1976

The Reach of 42 U.S.C. 1985(3): Sex Discrimination as a Gauge

Kevin E. Irwin

Follow this and additional works at: http://engagedscholarship.csuohio.edu/clevstlrev

Part of the Civil Rights and Discrimination Commons

How does access to this work benefit you? Let us know!

Recommended Citation

NOTES

SEX DISCRIMINATION AS A GAUGE

In 1971 the United States Supreme Court held in Griffin v. Breckenridge\(^1\) that 42 U.S.C. § 1985(3)\(^2\) could be used against private citizens who conspired to deprive others of their civil rights. The Supreme Court found that Congress had originally intended for the statute to reach the actions of private citizens,\(^3\) and that Congress had the authority to reach such activity under the thirteenth amendment and the constitutionally protected right to travel.\(^4\) In so holding, however, the Court offered no indication of how future claims arising under the statute would be adjudicated in fact situations unlike the unique one encountered in Griffin v. Breckenridge.\(^5\) Since the Supreme Court has not chosen to hear a section 1985(3) case since Griffin, it has been up to the lower federal courts to fashion answers to the many significant questions concerning the operation of the statute left unanswered by the Court. Some of these unanswered questions go to the heart of the statute, for example: Who can conspire in a civil conspiracy?\(^6\) What is the requisite intent for a section 1985(3) action?\(^7\) Does Congress have the power under section 1985(3) to reach private conspiracies unlike the racially motivated one encountered in Griffin v. Breckenridge?\(^8\)

This Note will examine how the federal courts have answered the questions left unresolved by the Supreme Court in Griffin, with particular emphasis being given to the three prominent questions mentioned above. It is hoped that by examining the boundaries of the statute, as demarcated by the holdings of the federal courts, an effective statement can be made concerning the potential reach of 42 U.S.C. § 1985(3).

To achieve its purpose, this Note must begin with an examination of section 1985(3) as originally enacted\(^9\) and the subsequent interpretations of it and its companion provisions by the Supreme Court of the post-Reconstruction era. As further background, two earlier Warren Court

\(^1\) 403 U.S. 88 (1971). The incident that gave rise to the Griffin case occurred in DeKalb, Mississippi when Lavon and James Breckenridge, mistakenly believing that a black man, one R. G. Grady, was a civil rights worker, forced Grady's car off the highway and at gunpoint severely clubbed Grady and the other black occupants of the car. For a general discussion of Griffin v. Breckenridge, see The Supreme Court, 1970 Term, 85 Harv. L. Rev. 38, 95 (1971); 40 Fordham L. Rev. 635 (1972); 1972 U. Ill. L.F. 199.


\(^3\) 403 U.S. at 101. See also notes 107-10 infra and accompanying text.

\(^4\) 403 U.S. at 104-07. See also notes 111-19 infra and accompanying text.

\(^5\) See note 1 supra for the facts in Griffin. See also notes 111-19 infra and accompanying text.

\(^6\) See notes 127-38 infra and accompanying text.

\(^7\) See notes 139-74 infra and accompanying text.

\(^8\) See notes 175-222 infra and accompanying text.

decisions must be touched upon, and a thorough exploration made of the holding of *Griffin v. Breckenridge*. Then, in order to analyze the adjudication of section 1985(3) in the federal courts since *Griffin*, the statute will be broken down into the four elements of its cause of action (as set out by the Court in *Griffin*) and each will be discussed individually. To provide a focus for that discussion, as well as some practical application for this Note, the examination of these elements will be conducted from the standpoint of a sex discrimination claimant attempting to utilize section 1985(3).

I. THE CIVIL RIGHTS ACTS AND THE STRICT CONSTRUCTIONIST COURT

42 U.S.C. § 1985(3) has its roots in the Ku Klux Klan Act of 1871. That Act was the culmination of two earlier attempts by Congress to enact workable civil rights legislation after the Civil War. The 1871 Act was largely the response of an empassioned Republican Congress to the incalculable violence practiced by the Ku Klux Klan during the


11 See notes 121-25 infra and accompanying text for the reasons why a sex discrimination claimant was chosen as a model.


13 The Reconstruction Congress’ first piece of civil rights legislation was the Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, 14 Stat. 27. Section 2 of the 1866 Act contained the germ of future civil rights legislation:

That any person who, under color of any law . . . shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act . . . on account of or by reason of his color or race . . . , shall be punished by fine . . . or imprisonment . . .

Congress’ second attempt was “An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes,” Act of May 31, 1870, ch. 114, 16 Stat. 140 (popularly known as “The Enforcement Act”). This act was passed after the ratification of the fourteenth and fifteenth amendments and was concerned primarily with voting rights. Sections 6 and 17 of this Act, however, were the forerunners of Sections 2 and 1, respectively, of the Ku Klux Klan Act. The significant difference was that the conspiracy provision of the 1870 Act, Section 6, provided only a criminal remedy; whereas the conspiracy provision of the Ku Klux Klan Act, Section 2, allowed for both a criminal and a civil remedy.

14 There can be no doubt that the Klan and other secret societies were guilty of innumerable crimes, and that their secrecy was often a cloak for lawlessness and outrages directed against the blacks and even against recalcitrant whites. Thus Ku Klux Klan investigation of 1871 reported 153 Negroes murdered in a single Florida county that year; over 300 murdered in parishes outside New Orleans; bloody race riots in Mississippi and Louisiana; a reign of terror in parts of Arkansas; and in Texas, “murders, robberies and outrages of all kinds.” It was, says the historian of reconstruction, Ellis P. Oberholtzer, a “reign of outrage and crime which, all taken together, forms a record of wrong among the most hideous in the history of any modern state.” Not all of this could be laid at the doors of the Klan or the White Leaguers, or even of the whites, but the evidence is conclusive that they were responsible for most of the violence that afflicted the South during these turbulent years.

SECTION 1985(3)

post-war period; and is generally regarded as the lineal ancestor of most civil rights legislation in force today.


That if two or more persons . . . conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws . . . , and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof . . . shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, of by both such fine and imprisonment as the court shall determine. And if any one or more persons engaged in any such conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy . . . .

In 1875, when Congress compiled the Revised Statutes, the criminal and civil remedies set out in Section 2 were separately codified. The criminal conspiracy provision found its way into two separate sections of the Revised Statutes. One was codified in Rev. Stat. § 5508, 18 Stat. 1073 (1875) (current version at 18 U.S.C. § 241 (1970)) [hereinafter cited as Rev. Stat. § 5508 (1875)] which provided:

If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.


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, 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; each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, not less than six months nor more than six years, or by both such fine and imprisonment.


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 . . . ; in any case of conspiracy set forth in this section, if one or more persons engaged therein do,
The heart of the Ku Klux Klan Act was section 2,\textsuperscript{17} which set out criminal and civil penalties for anyone who conspired to deprive another of his civil rights. The plain words of that section,\textsuperscript{18} as well as the legislative history of the Act itself, indicate that it was Congress' intent to reach the violent acts of private citizens (as opposed to only the acts of state agents) through the civil conspiracy provision in section 2 of the Act.\textsuperscript{19} Yet for a hundred years after its enactment this civil conspiracy statute was not available for use against private citizens.

Like all the Reconstruction era civil rights statutes the conspiracy provisions of the Ku Klux Klan Act were severely emasculated by the strict constructionism of the Supreme Court in the 1870's-1880's.\textsuperscript{20} The Court's strict interpretations of these statutes, and of the thirteenth, fourteenth, and fifteenth amendments they were meant to enforce, not only altered the effect intended by Congress, but also created the constitutional doctrines surrounding the fourteenth amendment to which we adhere today.

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. There have been some subsequent re-codifications since the 1875 Revised Statutes were compiled — most notably the Criminal Code of 1909, 35 Stat. 1092 and the first United States Code of 1926, 44 Stat. 462 — but they have been omitted because there have been no substantial changes in the conspiracy provisions since 1875.


For an overview of the statutory history of the early civil rights acts, see generally, 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS (1970); Gressman, supra note 15.

\textsuperscript{17} Relevant portions of Section 2 are set out in full at note 18 supra.

\textsuperscript{18} "If two or more persons . . . go in disguise upon the highway . . . ." Act of April 20, 1871, ch. 22 § 2, 17 Stat. 13. As the Supreme Court itself held in 1971: "Going in disguise, in particular, is in this context an activity so little associated with official action and so commonly connected with private marauders that this clause could almost never . . . be read to require the involvement of state officers." Griffin v. Breckenridge, 403 U.S. 88, 96 (1971).

\textsuperscript{19} See Griffin v. Breckenridge, 403 U.S. 88, 99-100 (1971); notes 107-10 infra and accompanying text. But 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, 379 (1967) wherein the author claims that since largely the same men who drafted the fourteenth amendment also drafted the Ku Klux Klan Act, it is inconceivable, given the fact that the fourteenth amendment has a state action requirement, that they intended any statute based upon that amendment to reach wholly private action. Therefore, Avins claims, the Ku Klux Klan Act was not an unconstitutional exercise of congressional power under the fourteenth amendment, but merely an example of poor draftsmanship.

\textsuperscript{20} Gressman, supra note 15, at 1336-37 points out that much of the confusion and misdirected zeal of the Reconstruction Congress found its way into the drafting of the post-war amendments and statutes, making the "loose and unspecific language of its legislation ripe for the alterations the strict constructionist judiciary had in mind."
With the Slaughter-House Cases\textsuperscript{21} of 1873 the Supreme Court had its first opportunity to interpret the privileges or immunities clause of the fourteenth amendment.\textsuperscript{22} Since the language in some key sections of the civil rights acts\textsuperscript{23} was based upon this important clause, the Court's decision indirectly had a great effect upon them.

In the Slaughter-House Cases the Court rejected the argument that the privilege of engaging in the slaughtering business was guaranteed to Louisiana citizens by the fourteenth amendment's privileges or immunities clause. The Court held that such a privilege was among those belonging to the citizens of the states, and as such, was to be protected only by the state governments.\textsuperscript{24} The Court noted that the fourteenth amendment did not place those privileges and immunities running between the citizen and the state under the special care of the federal government. Therefore, only those rights arising out of the individual's relationship to the national government would be protected by the privileges or immunities clause.\textsuperscript{25} The Court declined to determine what rights were placed under the special care of the federal government, but in dicta suggested that such rights might include: the right to travel to the nation's capital; the right to protection on the high seas and within foreign territory; and the right to peaceably assemble and petition the federal government for redress of grievances.\textsuperscript{26} As one commentator has pointed out, the irony of the Court's decision lies in the fact that these singular prerogatives (somewhat euphemistically called "rights") bore no practical relationship to the brutal violence that accompanied post-war violations of civil rights in the South and gave rise to the fourteenth amendment.\textsuperscript{27}

In effect, the Court's holding in the Slaughter-House Cases reduced the privileges or immunities clause to a nullity;\textsuperscript{28} and indirectly, placed Congress' enthusiastically drawn civil rights legislation on uncertain ground. This was especially true of the conspiracy sections, the heart of the earlier acts, for they were drafted to protect "rights or privileges granted or secured by the Constitution"\textsuperscript{29} and "privileges and immunities under the laws."\textsuperscript{30} After the Slaughter-House decision the rights so protected were next to nonexistent.

\textsuperscript{21}83 U.S. (16 Wall.) 36 (1873) (On the ground that it was a proper subject of the state's police power, the Court upheld a Louisiana statute that created a corporation and conferred upon it a twenty-five year monopoly to establish stockyards and slaughterhouses within a fixed division of New Orleans).

\textsuperscript{22}"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

\textsuperscript{23}See, e.g., Act of April 20, 1871, ch. 22, §§ 1, 2, 17 Stat. 13; Act of May 31, 1870, ch. 114, §§ 6, 17, 16 Stat. 140; Act of April 9, 1866, ch. 31, §§ 1, 2, 14 Stat. 27.

\textsuperscript{24}83 U.S. (16 Wall.) at 78-79.

\textsuperscript{25}Id.

\textsuperscript{26}Id.

\textsuperscript{27}Gressman, supra note 15, at 1338.

\textsuperscript{28}The remark is not original. The same description was employed by the late Chief Justice Warren. Warren, Fourteenth Amendment: Retrospect and Prospect, in The Fourteenth Amendment 218 (B. Schwartz ed. 1970).

\textsuperscript{29}See, e.g., Act of May 31, 1870, ch. 114, § 6, 16 Stat. 140.

\textsuperscript{30}See, e.g., Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.
Two years later, with the decision in United States v. Cruikshank, the emasculation of the privileges or immunities clause was officially extended to the civil rights legislation itself. In Cruikshank, sixteen indictments were brought under section 6 of the 1870 Act alleging, among many other things, the existence of a conspiracy to deny the right to assemble and petition the government. In dismissing the indictments, the Court applied the Slaughter-House rationale and reiterated that Congress could only legislate on the relationship between the citizen and the national government. To illustrate, since the indictment in Cruikshank did not specify that the victims of the conspiracy were assembling specifically for the purpose of petitioning the federal government, the Court held the right to be one that ran between the victims and the state (not between the victims and the federal government), and as such, it was outside the protection of the statute and beyond the reach of Congress.

Devastating as it was, Cruikshank's restriction of section 6 of the 1870 Act was not a lethal blow to the rest of Congress' civil rights legislation. The statutes were meant to enforce the provisions of the post-war amendments, so despite the crippling of the fourteenth amendment's privileges or immunities clause, the statutes were still theoretically capable of enforcing the remaining provisions of those amendments.

Just eight years after the decision in Cruikshank, however, the civil rights acts became totally incapable of carrying out the intentions of their framers when the Supreme Court handed down its decisions in United States v. Harris and the Civil Rights Cases. It was in these cases that the Court for the first time pronounced the state

---

31 92 U.S. 542 (1875) (the indictments in Cruikshank arose from a grisly incident known as the "Colfax Massacre;" the incident occurred in Colfax, Louisiana when a white sheriff and an all black posse were besieged in a courthouse by a mob that set the building afire and shot the black posse members as they were forced out by the flames). See H. Cummings & C. McFarland, Federal Justice 241-46 (1937). It is interesting to note that none of the grim facts appear in the Court's opinion dismissing the indictments.

32 Act of May 31, 1870, ch. 114, § 6, 16 Stat. 140; see note 13 supra.

33 92 U.S. at 551.

34 Id. at 548-50.

35 There were at least two notable bright spots in that eight year period. In 1879 the Supreme Court decided two cases that clearly advanced the intentions of the framers of the civil rights legislation: Strauder v. West Virginia, 100 U.S. 303 (1879) (the Court struck down a state statute which limited jury duty to white persons on the ground that it was contrary to the equal protection clause); and Ex parte Virginia, 100 U.S. 339 (1879) (the Court upheld section 4 of the 1875 Civil Rights Act, Act of March 1, 1875, ch. 114, § 4, 18 Stat. 335, which made it a federal offense to exclude any citizen from a jury because of his race).

36 106 U.S. 629 (1883).

37 109 U.S. 3 (1883).

38 Strong intimations of the state action doctrine had been made in Cruikshank: The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add any thing to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every re- publican government is in duty bound to protect all its citizens in the enjoyment
action doctrine of the fourteenth amendment. This doctrine, more than anything else, disabled the Reconstruction Congress' civil rights legislation.

The plaintiffs in the Civil Rights Cases had been denied access to various public places (an inn, a theatre, an opera house, and a railroad car) by the purely private actions of the owners of those establishments. When indictments were brought against these owners under sections 1 and 2 of the 1875 Civil Rights Act, the Court looked closely at these sections and questioned Congress' authority to enact them. The Court perceived that if Congress had the constitutional authority to enact sections 1 and 2, that authority had to come from one of the post-war amendments. The Court held that none of those amendments empowered Congress to legislate against the actions of private citizens.

According to the Supreme Court, denying someone admission to a public inn or theatre did not subject one to servitude, or fasten upon one a "badge of slavery"; therefore, Congress had no power under the thirteenth amendment to enact the disputed sections. This left only the fourteenth amendment as a possible source of Congressional power. Since the Court chose to strictly construe the fourteenth amendment, and read the first section of the amendment as controlling over the fifth, Congress, according to the Court, had power under the fourteenth amendment to reach only the actions of states, and not of private citizens:

of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

92 U.S. at 554-55. Other indications had appeared in Ex parte Virginia, 100 U.S. 339 (1879) and Virginia v. Rives, 100 U.S. 313 (1879). But despite these earlier decisions, and even though the decision in United States v. Harris preceded the Civil Rights Cases, the opinion in the Civil Rights Cases has become generally recognized to have established the state action doctrine.

Act of March 1, 1875, ch. 114, §§ 1, 2, 18 Stat. 355. This Act did not significantly affect the earlier civil rights acts. The main thrust of the 1875 Act was in the public accommodations provisions contained in section 1:

That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

109 U.S. at 20-22.

The fifteenth amendment deals only with voting so it was not considered by the Court, and it was not until 1964 and the decisions of Katzenbach v. McClung, 379 U.S. 294 (1964) and Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (both cases involved the constitutionality of Title II of the Civil Rights Act of 1964) that the commerce clause, U.S. Const. art. I § 8, was used to proscribe discrimination in public places connected with interstate commerce.

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

U. S. Const. amend. XIV, § 1 (emphasis added).

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U. S. Const. amend. XIV, § 5.
It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. . . . [T]he last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to.\textsuperscript{44}

The above-quoted portion of the Court's opinion in the \textit{Civil Rights Cases} is generally credited as the Supreme Court's official endorsement of the state action doctrine;\textsuperscript{45} after the \textit{Civil Rights Cases} the state action doctrine was firmly established in the lexicon of the fourteenth amendment.

In \textit{United States v. Harris},\textsuperscript{46} an indictment was brought under section 5519 of the Revised Statutes\textsuperscript{47} against twenty defendants in connection with the severe beating of four black men (one of whom died). As in the \textit{Civil Rights Cases} the Court questioned Congress' power to enact the legislation in question and examined the three post-war amendments for possible sources of Congressional authority. The Court dismissed the fifteenth amendment as inapplicable,\textsuperscript{48} and applied the burgeoning state action doctrine to eliminate the fourteenth amendment as well because section 5519 was drafted to be enforced against private persons.\textsuperscript{49} As for the thirteenth amendment, the Court conceded that this amendment apparently could reach private action, but concluded that the provisions of section 5519 overreached the boundaries of the thirteenth amendment. The \textit{Harris} Court held that section 5519 could be used to punish whites for conspiring against whites as well as blacks, and in the Court's eyes the thirteenth amendment, which only prohib-


\textsuperscript{45} See note 38 supra.

\textsuperscript{46} 106 U.S. 629 (1883).

\textsuperscript{47} REV. STAT. § 5519 (1875) was originally a provision within Section 2 of the 1871 Act, Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13. See note 16 supra.

\textsuperscript{48} 106 U.S. at 637.

\textsuperscript{49} As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution.

\textit{Id.} at 640.
mented slavery and involuntary servitude, could not be viewed as authorizing Congress to legislate concerning white conspiracies against whites.\textsuperscript{50}

Since the Supreme Court, at the time of the \textit{Harris} decision, was following a strict severability rule that required the invalidation in toto of an overly broad statute that could not be limited enough to be brought within constitutional bounds,\textsuperscript{51} all of section 5519 was struck down as unconstitutional because of the potential for unconstitutional application in a situation involving a white versus white conspiracy.\textsuperscript{52}

After the decisions in \textit{United States v. Harris} and the \textit{Civil Rights Cases}, the judicial limitation of the Reconstruction Congress' civil rights legislation effectively came to an end.\textsuperscript{53} The strict construction the Supreme Court had given the post-war amendments, and their enabling statutes, had brought litigation under the statutes to a near standstill; and due to the Court's interpretations, the civil rights statutes held little potential for proscribing the conduct of private citizens.

\section*{II. Case Law After the Supreme Court's Emasculation of the Civil Rights Legislation}

\subsection*{A. The Appearance of the Rights of National Citizenship}

After the Supreme Court's decisions in the \textit{Civil Rights Cases} and \textit{United States v. Harris}, the only statute available to redress civil rights violations committed by private citizens was the criminal conspiracy statute, Revised Statutes § 5508.\textsuperscript{54} This statute had survived the strict

\textsuperscript{50} Even if the amendment is held to be directed against the action of private individuals, as well as against the action of the States and United States, the law under consideration covers cases both within and without the provisions of the amendment. It covers any conspiracy between two free white men against another free white man to deprive him of any right accorded him by the laws of the State or of the United States. A law under which two or more free white private citizens could be punished for conspiring or going in disguise for the purpose of depriving another free white citizen of a right accorded by the law of the State to all classes of persons — as, for instance, the right to make a contract, bring a suit, or give evidence — clearly cannot be authorized by the amendment which simply prohibits slavery and involuntary servitude.

\textit{Id.} at 641.

\textsuperscript{51} The severability rule was adopted in United States v. Reese, 92 U.S. 214 (1876) when the Court declared a statute based on the fifteenth amendment unconstitutional because the statute could have been extended to denials of suffrage on other than racial grounds. Thereafter, the Court was willing to disregard some language in a statute in order to save it from unconstitutionality; but, as in \textit{Harris}, the Court would not write into a statute words of limitation that were not originally there. \textit{See generally}, Stern, \textit{Separability and Separability Clauses in the Supreme Court}, 51 Harv. L. Rev. 76 (1937). The severability rule was, however, ultimately rejected by the Supreme Court in 1960. United States v. Raines, 362 U.S. 17 (1960); \textit{accord}, Griffin v. Breckenridge, 403 U.S. 88 (1971).

\textsuperscript{52} 106 U.S. at 642.

\textsuperscript{53} Congress itself had the final role in dismantling the Reconstruction-era legislation when in 1894, the year the Democrats got control of the Presidency and both houses of Congress for the first time since before the Civil War, much of the Reconstruction Congress' civil rights legislation was repealed. Act of February 8, 1894, ch. 25, 28 Stat. 36.

constructionism of the Supreme Court because it was drafted to protect those rights secured by federal law and the Constitution. By protecting only those rights running between the individual citizen and the national government it escaped the charge of overbreadth that section 5519 had succumbed to in *United States v. Harris.* Given the limited opportunities for its use, section 5508 provided little protection against civil rights violations by private citizens; but, were it not for an obscure and confusing line of cases involving this statute, it is likely that no private citizen would have been prosecuted for a civil rights violation in the nineteenth century.

The obscure cases referred to mark one of the most curious developments in American constitutional law. In these cases the Supreme Court recognized an odd collection of prerogatives that have come to be known as the “rights of national citizenship.” Most of the cases which recognized these singular rights were brought under section 5508, and like the rights themselves, had remained little more than historical oddities until the Supreme Court decision in *United States v. Guest.* The *Guest* case unearthed one of the national citizenship rights, the right to travel, and thrust it into the constitutional limelight by holding that it could be protected from both public and private interference. The opinion in *Guest,* however, did nothing to clear the fog of case law from which the rights of national citizenship emerged. While this Note cannot presume to steer a true course through that fog, an attempt must be made to explore the precedents from which the rights of national citizenship sprang. As discussed earlier, in the *Slaughter-House Cases* the Supreme Court stated (in dicta) that certain rights were placed under the special care of the federal government because they ran exclusively between the individual citizen and the national government. Only these rights, the Court inferred, were eligible for protection under the privileges or immunities clause. Chief among the rights identified in the *Slaughter-House Cases* were the right to travel to the nation’s capital and the right to assemble and petition the federal government. Later, in *Cruikshank,* the Supreme Court reaffirmed (again in dicta) the existence of a federally protected right to petition the national government, and held that such a right could conceivably be protected from private interference by section 6 of the 1870 Civil Rights Act. This holding in *Cruikshank* could have marked the beginning of an expansive

56 See notes 47-52 supra and accompanying text.
58 See note 26 supra and accompanying text.
59 *Id.*
60 92 U.S. at 548-50. See notes 31-34 supra and accompanying text. For the legislative history of section 6 of the 1870 Civil Rights Act, see note 13 supra.
interpretation of the privileges or immunities clause. Drawing upon the
dicta in *Cruikshank*, such an expansive interpretation could have resulted
in a gradual recognition of more of these federally protected rights. This
expansion of the privileges or immunities clause never came to
 fruition however. *Cruikshank* was the last case to extrapolate upon the
*Slaughter-House* Court's identification of privileges or immunities.
After *Cruikshank*, those cases that established other rights of national
citizenship, did not rely solely upon the privileges or immunities ra-
tionale developed in the dicta of the *Slaughter-House* and *Cruikshank*
decisions.

*Ex parte Yarbrough* was the first case after *Cruikshank* in which
the Supreme Court recognized another of the rights that have come to
be known as national citizenship rights. *Yarbrough* involved the prose-
cution of eight men under Revised Statutes §§ 5508 and 5520. The
eight had conspired to prevent blacks from voting in a congressional
election and in carrying out the conspiracy had badly beaten a person.
The Court, faced with a challenge to the constitutionality of sections
5508 and 5520, held that there was a constitutionally protected right to
vote in a federal election and that Congress had power under the nec-
essary and proper clause to protect that limited right through the enact-
ment of the two statutes. According to the Court, Congress' power
under the necessary and proper clause was inherent in the healthy or-
ganization of government itself. The Court said if a republican form of
government such as the United States', that relies upon the free choice
of the people to elect their representatives, is to survive, the violent
acts of private persons cannot be allowed to threaten the right to vote. In
effect, the Court held that Congress possessed authority attendant
to a power of self-preservation that is inherent in a republican form
of government, in tandem with its authority under the necessary and
proper clause. So empowered, Congress was authorized to enact Re-

---

61 110 U.S. 651 (1884).
62 Rev. Stat. § 5520, 18 Stat. 1076 (1875) was a criminal statute designed to pro-
tect voting rights in federal elections.
63 *[T]his fifteenth article of amendment does, *proprio vigore*, substantially confer
on the negro the right to vote, and Congress has the power to protect and enforce
that right.

In the case of United States v. Reese, so much relied on by counsel, this court
said in regard to the Fifteenth Amendment, that "it has invested the citizens of
the United States with a new constitutional right which is within the protecting
power of Congress. That is an exemption from discrimination in the exercise of
the elective franchise on account of race, color, or previous condition of servitude.”
This new constitutional right was mainly designed for citizens of African descent.
The principle, however, that the protection of the exercise of this right is within
the power of Congress, is as necessary to the right of other citizens to vote as to the
colored citizen, and to the right to vote in general as to the right to be protected
against discrimination.

The exercise of the right in both instances is guaranteed by the Constitution
and should be kept free and pure by congressional enactments whenever that is
necessary.
110 U.S. at 665.
64 Id. at 658.
65 Id. at 666-67.
vised Statutes §§ 5508 and 5520 to proscribe any private conduct that impinged upon a citizen’s right to vote in a federal election.

In later cases that drew support from Yarbrough the Supreme Court recognized other rights of national citizenship.\(^{66}\) Like Yarbrough, these later cases identified rights that did not rest upon an express constitutional provision. These later cases made no reference to the privileges or immunities clause, and thus cannot accurately be said to have identified privileges or immunities like those mentioned in the Slaughter-House Cases. But after Yarbrough the distinction between those rights that could accurately be called privileges or immunities and those rights recognized in cases owing their origin to the Yarbrough precedent became unclear.

Illustrative of the Court’s subsequent merger of these rights into a single classification is the opinion in In re Quarles.\(^{67}\) In Quarles the Court held that a United States citizen had a right to inform a federal marshall of a violation of federal law. The Quarles Court’s discussion grouped Cruikshank and Yarbrough together and stated that the two cases recognized the same types of rights.\(^{68}\) Significantly, no discussion of the privileges or immunities clause appeared in the Court’s opinion.

Today, the distinction is apparently academic. The Supreme Court has on at least three occasions grouped all of the cases discussed above into one indiscernible category: simply, the cases that established “rights of national citizenship.”\(^{69}\) While such a gloss does make this area more tidy, the modern litigant who attempts to utilize one of these curious prerogatives cannot be sure of the exact nature or origin of these rights. Practically speaking, however, the important thing to note is that the Supreme Court has repeatedly held Congress can protect these rights from interference by private citizens.

B. United States v. Waddell

One of the more interesting cases that has been credited with establishing a right of national citizenship, United States v. Waddell,\(^{70}\) deserves separate consideration. In Waddell the Supreme Court relied upon the reasoning employed in Ex parte Yarbrough to allow section 5508- to reach a conspiracy designed to interfere with one Burrell Lindsey’s rights under the Homestead Act.\(^{71}\) Lindsey was forcibly driven

\(^{66}\) See United States v. Mosley, 238 U.S. 383 (1915) (the right to have your vote counted in a national election); In re Quarles, 158 U.S. 532 (1895) (the right to inform federal marshalls of violations of federal law); Logan v. United States, 144 U.S. 263 (1892) (the right to be safe from attack while in the custody of a United States marshall).

\(^{67}\) 158 U.S. 532 (1895).

\(^{68}\) Id. at 535.


\(^{70}\) 112 U.S. 76 (1884).

\(^{71}\) Rev. Stat. §§ 2289-91, 18 Stat. 422 (1895). Under these statutes a person could acquire fee simple title to land by building a house and making other improvements on the land, residing there for five years, and paying all the fees necessary to the issuance of title.
off land he was attempting to homestead and he brought suit under section 5508 against those who had driven him off. Since the statute clearly stated that a violation occurred when "two or more persons conspire to injure or oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . ," the government argued that the defendant's interference with Lindsey's homesteading rights (rights granted to him by a constitutionally valid federal statute) constituted an actionable violation of section 5508. The Supreme Court agreed, and relied exclusively on Ex parte Yarbrough in upholding the conviction of Lindsey's assailants. The Court quoted the Yarbrough opinion when it identified the source of Congress' authority to use section 5508 to protect homesteading rights:

The power arises out of the circumstance that the function in which the party is engaged, or the right which he is about to exercise, is dependent on the laws of the United States. In both of these cases it is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing.

While the Waddell Court did not specifically mention the necessary and proper clause, the Court's exclusive reliance on Yarbrough in its identification of congressional power indicates that the Yarbrough interpretation of Congress' power to enact section 5508 — as derived from the necessary and proper clause, read in conjunction with a republican government's inherent power of self-preservation — was employed.

The significance of Waddell is easy to overlook. Initially the case appears only to provide protection of a citizen's right to homestead. Upon a closer examination of the language in the decision, however, it is apparent that the Supreme Court was granting section 5508 protection to any rights expressly secured by federal statute. Waddell is

72 Rev. Stat. § 5508 (1875).
73 According to the Court, U.S. Const. art. IV, § 3, which provides that: "[Congress shall have the power] to dispose of and make all needful rules and regulations respecting the territory or other property of the United States" authorized Congress' enactment of the Homestead Acts. 112 U.S. at 79.
74 112 U.S. at 79-80.
75 112 U.S. at 80 (incorrectly quoting Ex parte Yarbrough, 110 U.S. 651, 662 (1884)).
76 See Twining v. New Jersey, 211 U.S. 78, 97 (1908) in which the Court inaccurately cited the right protected by Waddell as only a right to enter public lands.
77 The protection of this section [Rev. Stat. § 5508 (1875)] extends to no other right, to no right or privilege dependent on a law or laws of the State. Its object is to guarantee safety and protection to persons in the exercise of rights dependent on the laws of the United States, including, of course, the Constitution and treaties as well as statutes, and it does not, in this section at least, design to protect any other rights.

Whenever the acts complained of are of a character to prevent this [the exercise of a statutory right], or throw obstruction in the way of exercising this right, and for the purpose and with intent to prevent it, or to injure or oppress a person because he has exercised it, then, because it is a right asserted under the law of the United States and granted by that law, those acts come within the
the only case in which the Supreme Court has adopted this broad approach. Other cases in which the Court relied upon Yarbrough's interpretation of Congress' power to provide section 5508 protection involved only indistinct rights implied by the Constitution. If the Yarbrough interpretation of Congress' power to enact Revised Statute § 5508 is correct, it would seem that employment of this interpretation in Waddell to protect an express right is even more convincing than its employment in other cases that protected obscure and indefinite rights not expressly granted by a statute or the Constitution. However anomalous the Court's holding in Waddell therefore, given the Yarbrough precedent, it is quite correct.

III. Griffin v. Breckenridge AND THE REVITALIZATION OF THE CIVIL REMEDY FOR PRIVATE CONSPIRACIES

Not until 1971, fully one hundred years after the passage of the Ku Klux Klan Act, did 42 U.S.C. § 1985(3), the civil conspiracy statute, provide a remedy for a civil rights violation. The revival of this statute, however, was not an isolated event; it was part of the Warren Court's broad new view of the Reconstruction era legislation. Little can be added here to the material written on the Court's gradual adoption of this view, but two of the major developments need to be examined in order to better understand the Court's choice in Griffin v. Breckenridge of the thirteenth amendment and the right to travel as sources for Congress' power to proscribe the acts of private citizens.

A. Prelude to Griffin

1. United States v. Guest: Private Action and the Right to Travel

United States v. Guest78 was a companion case to United States v. Price.79 Both cases involved 18 U.S.C. § 241 and in both the Court affirmed its intention to have section 241 reach deprivations of any right or privilege secured by the laws or Constitution of the United States,80 including the fourteenth amendment.81 Like Price, the Guest decision, written by Justice Stewart, affirmed the state action requirement of the fourteenth amendment.82 Unlike Price, the Guest decision recognized

purview of the statute and of the constitutional power of Congress to make such statute.

112 U.S. at 79-80. A reading such as this, that would allow REV. STAT. § 5508 (1875) to protect rights granted under federal statutes, can have tremendous implications for litigation under 42 U.S.C. § 1985(3) (1970). See McLellan v. Mississippi Power & Light Co., 526 F.2d 870 (5th Cir. 1976); notes 200-22 infra and accompanying text.

79 383 U.S. 787 (1966). The incident which gave rise to the Price decision was the murder of three civil rights workers — Schwerner, Chaney, and Goodman — by sheriff Cecil Ray Price and seventeen others in Philadelphia, Mississippi.
81 Price dealt with the due process clause of the fourteenth amendment, whereas Guest involved the equal protection clause.
82 383 U.S. at 755. Justice Stewart's opinion for the Court explicitly confirmed this, but because of the strange alignment of the Court — Stewart, J. writing the opinion;
the right to travel (wholly apart from the fourteenth amendment) as being secured against all interference — whether it be private or state; and concluded that section 241 could be used to reach the conspiracies of private citizens.\textsuperscript{83}

In his dissent in \textit{Guest}, Justice Harlan sharply disputed the existence of such a constitutional right to travel,\textsuperscript{84} but the Court, while making it abundantly clear that the right to travel is independent of the fourteenth amendment, based the right alternatively on the commerce clause\textsuperscript{85} and on its being a basic right under the Constitution.\textsuperscript{88} It is significant that the Court's opinion cited \textit{Twining v. New Jersey}\textsuperscript{87} for the latter proposition. \textit{Twining} listed the right to travel as one of the old "rights of national citizenship," protected by section 241 under the \textit{Slaughter-House} dicta,\textsuperscript{88} and grouped it together with those other peculiar rights established in \textit{Cruikshank}, \textit{Yarbrough}, \textit{Quarles}, and \textit{Waddell}.\textsuperscript{89}

To some it may have appeared that with the \textit{Guest} decision the Supreme Court had for the first time recognized a constitutional

\textsuperscript{83} \textit{Id.} at 759 n.17.

\textsuperscript{84} \textit{Id.} at 762-74 (Harlan, J. concurring in part and dissenting in part).

\textsuperscript{85} \textit{Id.} at 758-59 (citing \textit{Edwards v. California}, 314 U.S. 160 (1941) (depression-era California law which prevented the free interstate passage of indigents held invalid)).

\textsuperscript{86} 383 U.S. at 758-59. The exact origin of the right to travel is open to dispute. In \textit{Guest} the Court actually avoided the issue. "Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right to travel, there is no need here to canvass those differences further. All have agreed that the right exists." \textit{Id.} at 759. In effect, the Court simply listed the precedents which had allowed that the right to travel existed. No attempt was made in \textit{Guest} to define its source. Three years later, the Court again declined to identify the right's source, "We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision." \textit{Shapiro v. Thompson}, 394 U.S. 618 (1969). The \textit{Shapiro} Court did, however, refer to three provisions of the Constitution upon which the Supreme Court had, in the past, grounded the right to travel: the privileges and immunities clause of U.S. \textit{Constr.} art. IV, § 2; the privileges or immunities clause of the fourteenth amendment; and the commerce clause, U.S. \textit{Constr.} art. I, § 8. One commentator has suggested there are at least three additional distinct sources not mentioned by the Court in \textit{Shapiro}: the "penumbra" of the first amendment; the equal protection clause of the fourteenth amendment; and the due process clauses.


It is conceivable that anyone, or perhaps all, of the provisions listed above could, in time, be recognized by the Court as a source of the right to travel. What is significant about the Court's opinion in \textit{United States v. Guest}, and in \textit{Griffin v. Breckenridge}, is that the Court reaffirmed the right to travel's place among those rights recognized as rights of national citizenship, and held that it could be protected against private interference. No matter what may be ultimately decided concerning the exact origins of the right to travel, there will always be good authority for that right's protection as a right of national citizenship.

\textsuperscript{87} 211 U.S. 78 (1908).

\textsuperscript{88} \textit{Id.} at 97. For a discussion of the dicta referred to see notes 21-30 \textit{supra} and accompanying text.

\textsuperscript{89} 211 U.S. at 97.
ground for congressional power to reach deprivations of civil rights perpetrated by private citizens. What is often overlooked is that Guest's holding on the right to travel was perfectly in line with that anomalous, yet long-established, line of cases which introduced the rights of national citizenship.\textsuperscript{90} Ironically, it was the \textit{Slaughter-House} opinion, the opinion which marked the beginning of the gradual emasculation of the Reconstruction-era legislation, that made the \textit{Guest} Court's holding possible. It was the dicta of the \textit{Slaughter-House} Court that spawned the rights of national citizenship, and it was these rights that provided the \textit{Guest} Court with additional constitutional ground on which to base Congress' authority under section 241 to reach private action.\textsuperscript{91}


Another of the old Reconstruction-era statutes was revived by the Supreme Court in \textit{Jones v. Alfred H. Mayer Co.}\textsuperscript{92} In \textit{Jones}, one Joseph Lee Jones sought relief under 42 U.S.C. § 1982,\textsuperscript{93} alleging the Alfred H. Mayer Company had discriminated against him by refusing to sell him a home in St. Louis County, Missouri. The Court held that section 1982 was a bar to all racial discrimination, public and private, in the sale or rental of property; and that the statute was a valid exercise of Congress' power under section two of the thirteenth amendment.\textsuperscript{94}

The seeds of the \textit{Jones} decision lay, incongruously, in the dicta of opinions like \textit{United States v. Harris} and the \textit{Civil Rights Cases}. It was the \textit{Harris} Court which first conceded that Congress conceivably had power under section two of the thirteenth amendment to reach private action;\textsuperscript{95} and it was the language of the \textit{Civil Rights Cases} that the \textit{Jones} Court seized upon to support its holding on the broad reach of the thirteenth amendment:

\begin{quote}
\textit{All Citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.}
\end{quote}

\textsuperscript{90} See notes 57-69 supra and accompanying text.

\textsuperscript{91} Prior to the decision in \textit{Griffin v. Breckenridge} it might have been possible to view the Court's holding on the right to travel in \textit{Guest} as inconclusive since the \textit{Guest} Court also held that the actions complained of in that case were conceivably done "under color of law." (The Court found it unnecessary to reach the question of whether the acts complained of constituted the requisite state action because they were ruling on a motion to dismiss, and the indictment contained a strong enough allegation of state action to deny the motion. 383 U.S. at 756-57.) After \textit{Griffin}, however, Congress' power to reach private action based on the right to travel was settled. \textit{Griffin v. Breckenridge}, 403 U.S. 88, 105 (1971).

\textsuperscript{92} 392 U.S. 409 (1968).

\textsuperscript{93} Originally enacted by Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, re-enacted by the Enforcement Act of 1870, Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144, and originally codified in REV. STAT. § 1778, 18 Stat. 348 (1875) (current version at 42 U.S.C. § 1982 (1970): "All Citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.")

\textsuperscript{94} 392 U.S. at 413. The thirteenth amendment provides: "1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. 2. Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XIII.

\textsuperscript{95} 106 U.S. at 640-41 (quoted at note 50 supra).
[T]his Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery — its "burdens and disabilities" — included restraints upon "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." 96

The Jones decision has been criticized97 and its full ramifications — especially the nature of the "fundamental rights" to which the Court will extend protection under the thirteenth amendment — have yet to be ascertained.98 But after Jones, it appears beyond dispute that Congress has broad powers under section two of the thirteenth amendment to reach private, racially motivated conduct.

Without these two cases, Guest and Jones, and their identification of two new sources for congressional authority to reach private action, the holding in Griffin v. Breckenridge would not have been possible. Griffin's reliance on these two decisions not only provided the Court with a constitutional basis for its holding, but it also stirred anew the controversies left unsettled by the Court in Jones and Guest.

B. Griffin v. Breckenridge

In reaching its historic decision to allow section 1985(3) to reach private deprivations of civil rights, the Griffin Court faced three obstacles: (1) the Supreme Court's earlier decision in Collins v. Hardyman99 that imposed a state action requirement upon section 1985(3); (2) the oft-debated question whether Congress intended for section 1985(3) to reach private action; and (3) the further question of from what source Congress derives its power to proscribe private action.

1. Griffin: Distinguishing Collins

In 1951 the Supreme Court held in Collins v. Hardyman that section 1985(3) could not be used to reach private action. The Collins Court reasoned that section 1985(3) could not reach private conspiracies because private persons could not deprive others of "equal protection of the laws" without some "manipulation of the law or its agencies."100 Although the Collins Court did not say so directly, apparently it found it necessary to read a state action requirement into section 1985(3) in order to save it from the fate of its criminal twin, Revised Statute § 5519,

96 392 U.S. at 441 (quoting Civil Rights Cases, 109 U.S. 3, 22 (1883)).
98 For a good prospective look at the potential implications of the Jones decision see Note, The "New" Thirteenth Amendment: A Preliminary Analysis, 82 Harv. L. Rev. 1294 (1969).
99 341 U.S. 651 (1951) (petitioners, members of a political group opposed to the Marshall Plan, alleged that the defendants, supporters of the Plan, had forcefully broken up petitioners' meeting in furtherance of a conspiracy to deprive the petitioners of their right to assemble).
100 Id. at 661.
at the hands of the Harris Court. The Harris Court had held section 5519 unconstitutional because the statute, as drafted, reached private action and the Harris Court believed a statute based on the fourteenth amendment had no authority to do so.\textsuperscript{101} Since the Collins Court felt section 1985(3) was likewise based upon the fourteenth amendment, only by restricting section 1985(3) to those actions of the states or their agencies could the Collins Court have upheld the statute. This, in effect, made section 1985(3) close to a useless redundancy, since anything actionable under that section was also actionable under 42 U.S.C. § 1983.

Griffin's treatment of the Collins precedent is hardly decisive; in fact, it is incorrect to say that Griffin overruled Collins.\textsuperscript{102} The Collins Court had concerned itself only with Congress' authority under the fourteenth amendment to enact section 1985(3), whereas the Griffin Court determined that Congress had that authority apart from the fourteenth amendment.\textsuperscript{103} Collins, therefore, may still be a viable precedent in support of the contention that any section 1985(3) claim alleging a deprivation of fourteenth amendment rights requires state action.\textsuperscript{104} The Court in Griffin, in effect, sidestepped the Collins holding once it had been isolated as a fourteenth amendment case.

In addition, Griffin's interpretation of "equal protection of the laws" further distinguished it from Collins. Griffin held there was "nothing inherent in [that] phrase that requires the action working the deprivation to come from the State."\textsuperscript{105} Therefore, according to Griffin, the equal protection language found in section 1985(3) did not limit the statute to the protection of fourteenth amendment rights; rather, it allowed protection for the "equal enjoyment of rights secured by the law to all."\textsuperscript{106} But this holding in Griffin does not diminish Collins' precedent value in the fourteenth amendment area, because "equal protection," as used by the Griffin Court in the sense of "equal enjoyment of legal rights," only applies to those rights secured outside of the fourteenth amendment. Therefore, in future actions brought under section 1985(3) involving deprivations of rights secured by the fourteenth amendment's equal protection clause, Collins v. Hardymun, despite the intimations in Griffin, is still controlling.

2. Griffin: Congress Did Intend for Section 1985(3) to Reach the Acts of Private Citizens

Finding congressional intent for section 1985(3)'s reach into private matters did not pose great difficulties for the Griffin Court. On

\textsuperscript{101} See note 49 supra and accompanying text.

\textsuperscript{102} "Whether or not Collins v. Hardymun was correctly decided on its own facts is a question with which we need not here be concerned." Griffin v. Breckenridge, 403 U.S. 88, 95 (1971).

\textsuperscript{103} Id. at 104-07.

\textsuperscript{104} Although they do not employ Collins as authority, this is the contention of a number of courts today. See, e.g., Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972); notes 179-99 infra and accompanying text.

\textsuperscript{105} 403 U.S. at 97.

\textsuperscript{106} Id. at 102. See notes 139-53 infra and accompanying text.
the face of the statute alone the Court found two reasons: First, the wording of the statute — "conspire or go in disguise on the highway, . . ." — clearly manifested an intent to proscribe private conduct. Second, reading the civil rights statutes together, section 1985(3)'s companion provisions would make that statute a redundancy if Congress had not intended for it to reach private action. Moreover, to further reinforce its reading of Congress' intent to reach private action, the Griffin Court delved into the legislative history of section 1985(3) and earlier judicial interpretations of its criminal counterparts — Revised Statutes § 5519 and 18 U.S.C. § 241. Ironically, one of the judicial interpretations chosen by the Griffin Court as demonstrative of Congress' intent to reach private action was the very language used by the Court in United States v. Harris to hold section 5519 unconstitutional:

In construing the exact criminal counterpart of § 1985(3), the Court in United States v. Harris . . . , observed that the statute was "not limited to take effect only in case [of state action]," . . . but "was framed to protect from invasion by private persons, the equal privileges and immunities under the laws, of all persons and classes of persons," . . .

3. Griffin: Congress Has Power, Under Both the Thirteenth Amendment and the Right to Travel, to Proscribe Private Conduct

The most significant of the Court's obstacles in Griffin was the identification of Congress' constitutional authority to reach private conduct through section 1985(3). Fortunately for the Court, however, the tailor-made facts of Griffin adapted readily to recently developed case law making the task relatively easy. Since the plaintiffs in Griffin were black, the Jones decision, (with its identification of a constitutional ground for reaching racially motivated action) provided the Court with one source for congressional authority — the thirteenth amendment. And, since the plaintiffs in Griffin were also traveling on federal and state highways, the Guest decision, (with its identification of a constitutional ground for reaching private conduct impinging upon one's right to travel) provided the Court with an additional source

107 Id. at 96.
108 Id. at 98-99.
109 As an example of the framers' intentions, the Court set out the oft-quoted remark of Representative Shellabarger who introduced the Ku Klux Klan Act: "[T]he United States has assumed to enforce, as against the States, and also persons, every one of the provisions of the Constitution." Id. at 100 (emphasis supplied by the Court).
110 Id. at 97-98 (quoting United States v. Harris, 106 U.S. 629, 639, 637 (1883)). The Harris decision itself, however, created no problems for the Court in Griffin. Not only did Griffin establish authority outside of the fourteenth amendment for section 1985(3)'s reach into private matters, but also the Griffin Court was not bound by the restrictive severability rule adhered to in Harris. See note 51 supra for discussion of the severability rule.
for congressional authority.\textsuperscript{114} Though the fourteenth amendment was raised in the plaintiffs' complaint,\textsuperscript{115} the \textit{Griffin} Court quite distinctly avoided a decision concerning Congress' authority under the fourteenth amendment to enact section 1985(3).\textsuperscript{116} The Court's reluctance to resolve this issue is troublesome because it offers little guidance for future section 1985(3) decisions.

It is the flip-side of the constitutional authority question that is all-important: What rights can section 1985(3) protect? For example, if Congress had power under the thirteenth amendment to enact section 1985(3), then surely the rights secured by that amendment are eligible for protection under the statute. Likewise, if Congress had power under the constitutionally protected right to travel, then that right (and by logical extension the other rights of national citizenship) is also eligible for protection under section 1985(3). In order to gain the protection of the statute, any other right must also be secured by a section of the Constitution that authorizes Congress to reach into the matters of private citizens, as opposed to matters of the states. Regretably, the \textit{Griffin} Court did not identify any other sections of the Constitution that might secure such rights.

On its face, then, \textit{Griffin's} holding on the sources of congressional authority is greatly restrictive of the potential reach of section 1985(3). No matter how the Court may define the "basic rights that the law secures to all free men,"\textsuperscript{117} protected under the thirteenth amendment by the \textit{Jones} decision, those thirteenth amendment rights of any consequence are secured only to black citizens. White citizens have no substantial rights under the thirteenth amendment. As for the right to travel, the infrequency of the situations that give rise to its use alone serves as a significant limitation.

Notably, the \textit{Griffin} Court intentionally declined to offer an indication of any other permissible source for congressional power:

\begin{quote}
In identifying these two constitutional sources of congressional power, we do not imply the absence of any other. . . . By the same token, since the allegations of the complaint bring this cause of action so close to the constitutionally authorized core of the statute, there has been no occasion here to trace out its constitutionally permissible periphery.\textsuperscript{118}
\end{quote}

While the above quoted language can be read to undercut a reading of \textit{Griffin} that would necessarily restrict section 1985(3) only to the protection of the right to travel and thirteenth amendment rights,\textsuperscript{119} the Court's abstention on this issue, as well as its equivocal language, make the paragraph susceptible to differing interpretations. Either opinion

\begin{footnotes}
\item[114] \textit{Griffin} v. Breckenridge, 403 U.S. 88, 105-06 (1971).
\item[115] Count 5 of the plaintiff's complaint is set out in full in \textit{Griffin}. \textit{Id.} at 90.
\item[116] \textit{Id.} at 107.
\item[117] \textit{Id.} at 105.
\item[118] \textit{Id.} at 107.
\item[119] For one author who reads \textit{Griffin} as authority for section 1985(3) to reach only racial discrimination, see 46 \textit{Tulane L. Rev.} 822 (1971).
\end{footnotes}
on the issue of congressional authority, restrictive or expansive, can claim support from the words of the Court.

In sum, the Griffin Court capitalized on a propitious fact situation to overcome its third obstacle — Congress' constitutional authority to reach private conduct. In so doing, the Court not only avoided the difficult fourteenth amendment questions presented by the plaintiffs’ complaint, but it also left the federal courts without guidance in their adjudication of section 1985(3) cases involving neither the right to travel nor any thirteenth amendment rights. As can be expected, the federal courts have not been uniform in their decisions concerning the reach of section 1985(3), and it is into this grey area of conflicting federal court opinions that a litigant seeking to use the statute must proceed.

IV. SECTION 1985(3) AFTER Griffin v. Breckenridge: WHAT IS ITS REACH?

A. Sex Discrimination: A Potential Litmus Test

An exploration of the various attempts by litigants to frame causes of action under section 1985(3) would be neither practical nor productive. Therefore, this Note will select the area of sex discrimination, using it as a touchstone to demonstrate the problems litigants and courts alike have experienced in utilizing the statute. The four elements of a section 1985(3) cause of action, set out by the Griffin Court, will be examined below and an attempt will be made to determine if a cause of action can successfully be framed under section 1985(3) for a sex discrimination claim. In so doing, comparisons will be made to the other areas in which litigants have attempted to use the statute. Focusing in this manner on sex discrimination, it is hoped, will serve to give the discussion some practical application, and thereby produce a better understanding of the future of section 1985(3).

Sex discrimination was not chosen arbitrarily. In many ways, the sex discrimination field has of late served as the center stage for civil rights litigation: Sex discrimination litigation has most recently come the closest to creating a new “suspect” class under the analysis of the equal protection clause; has given new impetus to the irrebuttable

120 403 U.S. at 102-03.

121 Under the equal protection clause of the fourteenth amendment there are two recognized standards of review applied to test the constitutionality of classifications made under the authority of law — the “rational basis” test and the “strict scrutiny” test. Those classes which the Supreme Court has deemed “suspect” receive the higher “strict scrutiny” standard of review. Imposition of this higher test makes it close to impossible to lawfully discriminate on the basis of a person’s being a member of the class in question. For an excellent overview of equal protection analysis under these two tests, see Note, Developments in the Law — Equal Protection, 82 Harv. L. Rev. 1065 (1969).

122 See Frontiero v. Richardson, 411 U.S. 677 (1972) (Air Force regulation which required husbands of female Air Force officers to prove that they were in fact dependent upon their wives for support before gaining dependency benefits was declared unconstitutional). Four Justices — Brennan, Douglas, White, and Marshall, J. J. — were willing to recognize sex as a suspect classification. The Frontiero decision, however, was the high water mark of efforts to gain “suspect” classification for sex discrimination; since that decision the
presumption doctrine;\textsuperscript{123} initiated the controversy over the existence of an “intermediary test” for equal protection standards;\textsuperscript{124} and may yet spawn a twenty-seventh amendment to the United States Constitution. Also, the next time the Supreme Court finds itself faced with a question regarding the constitutional bounds of section 1985(3), it could be in a sex discrimination case. This is because sex discrimination is an area that demands resourcefulness from its litigants. Race discrimination has become essentially a settled field, since litigants in the area have at their disposal a number of well mapped-out methods by which they may secure their civil rights.\textsuperscript{125} Sex discrimination litigants, on the other hand, do not as yet have all of these same means available to them; therefore, they tend to be more innovative, more willing to push existing remedies such as section 1985(3) to their constitutional limits. It is natural then, for any discussion concerned with the future reach of section 1985(3) to be attentive to the area of sex discrimination.

\textbf{B. The Elements of a Section 1985(3) Cause of Action}

Even though the federal courts were left without guidance concerning the reach of section 1985(3), the opinion in \textit{Griffin v. Breckenridge} made the statute’s adjudication somewhat simpler by setting out the elements that comprise a cause of action under section 1985(3):


\textsuperscript{123} See \textit{Cleveland Bd. of Educ. v. LaFleur}, 414 U.S. 632 (1974) (mandatory maternity leave struck down as a “conclusive presumption” concerning the physical ability of pregnant teachers and therefore violative of the due process clause of the fourteenth amendment).

\textsuperscript{124} See \textit{Reed v. Reed}, 404 U.S. 71 (1971) (Idaho statute that preferred men for the administration of estates declared unconstitutional). Since the Supreme Court in \textit{Reed} applied what appeared to be a “minimum scrutiny” or “fair and substantial basis” test to the questioned statute, some commentators have maintained that there are in fact three tests being applied in the equal protection area — “rational basis,” “fair and substantial basis,” and “strict scrutiny.” \textit{See Gunther, The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972); Wilkinson, The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality, 61 Va. L. Rev. 945 (1975). And while it cannot yet be said with certainty, it appears that a majority of the Court has endorsed the “fair and substantial basis” test’s use for gender-based classifications. \textit{See Craig v. Boren}, 97 S. Ct. 451 (1976) (Oklahoma statute that prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18 declared unconstitutional). Finally, there is the possibility that yet another test is being applied in the equal protection area for classifications that discriminate in favor of women. \textit{See Schlesinger v. Ballard}, 419 U.S. 498 (1975) (Navy’s mandatory discharge policy that was more favorable towards women upheld); \textit{Kahn v. Shevin}, 416 U.S. 351 (1974) (Florida tax exemption made available only for widows upheld).

\textsuperscript{125} Not only has race been a “suspect” class since \textit{Brown v. Board of Educ.}, 347 U.S. 483 (1954), but also, since \textit{Jones v. Alfred H. Mayer, Co.}, 392 U.S. 409 (1968), race discrimination litigants have had the older revitalized civil rights statutes such as 42 U.S.C. §§ 1981, 1982 (1970) at their disposal. Additionally, there is the more recent \textit{Civil Rights Act of 1964}, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6 (1970 & Supp. IV 1974).
To come within the legislation a complaint must allege that the defendants did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States." 126

In order to delineate the reach of section 1985(3) and determine if the statute can be used for a sex discrimination claim, one is tempted to look immediately to element (4) and deal at length with the question of what rights Congress has the constitutional power to protect with section 1985(3). But such an approach overlooks the fact that all of the elements must be present in order for a section 1985(3) cause of action to be successful. If a court determines the absence of any of the four, a section 1985(3) claim will be dismissed. Because of this, some courts are finding it unnecessary to even reach the fourth element; while others have been reaching it needlessly. Admittedly, elements (2) and (4) impose the most serious limitations upon the statute; but elements (1) and (3) do deserve comment.

1. Elements (1) and (3) of a Section 1985(3) Cause of Action

(1) [Two or more persons] "conspire or go in disguise upon the premises of another." 127

(3) [The conspirators] did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was [injured or deprived].

Elements (1) and (3) can conveniently be treated together since they deal less with the substantive components of the cause of action, and must always be satisfied in the same manner regardless of what rights the statute is being used to protect.

Read together, these two elements require a conspiracy, an overt act done in furtherance of that conspiracy, 128 and sufficient causation

126 403 U.S. at 102-03.

127 As the legislative history of the Ku Klux Klan Act indicates, this language was chosen with the activities of the Klan specifically in mind, and today it has a somewhat anachronistic sound.

between the overt act and the particular injury or deprivation of which the plaintiff complains. Although for the most part the federal courts have had little difficulty applying these two elements, there has been at least one noteworthy inconsistency. Some courts, either by oversight or through ignorance, have not considered whether there are enough conspirators to form a conspiracy.

Although the statute requires only two persons to constitute a conspiracy, in the contemplation of the law there are situations that involve many different people, but only one “person” for legal purposes. Under general principles of agency for example, legally only one “person” has acted when a business entity and its agents or employees commit a tort. The majority of the courts that have addressed this issue in a section 1985(3) decision have held, in accordance with agency principles, that only one “person” — the business entity — has acted.

The majority view on this question was ably expressed by Judge (now Justice) Stevens in Dombrowski v. Dowling: Applying the analysis used in Dombrowski to a situation involving a corporation necessarily limits the possibilities of a successful civil conspiracy suit against a corporation to a few specific situations: (1) when individual agents or employees act not in their corporate capacity but in their individual capacity, with no benefit enuring to the corporation; (2) when a corporation is a sham corporation set up for the purpose of carrying out the conspiracy (thereby giving a plaintiff grounds to “pierce the corporate veil” and reach the conspirators personally); or (3) when a conspiracy involves two separate corporations. Case law on these suggested situations has yet to be fully developed. The few courts that have discussed them have usually done so in dicta; but it appears safe to say that any successful section 1985(3) action

129 In this respect, a civil conspiracy action differs markedly from the traditional criminal conspiracy action since the damages in a civil conspiracy flow not from the bare existence of a conspiracy, but from the overt acts done in furtherance of that conspiracy. See generally Reichardt v. Payne, 396 F. Supp. 1010, 1019 (N.D. Cal. 1975); Fitzgerald v. Seamans, 384 F. Supp. 688, 693 (D.D.C. 1974).

130 459 F.2d 190 (7th Cir. 1972) (real estate corporation's agents held incapable of forming a conspiracy to refuse rental space to plaintiffs).

131 Id. at 196 (emphasis added). Accord, Baker v. Stuart Broadcasting Co., 505 F.2d 181, 183 (8th Cir. 1974) (corporation held incapable of conspiring to refuse employment to plaintiff); Lattimore v. Loews Theatres, Inc., 410 F. Supp. 1397, 1402 (M.D.N.C. 1975) (corporation could not conspire with its employees to deny a former employee equal protection in the absence of an allegation that the supervisor acted outside the scope of his employment); Jones v. Tennessee Eastman Co., 397 F. Supp. 815, 816 (E.D. Tenn. 1974), aff'd mem., 519 F.2d 1402 (6th Cir. 1975) (company held unable to conspire to deny plaintiff promotions and increases in pay); Girard v. 94th St. & Fifth Ave. Corp., 396 F. Supp. 450, 455 (S.D.N.Y. 1975) (corporation's board of directors held incapable of conspiring to block a lease assignment and stock transfer). Cf. Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953) (corporation held incapable of conspiring under section 1 of the Sherman Act).

132 Clark v. Universal Builders, Inc., 409 F. Supp. 1274, 1279 (N.D. Ill. 1976) (a number of corporations held to have conspired among themselves).

against a corporation is likely to occur in only one of the three above-mentioned situations.

Due largely perhaps to the infrequency of its consideration, the finer points of this issue have yet to be delineated. For example, even if on the authority of Dombrowski v. Dowling it were accepted as settled that a corporation and its agents cannot ordinarily be liable to a civil conspiracy charge, does this necessarily hold true also for a partnership? Can individual partners, or the partnership itself, be held to have conspired with the agents or employees of the partnership? Judge Stevens apparently did not consider this question in Dombrowski; yet his choice of the language "a single business entity" tempts an observation that perhaps he gave some consideration to the question.

While the Dombrowski holding on the inability of a business entity to conspire with itself is the majority view, it has not been unanimously accepted. In Rackin v. University of Pittsburgh, a federal district court refused to apply the Dombrowski rationale to a situation in which a university was charged with having conspired to deny tenure. The plaintiff alleged numerous instances of discrimination and the Rackin court attempted to limit the Dombrowski holding to situations involving "a single act of discrimination by a single business entity." The Rackin court offered no further explanation and cited no authority for its holding. This analysis is unpersuasive; no matter how many individual acts were involved in the Rackin case, that does not alter the fact that only one "person" (the University) committed the acts, and one "person" cannot constitute a conspiracy. At least five other district courts that have considered cases involving universities charged with civil conspiracies have not agreed with the Rackin court's conclusion. It can be expected, therefore, that those courts that reach the question of

134 For a sampling of those courts that have either overlooked or ignored this issue see Bellamy v. Mason's Stores, Inc., 508 F.2d 504 (4th Cir. 1974) (a corporation alleged to have conspired with its employees to fire an employee because of his membership in the Ku Klux Klan). Boreman, J., in his concurring opinion, however, noticed that the court's opinion overlooked this issue. Id. at 508 (Boreman, J. concurring); Westberry v. Gilman Paper Co., 507 F.2d 206, vacated as moot, 507 F.2d 215 (5th Cir. 1975) (a company, its agents, and employees held to have conspired to fire and kill an employee because of his anti-pollution efforts); Hughes v. Ranger Fuel Corp., 487 F.2d 6 (4th Cir. 1972) (a coal company alleged to have conspired to discharge an employee due to his criticism of the employer's employment practices); Pendrell v. Chatham College, 370 F. Supp. 494 (W.D. Pa. 1974) (a college, its agents, and employees held to have conspired to terminate plaintiff's employment).

135 459 F.2d at 196.


137 The Rackin court noted that "[Plaintiff] has alleged many continuing instances of discrimination and harassing treatment by the alleged conspirators. Her allegations comprise much more than 'essentially a single act of discrimination by a single business entity' and therefore the Dombrowski decision is inapplicable." Id. at 1005-06. Accord, Jackson v. University of Pittsburgh, 405 F. Supp. 607 (W.D. Pa. 1975) (same factual situation as Rackin).

whether a business entity can be charged with a civil conspiracy are likely to side with Judge Stevens in *Dombrowski*, and hold business entities incapable of conspiring under normal circumstances.

2. **Element (2) of a section 1985(3) Cause of Action**

(2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."

This second element poses the first substantial analytical questions encountered by a litigant attempting to frame a cause of action under 42 U.S.C. § 1985(3) for sex discrimination. It is this element that sets out the requisite intent that a conspirator must have in order for a conspiracy to be actionable under section 1985(3). According to the Supreme Court, this element requires that there be "some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." To understand what the Court meant by "class-based animus," an examination must be made of the reasoning in *Griffin*.

a. **Class-based Animus Defined**

As discussed earlier, the *Griffin* Court clearly had no difficulty in finding that Congress had intended for section 1985(3) to reach private action. But the Court's examination of Congressional intent did not stop there; for had *Griffin* held only that section 1985(3) was intended to reach private action, unlimited possibilities would have existed for the statute's application to traditionally state-adjudicated tort claims. Therefore, in order to prevent the statute from becoming a "general federal tort law," it was necessary for the *Griffin* Court to delimit which private conspiracies Congress had intended section 1985(3) to reach. In order to do this, the Court again examined the legislative history of section 2 of the Ku Klux Klan Act.

As the Court noted, section 2 was originally introduced in Congress as a broad prohibition against conspiracies entered into with the intent "to do any act in violation of the rights, privileges or immunities of another person . . . ." The broad language of the proposed statute, however, was considered untractable and the bill was soon amended. That amendment produced the final wording for section 2: and generated the congressional debate from which the *Griffin* Court distilled Congress' purported intention to establish the intent requirement for a section 1985(3) conspiracy. Quoting Representatives Willard and Shella-

---

140 See notes 107-10 supra and accompanying text.
141 403 U.S. at 101-02.
142 Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13; see note 16 supra.
143 403 U.S. at 100.
144 *Cong. Globe*, 42d Cong., 1st Sess. 68 (1871).
145 See note 16 supra.

http://engagedscholarship.csuohio.edu/clevstlrev/vol25/iss3/3
barger, the Court reasoned that the only way to prevent section 1985(3) from applying to all tortious conspiracies, thereby begetting a federal tort law, was to require the conspirators to have some class-based, invidious motivation behind their actions.\(^{146}\) The Court apparently came to this conclusion by examining both Willard's\(^ {147}\) and Shellabarger's\(^ {148}\) remarks and deducing that Congress used the phrase "equal protection" in section 2 of the 1871 Act to mean "the equal enjoyment of rights the law secures to all citizens." Therefore, section 2 (now 42 U.S.C. § 1985(3)) was drafted to proscribe conspiracies that aimed to deny a citizen his co-equal status. Such conspiracies, the Court felt, would necessarily have some "racial or otherwise class-based" motivation behind them.\(^ {149}\)

The Court's analysis of this element is not easy to follow. Perhaps in anticipation of this difficulty, the Griffin Court attempted to further elucidate this intent requirement by distinguishing it from the intent requirements contained in sections 242\(^ {150}\) and 1983.\(^ {151}\) Section 242 requires that there be a "specific intent" to deprive someone of a "right made definite by decision or other rule of law";\(^ {152}\) and section 1983's intent requirement lies at almost the other end of the spectrum, requiring instead that there be only the general intent requirement familiar to tort law, that one intend the natural consequences of one's actions.\(^ {153}\) The

\(^{146}\) 403 U.S. at 102.

\(^{147}\) "[T]he essence of the crime should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities under the laws . . . ." 403 U.S. at 100 (quoting Cong. Globe, 42d Cong., 1st Sess. 188 (1871) (remarks of Representative Willard)).

\(^{148}\) [Section 2 extends] to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section.

\(^{149}\) "The language requiring intent to deprive of equal protection, or equal privileges and immunities, means . . . . The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." 403 U.S. at 102 (emphasis in original).


\(^{152}\) Screws v. United States, 325 U.S. 91, 103 (1945) (several state police officers were charged with beating a black man to death in the course of arresting him in connection with a tire theft). Confronted with a void-for-vagueness challenge to 18 U.S.C. § 242 (1970), the Screws Court upheld that statute by reading into it a specific intent requirement: "[T]he presence of a bad purpose or evil intent alone may not be sufficient . . . a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness." Id. This same intent requirement has been extended to 18 U.S.C. § 241 (1970). United States v. Guest, 383 U.S. 745, 760 (1966).

\(^{153}\) Monroe v. Pape, 365 U.S. 167, 187 (1961) (13 Chicago police officers broke into petitioner's home, ransacked his house, arrested him without a warrant, held him in custody for ten hours, and subsequently released him without criminal charges being brought). In Monroe, the Supreme Court set out the intent requirement for section 1983 actions and compared it to that of section 242 actions:

In the Screws case we dealt with a statute that imposed criminal penalties for acts "willfully" done. We construed that word in its setting to mean the doing of an
section 1985(3) intent requirement actually lies somewhere between these two. A conspirator need not specifically intend to deny someone a right secured by law; but in contrast, it is not sufficient, standing alone, that the conspiracy resulted in such a denial. A conspiracy, for section 1985(3) purposes, must not only result in deprivation of a secured right, but the conspiracy must also have been motivated by some ill-will towards a particular class of which the plaintiff is a member. This is the purport of "class-based, invidiously discriminatory animus" being an element of a section 1985(3) cause of action.

b. Class-based Animus Applied

On their face, the words "class-based invidiously discriminatory animus" seem to imply that the "classes" referred to are the "suspect" classes so familiar to equal protection analysis of legislative classifications. The Griffin Court, however, stated that equal protection, as used in section 1985(3), has meaning apart from the equal protection clause of the fourteenth amendment: "The language requiring intent to deprive of equal protection, or equal privileges and immunities, means . . . . The conspiracy . . . must aim at deprivation of the equal enjoyment of rights secured by the law to all." Freed from their restrictive fourteenth amendment connotations, the words "class-based" and "invidiously discriminatory" take on broader meanings within the context of section 1985(3). The statute, therefore, has the potential of encompassing countless "classes" of litigants.

The Supreme Court provided no guidance in Griffin v. Breckenridge for determining which "classes" could (or could not) avail themselves of the statute's protection. The Court, in fact, refused to speculate on whether discrimination against any class, other than one based upon race, would be actionable under section 1985(3). Because of the Supreme Court's equivocation, those lower courts that have heard section 1985(3) claims since Griffin have had to rely upon their own interpretations of act with "a specific intent to deprive a person of a federal right." We do not think that gloss should be placed on § 1979 [current version at 42 U.S.C. § 1983 (1970)] which we have here . . . . § 1979 provides a civil remedy, while in the Screws case we dealt with a criminal law . . . . Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

Id. (citation omitted). In order to violate 42 U.S.C. § 1983 (1970), therefore, one need only intend to do an act that results in a person being deprived of any right, privilege, or immunity secured by law.

Although the Monroe Court's statement on section 1983 intent remains in force today, there are indications that the Supreme Court could, in time, revise this intent requirement. For example, the Court recently has announced a "discriminatory purpose" standard to be applied to claims of discrimination under the fourteenth amendment equal protection clause. Washington v. Davis, 96 S. Ct. 2040 (1976) (written test given to police officer applicants which had disproportionate adverse impact on black applicants was upheld). Thus far, however, the Davis "discriminatory purpose" standard has been applied only to practices that are neutral on their face but have a disproportionate impact on a definable class.

154 403 U.S. at 102 (emphasis in the original).
155 403 U.S. at 102 n.9.
"class-based animus" in their determinations of what satisfies the second element of a section 1985(3) cause of action.

Although no circuit court has yet had occasion to rule on whether discrimination based upon sex is the type of "class-based" discrimination contemplated by the Supreme Court in Griffin,\textsuperscript{156} it is safe to assume that a conspiracy designed to discriminate against someone on the basis of sex satisfies the requisite motivation for an actionable section 1985(3) conspiracy.\textsuperscript{157} This assumption is supportable by the few district court opinions that have so held and by a cursory examination of the holdings within the circuits on other types of actionable discriminatory animus.

First, only three district court cases can be accurately said to have held that private conspiracies motivated by sexual bias are sufficiently class-based to come within section 1985(3). In two of them, Reichardt \textit{v. Payne}\textsuperscript{158} and Stern \textit{v. Massachusetts Indemnity & Life Insurance Co.},\textsuperscript{159} the female plaintiffs alleged that they had been discriminated against in purchasing disability insurance policies;\textsuperscript{160} and in both cases the court directly held that sex discrimination was class-based within the purview of the Supreme Court's decision in Griffin.\textsuperscript{161} In the third case, Pendrall \textit{v. Chatham College},\textsuperscript{162} while the court held that section 1985(3) can support a cause of action for sex discrimination,\textsuperscript{163} the court did not specifically address the issue of whether the requisite animus of section 1985(3) was met. Similarly, there have been other cases in which the district courts have allowed a section 1985(3) claim based upon sex discrimination, but those cases have not mentioned any of the substantive issues concerning its propriety.\textsuperscript{164} This is but one indication of the general acceptance among the federal courts that a claim based upon sex discrimination unquestionably has the requisite "class-based animus" for section 1985(3).

\textsuperscript{156} Although Cohen \textit{v. Illinois Inst. of Technology}, 524 F.2d 818 (7th Cir. 1975), cert. denied, 96 S. Ct. 1883 (1976) and Weise \textit{v. Syracuse Univ.}, 522 F.2d 397 (2d Cir. 1975) both involved sex discrimination claims, neither court reached the issue of whether sex-based discrimination satisfied Griffin's class-based animus requirement. \textit{See}, e.g., 522 F.2d at 408 n.16.

\textsuperscript{157} This is not to say that sex discrimination \textit{per se} is actionable under section 1985(3), but only that sex-based discrimination has the requisite "class-based invidiously discriminatory animus" to satisfy the second element of a section 1985(3) cause of action. \textit{In order to make the broader assumption, that sex discrimination \textit{per se} is actionable under section 1985(3), a final element — Congress' authority to proscribe against sex discrimination — must also be satisfied.} \textit{See} notes 175-222 \textit{infra} and accompanying text.

\textsuperscript{158} 396 F. Supp. 1010 (N.D. Cal. 1975).


\textsuperscript{160} Representative of the plaintiff's allegations is the complaint in Reichardt which alleged among other things: "(1) women cannot obtain coverage for as long a period of disability as can men; (2) women must wait a longer period of time than men for benefit payments to commence once a disability has occurred; and (3) women are subject to a lower ceiling on monthly benefits than similarly situated men." 396 F. Supp. at 1012.

\textsuperscript{161} \textit{Id.} at 1018; 365 F. Supp. at 443.


\textsuperscript{163} \textit{Id.} at 348.

Secondly, further support can be found by quickly examining the types of discernible "classes" that, according to the circuit courts, satisfy Griffin's requirement that a conspiracy's motivation be class-based. Some of them include: members of the Jewish faith,\textsuperscript{165} members of a political group,\textsuperscript{166} members of an environmentalist group,\textsuperscript{167} members of a white middle-class church,\textsuperscript{168} members of a group of employees who filed for bankruptcy,\textsuperscript{169} and perhaps the smallest of the recognized classes, members of one particular family.\textsuperscript{170} Also one circuit has held that a section 1985(3) claimant need not even be an actual member of any class, that a conspiracy against one who has advocated the rights of a particular class has sufficient class-based animus.\textsuperscript{171} Judging from these varied, and sometimes quite anomalous, "classes" that have been held to be sufficient by the circuit courts, it is inconceivable that a litigant attempting to frame a cause of action under section 1985(3) could not satisfy that statute's intent requirement by alleging the existence of a conspiracy to discriminate on the basis of sex.\textsuperscript{172}

One final thing should be mentioned about this second element. In light of the potential, practical difficulties involved in proving that a defendant in a section 1985(3) action has the requisite class-based animus, it is foreseeable that this element might serve to greatly restrict the statute's future usefulness. One of the things that greatly facilitates the use of section 1983, for example, is the ease with which its intent requirement is proven; a section 1983 claimant need only prove that the

\textsuperscript{165} Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973). The Marlowe court curiously did not discuss the question of animus, but the court did uphold a claim brought under section 1985(3) that alleged religious discrimination.

\textsuperscript{166} Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), cert. denied, 424 U.S. 958 (1976) (class consisted of those opposed to the incumbent administration of an Indian tribe); Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973) (class consisted of supporters of opponent to incumbent sheriff). See also Classon v. City of Louisville, 518 F.2d 899 (6th Cir.), cert. denied, 423 U.S. 930 (1975) (class consisted of those carrying signs critical of President Nixon).

\textsuperscript{167} Westberry v. Gilman Paper Co., 507 F.2d 206, vacated as moot, 507 F.2d 215 (5th Cir. 1975).

\textsuperscript{168} Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971).

\textsuperscript{169} McLellan v. Mississippi Power & Light Co., 528 F.2d 870 (5th Cir. 1976). See note 224 infra.

\textsuperscript{170} Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972).

\textsuperscript{171} Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971) (plaintiff opposed his employer's allegedly racially discriminatory policy). Accord Pendrell v. Chatham College, 386 F. Supp. 341 (W.D. Pa. 1974) (plaintiff satisfied the class-based requirement twice over, she was a woman and an advocate of women's rights).

\textsuperscript{172} Those litigants who have attempted to demonstrate the requisite class-based animus for section 1985(3) purposes and who have failed, have done so usually for one of three reasons: (1) Their allegations do not assert that they are members of a discernible enough class. See, e.g., O'Neill v. Grayson County War Memorial Hosp., 472 F.2d 1140 (6th Cir. 1973); Bricker v. Crane, 468 F.2d 1228 (1st Cir. 1972), cert. denied, 410 U.S. 930 (1973). (2) Their allegations do not assert that they have been conspired against because of their membership in a certain class; rather, their being within a certain class was simply coincidental to the conspiratorial action taken against them. See, e.g., Harrison v. Brooks, 519 F.2d 1358 (1st Cir. 1975); Arnold v. Tiffany, 487 F.2d 216 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974); Hughes v. Ranger Fuel Corp., 467 F.2d 6 (4th Cir. 1972). (3) Their allegations completely neglected to assert any class whatsoever. See, e.g., McNally v. Pulitzer Publishing Co., 532 F.2d 69 (8th Cir. 1976); Hahn v. Sargent, 523 F.2d 461 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976); Lesser v. Braniff Airways, Inc., 518 F.2d 538 (7th Cir. 1975).
defendant instigated an action that resulted in the claimant being in some way deprived of his rights. By contrast, prosecutions under sections 241 and 242 are greatly hampered by the specific intent requirement of those statutes. Proving that a defendant "specifically" intended to deprive someone of a federal right has become a very difficult burden for the prosecution to carry in actions involving those two sections; and because of this, few actions brought under these statutes are ultimately successful.

Proving section 1985(3)'s intent requirement could pose similar difficulties. This would be particularly true in cases involving covert or subtle discrimination. It should be borne in mind, therefore, that although the federal courts have been willing to find a number of "classes" capable of satisfying Griffin's class-based motivation requirement, in some instances, a more demanding task of proving those allegations of class-based discrimination may lie ahead. The distinction here is between alleging facts sufficient to assert a claim of class-based discrimination, and proving facts sufficient to uphold a finding of class-based discrimination. And, if the problems encountered in proving intent in actions under sections 241 and 242 offer any indication, it could be that the success section 1985(3) litigants have had thus far in framing their allegations may not carry over into their efforts at proving them.

3. Elements (4) and (5) of a Section 1985(3) Cause of Action

Whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

The satisfaction of this fourth element, on its face, does not pose a serious problem for those litigants attempting to use section 1985(3) as a remedy for sex discrimination. The bare language of this element requires only that a claimant be either injured or deprived of a federal right. Only certain rights, however, will be protected under the statute; and the determination of which rights will be so protected involves criteria that of themselves constitute another element of a section 1985(3) cause of action. Although not identified as such by the Supreme Court


174 See Shapiro, Limitations in Prosecuting Civil Rights Violations, 46 CORNELL L. Q. 532 (1961). As the author points out, a prime example of this is sheriff Screws (the named defendant in Screws v. United States) and those tried with him. They were all acquitted in the retrial after the Supreme Court decision. Id. at 535.

175 The Supreme Court's framing of (4a) and (4b) in the disjunctive is misleading. It is conceivable that someone may be injured pursuant to a private conspiracy that possesses the requisite intent of section 1985(3) and not be deprived of any federal rights. According to the language of the Griffin Court, and of the statute itself, such conspiratorial conduct would appear to be actionable under section 1985(3), provided Congress has the constitutional authority to proscribe such private conduct. But therein lies the problem: Congress has such constitutional authority only when a federally protected right — such as the right to travel — is involved. Therefore, a conspiracy that merely injures someone, without depriving the person of a federal right, is not actionable under section 1985(3); rather, the injured party's proper civil remedy lies in a common law tort action.
in *Griffin v. Breckenridge*, it is apparent that such a fifth element does exist, because the framing of a section 1985(3) cause of action is not completed by fulfilling only the four elements listed in *Griffin*. Conceptually, there is an unspoken element that is the most crucial requirement of a section 1985(3) cause of action: A claimant must demonstrate that section 1985(3) has the constitutional authority to protect him from the particular private conspiracy that he alleges.\textsuperscript{176} Without such a demonstration of Congress' constitutional authority to proscribe, through its enactment of section 1985(3), the private conspiracy complained of, the fulfillment of elements (1) through (4) can be given no effect because the statute cannot be applied unconstitutionally. In *Griffin v. Breckenridge*, the Supreme Court recognized this requirement and treated it at length,\textsuperscript{177} but chose not to list it as an element of a section 1985(3) cause of action. For purposes of analyzing the statute, however, it is helpful to view this requirement separately.

In attempting to satisfy this unspoken fifth element, a litigant seeking to use section 1985(3) for a sex discrimination claim faces the same questions that confronted the Supreme Court in *Griffin*: From where does Congress derive its power to reach the acts of private citizens? In *Griffin*, the special facts of the case facilitated the Court's identification of two sources of Congress' constitutional authority — the thirteenth amendment and the right to travel.\textsuperscript{178} But these two sources offer no help to a litigant attempting to use the statute against sex discrimination. New constitutional guarantees must be explored by such a litigant. Accordingly, in the discussion that follows, the two most likely areas upon which a sex discrimination claimant could draw for the constitutional authority to allow section 1985(3) to reach private conspiracies, will be examined.

\textbf{a. The Fourteenth Amendment}

Section 1985(3) clearly should protect rights secured by the fourteenth amendment. As Judge Stevens pointed out in *Dombrowski v. Dowling*,\textsuperscript{179} the title of the statute itself, as it was originally enacted,\textsuperscript{180} expressly identified the fourteenth amendment as a source of Congress' authority to enact the statute. But as Judge Stevens' opinion in *Cohen v. Illinois Institute of Technology*\textsuperscript{181} demonstrated, recognizing that one's fourteenth amendment rights are eligible for protection under section 1985(3) does not help a sex discrimination claimant attempting to use section 1985(3) to reach private conspiracies.

In *Cohen*, a former female assistant professor brought suit against the Illinois Institute of Technology for its alleged sex-based discrimina-

\textsuperscript{176} *Griffin v. Breckenridge*, 403 U.S. 88, 103-07 (1971).
\textsuperscript{177} *Id.*
\textsuperscript{178} *Id.* See notes 111-19 supra and accompanying text.
\textsuperscript{179} 459 F.2d 190, 195 (7th Cir. 1972).
\textsuperscript{180} The Ku Klux Klan Act, from which section 1985(3) is derived, see note 16 supra, was originally entitled "an Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States." Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13.
\textsuperscript{181} 524 F.2d 818 (7th Cir. 1975).
tion against female faculty members. The plaintiff, Dr. Cohen, alleged that the Institute’s administration had conspired to deprive her of her fourteenth amendment right to equal protection by denying her tenure, and she sought to establish a complaint under section 1985(3). Judge Stevens, relying on his earlier opinion in Dombrowski v. Dowling, held that there can be no actionable section 1985(3) violation of a person’s fourteenth amendment rights in the absence of state action. Stevens reasoned that since the fourteenth amendment, as presently interpreted by the Supreme Court, is to be applied in accordance with the state action doctrine, the rights secured by that amendment are protected only against actions by the states. Accordingly, since Dr. Cohen had not sufficiently alleged state action in her complaint, she could not successfully claim that a right guaranteed to her by the fourteenth amendment had been violated.

As long as the Supreme Court continues to adhere to the state action doctrine, as established in United States v. Harris and the Civil Rights Cases, there can be no doubt that Stevens’ holding is correct; and the force of his argument should continue to control future determinations of this issue within the federal courts. For the most part, those few courts that have not agreed with Stevens’ decisions in Cohen and Dombrowski have based their conclusions upon a misreading of Griffin v. Breckenridge. Illustrative of such a misreading is the court’s opinion in Reichardt v. Payne. The plaintiff, Martha Reichardt, brought a class action against the Insurance Commissioner of California and the Life Insurance Company of North America (LINA) alleging that the insurance policies sold by LINA, and approved by the Commissioner, discriminated against women. In her complaint Ms. Reichardt alleged that both defendants violated sections 1985(3) and 1983 by depriving her of her fourteenth amendment right to equal protection of the laws. The Reichardt court, in discussing the section 1985(3) claim against LINA, incorrectly interpreted the part of Justice Stewart’s opinion in Griffin that dealt with the finding of congressional intent to allow section 1985(3) to reach private action. The court read Stewart’s remark, that Congress intended “to speak in § 1985(3) of all deprivations of ‘equal protection of the laws’ and ‘equal privileges and immunities under the laws’, whatever their source,” as a positive indication that the Supreme Court in Griffin intended to allow the rights secured by the equal protection

---

1. Id. at 827-28.
2. 396 F. Supp. 1010 (N.D. Cal. 1975). Two circuit courts have held that section 1985(3) has no state action requirement whatsoever. See Weise v. Syracuse Univ., 522 F.2d 387, 408 (2d Cir. 1975) and Richardson v. Miller, 446 F.2d 1247, 1249 (3d Cir. 1971). Since neither of these opinions contain an adequate exposition of the court’s reasoning, the opinion in Reichardt serves to best illustrate the contra-Cohen view.
3. The significant parts of Ms. Reichardt’s complaint are set out above, see note 160 supra.
5. Id.
clause of the fourteenth amendment to be protected against private conspiracies.190 The Reichardt court, however, overlooked the fact that the words "equal protection," as construed in section 1985(3) by the Griffin Court, have meaning apart from the equal protection clause of the fourteenth amendment. This is what Justice Stewart meant when he said, in Griffin, that a century of fourteenth amendment adjudication has made it understandably difficult to conceive of a deprivation of the equal protection of the laws by private persons.191 As this Note indicated earlier,192 the Griffin Court determined that equal protection, as used in section 1985(3), means the "equal enjoyment of rights secured by the law to all."193 One of the rights so secured is the fourteenth amendment right to the equal protection of the laws; and as Judge Stevens so ably pointed out in both Dombrowski v. Dowling and Cohen v. Illinois Institute of Technology, the right to the equal protection of the laws, like all fourteenth amendment rights, is presently protected only from the actions of the states, not from the actions of private citizens.194

The only successful way to rebut Stevens’ argument in Cohen, and thereby permit a sex discrimination litigant to assert fourteenth amendment rights against private citizens, is by launching a successful attack upon that argument’s major premise: the state action requirement of the fourteenth amendment. Such an approach immediately embroils one in a constitutional controversy that has been raging at least since the decision in United States v. Guest.195 It involves the very significant question of whether Congress has power, under section five of the fourteenth amendment, to reach private conduct; or whether as the state action doctrine would have it, section one of that amendment, with its admonishment “no state shall,” is to be read to require the amendment’s exclusive application to the actions of the states.

So much has been written on this question that it would be wasteful to address it at any length here.196 Suffice it to say, the two circuit

190 396 F. Supp. at 1018.
191 403 U.S. at 97.
192 See note 154 supra and accompanying text.
193 403 U.S. at 102.
194 459 F.2d at 195-96; 524 F.2d at 827-30. Judge Stevens' holding in both of these cases could have drawn support from an earlier Supreme Court case — Collins v. Hardymon, 341 U.S. 651 (1951). Since the Griffin Court distinctly did not overrule Collins, choosing instead to isolate Collins' precedential value to those cases involving fourteenth amendment rights, Collins could have been properly cited by Stevens as authority for the holdings in Cohen and Dombrowski. See notes 100-06 supra and accompanying text.
196 For just a sampling of the commentators who have addressed this issue see H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); J. TENBROEK, THE ANTI-SLAvEny ORuCINS OF THE FOURTEENTH AMENDMENT (1951); Avins, Federal Power to Punish Individual Crimes Under the Fourteenth Amendment: The Original Understanding, 43 Notre Dame Law. 317 (1968); 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); Cox, The Role of Congress in Constitutional Determinations, 40 U. Cinn.
court decisions that have held that section five of the fourteenth amendment will permit Congress to proscribe private conspiracies through section 1985(3)\(^{197}\) have not been well received,\(^{198}\) and do not suggest a trend among the federal courts. Also, theoretical constitutional arguments to the side, the realities of the present make-up of the Supreme Court do not bode well for the acceptance of such an expansive view of the protections extended by the fourteenth amendment.\(^{199}\) For now, the sex discrimination claimant seeking to use section 1985(3) must look elsewhere for a constitutional source upon which to base Congressional authority to reach private conspiracies.

b. A Possibility

There have been a few indications within the federal courts which, if extrapolated upon, could open up wide new areas for the utilization of section 1985(3). Especially portentous is the recent Fifth Circuit decision in *McLellan v. Mississippi Power & Light Co.*\(^{200}\)

The plaintiff in *McLellan* was an employee of the Mississippi Power & Light Co. (MPL) who was discharged because he violated MPL's company policy against employee's filing voluntary petitions in bankruptcy. After his dismissal, the plaintiff filed a section 1985(3) action against MPL and his union, the International Brotherhood of Electrical Workers, alleging they had conspired to deny him a federally pro-

---

197 Westberry v. Gilman Paper Co., 507 F.2d 206, vacated as moot, 507 F.2d 215 (5th Cir. 1975); Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971).


199 The overly sanguine predictions of some commentators, see, e.g., Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449, 526-27 (1974), that Congress may now have the power under section 5 to reach private discrimination overlooks the impact of the Nixon appointees on the Supreme Court. The Court today is markedly different from what it was when *United States v. Guest* was decided. In fact, of the six Justices in *Guest* who agreed that section 5 could be used to reach private action, only one, Justice Brennan, remains on the Court today.

200 526 F.2d 870 (5th Cir. 1976) (scheduled for rehearing en banc). See note 224 infra.
ected right to file for bankruptcy. After concluding that MPL employees desiring to file bankruptcy petitions comprised a sufficient class for purposes of alleging the requisite class-based animus of a section 1985(3) cause of action, the McLellan court identified the commerce clause in conjunction with the necessary and proper clause as the source for Congress' authority to reach the conspiracy alleged by the plaintiff. More specifically, the court held that the federal bankruptcy laws secured for the plaintiff certain federal rights to file for bankruptcy; that Congress derived its power to create those rights from the commerce clause; and that the necessary and proper clause allowed Congress to enact appropriate legislation to protect those bankruptcy rights. The McLellan court concluded that by creating section 1985(3) to safeguard federal rights from private interference, Congress had made the protection of federal bankruptcy rights possible.

The Fifth Circuit claimed support from United States v. Waddell for its interesting application of section 1985(3). As mentioned earlier, Waddell was a criminal action brought under the predecessor of 18 U.S.C. § 241 in which a group of individuals allegedly conspired to deprive a homesteader of his right to establish a claim under the homestead acts. Waddell's analysis of Congress' constitutional authority to reach a conspiracy against homesteading parallels the analysis used in McLellan. The Waddell Court held Congress derived power from article IV, section 3 of the Constitution to enact the homestead laws. By applying the interpretation of Congress' power under the necessary and proper clause that was established in Ex parte Yarbrough, the Waddell Court further held Congress could proscribe private conduct that interfered with homesteading rights secured by the Homestead Acts. The Waddell precedent does, therefore, strongly support the holding in McLellan. Moreover, the McLellan court could have drawn additional support from the Supreme Court's holding in

---

201 Id. at 871. It is hard to ascertain from the circuit court's opinion exactly how the plaintiff's complaint was framed; but from the court's reference to the plaintiff's "inartfully drawn" complaint, id., as well as Judge Roney's comment that the issues reached by the court were "neither briefed nor argued" before the court, id. at 883 (concurring in part and dissenting in part), it is possible that the McLellan court's innovative approach to section 1985(3) was a complete surprise to plaintiff's counsel.

202 Id. at 875-80.

203 More specifically, the court relied upon that clause's bankruptcy provision: "The Congress shall have power . . . . To establish . . . uniform laws on the subject of Bank-ruptcies throughout the United States." U.S. Const. art. I, § 8.

204 "The Congress shall have Power . . . . to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States." Id.

205 526 F.2d at 880.

206 Id. at 880-81.

207 112 U.S. 76 (1884).

208 526 F.2d at 881.

209 See notes 70-77 supra and accompanying text.


211 110 U.S. 651 (1884). See notes 70-77 supra and accompanying text.

212 112 U.S. at 79-80.
Griffin v. Breckenridge. It was in Griffin that the Court reiterated that Congress could protect rights of national citizenship from private interference, and Waddell was one of the decisions the Court cited as authority for that proposition.213 Once it is realized that the holding in Waddell classified federal statutory rights as rights of national citizenship and afforded those statutory rights the same protection from private interference that is given the rights of national citizenship, it becomes clear that the McLellan decision is not an aberration.214 The McLellan court's holding is a valid extension of a little recognized line of cases, tracing back to Ex parte Yarbrough, that have yet to be overruled or even undermined.

Applying McLellan's interpretation of the reach of section 1985(3) to Title VII of the 1964 Civil Rights Act215 holds some interesting possibilities for the sex discrimination claimant seeking to utilize the civil conspiracy statute. Title VII was enacted pursuant to Congress' authority under the commerce clause, and the necessary and proper clause could conceivably empower Congress to protect any rights secured by Title VII. Therefore, if McLellan's application of section 1985(3) were to survive scrutiny,216 a sex discrimination claimant who could allege a violation of employment rights secured by Title VII, could sue any private citizens who conspired to deny him those Title VII rights.

Although the McLellan rationale was not employed, this is the exact result reached by a district court in Milner v. National School of Health Technology.217 The plaintiff in Milner alleged that she had been discriminated against through National's policy of firing and refusing to hire divorced women. In her section 1985(3) claim, the plaintiff alleged that National had deprived her of rights secured by Title VII. The court denied the defendant's motion to dismiss and cryptically held:

[P]laintiff asserts that her dismissal violated Title VII of the Civil Rights Act 1964. That statute prohibits employment discrimination on the basis of sex by private employers. Therefore, plaintiff has sufficiently alleged the deprivation of a federally protected right under § 1985(3).218

No authorities were cited by the Milner court; and regrettably, no explanation, other than that sketched out by the court above, was given of the reasoning the court employed to reach its conclusion. So, as yet,

213 403 U.S. at 104. Also, the Griffin Court later cited United States v. Guest, 383 U.S. 745, 757-60 & n.17 (1966) and Twining v. New Jersey, 211 U.S. 78, 97 (1908) when it again mentioned that the rights of national citizenship were protected from private interference. 403 U.S. at 106. Significantly, both Guest and Twining listed Waddell as one of the cases that established a right of national citizenship.

214 See notes 70-77 supra and accompanying text.


216 The McLellan holding is already in danger of being overruled within its own circuit; on April 21, 1976, it was scheduled for a rehearing by the Fifth Circuit en banc. See note 224 infra.


218 Id. at 1395.

Published by EngagedScholarship@CSU, 1976
there is no clear indication that the McLellan rationale has gained any support among the federal courts. Some courts however, like the Milner court, that read the plain words of the statute along with the language in Griffin v. Breckenridge, have held the statute is capable of protecting federal statutory rights. The McLellan rationale should supply these courts with a convenient means to an already recognized end. Such an adoption of the McLellan rationale would allow for the utilization of section 1985(3) by a sex discrimination claimant in at least the employment area covered by Title VII, as well as open up broad new areas beyond sex-based discrimination for the statute’s use.

V. CONCLUSION

Griffin v. Breckenridge remains the only modern statement by the Supreme Court on the reach of section 1985(3). The Griffin Court rested its extension of section 1985(3) into the private sector exclusively upon two grounds — the thirteenth amendment and the national citizenship right to travel. On its face, the Griffin decision restricted the effective utilization of section 1985(3) to the race discrimination area. As discussed earlier, alternatively basing the authority for the statute’s use upon the fourteenth amendment even further restricts the statute’s reach since state action is required before that amendment can be invoked. Any potential section 1985(3) has for reaching private action outside of the race area lies in an exploration of the second con-

---

219 "If two or more persons . . . conspire whereby another is . . . deprived of having or exercising any right or privilege of a citizen of the United States . . . the party so deprived may have an action for recovery of damages." 42 U.S.C. § 1985(3) (1970). See note 16 supra for the entire text of the statute.

220 "To come within the legislation a complaint must allege that the defendants did (1) conspire . . . whereby another was (4b) deprived of having and exercising any right or privilege of a citizen of the United States." Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).


222 The advantages of using section 1985(3) in conjunction with Title VII are many. All of the rigorous jurisdictional requirements of Title VII, such as the exhaustion of administrative remedies, can be foregone in a section 1985(3) action; and the remedies afforded under section 1985(3), unlike Title VII which is limited only to back pay, include both punitive and compensatory damages.

Any question that Title VII, with its finely honed procedural requirements, was intended by Congress to be an exclusive remedy was conclusively settled by the Supreme Court in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) and Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Citing Gardner-Denver the Court in Johnson noted:

Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief. "(T)he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." Alexander v. Gardner-Denver Co. . . .

421 U.S. at 459 (citation omitted).
stitutional ground identified by the *Griffin* Court — the right to travel, one of the rights of national citizenship.

A sex discrimination claimant, like all litigants outside of the race discrimination area, must therefore plead a violation of a right of national citizenship if he is to ever successfully bring a section 1985(3) action. Realistically, the only rights of national citizenship available to such claimants are those recognized by the Supreme Court in *United States v. Waddell.*

As this Note has emphasized, correctly construed, *Waddell* stands for the proposition that rights granted by federal statute are rights of national citizenship. The violation of one's federal statutory rights by private individuals, therefore, is conceivably actionable under section 1985(3).

Owing to the present makeup of the Supreme Court and the far-reaching implications of classifying federal statutory rights as rights of national citizenship, there is little cause to anticipate an immediate acceptance of the *United States v. Waddell* interpretation endorsed by this Note and the Fifth Circuit in *McLellan v. Mississippi Power & Light Co.*

The questions raised by *McLellan* and *Waddell,* however, will have to be answered soon. For too long now the rights of national citizenship have remained little more than constitutional curiosities. Present litigation under section 1985(3), in time, is going to require the Supreme Court to explain the modern efficacy of the rights of national citizenship. Once the question reaches the Court, the issue will likely narrow to the proper interpretation of the *United States v. Waddell* opinion; and if the *McLellan* construction is adopted, a new chapter of this country's civil rights litigation could begin.

**KEVIN E. IRWIN**

112 U.S. 76 (1884).

526 F.2d 870 (5th Cir. 1976) (scheduled for rehearing en banc). While this Note was being set in print the Fifth Circuit reversed its original decision in *McLellan.* *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (1977). The circuit court's opinion based its reversal upon McLellan's failure to assert a sufficiently class-based animus behind MPL's actions. The court's opinion, however, substantially undermined the rationale of the first *McLellan* decision by its contention, in an advisory section, that a conspiracy must be violative of some law other than section 1985(3) before a conspiracy can be actionable under section 1985(3). This novel interpretation of section 1985(3) is highly disturbing. As Judge Godbold pointed out in his erudite dissent to the *McLellan* reversal, the interpretation the Fifth Circuit has given section 1985(3) is a manifestation of judicial distrust of *Griffin v. Breckenridge* and the potential sweep of section 1985(3); the interpretation cannot be supported by logic or legal precedent.

The only positive aspect of the Fifth Circuit's reversal of *McLellan* is that the Supreme Court now has a section 1985(3) case that is ideal for a grant of certiorari. The two *McLellan* decisions taken together present all the salient questions regarding section 1985(3) that have been unresolved since *Griffin v. Breckenridge.*