive them of equal protection by committing acts of racial terrorism, activating § 1986 and facilitating a suit against the mayor and police leadership premised on mere negligence.[88]

---

[78] 20 F.3d 1290 (3d Cir. 1994).
[79] *See generally* Fisher, *supra* note 10.
[80] *Clark*, 20 F.3d at 1293.
[81] *Id*.
[82] *See id*. at 1293–94.
[83] *Id*. at 1294, 1297.
[84] *Id*. at 1298.
[85] *Id*. at 1292 n.2.
[86] *Id*. at 1298 n.8.
[87] *Id*. at 1298.
[88] After the Third Circuit remanded, the U.S. District Court for the Middle District of Pennsylvania conducted a trial and subsequently granted judgment as a matter of law in favor of the municipal defendants on the plaintiffs' § 1986

What these cases illustrate is that no precedent stands in the way of embracing readings of §1985 and § 1986 that permit suits against state officials who negligently fail to enforce the law and in so doing facilitate private conspiracies of two or more persons to commit racial violence.

III. THE KLAN ACT'S APPLICATION TO PRISON LITIGATION

One might be tempted, after considering the historical evidence presented in Part II, to ask "so what?" Constitutional law as it currently stands does not recognize the concept of nonenforcement as an equal protection violation,[89] and §§ 1985 and 1986 are far from the most important tools in a twenty-first century civil rights litigator's toolkit. Be that as it may, the history behind these provisions, and the manner in which they were understood to facilitate enforcement of the Equal Protection Clause, may have real benefits for a particular class of civil rights plaintiffs: incarcerated people.

Prison litigation offers a compelling case study for testing out a historical interpretation of the Klan Act because the racial dynamics at work in prisons bear a striking resemblance to the racial dynamics at work in the Reconstruction-era South.[90] In the years following Robert E. Lee's surrender at Appomattox, Black people in the South faced relentless acts of racial terrorism and mob violence at the hands of the Ku Klux Klan, often with tacit or express state support.[91] Today, private perpetuators of racial harm do not usually employ such unabashed, all-encompassing, and violent tactics. Not usually, that is—except in prisons.

A. Prison Officials as Facilitators of Inmate-on-Inmate Racial Violence

claims, reasoning that the claims were "based on the theory that these [defendants] did not protect the [plaintiffs] against a conspiracy by townspeople. The [plaintiffs] neither pled this theory in the [complaint] nor proved at trial that these [defendants] knew in advance of any such conspiracy, if one in fact existed." The jury found for the defendants on the remaining claims. *See* Dkt. 261, Clark v. Borough of Hanover, No. 1:92-CV-00595 (M.D. Pa. Aug. 19, 1994). The ultimate outcome of *Clark*, which hinged on insufficient evidence, does not undermine the Third Circuit's construction of § 1986 at the summary judgment stage.

[89] Nor, for that matter, does it recognize nonenforcement as a violation of any other provision of the Fourteenth Amendment. *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (rejecting the idea that the Due Process Clause imposes on the state "an affirmative obligation . . . to ensure that [one's life, liberty, or property] do not come to harm").

[90] *See, e.g.*, Bryan Stevenson, *Slavery Gave America a Fear of Black People and a Taste for Violent Punishment. Both Still Define Our Criminal-Justice System*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html (describing how the racial dynamics in prisons compare to the racial dynamics in the South during Reconstruction).

[91] *See generally* Tiffany R. Wright et al., *Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983*, 126 DICK. L. REV. 685, 699–702 (2022) ("State law enforcement played an active role in Reconstruction violence from the very beginning."); *see also, e.g.*, LANE, *supra* note 1, at 49 (describing how Sheriff Alfred Shelby of Grant Parish, Louisiana "simply refused to do his job" and ultimately joined a white vigilante mob that killed a local official).

Around the country, correctional officers routinely fail to protect Black inmates from racially motivated violence.[92] Gangs are a pervasive part of contemporary prison life in America.[93] A handful of these gangs, like the Aryan Brotherhood, overtly espouse white supremacy and engage in both the organized crime typical of gangs and hate crimes.[94] Frequently, prison officials are aware of these gang dynamics and either purposefully place Black inmates in harm's way or are negligent with respect to their placement. At Corcoran Prison in California, for instance, guards put Black inmates into a cell known as the "Aryan Tank," where "they were made to face down inmates later described as 'white supremacists.'"[95] At Oklahoma City's Kay County Detention Center in 2017, a supervising officer "ordered corrections officers serving under him to move two Black pretrial detainees . . . to a cell row containing white supremacist inmates whom [he] knew were a danger to [them]."[96] The two detainees were ultimately attacked.[97] And in 2021, the Washington Informer reported that "top Ku Klux Klan members in America's prisons hold unlimited power over inmates."[98]

For Black inmates, then, life in prison resembles life in the Reconstruction-era South in an important respect: just as Black people during Reconstruction faced vigilante mobs of Ku Klux Klan members that were either supported by or ignored by the state, Black inmates today face

---

[92] Indeed, correctional officers themselves routinely subject Black inmates to harsher treatment and punishment. *See, e.g.*, Eric D. Poole & Robert M. Regoli, *Race, Institutional Rule Breaking, and Disciplinary Response: A Study of Discretionary Decision Making in Prison*, 14 L. & SOC'Y REV. 931, 940 (1980) (emphasizing that Black inmates are more likely to be officially reported for rule infractions even if they are just as likely to break rules); Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 U.C. IRVINE L. REV. 759, 782 (2015) (discussing "the potential linkages between implicit biases and their potential influence on prison disciplinary decisions"). At Indiana's Putnamville State Prison, for example, "a group of employees known as 'The Brotherhood'" has "for years . . . targeted minority inmates." *Allegations of Racist Guards are Plaguing the Corrections Industry*, S. POVERTY L. CTR. (Dec. 6, 2000), https://www.splcenter.org/fighting-hate/intelligence-report/2000/allegations-racist-guards-are-plaguing-corrections-industry [hereinafter *Allegations of Racist Guards*]. For a more recent example of this same phenomenon, see *Some Florida Prison Guards Openly Involved with White Terrorist Organizations*, EQUAL JUST. INITIATIVE (Jan. 10, 2022), https://eji.org/news/some-florida-prison-guards-openly-involved-with-white-terrorist-organizations/. A 2021 statistical study of five-hundred incidents in Minnesota's prisons revealed that "physical force was used more often against non-Whites" in that state's prison systems. *See* SUSAN MCNEELY, RACIAL DISPARITIES IN USE OF FORCE AGAINST INCARCERATED PEOPLE 2 (2021). And in 2016, the New York Times, summarizing New York's correctional facilities, wrote that "[i]n most prisons, blacks and Latinos [are] disciplined at higher rates than whites." Michael Schwirtz et al., *The Scourge of Racial Bias in New York State's Prisons*, N.Y. TIMES (Dec. 3, 2016), https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html.

[93] *See generally* DAVID SKARBEK, THE SOCIAL ORDER OF THE UNDERWORLD: HOW PRISON GANGS GOVERN THE AMERICAN PENAL SYSTEM (2014) (examining how prison gangs form and operate to provide governance for inmates).

[94] *See White Supremacist Prison Gangs: 2022 Assessment*, ANTI-DEFAMATION LEAGUE (Oct. 24, 2022), https://www.adl.org/resources/report/white-supremacist-prison-gangs-2022-assessment.

[95] *Allegations of Racist Guards*, *supra* note 922.

[96] Hicham Raache & Kaitor Kay, *Former Oklahoma Corrections Supervisor Enabled White Supremacists to Attack 2 Black Inmates, Ordered Excessive Force Against 3rd Inmate*, KFOR (Apr. 16, 2022), https://kfor.com/news/local/former-oklahoma-corrections-supervisor-enabled-white-supremacists-to-attack-2-black-inmates-ordered-excessive-force-against-3rd-inmate/.

[97] *Id.*

[98] Stacy M. Brown, *Murder Plot Reveals Deadly Mix: White Supremacists and Law Enforcement*, WASH. INFORMER (Aug. 4, 2021), https://www.washingtoninformer.com/murder-plot-reveals-deadly-mix-white-supremacists-and-law-enforcement/.

violence from white supremacist inmates, which is either facilitated or disregarded by prison officials.

B. Recognized Legal Tools for Combatting Racially Motivated Inmate-on-Inmate Prison Violence

Under civil rights law as it currently stands, inmates subjected to racially tinged private violence can sue prison officials for constitutional violations in two limited circumstances.[99] First, if a guard, for example, placed a Black inmate in a yard with white supremacist inmates, and did so with the intent that the Black inmate suffer racial violence because of the placement, the inmate could sue the guard for intentional race discrimination under § 1983 (a violation of the Equal Protection Clause as the Court has always understood it). One might call this, somewhat oxymoronically, "intentional" neglect. To succeed on such a claim, the inmate would have to show that the guard acted with a discriminatory purpose.[100] Given the burden of such a showing, cases proceeding on this theory are rare.

Brown v. Budz,[101] a Seventh Circuit opinion from 2005, illustrates how this kind of claim could be pled. In *Brown*, the plaintiff, a white man, was housed in a state facility for sexually violent persons; while playing cards in an unsupervised recreation room, he was attacked by a Black resident who "had attacked other Caucasian [f]acility residents on other occasions."[102] The plaintiff sued various facility personnel, alleging that they violated the Equal Protection Clause by intentionally "failing to protect [him] from attacks by African-American residents" and "failing to investigate [the assailant's] attacks" on him and other residents.[103] The district court dismissed on the ground that the plaintiff had failed to state facts tending to show discriminatory intent, but the Seventh Circuit reversed, emphasizing "the liberal requirements of notice pleading" under the Federal Rules of Civil Procedure and concluding that the plaintiff had made out an Equal Protection claim.[104] A Black plaintiff could make precisely the same kind of claim if the races in the *Brown* fact pattern were reversed.

Second, the injured inmate could dispense with the Equal Protection Clause and instead sue the correctional official on an Eighth Amendment theory, again under § 1983. Proceeding under the Eighth Amendment has two advantages over the "intentional neglect" theory: it does not require a showing of racial animus, and it requires only "deliberate indifference" to the inmate's

---

[99] Holding correctional officials liable is necessary because while the aggrieved inmate could in theory sue his assailants under state tort law, many incarcerated individuals are judgment-proof. *See* Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), https://www.prisonpolicy.org/reports/income.html. Thus, such claims are practically useless. In addition, constitutional suits against correctional officials might lead to beneficial policy changes that tort suits against fellow inmates would not.

[100] *See generally* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977) (setting forth nonexclusive list of factors to determine whether state action was committed with racially discriminatory intent).

[101] 398 F.3d 904 (7th Cir. 2005).

[102] *Id.* at 907.

[103] *Id.* at 916.

[104] *Id*.

safety rather than purposeful misconduct.[105] Even so, the "deliberate indifference" standard itself is difficult to satisfy. Under *Farmer v. Brennan*, the canonical case on this point, an inmate making an Eighth Amendment "failure to protect" claim must show: (1) that "he is incarcerated under conditions posing a substantial risk of serious harm,"[106] and (2) that the official is "both . . . aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and has actually "draw[n] the inference."[107] The standard, in other words, has both an objective and a subjective component. So cases involving successful Eighth Amendment claims for the failure to protect from violence are uncommon but occasionally successful.

Nelson v. Tompkins, a recent case from the Eleventh Circuit, illustrates the extreme facts necessary for a claim like this make it past the pleadings stage.[108] In *Nelson*, a Black man named Hatchett was charged with aggravated assault after stabbing a white store clerk, allegedly because he was angry after "watching news reports of white police officers shooting [B]lack men."[109] In custody, Hatchett mentioned the circumstances surrounding the stabbing to various jail officials; they nevertheless placed him in a cell with Nelson, a white man.[110] Hatchett subsequently strangled Nelson, and Nelson's estate brought a Fourteenth Amendment claim against various prison officials.[111] The officials moved to dismiss on qualified immunity grounds, the trial court denied the motion, and the Eleventh Circuit affirmed, reasoning that "Hatchett's underlying offense made the risk of serious harm he posed to white detainees . . . obvious" and Nelson's estate had "provided enough evidence from which a jury could reasonably find" that the officials were "deliberately indifferent to the substantial risk of serious harm Nelson faced."[112]

Lesser theories of fault do not offer viable bases for a claim against a prison official for the failure to protect against racially motivated inmate-on-inmate violence. For example, in *Kingsley v. Hendrickson*, the Supreme Court adopted a different Eighth Amendment test for the use of *excessive force* by jail officials in the pretrial context that considers only whether the force used was "objectively unreasonable" without any subjective inquiry.[113] But the Court has not extended *Kingsley* to "failure to protect" claims based on the Eighth Amendment, or to equivalent claims brought under the Fourteenth Amendment in the pretrial context.[114] Similarly, the Court has long declined to impose Eighth Amendment liability for simple negligence, reasoning that doing so

[105] Farmer v. Brennan, 511 U.S. 825, 834 (1970).
[106] 511 U.S. 825, 834 (1994).
[107] *Id.* at 837.
[108] 89 F.4th 1289 (11th Cir. 2024).
[109] *Id.* at 1292.
[110] *See id.* at 1293–94.
[111] *See id.* at 1293–95. *Nelson* technically involved a Fourteenth Amendment claim because the case arose in the pretrial context, where the Eighth Amendment does not apply. *See id.* at 1293; *see also* Goodman v. Kimbrough, 718 F.3d 1325, 1331 n.1 (11th Cir. 2013). Nevertheless, "the standards under the Fourteenth Amendment are identical to those under the Eighth" in the failure-to-protect context. Goebert v. Lee County, 510 F.3d 1312, 1326 (11th Cir. 2007). Since the *Farmer v. Brennan* standard applies to both sorts of claims, *Nelson*'s reasoning is equally applicable to the Eighth Amendment.
[112] *Id.* at 1295–97.
[113] 576 U.S. 389, 392 (2015) (emphasis removed).
[114] *See, e.g.*, *Nelson*, 89 F.4th at 1297 (applying subjective standard).

would fly in the face of other Eighth Amendment precedents that require the "unnecessary and wanton infliction of pain."[115] These limitations, coupled with those imposed by the Prison Litigation Reform Act,[116] mean that it is difficult—to put it mildly—for inmates to recover against prison officials who fail to protect them from inmate-on-inmate racial violence.

C. Sections 1985 and 1986: Paving the Way to a Simple Negligence Standard

Sections 1985 and 1986, coupled with the concept of state nonenforcement as an equal protection violation, offer plaintiffs who have been subjected to inmate-on-inmate racial violence a potential pathway to recovering from prison officials for simple negligence. As noted, conspiracies by gangs like the Aryan Brotherhood to assault or murder Black inmates are commonplace in prisons across America. To be sure, such conspiracies on their own are not enough to trigger civil liability under §§ 1985 or 1986, but racial violence in prisons often arises because corrections officials either deliberately or negligently place Black inmates in cells with white supremacists, leading to grisly fights and even deaths that the officials do not stop.[117] On a systemic level, such actions begin to look a great deal like state nonenforcement because the culpable officials are effectively refusing to provide adequate protection to Black inmates.

It follows that if at least two inmates (say, white supremacist gang members) conspired to assault a Black inmate, the Black inmate could sue the guard(s) who placed him in danger under § 1986, alleging that the guard knew of the potential of a § 1985 conspiracy by the inmate-assailants and negligently failed to prevent it. The inmate could also potentially hold the operator of the prison liable for chronic nonenforcement. It is true that the doctrine of sovereign immunity would likely bar a § 1986 suit against a state corrections department, unless a court made the unlikely determination that Congress had abrogated sovereign immunity when it enacted § 1986.[118] But if the prison in question was operated by a private prison company, the inmate could likely sue the company without the strictures of sovereign immunity.[119] The same holds true if the operator of the prison was a municipality.[120]

Consequently, in a narrow but important class of cases, a historical understanding of §§ 1985 and 1986 might make it easier for incarcerated plaintiffs to recover against prison officials and (in some circumstances) prison operators. Section 1986, properly interpreted, creates liability for

---

[115] Estelle v. Gamble, 429 U.S. 97, 103 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

[116] Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 18 and 28 U.S.C.). The interstices of the PLRA are beyond the scope of this essay. For a summary of the law's provisions and their effect on prison litigation in the years immediately following the law's passage, see generally William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651 (2004).

[117] *See Allegations of Racist Guards*, *supra* note 922; Raache & Kay, *supra* note 966.

[118] This conclusion is unlikely because the Supreme Court, in *Will v. Michigan Department of State Police*, held that Congress did not abrogate state sovereign immunity when it enacted § 1983. 491 U.S. 58, 67 (1989).

[119] *See, e.g.*, Caine v. Butler, 685 F. Supp. 3d 1315, 1326–27, 1326 n.10 (M.D. Ala. 2023) (concluding private prison employees are not entitled to sovereign immunity as "such is reserved for the State and its employees").

[120] *Cf.* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 701 (1978) (concluding that municipalities can be sued under § 1983 so long as they acted pursuant to an unconstitutional policy or custom).

simple negligence when an official with "power to prevent or aid in preventing" a conspiracy between two or more people to commit an act of racial violence "neglects or refuses" to do so.[121] Under existing law, such liability is only possible if the official has been "intentionally negligent" in choosing where to place an inmate,[122] or if the official has exhibited deliberate indifference to the inmate's placement.[123] Both of these standards of fault contain subjective components that make them extremely difficult for a plaintiff to prove. Simple negligence, on the other hand, is both purely objective and easier to show.[124]

CONCLUSION

Implementing the framework described in this essay would be difficult and many open questions remain. How would a plaintiff prove the presence of chronic state nonenforcement sufficient to allege a civil conspiracy to violate the Equal Protection Clause under § 1985 and official negligence under § 1986? And how does one distinguish between mere *under*enforcement and actionable *non*enforcement? Because "the concept [of nonenforcement] was undertheorized and unelaborated" in the Reconstruction era, there is little in the way of clear guidance in the legislative history and caselaw from the time.[125] Indeed, as Part II noted, the legislators who debated the Klan Act were themselves unsure about whether, and to what extent, its provisions could reach private individuals. In addition, modern hurdles complicate the picture. The Prison Litigation Reform Act makes it challenging for prisoners to bring civil rights claims and limits the attorney's fees available for successful suits.[126] Moreover, qualified immunity applies to any § 1983 and § 1985 civil conspiracy claim against a state official and could easily be extended to § 1986 claims against such officials as well.[127] On the other hand, the judiciary's increasing hostility to qualified immunity might lead courts to refuse to extend the doctrine to new situations [128] More importantly, using § 1985 and § 1986 in the manner described in this essay would not require a radical overhaul of the Supreme Court's more recent precedents. It would simply require the right plaintiff.

* * *

[121] 42 U.S.C. § 1986.
[122] *See generally, e.g.*, Brown v. Budz, 398 F.3d 904 (7th Cir. 2005).
[123] *See generally, e.g.*, Nelson v. Tompkins, 89 F.4th 1289 (11th Cir. 2024).
[124] Importantly, adopting this essay's reading of § 1986 would not open the floodgates of equal protection litigation. Under the express terms of the provision, it is not possible to allege a negligent failure to protect under § 1986 without alleging the predicate of an intentional, race-based conspiracy under § 1985. This conspiracy involves the same degree of fault (intent) that the Supreme Court has long required to make out an equal protection claim. *See generally* Washington v. Davis, 426 U.S. 229 (1976).
[125] *See* BRANDWEIN, *supra* note 200, at 240 (describing open questions regarding this conception of equal protection).
[126] Prison Litigation Reform Act, 42 U.S.C. § 1997e (1996).
[127] *See* Ziglar v. Abbasi, 582 U.S. 120, 155 (2017) (extending qualified immunity to § 1985 claims of civil conspiracies by government officials); Brandon v. Lotter, 157 F.3d 537, 539–40 (8th Cir. 1998) (discussing, but declining to rule on, the notion that qualified immunity applies to § 1986 claims against state officials); *but see* Richardson v. McKnight, 521 U.S. 399, 412 (1997) (holding that prison guards employed by a private prison company are not entitled to qualified immunity).
[128] *See, e.g.*, Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting from denial of certiorari); Zadeh v. Robinson, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante).

As one commentator recently argued, originalism is "our law."[129] With the Supreme Court expressing increasing interest in a historically informed conception of the Fourteenth Amendment,[130] civil rights plaintiffs can use that history to their advantage. As Senator Howard said over one-hundred-fifty years ago:

> Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law? Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government . . . ?[131]

It is time to resurrect the Equal Protection Clause. And the Ku Klux Klan Act of 1871 provides a path, though perhaps partially concealed by the weeds of history, through which to implement the Clause's guarantees. We need only accept its invitation to do so.

[129] William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2352 (2015).
[130] *See, e.g.*, Transcript of Oral Argument at 174, Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll., 600 U.S. 181 (2023) (No. 21-707) (discussing the original public meaning of the Equal Protection Clause in the context of race-conscious admissions policies at public universities).
[131] CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard).