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FEDERAL JURISDICTION—CIVIL RIGHTS: A FEDERAL REMEDY AGAINST PRIVATE CLASS DISCRIMINATION UNDER 42 U.S.C. § 1985(3) (1970)—*Griffin v. Breckenridge*, 403 U.S. 88 (1971).

Plaintiffs, black citizens of Mississippi, sued in federal court under 42 U.S.C. § 1985(3)[1] alleging that defendants, white citizens of Mississippi, had conspired to deprive them of the equal protection of the laws and equal privileges and immunities under the law. Plaintiffs' claim arose out of an incident during which defendants, under the mistaken belief that a person in the company of plaintiffs was a civil rights worker, stopped plaintiffs' car on a public highway, forced them from the car and physically assaulted them. The district court dismissed the suit on the ground that section 1985(3) reached only conspiracies under color of state law, and the United States Court of Appeals for the Fifth Circuit affirmed.[2] On appeal the United States Supreme Court reversed. *Held:* section 1985(3) does reach private, racially motivated conspiracies in deprivation of the equal protection of the laws and is a legitimate exercise of congressional power under the thirteenth amendment and under Congress's power to protect the right of interstate travel. *Griffin v. Breckenridge*, 403 U.S. 88 (1971).

Section 1985(3) was originally enacted as part of the sweeping civil rights legislation of the Reconstruction period.[3] The history of section 1985(3), as with other surviving sections of the civil rights legislation of that period, has been marked by judicially imposed limitations on

1. 42 U.S.C. § 1985(3) (1970) provides:
If two or more persons in any state or territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . [and] . . . if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

2. Griffin v. Breckenridge, 410 F.2d 817 (5th Cir. 1969), *noted in* 45 NOTRE DAME LAWYER 372 (1970) *and* 23 VAND. L. REV. 158 (1969).

3. Section 1985(3) was first enacted as part of the Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13, which was one of seven statutes enacted from 1866 to 1875 to implement the provisions of the then recently enacted thirteenth, fourteenth and fifteenth amendments. For a brief discussion of the purpose and coverage of those enactments see R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 36-40 (1947).

its application.[4] The Court's action in *Griffin,* in removing the color of state law requirement from section 1985(3), redefining its scope, and identifying alternative sources of congressional power to reach private conspiracies, represents a significant step in the recent trend toward revitalization of that legislation.[5]

An early indication of the difficulties to be encountered in interpreting the broad language of section 1985(3) was *United States v. Harris*.[6] There the Court interpreted the exact criminal counterpart of section 1985(3)[7] to include private conspiracies in deprivation of fourteenth amendment rights. The Court then found that Congress had no authority under the fourteenth amendment to legislate against private conspiracies and declared the statute unconstitutional.[8] Probably as a result of the doubts raised as to its constitutionality by the *Harris* decision, section 1985(3) lay dormant for many years.[9]

In *Collins v. Hardyman*[10] the Court first considered the question of whether section 1985(3) included private conspiracies in deprivation of federal rights.[11] The *Collins* Court emphasized that the language of section 1985(3) referred only to conspiracies "for the purpose of depriving any person or class of persons of the equal protection of the laws, or of the equal privileges and immunities under the law."[12] Applying the theory developed in the *Civil Rights Cases,*[13] the Court reasoned that one's rights might be violated by a private conspiracy, but a violation of rights could not constitute a deprivation of the equal protection of the laws or equal privileges and immunities under the

4. For a discussion of the nature and effect of those limitations see Gressman, *The Unhappy History of Civil Rights Legislation,* 50 MICH. L. REV. 1323 (1952).

5. *See* notes 16-19 and accompanying text, *infra.*

6. 106 U.S. 629 (1882).

7. Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13. This was repealed in 1909.

8. The *Harris* Court also considered the constitutionality of the statute under the thirteenth amendment and found that even if that amendment were held to be directed against the action of private individuals the statute still would be unconstitutionally overbroad. The Court stated that a law punishing white citizens for conspiring to deprive other white citizens of their rights "clearly cannot be authorized by the amendment which simply prohibits slavery and involuntary servitude." *Harris,* 106 U.S. at 641.

9. It has been noted that from the date of its enactment until 1920 there were no reported cases involving section 1985(3). Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?,* 26 IND. L. J. 361, 363 (1951).

10. 341 U.S. 651 (1951).

11. The circuit court, reversing a lower court decision, had held that section 1985(3) did include private conspiracies in deprivation of rights of national citizenship. Hardyman v. Collins, 183 F.2d 308 (9th Cir. 1950).

12. *Collins,* 341 U.S. at 660.

13. 109 U.S. 3 (1883).

law unless there also existed "some manipulation of the law or its agencies to give sanction or sanctuary for doing so."[14] The *Collins* Court then held that section 1985(3) did not apply to *private* conspiracies.[15]

Recent cases arising under other civil rights statutes raised doubts as to the continued validity of the *Collins* "color of state law" construction of section 1985(3), but none dictated its removal. In *Jones v. Alfred H. Mayer Co.*[16] the Court held that 42 U.S.C. § 1982[17] bars all racial discrimination, private as well as public, in the sale or rental of property.[18] Subsequent lower court decisions recognized "by analogy to the *Jones* case that 42 U.S.C. § 1981 . . . is intended to prohibit private racial discrimination"[19] in contracts of employment.

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14. *Collins*, 341 U.S. at 661. This theory was developed in the *Civil Rights Cases* for the purpose of defining the scope of congressional power under the fourteenth amendment. In *Collins*, however, the Court was not speaking in terms of congressional power; rather, it was simply interpreting the language of section 1985(3) in a manner consistent with the earlier interpretation of the similar language of the fourteenth amendment.

The "color of state law" requirement imposed in *Collins* has, with few exceptions, been followed by the lower federal courts. *See, e.g.*, Ehrlich v. Van Epps, 428 F.2d 363 (7th Cir. 1970); Wallach v. Cannon, 357 F.2d 557 (8th Cir. 1966); Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959). Additional cases are cited in Kock v. Zuieback, 194 F. Supp. 651, 657-58 (S.D. Cal. 1961). *But see* Norton v. McShane, 332 F.2d 855, 863 n.13 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965) (expressing uncertainty as to whether section 1985(3) applied only where some of the persons so conspiring acted under color of state law, but finding it unnecessary to pass on the question); Miles v. Armstrong, 207 F.2d 284 (7th Cir. 1953) (finding action under color of state law not required because section 1985(3) applied only to deprivation of rights under federal statutes, not to state rights); Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (D. Mo. 1969), and Gannon v. Action, 303 F. Supp. 1240 (D. Mo. 1969) (finding that the clear and unambiguous terms of section 1985(3) do not contain any requirement of action under color of state law).

15. The *Collins* Court did consider the possibility that a "conspiracy by private individuals could be of such magnitude and effect as to work a deprivation of equal protection of the laws, or of equal privileges and immunities under the laws." 341 U.S. at 662. It then cited the post-Civil War Ku Klux Klan as a possible example of such a conspiracy.

16. 392 U.S. 409 (1968). For a discussion of *Jones* see Comment, *The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co.*, 55 VA. L. REV. 272 (1969).

17. 42 U.S.C. § 1982 (1970) provides that:

> All citizens of the United States shall have the same rights, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

18. It had previously been held that section 1982 did not apply to instances of private discrimination. Hurd v. Hodge, 334 U.S. 24, 31 (1948).

19. Waters v. Wisconsin Steel Works, 427 F.2d 476, 482 (7th Cir. 1970). *Accord*, Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968). For a discussion of the implications of *Jones* with regard to the possible utilization of section 1981 against racial discrimination in employment see Peck, *Remedies for Racial Discrimination in Employment: A Comparative Evaluation of Forums*, 46 WASH. L. REV. 455, 475-78 (1971).

A similar application of the *Jones* rationale to section 1985(3) was not possible.[20] The *Jones* decision emphasized the legislative history of section 1982 as a part of section 1 of the Civil Rights Act of 1866, noting that it was enacted subsequent to the adoption of the thirteenth amendment and prior to the adoption of the fourteenth, thereby indicating a congressional intent to implement thirteenth amendment rights without the state action limitation of the fourteenth amendment.[21] Since section 1985(3) was first enacted as a part of the Civil Rights Act of 1871 and was generally viewed as an implementation of rights under the fourteenth amendment, that same argument would not apply.[22] Also, the color of state law requirement under section 1985(3) was based on an interpretation of the language of the statute rather than on any determination as to the limits of congressional power,[23] so any change in that requirement had to await the Court's reinterpretation of the language. However, *Jones* did indicate a changed attitude of the Court concerning the degree of liberality with which civil rights statutes should be interpreted,[24] making a reinterpretation of the language of section 1985(3) likely.[25]

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42 U.S.C. § 1981 (1970) provides:

All persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

20. *See* Griffin v. Breckenridge, 410 F.2d 817 (5th Cir. 1969).

21. *Jones*, 392 U.S. at 430-33.

22. The fourteenth amendment was adopted in 1868. Much of the language of section 1985(3) was in fact derived from the Act of July 31, 1861, ch. 33, 12 Stat. 284. However, that statute applied only to conspiracies against the United States Government or its agents, and it was not until 1871 that the statute was enacted in its present form.

23. *See* notes 10-15 and accompanying text, *supra*. In dictum contained in two separate opinions in United States v. Guest, 383 U.S. 745 (1966), six Justices agreed that section five of the fourteenth amendment did authorize Congress to enact legislation punishing private interference with fourteenth amendment rights; however, the Court still has not squarely met and decided that issue. Since the *Collins* interpretation of section 1985(3) was influenced by the Court's concern with the scope of congressional power under the fourteenth amendment, actual removal of the state action requirement from the fourteenth amendment would have left the *Collins* interpretation of section 1985 (3) with little validity.

24. "'We think that history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968), *quoting* United States v. Price, 383 U.S. 787, 801 (1966).

25. *See* Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (D. Mo. 1969), and Gannon v. Action, 303 F. Supp. 1240 (D. Mo. 1969). Both cases held, on the authority of the *Jones* decision, that the plain and unambiguous terms of section 1985(3) did not contain any requirement of action under color of state law.

The *Griffin* Court abandoned the *Collins v. Hardyman* principle that there can be no deprivation of equal protection of the laws without some degree of state involvement and concluded that "there is nothing inherent in the phrase that requires the action working the deprivation to come from the state."[26] While the *Collins* decision was influenced by a desire to avoid the constitutional issues that might have been raised by holding section 1985(3) to include private conspiracies, the *Griffin* Court noted that many of those problems "simply do not exist."[27] Also, the Court observed that each of the three possible forms for a state action limitation on section 1985(3) was explicitly dealt with in other parts of the same statute, and that such a limitation on section 1985(3) would, therefore, render it superfluous.[28] The Court further noted that during the debates surrounding adoption of the amendment which added the present civil remedy to the statute, the sponsors were concerned solely with the motivation[29] that would be required to bring the conspiracy within the statute. There

26. *Griffin*, 403 U.S. at 97. This interpretation of the language conforms to that announced in United States v. Harris, 106 U.S. 629, 639 (1882). It was that interpretation that caused the criminal counterpart of section 1985(3) to be declared unconstitutionally overbroad. *See* notes 6-9 and accompanying text, *supra*.

27. *Griffin*, 403 U.S. at 96. The constitutional issues that the *Collins* Court felt might be raised by a decision including private conspiracies within the scope of section 1985(3) involved:

> . . . Congressional power under and apart from the Fourteenth Amendment, the reserved power of the States, the content of rights derived from national as distinguished from state citizenship, and the question of separability of the Act in its application to those two classes of rights.

Collins v. Hardyman, 341 U.S. at 659.

One of the problems perceived in *Collins* which no longer exists is the question of separability of the act with regard to its application to rights of national citizenship as distinguished from state citizenship. It is now the rule that a court need not find a statute to be constitutional in all of its possible applications in order to find a particular application constitutional, and if it is found that a particular application would be unconstitutional, the court may give it a limited construction. Griffin v. Breckenridge, 403 U.S. 88, 104 (1971). *See* United States v. Raines, 362 U.S. 17, 20-24 (1960). By finding constitutional authorization for this particular application of the statute under both the thirteenth amendment and the power of Congress to protect the right of interstate travel, the *Griffin* Court avoided consideration of the other difficult constitutional issues mentioned in *Collins*, specifically, the scope of congressional power under the fourteenth amendment.

28. The three possible forms of a state action limitation on section 1985(3) listed by the court are: (1) that there must be action under color of state law, (2) that there must be interference with or influence upon state authorities, and (3) that there must be a private conspiracy so massive and effective that it supplants state authorities. *Griffin*, 403 U.S. at 98.

29. *See* notes 35-37 and accompanying text, *infra*.

was no suggestion that liability would not be imposed for purely private conspiracies.[30]

The expansion of the scope of section 1985(3) resulting from removal of the color of law requirement has been limited to some extent by the Court's clarification of the intent requirement under the statute. Prior to *Griffin* it was generally held that a cause of action under section 1985(3) required a showing of "intentional or purposeful" discrimination;[31] however, that requirement was not consistently applied. Many courts found the requirement to be met by complaints alleging that plaintiff, simply as an individual, was singled out for discriminatory treatment;[32] others held that in order to meet the requirement of intentional or purposeful discrimination the plaintiff must show that he was subjected to a greater risk of injury than were other residents of the state.[33] Although the latter requirement was difficult to meet without a showing of class discrimination,[34] no court specifically limited applica-

30. For an analysis reaching a contrary conclusion, see Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS L.J. 331 (1967). Avins analyzes the congressional debates surrounding passage of the 1871 act and concludes that the act was intended as an exercise of congressional power under the fourteenth amendment, with the clear intention that it be restricted in application to instances of state action. He views the broad language of sections 5519 and 1985(3) merely as examples of bad draftsmanship. He points out that the reasoning of the Court in *Harris* was identical to the reasoning of those supporting the 1871 act, and he concludes that section 5519 was declared unconstitutionally overbroad because its language did not reflect the intent of its sponsors. Under this analysis the *Collins* interpretation of 1985(3), although contrary to the *Harris* interpretation of identical language, could be considered an accurate reflection of the intent of the 42nd Congress.

31. This element of a cause of action under section 1985(3) generally has been attributed to a 1944 case which involved the predecessor statutes to section 1985(3) and 1983. Snowdon v. Hughes, 321 U.S. 1 (1944). *Snowden* held that in order for a denial of a right conferred by a state law to constitute a denial of equal protection of the laws there must be present in that denial an element of intentional or purposeful discrimination. *See also* Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959).

32. *See, e.g.*, Jenks v. Henys, 378 F.2d 334 (9th Cir. 1967); Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 96 (6th Cir. 1947); Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946); Maniaci v. Warren, 314 F. Supp. 853 (W.D. Wis. 1970); Stevenson v. Sanders, 311 F. Supp. 683 (W.D. Ky. 1970); Klor v. Hannon, 278 F. Supp. 359 (C.D. Cal. 1967); Rhodes v. Houston, 202 F. Supp. 624 (D. Neb.), *aff'd* 309 F.2d 959 (8th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963). At times this appeared to have developed into a rather technical requirement. *Compare* Lee v. Hodges, 321 F.2d 480 (4th Cir. 1963) (an allegation of purposeful discrimination was held sufficient), *with* Birnbaum v. Trussell, 371 F. 2d 672 (2d Cir. 1966) (an allegation of malicious discrimination was held insufficient).

33. *See, e.g.*, Stift v. Lynch, 267 F.2d 237 (7th Cir. 1959); Jennings v. Nester, 217 F.2d 153 (7th Cir. 1954), *cert. denied*, 349 U.S. 958 (1955); Campo v. Niemeyer, 182 F.2d 115 (7th Cir. 1950); Morgan v. Null, 120 F. Supp. 803 (S.D. N.Y. 1954).

34. *See, e.g.*, Wyland v. Mason's Stores, 279 F. Supp. 283, 289 (W.D. Pa. 1968).

tion of section 1985(3) to instances where class discrimination was present.

In *Griffin* the Court stated that section 1985(3) is not intended as a remedy for the discriminatory deprivation of rights unless there is "the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment."[35] The Court then concluded that the language of the sponsors[36] and of the statute "requiring an intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[37] Those cases holding a cause of action to have been stated under section 1985(3) by a complaint alleging purposeful discrimination toward an individual with no allegation of racial or otherwise class-based motivation will not be followed.[38]

The *Griffin* Court restricted its decision to the facts of the case and did not decide whether future applications of section 1985(3) will be limited to those instances where racial bias is the motivating factor behind the conspiracy. However, it did refer to congressional testimony preceding passage of the 1871 limiting amendment which clearly indicates that such a limitation was not intended.[39] Since the

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Therein the court noted that plaintiff had made no allegation of class discrimination and concluded that no cause of action under section 1985(3) was stated.

35. *Griffin,* 403 U.S. at 102.

36. *Id.* at 101.

37. *Id.* at 102. This is precisely the language relied upon by the *Collins* Court in imposing the color of law requirement. *See* notes 11-13 and accompanying text, *supra.* Although perhaps unnecessary, the imposition of this limitation does not appear to be consistent with the *Griffin* Court's stated desire to give the statute a scope as broad as its language. 403 U.S. at 97.

38. The Court made it clear, however, that liability under section 1985(3) is not dependent upon a showing of a specific intent to cause a particular injury or to deprive plaintiff of a federal right. *Griffin,* 403 U.S. at 102 n.10. Rather, it suggested that the standard for liability under section 1985(3) will be the tort standard as announced in Monroe v. Pape, 365 U.S. 167, 187 (1961), for application under section 1983, "that makes a man responsible for the natural consequences of his action." Therefore, a cause of action for a negligently caused injury could lie under section 1985(3) if it could be shown that the negligent act was done in furtherance of a conspiracy motivated by class discrimination.

For a discussion of the application of the negligence standard to a case of police abuse arising under section 1983 see 23 VAND. L. REV. 1341 (1971).

39. *Griffin,* 403 U.S. at 102 n.9. The Court referred to congressional testimony during the debates preceding passage of the 1871 limiting amendment as an indication of the type of invidiously discriminatory motivation intended to be reached by the statute. CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871) (remarks of Senator Edmunds):

We do not undertake in this bill to interfere with what might be called a private

Court stated that its intent was to give effect to that congressional purpose, it may reasonably be concluded that class discrimination based on factors other than race will be within the statute.

A question then arises as to whether the language of section 1985(3) will be construed in such a manner as to limit the types of non-racial class discrimination to which the statute may be applied. The *Griffin* decision suggests no such limitation. The Court's limitation on the application of the statute to the *kind* of invidiously discriminatory animus intended by the sponsors of the limiting amendment was in reference to the class limitation itself, not to the types of classes to be included. Also, the Court's reference to the testimony of Senator Edmunds was to show that application of the statute was not intended to be limited to racial discrimination. It should not be read as suggesting that application of the statute is to be limited to those particular types of classes to which the senator referred. It is possible, of course, that in future cases the Court could formulate limitations on the types of class discrimination to which the statute will be applied. For example, the testimony of Senator Edmunds could be cited for the purpose of limiting application of the statute to the types of classes to which he referred: those based on such factors as religion, political affiliation, or place of origin. It might be argued that these are some of the broad historical categories of discrimination which are national in scope and therefore of special significance for federal protection. However, such a limitation would be artificial at best and the problems involved in defining the types of classes included under such criteria would be nearly insurmountable. Furthermore, it cannot be said that because a class is not national in scope or historical in origin it is any less in need of federal protection against discrimination. Because of the practical problems and the policy considerations which would be involved in construing the language of section 1985(3) as applying only to discrimination against particular classes, it is unlikely that such a limitation will be imposed.

Assuming that the language of section 1985(3) will be found to extend to all conspiracies motivated by racial or class-based invidious

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conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat . . . or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, . . . then this section could reach it.

discrimination involving deprivation of federal rights, and resulting in injury, there remains one significant limitation on the application of the statute: identification of a constitutional source of congressional power to reach the conspiracy alleged. The *Griffin* Court held that the creation of "a statutory cause of action for Negro citizens who have been victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men"[40] is within the power of Congress to legislate against badges of slavery under section 2 of the thirteenth amendment. Because the thirteenth amendment contains no state action requirement, congressional power under section 2 is limited only by a determination of what constitutes badges and incidents of slavery, and the scope of that power is significant for identifying possible future applications of section 1985(3).

In *Jones v. Alfred H. Mayer Co.*[41] the Court declared that the power of Congress to pass all laws necessary to abolish badges and incidents of slavery in the United States includes the power to eliminate all racial barriers to the aquisition of real and personal property.[42] Further, Congress, not the Court, "has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation."[43] So long as that determination is a rational one, the Court will not declare it beyond the power of Congress.[44] The *Jones* decision left the issue of the limits of congressional power under the thirteenth amendment very much open to conjecture, and the principal case does little to clarify the matter.

40. *Griffin*, 403 U.S. at 105.

41. 392 U.S. 409 (1968).

42. The *Jones* decision overruled several previous decisions, including Hodges v. United States, 203 U.S. 1 (1906). In *Hodges* the Court recognized that "one of the disabilities of slavery . . . was a lack of power to make or perform contracts. . . ." *Id.* at 17. Yet it held that interference, on the basis of race, with the right of a black citizen in the performance of his contract of employment did not constitute a badge of slavery. This conclusion resulted from the Court's view that only conduct which actually enslaves someone can be subjected to punishment under legislation enacted to enforce the thirteenth amendment. *Id.* at 16.

For a discussion of the development of congressional power under the thirteenth amendment see Comment, *Constitutional Law: Badges and Indices of Slavery Prohibited under the 1866 Civil Rights Act*, 17 LOYOLA L. REV. 79 (1970).

43. *Jones*, 392 U.S. at 440.

44. Subsequent lower court decisions have held, on the authority of *Jones*, that the thirteenth amendment also authorizes Congress to legislate against racial discrimination involving contracts of employment. *See, e.g.*, Waters v. Wisconsin Steel Works, 427 F.2d 476, 482 (7th Cir. 1970); Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968).

In *Griffin* the Court did not specifically identify any particular rights the deprivation of which would constitute badges of slavery; rather, it referred in general terms to "the basic rights the law secures to all free men."[45] The complaint in *Griffin* alleged that the purpose of the conspiracy was to prevent plaintiffs and other blacks from seeking the equal protection of the laws and from enjoying equal rights, privileges and immunities of citizens under the laws, "including a long list of enumerated rights such as free speech, assembly, association, and movement."[46] Since any of those rights might well be described as among "the basic rights the law secures to all free men," it appears that a conspiracy in deprivation of any federally protected right will be found to be within section 1985(3) as a valid exercise of congressional power under the thirteenth amendment, at least where the conspiracy is motivated by discrimination against blacks.

There has been no express Supreme Court ruling on whether congressional power to legislate against badges of slavery extends to discrimination against racial groups other than blacks. In *Jones* the Court referred to the power of Congress "to eliminate all racial barriers" to the acquisition of property, with no indication that that power was limited to the elimination of such barriers for blacks. It could be argued, therefore, that discrimination against any racial group resulting in the deprivation of rights constitutes a badge of slavery.[47] However, the *Griffin* decision does nothing to further this view of congressional power; it contains no language referring to congressional power to eliminate "all racial discrimination," as did *Jones*. In fact, the *Griffin* Court stated that congressional power to identify and legislate against badges and incidents of slavery is to give effect to our commitment "as a nation to the proposition that the former slaves and their descendents should be forever free."[48] It is not clear whether the Court intended this as a statement of the sole purpose of congressional

45. *Griffin*, 403 U.S. at 105.
46. *Id.* at 103.
47. Adoption of this view could result in significant expansion of congressional power under the thirteenth amendment because of the rather fine distinctions between racial discrimination and discrimination on the basis of religion or economic status. For example, the power of Congress to legislate against the badges of slavery could conceivably develop into a general power to guarantee to every person that he will not be deprived of "the basic rights the law secures to all free men" as a result of race or class discrimination. This would result in a parallel expansion of the types of conspiracies actionable under section 1985(3) with thirteenth amendment authorization.
48. *Griffin*, 403 U.S. at 105.

power under the thirteenth amendment, but if it was, then the only causes of action under section 1985(3) authorized by that amendment will be those resulting from conspiracies motivated by discrimination against blacks.[49]

Assuming that congressional power under the thirteenth amendment is so limited, then for those conspiracies which are found to have the requisite class-based, invidiously discriminatory animus, but which are not based on discrimination against blacks, it becomes necessary to find other sources of constitutional authority. In *Griffin* the Court specified as an independent source of congressional power the right of interstate travel, which, "like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation"[50] and "is assertable against private as well as public interference."[51] Although not specifically stated by the Court, it logically follows that if the conspiracy has as its purpose or effect the infringment of any of the rights of national citizenship which have been held to be assertable against private individuals,[52] not just the right of interstate travel, the injured party will be allowed to seek relief in federal court under section 1985(3) without regard to the existence of state action.

By relying alternatively on congressional power under the thirteenth amendment to legislate against the badges and incidents of slavery, and on its power to legislate in protection of the right of interstate travel, the Court avoided considering whether application of section 1985(3) against private conspiracies in deprivation of the equal protection of the laws constitutes a valid exercise of congressional

49. However, even that conclusion would not necessarily mean that the plaintiff must be black. For example, discrimination against blacks in the purchase or sale of property was held in *Jones* to constitute a badge of slavery against which Congress had the power to legislate. Surely a conspiracy aimed at denying blacks the right to purchase property in a neighborhood would not be beyond congressional power under the thirteenth amendment simply because the person injured was white.

50. *Griffin*, 403 U.S. at 106.

51. *Id.* at 105. The principle that the right to interstate travel is assertable against private as well as public interference was first announced in United States v. Guest, 383 U.S. 745, 759 (1966). Prior cases recognizing congressional power to protect the right of interstate travel had involved only governmental interference. *Id.* at 759 n.17.

52. Among the rights of national citizenship which have been held to be assertable against private interference are the right to be free of private interference in federal elections, Ex parte Yarbrough, 110 U.S. 651 (1884); the right to be free from attack while in the custody of a U.S. marshal, Logan v. United States 144 U.S. 263 (1892); the right to inform federal officials of violations of federal law, *In re* Quarles, 158 U.S. 532 (1895), United States v. Cruikshank, 92 U.S. 542 (1875); and the right to exercise other specific rights granted by federal statute, United States v. Waddell, 112 U.S. 76 (1884).

power under the fourteenth amendment.[53] Recent cases arising under the fourteenth amendment have significantly relaxed the "state action" limit on congressional power under that amendment. Indeed, some commentators have concluded that the requirement has in fact been removed, at least for some categories of cases.[54] Actual removal of the state action requirement would obviate reliance on other sources of constitutional authorization for particular applications of section 1985(3). However, in the absence of any affirmative declaration in that regard, it must be assumed that conspiracies meeting the requirement of a class-based invidiously discriminatory animus, but involving neither discrimination against blacks nor infringment of rights of national citizenship, will not be subject to attack under section 1985(3) unless the state action requirement of the fourteenth amendment is met.

An inevitable criticism of the *Griffin* decision will be that it constitutes yet another extension of federal jurisdiction into areas previously reserved to the states. It should be noted, however, that removal of the color of state law requirement from section 1985(3) is of present significance only for those categories of cases outside the scope of the fourteenth amendment. For cases involving action under color of law, thereby meeting the fourteenth amendment state action requirement, section 1983 clearly provides the most likely means of recovery.[55] It should also be recognized that although the Court removed the color of state law requirement, it imposed the more appropriate requirement of discrimination based on race or other class. While it is true that virtually every plaintiff can allege that his injury resulted from action taken against him as a member of a class rather than as an individual,

53. For a discussion of the extent of congressional power under the fourteenth amendment see Silard, *A Constitutional Forecast: Demise of the State Action Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966). For a discussion of the implications of United States v. Guest, 383 U.S. 745 (1966) in this regard see Comment, *Fourteenth Amendment Congressional Power to Legislate Against Private Discrimination: The Guest Case*, 52 CORNELL L. REV. 586 (1967).

54. *See, e.g.*, Morris & Powe, *Constitutional and Statutory Rights to Open Housing*, 44 WASH. L. REV. 1, 57-60 (1968).

55. 42 U.S.C. § 1983 (1970) states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

the possibility of plaintiffs gaining access to federal courts on mere colorable allegations presents no significant difficulty. In cases arising under section 1985(3), as in other cases where federal jurisdiction exists under a particular statute, the plaintiff must plead facts showing the basis for that jurisdiction, and it cannot be shown by mere conclusory allegations.[56]

Nevertheless, since neither diversity of citizenship nor jurisdictional amount need be alleged in civil rights actions brought under 28 U.S.C. § 1343,[57] the removal of the color of law requirement from section 1985(3) does create a significant addition to the federal remedies available for combatting violations of civil rights. While the Court's limitation of the scope of the statute to instances of class discrimination will preclude its application to some types of cases previously held to be covered,[58] it is unlikely that such limitation will result in serious denials of remedy. Injuries suffered as a result of private injustice normally can find relief at the state level. It is when the injustice results from class discrimination or from official action that the local remedy tends to be inadequate. Most deprivations of rights resulting from action under color of state law, whether or not motivated by class discrimination, can find relief in federal court under section 1983. Similar relief is now available under section 1985(3) for injuries resulting from class discrimination not involving action under color of the state law. However, relief under section 1985(3) is limited by the scope of congressional power under the Constitution. Removal of the state action limitation on congressional power under the fourteenth amendment would allow application of section 1985(3) to all categories of class-based discrimination. A similar result could be achieved by recognizing that congressional power to legislate against badges of slavery under the thirteenth amendment extends to the protection of groups other than blacks.

56. 4 F. POORE & E. KOEBER, CYLOPEDIA OF FEDERAL PROCEDURE, 14.145, at 162 (3d rev. ed. 1970).

57. 28 U.S.C. § 1343 (1970) provides in relevant part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right of [*sic*] privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> . . . .

58. *See* note 31, *supra*.

Whatever course is taken regarding congressional power under the thirteenth and fourteenth amendments, development of section 1985(3) into a fully effective remedy for injuries resulting from all types of class-based discrimination is dependent upon expansion of the recognized scope of that power.