

CASENOTES

Federal Regulation of Intra-Family Deprogramming Conspiracies Under the Ku Klux Klan Act of 1871: *Ward v. Connor*.¹ — In the Civil Rights Act of 1871,² the Forty-Second Congress provided statutory protection for the victims of conspiratorial terrorist acts perpetrated by the Ku Klux Klan and similar organizations.³ A portion of the Act of 1871 — hereinafter referred to as section 1985(3)⁴ — provides a cause of action for victims of conspiracies in which no state involvement is present.⁵ In its only construction of section 1985(3), the Supreme Court of the United States held in *Griffin v. Breckenridge*⁶ that the statute afforded a cause of action to the victims of a racially motivated conspiratorial assault and battery.⁷ Recently, in *Ward v. Connor*,⁸ the United States Court of Appeals for the Fourth Circuit extended the coverage of section 1985(3) to permit a member of a religious group who was kidnapped and sub-

¹ 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1253 (1982).

² An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, ch. 22, 17 Stat. 13 (1871) (codified in part at 42 U.S.C. §§ 1983, -85, -86 (1976 & Supp. III 1979)).

³ *Id.* The legislation was enacted in response to a special message sent to Congress by President Ulysses S. Grant urging legislation to deal with the rising tide of terrorism in the southern states led by the Ku Klux Klan. 1B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 591-93 (1970) [hereinafter cited as SCHWARTZ, CIVIL RIGHTS]. Although the Klan was the largest such group, it was not the only terrorist organization operating in the Reconstruction South. Other similar groups present during the period included the Knights of the White Camelia, the '76 Association, the Pale Faces, the Knights of the Rising Sun, and the White Brotherhood, as well as local insurrectionary bands affiliated to a greater or lesser degree with the Ku Klux Klan. See K. STAMPP, THE ERA OF RECONSTRUCTION 199 (1965); A. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION 49-51 (1971).

⁴ 42 U.S.C. § 1985(3) (Supp. III 1979). The section states, in pertinent part:

If two or more persons . . . conspire . . . 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] do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Id. The section was previously designated as 42 U.S.C. § 1985(c)(1976) and 8 U.S.C. § 47(3)(1946). For the remainder of this casenote, however, the statute will be referred to as § 1985(3), notwithstanding its designation at the time of the cases discussed.

⁵ *Id.* Thus, this section is distinguishable from 42 U.S.C. § 1983 which prohibits deprivations of constitutional rights only by persons acting under color of state law. 42 U.S.C. § 1983 (Supp. III 1979).

⁶ 403 U.S. 88 (1971).

⁷ *Id.* at 101.

⁸ 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1253 (1982).

jected to "deprogramming"⁹ by his family and others to maintain a cause of action under the statute.¹⁰

The plaintiff in *Ward* was a twenty-eight-year-old white, male member of the Unification Church.¹¹ The defendants were his closest relatives and certain other persons acting in concert with them.¹² The plaintiff alleged that as he prepared to return to New York following a Thanksgiving visit with his sister in Virginia, he was kidnapped by the defendants and held captive for 35 days.¹³ The plaintiff alleged that the defendants conspired to kidnap him and force him to renounce his religious beliefs.¹⁴ The plaintiff also alleged that during his imprisonment he was subjected to physical and verbal abuse by his captors in their vain attempt to deprogram him of his devotion to the Reverend Sun Myung Moon.¹⁵

The plaintiff sued the defendants in the federal district court for eastern Virginia under section 1985(3) and seven state law tort claims.¹⁶ The defendants moved to dismiss the federal claim on the ground that the plaintiff had failed to allege facts giving rise to a cause of action under federal law.¹⁷ The district court dismissed the plaintiff's section 1985(3) claim pursuant to that motion.¹⁸ The court held that the plaintiff had failed to establish that a right

⁹ "Deprogramming" in this context has been described as the abduction and confinement of a person to apply intense emotional, and sometimes physical pressure to force the renunciation of religious beliefs. *Baer v. Baer*, 450 F. Supp. 481, 485 (N.D. Cal. 1978). Commentators, however, disagree on the character of the act. Compare LeMoult, *Deprogramming Members of Religious Sects*, 46 *FORDHAM L. REV.* 599 (1978) [hereinafter cited as LeMoult] (terming it a modern form of religious persecution analogous to crucifixion, torture and burning at the stake) with Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 *S. CAL. L. REV.* 1, 78 (1977) [hereinafter cited as Delgado] (terming it a form of marathon encounter therapy to neutralize the effects of cult conditioning, and a self-help device for parents of "cult youth").

¹⁰ 657 F.2d at 48.

¹¹ Brief for Respondent at 2a-3a, *Mandelkorn v. Ward*, 102 S. Ct. 1253 (1982). The Unification Church is an international religious organization. *Id.*

¹² *Id.* at 3a-8a. Of the 33 conspirators named in the plaintiff's complaint, at least ten were relatives of the plaintiff. *Id.* at 3a-7a. They included the plaintiff's mother, father, two sisters, a brother, three uncles and two aunts. *Id.*

¹³ *Id.* at 20a.

¹⁴ *Id.* at 9a. The complaint also alleged that the conspirators' purposes were to prevent him from freely associating with other members of the Unification Church, to hinder his interstate travel and to prevent him from discussing and exercising his religious beliefs. *Id.*

¹⁵ *Ward v. Connor*, 495 F. Supp. 434, 435 (E.D. Va. 1980), *rev'd* 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1253 (1982).

¹⁶ *Id.* at 435-436. The plaintiff's state law claims were for statutory conspiracy, assault, battery, false imprisonment, invasion of privacy, intentional infliction of emotional harm and grand larceny. *Id.* at 436. Not all of the 33 defendants named in the federal claim were included in the state claim suits. *Id.* The plaintiff sought injunctive relief against his ten relatives and one non-family defendant, and punitive and compensatory damages from all other non-family defendants named to the suit. Brief for Respondent at 20a-30a, *Mandelkorn v. Ward*, 102 S. Ct. 1253 (1982).

¹⁷ 495 F. Supp. at 436.

¹⁸ *Id.* at 438. Diversity jurisdiction over the plaintiff's state claims was retained by the district court. *Id.*

securable by the national government against private deprivations had been infringed, and, in addition, had failed to allege facts tending to demonstrate the requisite elements of section 1985(3) action.¹⁹

On appeal, the Fourth Circuit Court of Appeals reversed the lower court.²⁰ The appeals court held that the allegation that one of the conspiracy's purposes was to prevent the plaintiff's intended interstate travel was sufficient to establish congressional authority to reach the private act of discrimination alleged.²¹ The court also held that the statute reaches religious discrimination,²² and that although the defendants may have been motivated in part by their concern for the plaintiff rather than by their hatred for members of the Unification Church as a class, the cause of action was not defeated.²³ Accordingly, the court granted the plaintiff a cause of action under section 1985(3).²⁴

This casenote examines the Fourth Circuit's holding in *Ward v. Connor* in light of the Supreme Court's interpretation of section 1985(3) in *Griffin v. Breckenridge*.²⁵ First, the history of section 1985(3) will be discussed, including the statute's early application to private acts of discrimination. The Supreme Court's interpretation of the section in *Griffin* will then be considered. Next, *Griffin*'s two-prong analysis of section 1985(3) claims will be juxtaposed against both the district court's and the court of appeals' decision in *Ward*. The casenote then turns to an analysis of the Fourth Circuit's decision. Specifically, the court's ruling that Congress has the constitutional authority to regulate the challenged private activity will be considered. Next, the court's extension of the scope of section 1985(3) to include discrimination against religious groups will be examined. Finally, the Fourth Circuit's interpretation of *Griffin*'s requirement that a class-directed bias motivate private conspiracies subject to section 1985(3) will be scrutinized. It will be submitted that while the *Ward* court was justified in extending the protection of section 1985(3) to religious groups, its treatment of *Griffin*'s bias requirement fails to comport with the Supreme Court's interpretation of section 1985(3), and with the statute's legislative history.

I. THE BACKGROUND OF *WARD V. CONNOR*

Section 1985(3) is the codification of a portion of section two of chapter twenty-two of the Civil Rights Act of 1871.²⁶ Popularly known as the "Ku

¹⁹ *Id.* See text and notes at notes 72-90 *infra*.

²⁰ 657 F.2d at 49.

²¹ *Id.* at 48.

²² *Id.*

²³ *Id.* at 49.

²⁴ *Id.*

²⁵ 403 U.S. 88 (1971).

²⁶ Compare An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, ch. 22 § 2, 17 Stat. 13 (1871) with 42 U.S.C. § 1985(3) (Supp. III 1979). The original language of that portion of the Act of 1871 has

Klux Klan Act,"²⁷ the Act was the congressional response to violent and brutal acts committed by bands of hooded marauders who terrorized the South during the Reconstruction era.²⁸ The legislative history of the Ku Klux Klan Act is rife with tales of murder, beatings and other acts of terrorism carried out by the Klan and similar organizations during the postbellum period.²⁹ The Act of 1871³⁰ embodied a congressional intent to provide a private cause of action to victims of such terrorist acts.³¹ The portion of the Act which manifested this congressional purpose, subsequently codified as section 1985(3), imposes four distinct requirements on parties suing under the statute: first, there must be conspiracy; second, the purpose of the conspiracy must be to deprive either directly or indirectly equal protection of the laws, or equal privileges and immunities thereunder; third, there must be an act in furtherance of the conspiracy; finally, there must be either an actual injury incurred, or an actual deprivation of a right.³² The statute as originally introduced in Congress was to reach all conspiratorial deprivations of rights.³³ The enormous sweep of the original language led to pressures for amendment, which resulted in the nar-

survived virtually unchanged in the terms of § 1985(3).

²⁷ See, e.g., *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973).

²⁸ See CONG. GLOBE, 42d Cong., 1st Sess. 227 (1871) (resolution by Sen. Sherman): That as organized bands of lawless and desperate men . . . bound by secret oaths . . . have, by force, terror, and violence . . . overthrown the safety of person and property, and the rights which . . . are guaranteed by the Constitution of the United States . . . the Judiciary Committee is instructed to report a bill or bills to enable the federal government to punish and prevent such organized violence, and secure to all citizens the rights so guaranteed.

Id. See also remarks of Sen. Chandler: "Thousands and tens of thousands are being taken out and whipped and scourged every day by the Klan. The question to be settled here is, can we stop these outrages or can we not?" *Id.* at 271. See also SCHWARTZ, CIVIL RIGHTS, *supra* note 3, at 591.

²⁹ See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. app. 33 (1871) (remarks of Sen. Scott). To highlight the need for national legislation to curtail the activities of the Klan, Senator Scott detailed the Klan's midnight whipping of a Negro preacher named Corliss; its whipping and shooting of Caswell Holt, a Negro male; the Klan's whipping of a white Republican named Ramsour; and the Klan's assault on a white federal revenue officer named C.D. Upchurch. *Id.* See also *id.* at 155-59 (remarks of Sen. Sherman). Addressing the Senate debates over the Act of 1871, Senator Sherman pointed to testimony before the Select Committee on Outrages in southern States as evidence of the need for federal legislation. *Id.* The senator cited testimony by four witnesses to atrocities perpetrated by the Klan: Judge Settle of North Carolina testified to the Klan's whipping of a 70-year-old Negro man and his two daughters; Judge Pryor of Kentucky testified to the cold-blooded murder of United States Army Captain Joseph G. Crane by Klan thugs; Peter R. Harden testified to the Klan's midnight lynching of Wyatt Outlaw, a Negro male, and the Klan's subsequent drowning of a retarded Negro male who witnessed the lynching; Robert W. Logan testified to the enormous number of "whippings, shootings and burnings" by these terrorist groups. *Id.* Senator Sherman added that neither indictments nor conviction for these crimes could be gained due to the Klan's interference with state judicial processes. *Id.* at 157-59, 165-66.

³⁰ See note 2 *supra*.

³¹ *Collins v. Hardyman*, 341 U.S. 651, 662 (1951).

³² 42 U.S.C. § 1985(3)(Supp. III 1979), construed in *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971).

³³ *Griffin v. Breckenridge*, 403 U.S. at 99-100, citing CONG. GLOBE, 42d Cong., 1st Sess. at 478 and app. 68, 69, 188 (1871).

rowing of the scope of the law of deprivations attacking equality of rights.³⁴ Thus, conspiracies engaged in to deny equality before the law which caused injury or the deprivation of rights were to be actionable under this portion of the Act of 1871.³⁵

In the wake of the Supreme Court's decision in *United States v. Harris*³⁶ that the state must be a participant in any conspiracy to discriminate subject to federal proscription,³⁷ the forerunners of section 1985(3) went largely unused for 100 years.³⁸ The issue in *Harris* was whether the criminal analogue to section 1985(3),³⁹ which was being used to prosecute conspirators to a murder, could be applied under the Constitution to purely private actors.⁴⁰ The Court held that the Constitution does not empower Congress to reach private discriminatory acts, and thus struck down the criminal statute.⁴¹ The *Harris*

³⁴ 403 U.S. at 100.

³⁵ The language of the Act and its title reflect an apparent intent of the Forty-Second Congress to employ the fourteenth amendment to reach the terrorist acts of the Klan and its brother organizations. 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). It has been frequently declared, however, that the Act of 1871 was passed to implement all three Civil War amendments — the thirteenth, fourteenth and fifteenth amendments. See *Byrd v. Sexton*, 277 F.2d 418, 426 (8th Cir. 1960), cert. denied, 364 U.S. 818 (1960); *Bomar v. Bogart*, 159 F.2d 338, 339-40 (2d Cir. 1947); *Koch v. Zuieback*, 194 F. Supp. 651, 657 (S.D. Cal. 1961), aff'd, 316 F.2d 1 (9th Cir. 1963). For a more detailed survey of the intent of the framers of the section, see Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402, 407-20 (1979).

³⁶ 107 U.S. 629 (1882).

³⁷ *Id.* at 639.

³⁸ There were no reported cases of suits under § 1985(3) prior to 1920. See Note, *The Scope of Section 1985(3) Since Griffin v. Breckenridge*, 45 GEO. WASH. L. REV. 239, 240 n.4 (1977); Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?* 26 IND. L.J. 361, 363 (1951). The Supreme Court considered suits under the section (formerly codified at 8 U.S.C. § 47(3)) on only three occasions in the 80 years after its enactment. See *Tenney v. Brandhove*, 341 U.S. 367, 369-72 (1951); *Snowden v. Hughes*, 321 U.S. 1, 5-13 (1944); *Hague v. CIO*, 307 U.S. 496, 506 & n.4 (1939).

³⁹ The criminal analogue to § 1985(3) which was involved in *Harris* provided:

If two or more persons . . . conspire . . . 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 . . . each and every person so offending shall be . . . punished by a fine . . . or by imprisonment . . . or by both such fine and imprisonment. . . .

An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, ch. 22 § 2, 17 Stat. 13-14 (1871) codified at 70 Rev. Stat. ch. 7 § 5519, repealed, 35 Stat. 1154 (1909), reenacted and codified with some differences in language at 18 U.S.C. § 241 (1976). The then-existing statute, as construed by the Court in *Harris*, is found in 106 U.S. at 632.

⁴⁰ 106 U.S. at 636.

⁴¹ *Id.* at 644. In *Harris*, the Court considered the constitutionality of the criminal counterpart to § 1985(3) (see note 39 *supra*) under the thirteenth, fourteenth and fifteenth amendments, and the privileges and immunities clause of article 4, section 2 of the Constitution. *Id.* at 636-44. The *Harris* Court concluded that congressional authority to enact the statute was not vested by any of these provisions. *Id.* at 644. The Court noted that fifteenth amendment rights were not involved. *Id.* at 637. The Court declared that the statute's language was too broad to fit within the thirteenth amendment. *Id.* at 640-41. Finally, the Court held that the fourteenth amendment and the privileges and immunities clause only protect against action by state governments. *Id.* at 637-39, 643-44. Having determined that Congress was without authority to enact

Court's holding raised grave doubts as to section 1985(3)'s constitutionality.⁴²

The doubts over section 1985(3)'s constitutionality were resolved temporarily by the Supreme Court's decision in *Collins v. Hardyman*.⁴³ The issue in *Collins* was whether, under the equal protection language of section 1985(3),⁴⁴ the plaintiffs could claim the statute's protection absent any involvement by state authorities in the alleged discriminatory conspiracy.⁴⁵ The *Collins* Court held that to state a claim under the section, a plaintiff must allege a conspiracy to manipulate or influence a state's ability to afford equal protection to its citizens.⁴⁶ Failure to allege such an effect on state officials' actions would defeat the cause of action.⁴⁷ The Court's holding in *Collins* was subsequently construed to require traditional state action in the discriminatory deprivation of rights.⁴⁸

Twenty years after the *Collins* decision, the Court reconsidered the construction of section 1985(3) in *Griffin v. Breckenridge*.⁴⁹ *Griffin* involved a racially motivated beating.⁵⁰ The plaintiffs in *Griffin* were black citizens of the United States and residents of Kemper County,⁵¹ Mississippi.⁵² The defendants were

the statute, the *Harris* Court declared § 1985(3)'s criminal analogue unconstitutional. *Id.* at 644.

⁴² See, e.g., M. KONVITZ, *THE CONSTITUTION AND CIVIL RIGHTS* 101-03 (1947).

⁴³ 341 U.S. 651 (1951). *Collins* involved a "lawless political brawl, precipitated by a handful of white citizens against other white citizens." *Id.* at 662. The plaintiffs in *Collins* were members of a group opposed to the Marshall Plan. *Id.* at 653. The plaintiffs alleged that the defendants, motivated by their disagreement with the plaintiff's views, conspired to disrupt a political meeting of those opposed to the Plan. *Id.* at 653-54.

⁴⁴ The equal protection language present in § 1985(3) as referred to in *Collins* is: "'for the purpose of depriving . . . of the equal protection of the laws, or of equal privileges and immunities under the laws.'" *Id.* at 660 (emphasis supplied by the Court). This language parallels the terms of section one of the fourteenth amendment. See note 117 *infra*. Significantly, the *Collins* Court restricted its analysis to the interpretation of the section's language, and concluded that the statute by its own terms required interference with a state official's ability to protect the plaintiff's rights. *Id.* at 661. Therefore, unlike the Court in *United States v. Harris*, the *Collins* Court did not reach the constitutional question of whether the fourteenth amendment or any other constitutional power would authorize congressional regulation of private acts of discrimination through § 1985(3). *Id.* at 662. See *United States v. Harris*, 106 U.S. 629, 636 (1882). See text and note at note 41 *supra*.

⁴⁵ 341 U.S. at 656.

⁴⁶ *Id.* at 661. By interpreting the language of § 1985(3) to require state involvement in the alleged conspiracy, the *Collins* Court was thus able to contain the statute within the ambit of the fourteenth amendment's authority. *Id.* at 659.

⁴⁷ *Id.* at 661.

⁴⁸ *Collins* did not explicitly require that conspirators be operating under color of state law to be within the ambit of the section. Rather, the Court suggested that a conspiracy to influence a state official's ability to provide equal protection would be actionable under § 1985(3). *Id.* at 661. Lower courts, however, subsequently treated *Collins* as requiring traditional state action. See, e.g., *Wallach v. Cannon*, 357 F.2d 557, 561 (8th Cir. 1966); *Hucy v. Barloga*, 277 F. Supp. 864, 869 (N.D. Ill. 1967); *Bryant v. Donnell*, 239 F. Supp. 681, 688 (W.D. Tenn. 1965).

⁴⁹ 403 U.S. 88 (1971).

⁵⁰ *Id.* at 89-91.

⁵¹ Kemper County is located on Mississippi's border with Alabama. *Id.* at 106.

⁵² *Id.* at 89.

white, United States citizens and were also residents of Kemper County.⁵³ The plaintiffs alleged that on July 2, 1966, the defendants stopped the plaintiffs' automobile on a highway, near the Mississippi-Alabama border, and, while holding them at gunpoint, brutally beat the plaintiffs with blackjacks.⁵⁴ The plaintiffs also alleged that the defendants were acting under the mistaken belief that the plaintiffs were civil rights workers.⁵⁵ The issue presented in *Griffin* was whether the plaintiffs could state a cause of action under section 1985(3) where the complaint alleged no involvement by state officials.⁵⁶ The Court recognized that the allegations presented approached the paradigm for the acts proscribed by Congress in section 1985(3).⁵⁷ The Court held that section 1985(3) does reach private actors, and that the plaintiffs did state a cause of action under the section.⁵⁸ The *Griffin* Court's holding signaled the end to the state action requirement for suits brought under the section.⁵⁹

⁵³ *Id.* at 90.

⁵⁴ *Id.* at 90-91.

⁵⁵ *Id.* at 90.

⁵⁶ *Id.* at 92-93.

⁵⁷ *Id.* at 103. "Indeed, the conduct here alleged lies so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this did not." *Id.*

⁵⁸ *Id.* at 103-07. The *Griffin* Court recognized the problem posed by the statutory language requiring a denial of equal protection or equal privileges and immunities. *Id.* at 96-97. The Court noted that a denial of equal protection by private actors was difficult to conceptualize in light of prior fourteenth amendment litigation in which the focus was upon state action requirements. *Id.* at 97. The Court determined, however, that nothing in the language of § 1985(3) by its own terms required the presence of state action. *Id.* The Court then looked to the companion statutes to § 1985(3). *Id.* at 98-99. The Court noted that each companion section provided a remedy for a particular form of state action, *id.*, and taken together those sections covered all of the apparent forms of state involvement possible in deprivations of equal protection. *Id.* at 98-99. The Court concluded that inclusion of a state action requirement to trigger the statutory protection in § 1985(3) would have been redundant. *Id.* at 99. Hence, the Court concluded that state action need not be shown to state a cause of action under § 1985(3). *Id.* at 101. The Court reinforced its determination that § 1985(3) reaches private acts of discrimination by reviewing the section's legislative history. *Id.* at 99-101. Comments made during the debates over the bill which showed the intent of some legislators to reach private discrimination weighed heavily in the Court's survey of the legislative history. *Id.* The Court also relied on Congress' preoccupation with the type of animus required to bring the section into play as evidence of the drafters' assumption that the section's coverage was to include private acts of discrimination. *Id.* at 100. The Court concluded that "[i]t is thus evident that all indicators — text, companion provisions, and legislative history — point unwaveringly to § 1985(3)'s coverage of private conspiracies." *Id.* at 101.

⁵⁹ *Id.* at 104. *Griffin* did not expressly overrule the *Collins* decision. *Id.* at 95. The *Griffin* Court noted that *Collins*' strict interpretation of the equal protection language of the section was influenced by the constitutional problems raised by allowing it to reach beyond state action into the realm of private conduct. *Id.* at 94. These constitutional concerns were exacerbated in *Collins* by the severability rule then in use which mandated the invalidation of an entire statute if any portion was unconstitutionally overbroad. *Id.* at 104. Thus, under the severability rule, the statute in question would be declared unconstitutional if any possible application would be beyond the scope of Congress' authority. *Id.*, citing *Baldwin v. Franks*, 120 U.S. 678, 685 (1887). The Court in *Griffin* noted that the severability rule had been "long since firmly rejected," 403

Having determined that section 1985(3) was meant to reach private discriminators, the *Griffin* Court was left to construe the limits on the section's applicability. Turning to this task, the Court adopted a two-step analysis to determine whether a cause of action is within the scope of section 1985(3). First, the case must be within the constitutional ambit of a specific congressional power to reach private actors.⁶⁰ The Court found that congressional authority to reach the private acts of discrimination in *Griffin* was rooted in two constitutional sources: the thirteenth amendment and the right to interstate travel.⁶¹ Second, the alleged conduct must fall within the statutory requirements of section 1985(3).⁶² Turning to the second step of its analysis, the Court recognized the ambiguity of the section's requirement that the conspirators be motivated by an intent to deny equal protection or equal privileges and immunities.⁶³ The Court therefore imposed a "gloss" on the section's language by interpreting the requirement to mean that conspiracies motivated by an "invidiously discriminatory class-based animus" would be actionable.⁶⁴ In the eleven years since the *Griffin* decision, the Court has not had occasion to reconsider its construction of section 1985(3).⁶⁵ Consequently, the two-step analysis suggested by the *Griffin* opinion must be employed to test the applicability of the section to the facts of a given case.

U.S. at 104, citing *United States v. Raines*, 362 U.S. 17, 20-24 (1960), and concluded that "it is clear, in the light of the evolution of decisional law in the years since [*Collins*] was decided, that many of the constitutional problems there perceived simply do not exist." 403 U.S. at 95-96. The *Griffin* Court, however, did not entirely rid the section of its state action requirement. The Court limited the reach of the section to private conspiracies motivated by "class-based, invidiously discriminatory animus." *Id.* at 102. See text and notes at notes 118-21 *infra*. By leaving the *Collins* decision undisturbed, therefore, the *Griffin* Court implicitly left the state action requirement in place for conspiracies not motivated by class bias.

⁶⁰ 403 U.S. at 104. In holding that § 1985(3) covered private acts of discrimination, the *Griffin* Court thus brought into issue whether the fourteenth amendment — which had been held only to reach state action — could be relied upon as constitutional authority for the statute. *Id.* at 94-96. See text and notes at notes 36-48 *supra*. The Court, however, expressly reserved the question of the scope of the fourteenth amendment's authority over private conduct, *id.* at 107, and instead relied on other constitutional grounds for § 1985(3)'s extension. *Id.* at 104-06.

⁶¹ *Id.* See text and notes at notes 102-06 *infra*. The Court added that in identifying these two sources, it was not precluding the possible use of alternative bases for congressional intervention into private conduct. *Id.* at 107. In *Griffin*, the Court treated the constitutional portion of its analysis only after determining that the statutory requirements were satisfied. For this casenote's treatment of *Ward*, the order of the *Griffin* analysis has been reversed to demonstrate better the constraints present in construing the section's language.

⁶² *Id.* at 102-03.

⁶³ *Id.* at 97.

⁶⁴ *Id.* at 102. See text and notes at notes 117-23 *infra*. It would appear that conspiracies which both fulfill the statutory requirements and *Griffin*'s gloss, and infringe a right securable by Congress from private deprivations, are thus protectable under § 1985(3).

⁶⁵ The Court has considered, however, at least one case under § 1985(3) since *Griffin*. Nevertheless, in *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979), the Court did not reach the question of statutory construction. Rather, the Court in *Novotny* was presented with the question of whether sex discrimination in violation of § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a) (1976), constituted a denial of "the equal protection, or of equal privileges and immunities under the laws" within the meaning of § 1985(3). 442 U.S. at

II. THE HOLDINGS IN *WARD V. CONNOR*

While the two-step analysis promulgated by the *Griffin* Court for testing actions brought under section 1985(3) is reasonably straightforward, its application has not been wholly consistent. Lower courts have reached widely divergent results on both the constitutional requirements,⁶⁶ and the statutory prerequisites⁶⁷ that the *Griffin* analysis mandated. This lack of consensus was reflected in *Ward v. Connor*. Both the district and appellate courts in *Ward* recognized the *Griffin* test as controlling for suits under section 1985(3).⁶⁸ Disparate conclusions were reached, however, as a result of variations in the two courts' constructions of *Griffin's* holding. The *Griffin* Court cited certain important, and potentially conflicting, considerations as constraints on its construction of section 1985(3). Specifically, the court expressed its desire to give the statute "a sweep as broad as its language,"⁶⁹ while at the same time to prevent the statute from creating a general federal tort law.⁷⁰ The difference in significance accorded these two constraining considerations produced the conflicting results in the two *Ward* decisions. The remainder of this casenote will consider the divergent constructions of *Griffin* given by the two courts in *Ward*, and propose guiding principles to determine the section's applicability to future cases. While the casenote will devote some attention to the constitutional requirement of *Griffin's* two-part analysis, the discussion will focus primarily on the statutory construction of section 1985(3) — specifically, the class-based animus gloss read into the section by *Griffin*.⁷¹ In conclusion, the casenote will propose guiding principles that will be true to both the statutory language and to the constraining considerations expressed by the *Griffin* Court in its construction of section 1985(3).

372. The Court held that the deprivation of a right created by Title VII cannot be a basis for a cause of action under § 1985(3). *Id.* at 378. Thus, the Court in *Novotny* did not alter the *Griffin* analysis for determining whether a cause of action exists under § 1985(3).

⁶⁶ For example, in *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971), the United States Court of Appeals for the Eighth Circuit held that § 1985(3) may be asserted against all private discrimination fitting under the section's language on the authority of section 5 of the fourteenth amendment. *Id.* at 1235. In *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), the United States Court of Appeals for the Seventh Circuit held that § 1985(3) is not assertable against any private discrimination where the fourteenth amendment is relied upon as the sole constitutional authority for Congress' regulation of the particular instance of private conduct alleged. *Id.* at 196. For a fuller treatment of *Griffin's* constitutional requirement, see text and notes at notes 96-113 *infra*.

⁶⁷ For example, a Unification Church member was allowed by one court to sue under § 1985(3) under facts similar to those in *Ward*, *Rankin v. Howard*, 457 F. Supp. 70, 75 (D. Ariz. 1978), *rev'd on other grounds*, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981), while another Unification Church member was denied a cause of action under the section. *Van Styn v. Van Styn*, No. 79-C-3468 (N.D. Ill. Feb. 7, 1980). For a fuller treatment of *Griffin's* statutory requirements, see text and notes at notes 114-23 *infra*.

⁶⁸ See 495 F. Supp. at 436 and 657 F.2d at 47.

⁶⁹ 403 U.S. at 97.

⁷⁰ *Id.* at 102.

⁷¹ See text and notes at notes 117-23 *infra*.

A. *The District Court's Repudiation*

In reaching its conclusion that the plaintiff had failed to state a cause of action under section 1985(3), the district court in *Ward* employed *Griffin's* two-step analysis.⁷² Treating the first step, the court held that the plaintiff had not alleged the infringement of a right which the federal government is constitutionally able to protect from private discrimination.⁷³ The district court looked behind the plaintiff's allegation of the infringement of his right to travel and determined that the gravamen of the suit was the infringement of the plaintiff's first amendment right to freedom of religious practice.⁷⁴ That right, the court noted, may be protected only from state deprivations.⁷⁵ Thus, the court viewed the plaintiff's allegation of an infringement of free travel as a pretext for the vindication of his right to religious freedom. Lacking any allegations of governmental involvement in the defendants' conspiracy to deprive the plaintiff of his freedom of religion, the court concluded that section 1985(3) could not be used to grant alternative relief.⁷⁶

The district court in *Ward* did not rest its decision solely on its determination that the plaintiff had failed to allege the infringement of a right protectable by the federal government from private discrimination. Applying the second step of the *Griffin* analysis, the district court noted the failure of the plaintiff's complaint to fulfill the statutory requirements of section 1985(3).⁷⁷ The district court held that the plaintiff did not allege the "class-based invidiously discriminatory animus" required by *Griffin*.⁷⁸ The district court looked first to the class allegedly discriminated against: members of the Unification Church. The court declared that it was not convinced that Congress intended section 1985(3) to protect non-racial classifications.⁷⁹ Noting that *Griffin* had expressly reserved the question,⁸⁰ the district court employed a "discrete, insular and immutable characteristics" test for determining whether religious classifications are protected under the statute.⁸¹ Because religious classifications involve

⁷² 495 F. Supp. at 437.

⁷³ *Id.* at 438.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 437-38.

⁷⁸ *Id.* at 437.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* The "discrete, insular and immutable characteristics" test has been employed by the Supreme Court to distinguish classes protected under the fourteenth amendment's equal protection clause. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). *Cf. Regents of the University of California v. Bakke*, 438 U.S. 265, 290 (1978) (characteristics relevant in deciding whether new classifications "suspect").

Prior to its holding in *Ward*, the appeals court had approved the use of the discrete, insular and immutable characteristics test to deny class status of a person who brought an action under § 1985(3). *See Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025, 1028 (E.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974), discussed at text and note at note 144 *infra*.

characteristics voluntarily assumed, the court held they were not within the scope of the statute.⁸² Therefore, the court held as a threshold matter that the plaintiff did not fall within a class protected by section 1985(3).⁸³

Recognizing that courts had differing views on the class status of religious groups,⁸⁴ the district court in *Ward* stated that even if the class alleged by the plaintiff was protected, the plaintiff had failed to demonstrate the requisite bias against the class.⁸⁵ The district court noted that the defendants were plaintiff's "closest blood relatives."⁸⁶ The court found that the defendants were motivated by their concern for a loved one rather than by bias against the Unification Church.⁸⁷ The court also noted that the plaintiff was not the victim of systematic racial terrorism, nor denied access to state remedies.⁸⁸ The court concluded that the suit therefore failed to fulfill the statutory requirement of a discriminatory bias against a class.⁸⁹ Thus, the court declared, to grant the plaintiff's cause of action would be to distort the purposes of section 1985(3).⁹⁰

B. *The Circuit Court's Allowance*

On appeal, the Fourth Circuit disagreed with the lower court's application of both steps of the *Griffin* analysis and reversed the dismissal of the plaintiff's complaint.⁹¹ On the constitutional requirement, the circuit court held that the infringement of any right which the federal government is empowered to protect from private discrimination satisfies the *Griffin* test, despite any contemporaneous infringement of a right not subject to such protections.⁹² On the statutory requirements, the circuit court held that religious groups constitute a protected class,⁹³ and that the mere allegation of discriminatory bias is sufficient to support an action under the section.⁹⁴ The circuit court concluded that the section protects individuals from wholly private conspiracies aimed at depriving freedom of religion where the right to interstate travel is also impinged.⁹⁵ To understand fully the appeals court's decision, each part of its treatment of the two-part *Griffin* test will be considered.

⁸² 495 F. Supp. at 437.

⁸³ *Id.* The district court recognized that the issue of class coverage was unsettled among lower federal courts, and noted that several courts have granted the class status to religious groups under § 1985(3). *Id.* "Yet, we are persuaded, from a review of the better-reasoned decisions . . . that § 1985(3) does not afford plaintiff a remedy in the instant case." *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 438.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 657 F.2d at 49.

⁹² *Id.* at 48.

⁹³ *Id.*

⁹⁴ *Id.* at 49.

⁹⁵ *Id.* at 48.

III. A CRITIQUE OF THE *WARD* RESULTA. *The Requirement of Constitutional Authority*

The first step of the *Griffin* analysis is the requirement of constitutional authority for the federal government's regulation of private discrimination.⁹⁶ The authority cited by the Fourth Circuit in *Ward* was the congressional power to protect the right of interstate travel.⁹⁷ The plaintiff in *Ward* alleged that the interference with his intended interstate travel was an object of the conspiracy and that his right was impinged by the abduction.⁹⁸ The circuit court, acting on dicta in *Griffin* implying that Congress has the power to protect the rights to interstate travel from private deprivations, found the requisite constitutional authority to be present.⁹⁹ The circuit court rejected the lower court's examination of the "gravamen" of the plaintiff's complaint.¹⁰⁰ Rather, the court held that the allegation of an interference with the right to travel satisfies *Griffin*'s requirement that the challenged activity be one against which Congress has the authority to legislate.¹⁰¹

While *Ward*'s holding that the right to travel grants Congress the authority to reach certain private acts of discrimination is a broad construction of that right, the interpretation seems sound in light of *Griffin*. In declaring that section 1985(3) affords protection to victims of wholly private discriminatory conspiracies, the *Griffin* Court recognized that specific constitutional authority must be present to empower Congress to reach such private actors.¹⁰² One of the source of authority identified by the Supreme Court was the right to travel.¹⁰³ The Court stated that the right has been recognized as among those

⁹⁶ 403 U.S. at 104. See note 61 *supra*.

⁹⁷ 657 F.2d at 48.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² 403 U.S. at 104. The Court noted that its inquiry did not need to find § 1985(3) constitutional in all possible applications of the section, but rather needed only to identify a source of congressional power to reach the conspiracy alleged in the case before it. *Id.* Therefore, for actions arising under § 1985(3), the constitutionality of the section's extension will turn on the specific facts of each case.

¹⁰³ *Id.* at 105-06. The *Griffin* Court also recognized the thirteenth amendment as a constitutional source for the authority to reach private discrimination. *Id.* at 104-05. The thirteenth amendment empowers Congress to identify discriminatory activities constituting "badges and incidents of slavery" and to legislate against such acts. *Id.*, citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968). The Court concluded that Congress was within its power under section two of the thirteenth amendment in granting the § 1985(3) cause of action to Negro citizens. 403 U.S. at 105. In *Griffin*, all of the plaintiffs were Negroes; all of their assailants were white. *Id.* at 89-90. The discriminatory activities allegedly perpetrated by the defendants fell within the "badges and incidents of slavery" proscription of the thirteenth amendment. *Id.* at 105. Hence, the Court's holding that the thirteenth amendment empowered Congress to reach private actors through § 1985(3) was sufficient to decide the case, and the Court could well have curtailed its analysis at this point. That the Court did press forward to identify the right to travel as a basis for constitutional authority is evidence that the Court did not intend § 1985(3) to be limited to racial discrimination. Since *Griffin* dealt with acts prohibited by both the right to travel and the thirteenth amendment, however, the Court had no need to consider what the full scope of § 1985(3)'s coverage would be when the right to travel is relied upon as the sole source of constitutional authority.

rights and privileges of national citizenship which are within Congress' power to protect from private deprivation.¹⁰⁴ The *Griffin* Court, however, cited no constitutional provision for the proposition that the right to travel is constitutionally protected.¹⁰⁵ Nevertheless, the Court went on to declare that not only interferences with actual interstate travel, but also interferences with intended interstate travel, empower Congress to provide statutory protection.¹⁰⁶

¹⁰⁴ 403 U.S. at 105-06.

¹⁰⁵ *Id.* Rather, the Court relied on precedents to support its conclusion that the right to travel does not rest solely upon the fourteenth amendment, and is assertable against both private and governmental deprivations. *Id.* Of the precedents cited, the *Griffin* Court was necessarily placing primary reliance on *United States v. Guest*, 383 U.S. 745, (1966), as justification for its construction of the right to travel. *Guest* dealt with the application of 18 U.S.C. § 241 (1976), the criminal counterpart of § 1985(3), see note 39 *supra*, to a private conspiracy involving criminal acts of racial discrimination. 383 U.S. at 746-47 & n.1. Justice Stewart, as the sole justice speaking for the Court in a severally divided decision, held that the right to travel is assertable against private, as well as governmental deprivations. *Id.* at 759 n.17. As in *Griffin*, Justice Stewart's opinion in *Guest* failed to identify a specific constitutional provision as establishing the right to travel, but instead relied on precedent defining the right. *Id.* at 758. Justice Stewart concluded that "[a]lthough there have been recurring differences within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists." *Id.* at 759. Justice Stewart recognized that the precedent relied upon to establish the existence of the right to travel involved only governmental interferences, and did not address the issue of private infringements of the right. *Id.* at 759 n.17. Nevertheless, he concluded that:

their reasoning fully supports the conclusion that the constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private. In this connection, it is important to reiterate that the right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment.

Id.

Justice Harlan, in a sharp dissent to this portion of Justice Stewart's opinion, declared that no previous construction of the right to interstate travel supported the extension of congressional authority in the case at bar. *Id.* at 763 (Harlan, J., dissenting). Justice Harlan then engaged in the canvass of possible sources for the right which Justice Stewart had chosen to avoid. *Id.* at 764-70. Justice Harlan in turn considered and rejected the applicability of precedent grounding the right in the privileges and immunities clause, the commerce clause and the due process clause. *Id.* Justice Harlan noted that cases placing the source of the right to travel in the privileges and immunities clause of article IV and the due process clause of the fourteenth amendment were unavailing to the *Guest* Court because they treated only governmental deprivations of the right. *Id.* at 764-67, 769-70. Justice Harlan also saw the commerce clause rationale as inapplicable, since its authority stems from economic factors absent in the regulation of private criminal discrimination. *Id.* at 767-69. Nor did Justice Harlan conclude that protecting the right to travel against interference by private actors was justified by constitutional policy. *Id.* at 771. Infringements by governmental authorities of individual rights are by their nature of constitutional magnitude, whereas infringements by private groups constitute "at most a temporary breakdown of law and order, to be remedied by the exercise of state authority or by appropriate federal regulation." *Id.* at 772. The Court's recognition of the authority of Congress to secure the right of interstate travel from the private deprivation involved in *Guest*, Justice Harlan concluded, was unprincipled lawmaking, justified neither by explicit constitutional provision, nor by sound constitutional policy. *Id.* at 771-73.

¹⁰⁶ 403 U.S. at 106. *Griffin* expanded upon *Guest*'s treatment of the right to travel in this respect. *Griffin* sets out specific examples of private interferences with the right to travel which may be protected by § 1985(3). *Id.* at 106. In *Guest*, Justice Stewart had no occasion to enumerate acts which constitute infringements of the right to travel since, in that case, the victims actually were denied the use of highway facilities and other incidents of interstate travel. 383 U.S. at 757. Justice Stewart concluded that, given the allegations of an actual denial of access to interstate

Having determined that the plaintiff in *Ward* alleged that his intended interstate travel was interrupted, the Fourth Circuit in *Ward* deemed the constitutional requirement of the *Griffin* analysis to be satisfied. The appeals court thus disregarded the district court's conclusion that state action was necessary because the plaintiff's suit was in reality aimed at the vindication of first amendment rights to religious freedom. In this regard, the Fourth Circuit has followed the Supreme Court's most expansive reading of the right to travel as empowering Congress to reach what were traditionally state law matters. Nonetheless, the *Ward* court's construction of the right to travel seems quite valid. The Supreme Court continues to consider the right to travel "virtually unqualified."¹⁰⁷ Furthermore, there is some evidence that the Court has not retreated from its determination that the right to travel is assertable against both governmental and private actors.¹⁰⁸ Nor has the Court declared any particular constitutional provision to be the source of the right to interstate travel.¹⁰⁹ Given this vague but expansive construction of the right to interstate travel by the Supreme Court, the Fourth Circuit was justified in determining that an incidental infringement of the right, if properly alleged as an object of the conspiracy, suffices to ground constitutional authority to regulate private conduct in satisfaction of *Griffin*'s first requirement.

While the Supreme Court's construction of the right to travel implicitly grants broad authority to the Congress, the unrestrained application of this congressional authority to regulate private conduct would subsume a large

travel, it was open to the state to prove that the specific intent of the defendants was to infringe the victims' right. *Id.* at 760.

In *Griffin*, the allegations in the complaint only tended to show that the plaintiffs may have had their rights to interstate travel infringed. 403 U.S. at 106. In dicta, the *Griffin* opinion set out several factors which, if proved, could constitute violations of federal protected rights:

[I]t is open to the petitioners to prove at trial that they had been engaging in interstate travel or intended to do so, that their federal right to travel interstate was one of the rights meant to be discriminatorily impaired by the conspiracy, that the conspirators intended to drive out-of-state civil rights workers from the State, or that they meant to deter the petitioners from associating with such persons.

Id. Under this language, a conspiracy which interfered with a plaintiff's intended interstate travel would apparently be actionable. Combined with the Court's rejection of the necessity of a specific intent to deprive the protected right, *id.* at 102 n.10, the inclusion of the mere intent to travel language signaled an expansion of *Guest* in that all tortious conduct involving a detention of the plaintiff would thus come within Congress' authority by virtue of the plaintiff's claim that he intended to engage in interstate travel.

¹⁰⁷ *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978) (per curiam), citing *United States v. Guest*, 383 U.S. at 757-58 and *Griffin v. Breckenridge*, 403 U.S. at 105-06.

¹⁰⁸ See, e.g., *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979) (Stevens, J., concurring): "Some privileges and immunities of citizenship, such as the right to engage in interstate travel . . . are protected by the Constitution against interference by private action, as well as impairment by state action." *Id.* at 383.

¹⁰⁹ *Jones v. Helms*, 101 S.Ct. 2434, 2439 (1981) (textual source of the right to travel a subject of debate); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980) (constitution protects important but unarticulated rights such as the right to travel despite their not being enumerated); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254-55 (1974) ("ultimate scope" of the right to travel remains unsettled); *Graham v. Richardson*, 403 U.S. 365, 375 (1971) (source of the constitutional right has never been ascribed to any particular provision).

share of traditional state tort law matters under a general federal tort law.¹¹⁰ The *Griffin* Court recognized that such an expansive role for the Congress would offend principles of federalism.¹¹¹ The Court ruled, however, that the proper balance between federal and state functions could be reached by demanding strict adherence to the requirements of section 1985(3).¹¹² Hence, to avoid the federalization of tort law, a close reading of *Griffin's* statutory requirements is mandated.¹¹³

B. The Requirement of Statutory Coverage

The second step of the *Griffin* analysis is the requirement that the case fit within the language of section 1985(3).¹¹⁴ The Fourth Circuit in *Ward* noted that the complaint alleged a conspiracy, with an act in furtherance of the conspiracy and an actual injury to the plaintiff and, therefore, that the three of the four statutory requirements were met.¹¹⁵ Thus the treatment of the second clause of the section was determinative of the plaintiff's cause of action.¹¹⁶

The language of the second clause of section 1985(3) speaks in terms of the denial of equal protection.¹¹⁷ The Supreme Court in *Griffin* interpreted this

¹¹⁰ See generally *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 99 n.29, 103 (1971); Note, *State Action No Longer a Requisite Under 42 U.S.C. § 1985(3)* — *Griffin v. Breckenridge*, 403 U.S. 88 (1971), 3 SETON HALL L. REV. 168, 177 (1971).

¹¹¹ 403 U.S. at 101.

The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose — by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.

Id. at 102.

¹¹² *Id.* at 102. The same result had been reached by the Court with regard to actions arising under 18 U.S.C. § 241 (1976), the criminal analogue to § 1985(3). See note 39 *supra*. See *United States v. Guest*, 383 U.S. at 760. In *Guest*, Justice Stewart declared the reach of congressional authority to regulate criminal deprivations of the right of interstate travel to be restricted by the language of that section to situations in which the specific intent of the conspirators was to deprive the victim of the right to interstate travel. *Id.* Likewise, in *Griffin*, the Court declared the reach of federal power to private actors to be limited by the language of § 1985(3) to situations in which the infringement is motivated by an invidiously discriminatory class bias. 403 U.S. at 102.

¹¹³ See *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977). ("We remain mindful . . . of the Supreme Court's evident concern in *Griffin* over the broad literal sweep of the statute. That concern dictates the exercise of restraint when a court is confronted with class-based discrimination ground in a non-racial animus." *Id.* at 929); *Furumoto v. Lyman*, 362 F. Supp. 1267 (N.D. Cal. 1973). ("In extending *Griffin*, thus, precision must be maintained." *Id.* at 1286).

¹¹⁴ 403 U.S. at 102. See note 61 *supra*.

¹¹⁵ *Ward v. Connor*, 657 F.2d at 47 n.2.

¹¹⁶ *Id.* at 47.

¹¹⁷ The language of the section states: "for purpose of depriving . . . the equal protection of the laws, or . . . equal privileges and immunities under the laws. . . ." 42 U.S.C. § 1985(3) (Supp. III 1979). As noted by the *Griffin* Court, the section's language parallels the language of section one of the fourteenth amendment which provides, in part, that no state "shall abridge the privileges or immunities of citizens . . . nor deny . . . equal protection of the laws." 403 U.S. 96-97.

clause as requiring "invidiously discriminatory class-based animus."¹¹⁸ The *Griffin* Court noted that Congress did not intend to proscribe all private conspiratorial interferences with the rights of others.¹¹⁹ Indeed, the Court implied that constitutional consideration would bar the interpretation of the section as a general federal tort law.¹²⁰ These constitutional difficulties would be avoided, the Court declared, by construing the second element of the section to require invidiously discriminatory class-based animus as the motivation for the conspirators' injurious actions.¹²¹

The *Griffin* Court's discussion of invidiously discriminatory class-based animus was not exhaustive. The Court did, however, implicitly identify two components of the requirement. The first component requires the existence of some identifiable class to which the plaintiff belongs.¹²² The second component requires the presence of an invidiously discriminatory bias against that class which motivates the conspiracy.¹²³ Thus a conspiracy that is both aimed at an individual who is a member of a protected class, and motivated by hatred of the victim's class is a conspiracy "for the purpose of depriving . . . a person or class of persons of the equal protection of the laws . . ." in violation of section 1985(3).

1. The Class Component

The *Griffin* Court left unresolved what classes were to be protected by section 1985(3).¹²⁴ Because *Griffin* involved racial classifications, the Court limited its holding to the facts before it. In its opinion, however, the Court included language implicitly allowing a broader reading of the section, and referred to legislative history tending to show that the section, as contemplated by its framers, was to reach more than just racial discrimination.¹²⁵

¹¹⁸ *Id.* at 102. "The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." *Id.* (emphasis supplied by the Court).

¹¹⁹ *Id.* at 101. "That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the right of others." *Id.*

¹²⁰ See note 111 *supra*.

¹²¹ 403 U.S. at 102. The Court's apparent motive for predicating the applicability of § 1985(3) on presence of class-based animus was the difficulty that legitimate plaintiffs would face in proving that their assailants were in fact motivated by a desire to deny equal protection of the laws. Therefore, under the Court's construction of this clause of § 1985(3), the denial of equal protection or equal privileges and immunities called for by the statute's language must necessarily be assumed when bias against a class protected by the section motivates the conspiratorial deprivation of the plaintiff's rights. *Id.* at 102. Focus for the violation of the statute will be on the presence of such an invidiously discriminatory animus, not on the specific intent of the conspirators to deprive the victim of a federal right. *Id.* at 102 n.10.

¹²² *Id.* at 103.

¹²³ *Id.*

¹²⁴ *Id.* at 102 n.9. "We need not decide . . . whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable. . . ." *Id.*

¹²⁵ *Id.* But see note 103 *supra*. After declining to elaborate on the scope of § 1985(3)'s class protection, the Court cited, without quoting, the remarks of Senator Edmunds during congressional debates over passage of the Ku Klux Klan Act of 1891. *Id.* In the passage referred to, the senator stated:

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

In *Ward*, the Fourth Circuit deemed the class component of *Griffin's* gloss¹²⁶ to be crucial to the applicability of section 1985(3) to the case at hand.¹²⁷ The circuit court noted that the district court in *Ward* had doubted whether the section was intended to reach conspiracies not motivated by racial animus.¹²⁸ The court acknowledged the limiting language of the *Griffin* opinion, as well as the decision's express reservation of the question of what other classes were encompassed by the section.¹²⁹ The circuit court emphasized, however, that the legislative history of section 1985(3) implied an expansive class coverage under the statute.¹³⁰ The court also noted that some lower federal courts have extended the section's protection to religious groups.¹³¹ Accordingly, the circuit court concluded that *Griffin's* construction of section 1985(3) supports the extension of the statutory protection to religious classifications.¹³²

The circuit court in *Ward* reached its conclusion that religious groups constitute classes within the protection of section 1985(3) without propounding either a rule for the extension or a rationale for protecting victims of religious discrimination. Instead, the Fourth Circuit relied heavily on precedent in other lower federal courts recognizing religious groups as classes protected by the section.¹³³ Supported by this authority, the circuit court simply declared that

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 . . . then this section could reach it.

CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871).

¹²⁶ See text at note 64 *supra*.

¹²⁷ 657 F.2d at 47. "[T]he principal question before us is whether a religious group which is the object of the discriminatory animus may be deemed a class falling within the ambit of [§ 1985(3)]." *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 48.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* The *Ward* Court pointed to four cases as precedent for the extension of § 1985(3) to religious classifications. The court cited *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971), in which the Eighth Circuit held that victims of private religious discrimination are protected under the statute. *Id.* at 1234-35. Significantly, however, the *Action* court did not hold that religious groups are a class within the statutory meaning. Rather, the court held that the first amendment guarantees are assertable against private individuals under section 5 of the fourteenth amendment. *Id.* at 1234-35. The *Action* court then declared that conspiracies to deprive religious freedom motivated by race and economic class animus are within § 1985(3)'s coverage. *Id.* at 1232. The *Ward* court also cited *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973), where the Sixth Circuit held that class bias predicated on both religion and national origin is within the scope of the statute. *Id.* at 1065. Thus, the *Marlowe* court did not recognize religious classifications as independently protected under the section. However, the Sixth Circuit court subsequently cited *Marlowe* in dicta as holding that religious groups are so protected. *Browder v. Tipton* 630 F.2d 1149, 1152 (6th Cir. 1980). In the third and fourth cases cited by *Ward*, federal district courts also concluded that religious classes are protected under the section. *Rankin v. Howard*, 457 F. Supp. 70, 74-75 (D. Ariz. 1978), *rev'd on other grounds*, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981); *Baer v. Baer*, 450 F. Supp. 481, 491 (N.D. Cal. 1978). To reinforce its conclusion that the consensus among lower federal courts favors extending § 1985(3) to religious groups, the Fourth Circuit in *Ward* also cited dicta in two other cases which support this notion. 657 F.2d at 47, *citing* *Western Telecasters, Inc. v. California Fed. of Labor, AFL-CIO*,

courts had almost unanimously extended section 1985(3) coverage to religious groups, and that it would follow suit.¹³⁴ The appeals court's failure to identify the rationale it employed in extending section 1985(3)'s protection is troubling since prior to *Ward* the Fourth Circuit had not addressed the issue of the class status of religious groups.¹³⁵

In failing to identify a test for determining class status under section 1985(3), the *Ward* court mirrored the reasoning of many other federal courts presented with non-racial groups seeking redress under the statute.¹³⁶ Some federal courts, however, have groped for tangible guidelines to be used to

415 F. Supp. 30, 33 (S.D. Cal. 1976); *Arnold v. Tiffany*, 359 F. Supp. 1034, 1036 (C.D. Cal. 1973), *aff'd on other grounds*, 487 F.2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974). Thus, precedent is present for the extension of § 1985(3) to religious classes. However, as the district court in *Baer v. Baer* noted after surveying relevant case law, the precedents are "by no means compelling." 450 F. Supp. at 491.

¹³⁴ 657 F.2d at 48. "[T]he lower federal courts have, almost without exception, extended the coverage of the statute to religious groups. . . . In light of these cases, and the legislative history, we think it reasonable to conclude that religious discrimination . . . falls within the ambit of [§ 1985(3)]." *Id.* While it agreed with the conclusions of these courts, the Fourth Circuit did not cite the rationale of any of the cases relied upon as singularly persuasive. *Id.* This is significant as it points up the absence of a consensus among lower courts on the rule to be followed for defining classes to be protected under the section. See note 137 *infra*.

Of the cases relied upon by the Fourth Circuit, the clearest rationale for the extension of class status to religious groups is presented by the *Baer* court. The court stated:

While religious status may differ from racial status because it is not a congenital and inalterable trait, membership in a minority religious group, like membership in a minority racial group, has often excited the fear, hatred and irrationality of the majority. Two thousand years of human history compellingly prove that no easier road to martyrdom is found than in adherence to an unpopular religious faith.

450 F. Supp. at 491. Neither the *Marlowe* nor *Rankin* courts offered any rationale for its extension of *Griffin*. See *Marlowe v. Fisher Body*, 489 F.2d at 1065. *Rankin v. Howard*, 457 F. Supp. at 74. Finally, the *Action* court's rationale is contrary to Fourth Circuit precedent. In a case prior to *Ward*, the Fourth Circuit held that the fourteenth amendment does not empower § 1985(3) to reach private actors. *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504, 507 (4th Cir. 1974). The *Action* court, however, held that the fourteenth amendment may be relied upon to reach private discriminators. Thus, the *Action* court held that because the gravamen of the conspiracy alleged involved the deprivation of first amendment rights to freedom of religion, the fourteenth amendment authorized § 1985(3) to reach the private discriminators. 450 F.2d at 1234-35. In this regard, the *Ward* court's reliance on *Action* appears misplaced.

¹³⁵ See *Rodgers v. Tolson*, 582 F.2d 315, 317 (4th Cir. 1978).

¹³⁶ The absence of a valid guiding principle has resulted in the recognition or refusal of groups' class status on an apparent *ad hoc* basis. See *Carchman v. Korman Corp.*, 456 F. Supp. 730, 735 (E.D. Pa. 1978), *aff'd*, 594 F.2d 354 (3d Cir. 1979), *cert. denied*, 444 U.S. 898 (1979), and cases cited therein. Compare *Means v. Wilson*, 522 F.2d 833, 840 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976) (class status of political group supporting candidate for office recognized) with *Furumoto v. Lyman*, 362 F. Supp. 1267, 1286 (N.D. Cal. 1973) (class status of political protesters denied). Compare *Azar v. Conley*, 456 F.2d 1382, 1386 (6th Cir. 1972) (class status of single, white middle-class family recognized) with *Baskin v. Parker*, 602 F.2d 1205, 1209 (5th Cir. 1979) (class status of white farm families denied). Compare *Local No. 1 (ACA), Broadcast Employees of the Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. International Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 419 F. Supp. 263, 277 (E.D. Pa. 1976) (class status of union recognized) with *Western Telecasters, Inc. v. California Fed'n of Labor, AFL-CIO*, 415 F. Supp. 30, 33 (S.D. Cal. 1976) (class status of union denied).

determine the validity of classes claiming protection under section 1985(3).¹³⁷ Among the guidelines proposed, one would limit classes protected under the section to those possessing discrete, insular and immutable characteristics.¹³⁸ For example, the United States Court of Appeals for the Sixth Circuit in *Browder v. Tipton*¹³⁹ denied the class status of the plaintiffs because they did not possess such characteristics.¹⁴⁰ The *Browder* court reasoned that restricting the scope of section 1985(3) to classes with discrete, insular and immutable characteristics both protects those groups recognized by the Supreme Court as vulnerable to discrimination, and limits the categories of potential plaintiffs.¹⁴¹ Nevertheless, neither this guideline, nor any other, has been uniformly employed by the courts.¹⁴²

Prior to its decision in *Ward*, the Fourth Circuit had recognized the discrete, insular and immutable characteristics test as the correct measure for determining the classes that are to be protected under section 1985(3). In *Bellamy v. Mason's Stores, Inc.*,¹⁴³ the class status of a group was denied by a district court because it was not defined by discrete, insular and immutable characteristics such as race, sex and alienage.¹⁴⁴ In affirming the district court's holding, however, the circuit court implied that religious classifications would

¹³⁷ Although a number of rules have been advanced establishing criteria for determining protected classes under § 1985(3), no consensus has been reached among federal courts on the use of any one principle. See, e.g., *Lopez v. Arrowhead Ranches*, 523 F.2d 924, 928 (9th Cir. 1975) (groups constituting classes must be defined by characteristics other than merely having been victims of same conduct); *Westberry v. Gilman Paper Co.*, 507 F.2d 206, 215, *vacated per curiam as moot*, 507 F.2d 215 (5th Cir. 1975) (groups protected must be class sharing some "intellectual nexus"); *Cameron v. Brock*, 473 F.2d 608, 610 (6th Cir. 1973) (groups accorded protection must constitute "clearly defined class"); *Carchman v. Korman Corp.*, 456 F. Supp. 730, 736 (E.D. Pa. 1978), *aff'd*, 594 F.2d 354 (3d Cir. 1979), *cert. denied*, 444 U.S. 898 (1979) (groups protected will be those whose stable, well defined characteristics have been historically vulnerable to prejudice).

¹³⁸ See, e.g., *Browder v. Tipton*, 630 F.2d 1149, 1153 (6th Cir. 1980); *Carchman v. Korman Corp.*, 594 F.2d 354 (3d Cir. 1979), *cert. denied*, 444 U.S. 898 (1979); *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118, 1133-34 (W.D. Pa. 1980). The test has also been used on several occasions by district courts in the Fourth Circuit. See *Savina v. Gebhart*, 497 F. Supp. 65, 68 (D. Md. 1980); *Kent Island Joint Venture v. Smith*, 452 F. Supp. 455, 459 (D. Md. 1978); *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025, 1028 (E.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974).

¹³⁹ 630 F.2d 1149 (6th Cir. 1980). These criteria for class status derive from traditional equal protection clause analysis under the fourteenth amendment. *Id.* at 1152. See note 81 *supra*.

¹⁴⁰ 630 F.2d at 1153. In *Browder*, the plaintiffs, employees of a freight line company who alleged that the defendants caused them to be arrested because they crossed defendants' picket line, were denied a cause of action under the section for the failure to allege a protected class. *Id.* at 1154-55.

¹⁴¹ *Id.* at 1152-53.

¹⁴² See note 137 *supra*. As noted by one court, this absence of a guiding rule has resulted in a situation where "[i]n order to avoid problems inherent in construing § 1985(3) as a general Federal Tort Law, many lower courts have engaged in a course of sophistry that would warm the cockles of the heart of a 14th century metaphysician." *Ackley v. Maple Woodman Assocs.*, 15 Ohio Op. 3d 420, 422 (Ohio Ct. C.P. 1979).

¹⁴³ 368 F. Supp. 1025 (E.D. Va. 1973), *aff'd* 508 F.2d 504 (4th Cir. 1974).

¹⁴⁴ 368 F. Supp. at 1028. Ironically, the plaintiff in *Bellamy* seeking protection under the Ku Klux Klan Act was himself a member of the United Klans of America who claimed he was discriminated against because of his membership in that organization. *Id.* at 1027.

be deemed as having the required characteristics for class status under section 1985(3).¹⁴⁵

In *Ward*, the Fourth Circuit did not address its prior recognition of the discrete, insular and immutable characteristics test in *Bellamy*. The court did note, however, that it was persuaded that religious groups constitute classes qualifying for protection because of their similarity to racial classes, which were expressly recognized by *Griffin* as within the ambit of section 1985(3).¹⁴⁶ Thus, the Fourth Circuit's opinion in *Ward* probably does not signal the court's total rejection of the discrete, insular and immutable characteristics test for class qualification. Rather, *Ward* demonstrates that the court will employ the test only as a rough benchmark against which the characteristics of a group may be measured. In this regard, the Fourth Circuit, under *Bellamy* and *Ward*, has apparently adopted an approach to class status very similar to that employed by the Sixth Circuit Court of Appeals in *Browder*.¹⁴⁷

The Fourth Circuit's determination in *Ward* that religious groups qualify as classes under section 1985(3) rests on firm ground. Not only is this result implicitly mandated by *Griffin*,¹⁴⁸ but it is also a logical extension of the discrete, insular and immutable characteristics criteria previously employed by the Fourth Circuit. These criteria have been used in equal protection analysis to identify and protect politically powerless minorities from discriminatory governmental actions.¹⁴⁹ In the application of the criteria, religious groups have not been deemed a "suspect class"¹⁵⁰ worthy of heightened equal protec-

¹⁴⁵ 508 F.2d at 505. The appeals court based its affirmance of the district court's result on the absence of constitutional authority to support § 1985(3)'s extension. *Id.* at 507. Thus, the Fourth Circuit apparently deemed the class aspect of the statutory requirements to be satisfied, although it did not address either the use of the discrete, insular and immutable characteristics test or the plaintiff's status under the test. The court, therefore, apparently recognized the test as valid, but implicitly deemed the class coverage under the test as not confined to those classes traditionally protected under the equal protection clause.

¹⁴⁶ 657 F.2d at 48.

¹⁴⁷ In *Browder v. Tipton*, 630 F.2d 1149 (6th Cir. 1980), the Sixth Circuit, while putatively employing the class text for the fourteenth amendment equal protection clause actions, noted the valid class status of religious groups. 630 F.2d at 1152. Religious classes have not been recognized as qualifying for special protection under the traditional test for the equal protection clause. See note 152 *infra*. The Sixth Circuit, therefore, seemed to couch the recognition of the class status of religious groups under the section in terms of groups historically subject to class discrimination. *Id.* at 1153. Thus, for class status under the section, the Sixth Circuit implicitly deemed the coverage of the traditional equal protection clause criteria to include religious classifications, because that test was propounded to protect classes such as religious groups that are discriminated against due to societal prejudice. *Id.* at 1153; *But cf.* *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1243 (3d Cir. 1978), *rev'd on other grounds*, 442 U.S. 366 (1979) (recognizing class status of women because gender is an immutable characteristic and hence one for which class members bear no responsibility).

¹⁴⁸ The recognition of religious groups' status is compelled by *Griffin*'s implicitly expansive treatment of the class coverage in which the Court expressly reserved its judgment while noting portions of legislative history demonstrating an inclusive congressional intent. 403 U.S. at 102 n.9. See note 125 *supra*.

¹⁴⁹ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁵⁰ See *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973). Classes recognized as qualifying for special protection under the traditional test include those based on race, national origin, alienage and sex. *Id.* See generally J. NOWACK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 535-623 (1978) [hereinafter cited as NOWACK, CONSTITUTIONAL LAW].

tion scrutiny. Because religion is accorded its own special status under the Constitution,¹⁵¹ however, the invocation of "suspect class" status has not been necessary to restrain the government from interfering with first amendment rights to freedom of religion.¹⁵² By its holding in *Ward*, the Fourth Circuit recognized the protected status religious groups enjoy under the Constitution, and extended the protection of section 1985(3) to conspiracies motivated by bias against them.¹⁵³

In summary, the *Ward* court held that religious groups are within the scope of classes protected by section 1985(3). Although the court failed to articulate a clear standard by which to determine what constitutes a protected class under the statute, the ruling seems warranted by both the legislative history of section 1985(3) and by judicial precedent. Furthermore, by holding that religious groups are a protected class, the Fourth Circuit has exhibited proper deference towards a group accorded special treatment by the Constitution. Having thus determined that religious group may claim section 1985(3)'s protection, it remained for the court to decide if the discrimination alleged violated the statute.

2. The Bias Component

To state a claim under *Griffin*'s interpretation of section 1985 (3), a plaintiff must also allege that an invidiously discriminatory bias against a protected class to which he belongs motivated the conspiracy at issue.¹⁵⁴ The district court in *Ward* reasoned that since the plaintiff's complaint alleged no facts tending to show that the defendants were motivated by anything other than their familial concern for a loved one, the plaintiff failed to state a cause of action under section 1985(3).¹⁵⁵ The Fourth Circuit in *Ward* rejected the district court's conclusion that a sufficient demonstration of class bias was absent in the

¹⁵¹ U.S. CONST. amend. I.

¹⁵² This result is not startling. The fourteenth amendment, which encompasses the equal protection clause, by its terms reaches only to the actions of state governments. U.S. CONST. amend. XIV § 1. Hence, the classes identified under equal protection clause analysis are accorded protection only from governmental deprivations of equal rights. NOWAK, CONSTITUTIONAL LAW, *supra* note 150, at 518. Religious classifications, however, are already protected from unequal treatment by governmental bodies by the first amendment. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. Thus, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court employed a close review (similar to the equal protection clause analysis of suspect classifications) of a law allegedly burdening free religious exercise. *Id.* at 214. The Court concluded that public school compulsory attendance laws could be applied to Amish children after completion of the eighth grade only if the requirement does not infringe the free exercise of a religious belief, or alternatively, if a state interest of sufficient magnitude to override the claimed interest is present. *Id.* at 214-15. Therefore, given the first amendment's bar to governmental denial of religious equality, protection of religious groups under the equal protection clause would be redundant.

¹⁵³ 657 F.2d at 48.

¹⁵⁴ *Griffin v. Breckenridge*, 403 U.S. at 103. *See also* *Weiss v. Patrick*, 453 F. Supp. 717, 723 (D.R.I. 1978), *aff'd mem.* (588 F.2d 818 (1st Cir. 1978)); *Bradley v. Clegg*, 403 F. Supp. 830, 833 (E.D. Wis. 1975); *Spencer v. Community Hosp. of Evanston*, 393 F. Supp. 1072, 1079 (N.D. Ill. 1975)).

¹⁵⁵ 495 F. Supp. at 437-38.

plaintiff's complaint.¹⁵⁶ In reversing the lower court's conclusion, the appeals court exercised only a cursory review of the bias allegations contained in plaintiff Ward's complaint.¹⁵⁷ The circuit court recognized the validity of the district court's assumption that parental concern was a major impetus to the alleged kidnapping.¹⁵⁸ Nonetheless, the court found that the mere allegation of the defendant's animosity towards the members of the Unification Church was sufficient to establish an inference of the existence of class bias, enabling the plaintiff to survive a motion to dismiss.¹⁵⁹

It is not clear, however, that *Ward's* cursory treatment of the bias requirement is mandated by *Griffin*. Characterizing the existence of an invidiously discriminatory bias as solely a question of fact satisfied by bare allegation does not accord with *Griffin's* treatment of the requirement. While *Griffin* did not purport to define fully what motivating bias would be required to satisfy the statute,¹⁶⁰ a close reading of the case supports the conclusion that the Supreme Court did not deem the bias requirement to be satisfied by simply alleging that such a bias exists.

The *Griffin* Court, in reaching the conclusion that the bias against the plaintiffs' class was sufficiently alleged to support the inference of its existence, looked to the specific allegations in the plaintiffs' complaint.¹⁶¹ The *Griffin* Court noted that the complaint alleged that the conspiracy involved a brutal beating, and was motivated by the defendants' desire to intimidate the Negro community as a whole to thus deprive them of their civil rights.¹⁶² Furthermore, the complaint reinforced the allegation that the conspiracy was motivated by racial bias with the further allegation that the conspirators were acting under the mistaken belief that at least some of the plaintiffs were civil rights activists.¹⁶³ The Court concluded that given these allegations,¹⁶⁴ the plaintiffs' complaint clearly supported an inference of the requisite animus.¹⁶⁵

¹⁵⁶ 657 F.2d at 49.

¹⁵⁷ *Id.* The appeals court devoted only one paragraph to its analysis of the bias requirement.

¹⁵⁸ *Id.* "[W]e do not quarrel with the [district] court's assumption in regard to such parental concern. . . ." *Id.*

¹⁵⁹ *Id.* The court stated that "the complaint sufficiently charges that the defendants were motivated to act as they did . . . because of their animosity towards the members of the Unification Church." *Id.* Thus, the appeals court saw the clause as possibly involving mixed motives, and allowed the action to proceed to determine whether class bias was indeed present.

¹⁶⁰ 403 U.S. at 102 n.9.

¹⁶¹ *Id.* at 103.

¹⁶² *Id.* All of the plaintiffs in *Griffin* were members of the Negro race, *id.* at 89, and the conspiracy was alleged to have been aimed at them because of this shared characteristic. *Id.* at 103.

¹⁶³ *Id.*

¹⁶⁴ There were no allegations of personal animosity between the defendants and plaintiffs, nor any evidence that the defendants knew the plaintiffs at all. *Id.* at 89-92. Indeed, allegations in the complaint that the defendants were acting under the mistaken belief that the plaintiffs were civil rights activists support the conclusion that the defendants were motivated not by personal animosity, but rather by class hatred against the plaintiffs' race. *Id.* at 90.

¹⁶⁵ *Id.* at 103. The *Griffin* Court's determination that the plaintiffs' case satisfied the bias requirement was influenced by its perception of the close similarity between the acts alleged and those sought to be reached by the framers of § 1985(3). *Id.* at 103. The intent of the Forty-Second Congress in enacting the legislation from which § 1985(3) is derived was to provide protection to persons terrorized by the Klan and similar organizations because of their membership in a

Thus, the *Griffin* analysis requires, at a minimum, the allegation of specific facts which by their character tend to demonstrate the presence of an invidious class bias.¹⁶⁶

In the wake of *Griffin*, few fixed rules have emerged among lower federal courts to test whether the allegations made in a section 1985(3) claim support an inference of the presence of the requisite bias. Generally, it has been stated

disfavored class. See text and notes at notes 26-31 *supra*. As noted by the Solicitor General's amicus brief in *Griffin*:

Considering the conditions prevailing at the time of [§ 1985(3)'s enactment], it would have been wholly natural to infer an intent to inhibit equal enjoyment of rights by Negroes from an assault that was shown to be motivated by the race of the victim, *rather than by personal animosity against him as an individual*. And, unhappily, circumstances have not so changed in a century as to render such a presumption unreasonable today — subject to rebuttal in a proper case.

Memorandum Brief for the United States as Amicus Curiae, at 18, *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (emphasis added). Thus, under the interpretation of § 1985(3) proposed by the Solicitor General, a presumption that the intent of the conspirators was to deny the victim's enjoyment of equal rights would be valid when the conspiracy was motivated by the victim's race. *Id.* As the amicus brief went on to note, however: "It is another matter . . . to establish that the assault was directed at the race of the victim, not at the man." *Id.* The amicus brief argued that the *Griffin* plaintiffs' complaint was sufficient in this regard because it did not make only "conclusory allegations," but also "particularized" its allegations of racial motive. *Id.* at 19. With these allegations made, the amicus brief concluded, the plaintiffs had raised a question of fact to be proved at trial "that they were the victims of a conspiracy designed to intimidate them because of their race, and, through them, the black community. . . ." *Id.* Thus, the amicus brief did not conclude that from the mere allegation that the defendants were white and the plaintiffs were black a presumption of class bias motivating the conspiracy would be valid. Rather, the Solicitor General deemed the inference of class bias to be justified in *Griffin* because of the further allegations in the complaint establishing the relationship between the parties and injuries involved. *Id.* at 19.

In *Griffin*, the Court implicitly agreed with the amicus brief's conclusion that the defendant's class bias could be readily imputed from the unprovoked and random beating of a group of blacks on a country road in Mississippi in 1966, and thus a separate study of the bias element was not necessary. However, the *Griffin* Court placed some importance on the further allegation in the complaint of the defendant's mistaken belief that one plaintiff was a civil rights worker. 403 U.S. at 103. The Court's reliance on this added allegation of fact supporting the class bias allegation was a factor in winning the statutory protection, and its conclusion points to the Court's unwillingness to assume a discriminatory bias absent more showing. Whether the Court would have allowed the cause of action if *Griffin* had involved an act from which class bias was not so easily inferred is uncertain given the terse treatment of the bias requirement.

¹⁶⁶ That *Griffin* requires facts demonstrating class bias is reinforced by the legislative history which the Court noted with apparent approval. *Id.* at 102 n.9, citing CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871) (Remarks of Sen. Edmunds). See note 125 *supra*. There the senator declared that the section was not intended to reach a neighborhood feud giving rise to a conspiracy to prevent the victim from gaining an indictment for the burning down of his barn. CONG. GLOBE, 42d Cong., 1st Sess. 567. According to the senator, the statute would, however, protect a victim whose barn was burned down because he was in a disfavored class. *Id.* The distinction drawn between these two situations was the class bias present in the latter case. *Id.* This hypothetical illustration does not declare that to avoid the sweep of the section's coverage, the parties in the "neighborhood feud" situation need necessarily have homogeneous class characteristics. *Id.* Rather, the illustration — which must be considered in the context of the debates over Klan activity in which it is set — maintains that when a person who is a member of one of the classes which were being systematically victimized by Klan organizations is singled out and injured in a manner consistent with Klan terrorism because of his class, that person will be protected. *Id.* Conversely, when a person is injured as a result of a neighborhood dispute, class membership and the nature of the injury notwithstanding, that person's cause of action will be

that the complaint must allege facts showing both that the criteria defining the class were invidious, and that the defendants were motivated by the plaintiff's class status.¹⁶⁷ Furthermore, there appears to be general agreement among courts that the discriminatory bias must be directed at a class; conspiracies motivated by a desire to deprive everyone generally of some right will not suffice,¹⁶⁸ nor will conspiracies motivated by a desire to deprive an individual *qua* individual of equal protection of the laws.¹⁶⁹ Finally, it has been held that conclusory allegations that class bias motivated the defendants' behavior will not support a cause of action under the section absent factual evidence supporting those conclusions.¹⁷⁰

The principal indicium available to a court with which to determine the sufficiency of a plaintiff's allegations of discriminatory bias is the relationship among the parties to the suit, the class allegedly discriminated against, and the injury claimed.¹⁷¹ If examination of this relationship does not demonstrate a class-motivated bias, the plaintiff's claim may be dismissed.¹⁷² For example, in

outside the scope of the protection afforded. *Id.* Only conspiracies executed "so as to deprive classes . . . of their constitutional right to protection and equality were to be within the ambit of the statute as it was conceived by its framers." *Id.* Thus, even the example in the legislative history noted by *Griffin* would seem to require allegations which demonstrate that the conspiracy alleged was not merely the result of a neighborhood feud — or a family disagreement, but rather was in fact motivated by a desire to deprive "classes of the community of their constitutional rights." *Id.*

¹⁶⁷ See, e.g., *Lessman v. McCormick*, 591 F.2d 605, 608 (10th Cir. 1979); *Harrison v. Brooks*, 519 F.2d 1358, 1360 (1st Cir. 1975); *Phillips v. Fisher*, 445 F. Supp. 552, 555 (D. Kan. 1977).

¹⁶⁸ *Browder v. Tipton*, 630 F.2d 1149, 1153 (6th Cir. 1980); *Taylor v. Brighton Corp.*, 616 F.2d 256, 266 (6th Cir. 1980); *Lopez v. Arrowhead Ranches*, 523 F.2d 924, 928 (9th Cir. 1975).

¹⁶⁹ *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743, 748 (10th Cir. 1980); *Hughes v. Ranger Fuel Corp.*, Div. of Pittston Co., 467 F.2d 6, 10 (4th Cir. 1972); *Carchman v. Korman Corp.*, 456 F. Supp. 730, 734 (E.D. Pa. 1978), *aff'd*, 594 F.2d (3d Cir. 1977), *cert. denied*, 444 U.S. 898 (1979). The Fourth Circuit's decision in *Ward* is significant in that the court allowed a suit to stand where the complaint alleged class bias on facts which by themselves demonstrated only bias against the plaintiff as an individual. 657 F.2d at 48.

¹⁷⁰ See, e.g., *Herrmann v. Moore*, 576 F.2d 453, 457 (2d Cir. 1978); *Robinson v. McCorkle*, 462 F.2d 111, 113 (3d Cir. 1972); *German v. Killeen*, 495 F. Supp. 822, 829 (E.D. Mich. 1980); *Morpurgo v. Board of Higher Educ. in New York*, 423 F. Supp. 704, 711 (S.D.N.Y. 1976); *Schoonfield v. Mayor and City Council of Baltimore*, 399 F. Supp. 1068, 1086 *aff'd*, 544 F.2d 515 (4th Cir. 1976); *Kerckhoff v. Kerckhoff*, 369 F. Supp. 1165, 1166 (E.D. Mo. 1974), *aff'd*, 505 F.2d 735 (8th Cir. 1974).

¹⁷¹ See, e.g., *Griffin v. Breckenridge*, 403 U.S. at 103. In *Griffin*, the Court specifically singled out the factual allegations of the defendants' misidentification of the plaintiffs (demonstrating both racial bias and unfamiliarity between the parties), the racial class differences between the parties, and the physical injuries allegedly inflicted. *Id.* at 89-90. From its perception of the relationship among these factors, the Court then concluded that an inference of class bias was established. *Id.* at 103. The relationship among the parties, class and injury alleged is not the exclusive basis for a court's conclusion, however. See, e.g., *Selzer v. Berkowitz*, 459 F. Supp. 347, 351 (E.D.N.Y., 1978) (derogatory public statements made by defendants about plaintiff's class support class bias inference); *Croswell v. O'Hara*, 443 F. Supp. 895, 897 (E.D. Pa. 1978) (sufficiency of class bias allegation depends on totality of factual circumstances).

¹⁷² See, e.g., *German v. Killeen*, 495 F. Supp. 922, 929 (E.D. Mich. 1980); *Jackson v. Associated Hosp. Serv. of Philadelphia*, 414 F. Supp. 315, 325-26 (E.D. Pa. 1976), *aff'd*, 549 F.2d 795 (3d Cir. 1977), *cert. denied*, 434 U.S. 832 (1977); *Kerckhoff v. Kerckhoff*, 369 F. Supp. 1165, 1166 (E.D. Mo. 1974), *aff'd*, 505 F.2d 735 (8th Cir. 1974); *contra*, *Reichardt v. Payne*, 396 F. Supp. 1010, 1018 (N.D. Cal. 1975), *aff'd*, 591 F.2d 499 (9th Cir. 1979).

a case where the plaintiff alleged racial discrimination, but other factual allegations contained in the complaint tended to show that the tortious conduct was motivated by mere avarice, one court reasoned that the complaint must allege facts which demonstrate that class bias indeed may have motivated the challenged conduct.¹⁷³ The Fourth Circuit, in a case prior to *Ward*, had recognized the necessity of this further showing of class-directed bias. In *Hughes v. Ranger Fuel Corp., Division of Pittston Corp.*,¹⁷⁴ the court addressed the issue of whether individuals allegedly assaulted by employees of the defendant (while taking photographs of a dangerous landslide caused by the defendant mining corporation) could state a claim under section 1985(3).¹⁷⁵ The appeals court declared that the allegations suggested only a bias against the plaintiffs individually, not as members of a class.¹⁷⁶ Thus, the court held, where class bias was not readily apparent, the plaintiffs could not maintain an action under section 1985(3) absent factual allegations that the defendants' acts were part of a general pattern of discrimination directed at a class of which the plaintiffs were members.¹⁷⁷

Despite prior recognition of the requirement of clear factual allegations by

¹⁷³ In *Phillips v. Fisher*, 445 F. Supp. 552 (D. Kan. 1977), the court stated:

We do not say today that a plaintiff who seeks relief from alleged racial discrimination must allege facts which inescapably lead to the finding of a race-based animus on the part of the defendant. There are situations where the facts alleged themselves lead to a reasonable inference that the motive behind a defendant's actions may have been race. For example, if a black man is refused service in a restaurant, an allegation that the cause thereof was racial prejudice squares with the common experience of men in everyday life, and the causative inference is a logical one to draw. If a black man is arrested fleeing the scene of a bank robbery, [however,] it does not comport with the common experience of men to infer that the motive . . . for his arrest is his race; other apparent motives . . . so predominate as to make inferences of racial discrimination laughable.

Id. at 556-57, quoting *Steele v. Bunton*, No. 77-4152 (D. Kan. Oct. 4, 1977). Thus, in *Phillips v. Fisher*, the court held that although racial class differences were present and there was no evidence that the parties were acquainted outside of the tortious conduct, the allegation by the plaintiff, a Negro, that he was robbed by the defendants, white moving van operators, because of his race does not establish the type of relationship among the parties, class and injury necessary to support an inference of class bias. 445 F. Supp. 557. Consequently, the court in *Phillips* dismissed the plaintiff's federal claim. *Id.*

¹⁷⁴ 467 F.2d 6 (4th Cir. 1972).

¹⁷⁵ *Id.* at 8.

¹⁷⁶ *Id.* at 10.

¹⁷⁷ *Id.* In addition, the court in *Hughes* noted with approval a decision by the United States Court of Appeals for the Second Circuit in which the "general pattern of discriminatory action" language was employed. *Id.* at 10 n.12, citing *Kletschka v. Driver*, 411 F.2d 436, 447 (2d Cir. 1969). It is interesting to note that the district court in *Ward* by its reasoning implicitly followed the lead of the *Hughes* decision. After reviewing the congressional purpose in enacting § 1985(3) — to provide a remedy for victims of Klan violence — the district court in *Ward* concluded that as the plaintiff "is not a victim of systematic racial terrorism," he stated no claim cognizable under the statute. 495 F. Supp. at 438. The requirement that a plaintiff show that he was the victim of a general pattern of discrimination against his class has also been recognized by other courts. See *German v. Killeen*, 495 F. Supp. 922, 929 (E.D. Mich. 1980). Cf. *McNally v. Pulitzer Publishing Co.*, 532 F.2d 65, 75 (8th Cir. 1976) (absence of allegations showing pattern of tortious conduct directed at others due to shared class characteristics defeats cause) *Action v. Gannon*, 450 F.2d 1227, 1232 (8th Cir. 1971) (facts showing pattern of challenged conduct against other class members support cause). This requirement has not been uniformly applied, however. See, e.g., *Reichardt v. Payne*, 396 F. Supp. 1010, 1018 (N.D. Cal. 1975), *aff'd*, 591 F.2d 499 (9th Cir. 1979).

the plaintiff demonstrating the defendants' class-directed bias, the Fourth Circuit did not impose such a burden on the plaintiff in *Ward*. The circuit court declared that the plaintiff's allegations stated a discriminatory motive sufficient to support a claim under section 1985(3).¹⁷⁸ The *Ward* Court, however, did not designate which allegations in the complaint supported its conclusion.¹⁷⁹ This silence is puzzling in that an examination of the relationship among the parties, class, and injury alleged in the *Ward* complaint does not reveal clear factual allegations of discriminatory bias as found in *Griffin*. Unlike the plaintiffs in *Griffin*, the plaintiff in *Ward* did not allege racial discrimination.¹⁸⁰ Therefore, the assumption of class-directed bias present in *Griffin* was absent in *Ward*. In addition, *Ward* centered on a family's attempt to deprogram a relative who had probably undergone drastic personality changes upon his entry into a religious group.¹⁸¹ Thus, the randomness of the conspiratorial assault in *Griffin* was lacking in *Ward*. Furthermore, unlike the harm alleged in *Griffin*, the injuries incurred in *Ward* were not directed at the plaintiff as punishment for his membership in a class,¹⁸² but rather were intended to force the plaintiff to give up his membership therein.¹⁸³ These clear differences in the relationships between the parties and injuries in *Griffin* and those in *Ward* led the district court in *Ward* to conclude that, absent more factual allegations that the defendants were motivated by hatred for Unification Church members per se, class bias could not be presumed.¹⁸⁴

The Fourth Circuit in *Ward*, however, rejected the district court's reasoning that because the plaintiff was not a victim of either racial bias, or a systematic pattern of discrimination, a stronger showing of class bias must be made in the allegations.¹⁸⁵ The appeals court relied heavily on the single factor of the presence of a protected class in the alleged conspiracy. The court reasoned that the allegation of an intent to force a family member to change his religious affiliation supported an inference of discriminatory bias against members of the Unification Church as a class. The court found the defendants'

¹⁷⁸ 657 F.2d at 49.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 47. The factual distinctions between *Griffin* and *Ward*, i.e., racial violence versus religious deprogramming, are significant to both the class component of the *Griffin* gloss and to the bias component. The circuit court in *Ward* noted the significance of its decision to extend the class coverage of § 1985(3) to religious groups in light of *Griffin*, and it carefully reviewed *Griffin*'s language and subsequent treatment of the issue. *Id.* at 47-48. The appeals court, however, did not consider the significance of its extension with regard to the bias component. *Id.* at 49. Rather, the circuit court in *Ward* granted the cause of action without expressly considering whether the presumptions about class bias motivation which were valid in *Griffin* were also valid with regard to the facts alleged in *Ward*.

¹⁸¹ *Id.* at 46-47. Although not mentioned in the complaint, membership in religious groups such as the Unification Church is usually coupled with an alteration or "conversion" in the new devotee's personality. See Delgado, *supra* note 9, at 21-25, and LeMoult, *supra* note 9, at 601-02.

¹⁸² 403 U.S. at 103.

¹⁸³ Brief for Respondent at 9a, *Mandelkorn v. Ward*, 50 U.S.L.W. 3570 (U.S. Jan. 18, 1982). See text and note at note 12 *supra*.

¹⁸⁴ 495 F. Supp. at 438.

¹⁸⁵ 657 F.2d at 49.

behavior analogous to racially motivated discrimination.¹⁸⁶ The court implicitly recognized, however, that a conspiracy aimed at the plaintiff as an individual would not satisfy section 1985(3).¹⁸⁷ Thus, a conspiracy motivated by the defendants' distaste for the plaintiff's religious choice would not alone constitute the type of class-based discrimination necessary to support a cause of action under the section.¹⁸⁸ Such a conspiracy would be evidence only of bias against the plaintiff individually, not against the plaintiff's class as a whole. Nonetheless, the appeals court concluded that, in the case before it, the plaintiff had sufficiently alleged animosity towards Unification Church members as a class to satisfy *Griffin's* bias component.¹⁸⁹

Significantly, the Fourth Circuit in *Ward* identified no allegation of fact supporting the plaintiff's conclusory allegation of class bias,¹⁹⁰ nor did the court require the allegation of further facts pointing to at least some intention on the defendants' part to affect Unification Church members generally, or to deprive them of their rights as a class.¹⁹¹ Thus, the Fourth Circuit's treatment of *Griffin's* bias component is apparently based on a conclusion that from the presence of a class protected by the section, a bias against that class may be presumed. Under this construction of the *Griffin* gloss, the presence of a protected class will itself establish a presumption of bias against that class. Hence, for motions to dismiss, the sole focus of the court's inquiry will be on the presence of a class deemed to be protected by section 1985(3).

The *Ward* court's presumption of class bias from broadly pleaded facts can be seen as an application of the general principle that in civil rights actions, pleadings should be liberally construed.¹⁹² Despite this general pleading rule, however, a plaintiff claiming under section 1985(3) must still allege facts which tend to raise a question of class bias.¹⁹³ In *Ward*, both the trial and appellate courts recognized that allegations which demonstrate only a bias against the plaintiff as an individual are not sufficient to support an inference of bias against the class.¹⁹⁴ The absence of further allegations of fact tending to show a discriminatory class bias, such as the presence of an on-going conspiracy to deprogram Unification Church members generally, compelled the district court to conclude that the plaintiff's complaint was not sufficient to state a

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* The appeals court declared that the inference of bias against a class was established because the "complaint sufficiently charges that the defendants were motivated to act as they did not only because they found the plaintiff's religious beliefs intolerable, but also because of their animosity towards the members of the Unification Church." *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* The circuit court did not mention the "systematic pattern" test employed by the court below in finding no class bias to be present.

¹⁹² *Furumoto v. Lyman*, 362 F. Supp. 1267, 1274 (N.D. Cal. 1973), citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

¹⁹³ See *Griffin v. Breckenridge*, 403 U.S. at 103. By its survey of the plaintiff's allegations of fact in support of the central allegation of class animus, the *Griffin* Court's analysis mandates the presence of factual pleadings from which bias may be inferred. *Id.* See text and notes at notes 160-66 *supra*.

¹⁹⁴ See 495 F. Supp. 438. See also text and notes at notes 180-81 *supra*.

cause of action under section 1985(3).¹⁹⁵ The Fourth Circuit disagreed with this result, and by its language necessarily concluded that where the plaintiff is a member of a protected class, the mere allegation of bias against the class supports an inference of class motivation.¹⁹⁶ Indeed, the circuit court held that even in the presence of strong evidence that the defendants' tortious conduct was motivated against the plaintiff individually,¹⁹⁷ the mere allegation of animosity towards a protected class generally may suffice to support a cause of action under section 1985(3).¹⁹⁸

This determination by the Fourth Circuit signals a relaxation of the bias requirement imposed by the Supreme Court in *Griffin*. *Griffin*'s invidious class-based animus gloss was the Court's interpretation of the language in section 1985(3) referring to denials of equal protection. By construing that language to require class-based animus, the Court gave content to the apparent congressional intent to reach private discriminators, while avoiding potential federalism problems posed by the statute. Thus, the gloss was intended by the Court to mean only that when class hatred does motivate a private conspiracy, the intent to deprive equal protection of the laws of the United States will be presumed.¹⁹⁹ The Fourth Circuit's opinion in *Ward* extends this presumption to the extent that the mere existence of a protected class will imply the presence of a class-directed bias, sufficient to survive a motion to dismiss, despite the absence of any allegation of on-going or systematic discrimination.²⁰⁰

That tortious conduct against a member of a religious group may have the invidiously discriminatory character required by *Griffin* for actions under section 1985(3) is clear.²⁰¹ Where the relationship between the parties and the challenged conduct suggests personal motivation, however, class bias should not be presumed merely because the plaintiff alleges his membership in a religious group or other protected class. Although allegations of a systematic pattern of discrimination have not been uniformly required by lower federal courts to support an inference of class bias,²⁰² such a requirement seems particularly warranted in cases like *Ward*.

In *Ward*, the cutting edge between the case's characterization as a civil rights violation or as an intra-family tort was the nature of the bias motivating the defendants. Hence, the allegation of facts tending to demonstrate class as opposed to personal bias against the plaintiff was crucial. The requirement of specific allegations demonstrating class bias, and thus establishing a civil rights violation, was especially important in the *Ward* situation in light of the

¹⁹⁵ 495 F. Supp. at 438.

¹⁹⁶ 657 F.2d at 49. The language in the complaint which the court apparently deemed sufficient to raise a class bias question states: "The conspiracy was the result of defendants' class based animus towards the Church and its members, and because plaintiff was a member of that class of persons who belongs to the Church." Brief for Respondent at 8a-9a, *Mandelkorn v. Ward*, 102 S. Ct. 1253 (1982).

¹⁹⁷ 657 F.2d at 49.

¹⁹⁸ *Id.*

¹⁹⁹ 403 U.S. at 102.

²⁰⁰ 657 F.2d at 49. The extension of the presumption is the necessary result of the appeals court's recognition of the plaintiff's suit as satisfying *Griffin*'s gloss without requiring factual allegations demonstrating class bias. *Id.* See text at notes 190-91 *supra*.

²⁰¹ See, e.g., *Baer v. Baer*, 450 F. Supp. 481, 491 (N.D. Cal. 1978). See note 134 *supra*.

²⁰² See note 177 *supra*.

Supreme Court's long recognition of state law preeminence in matters concerning domestic relations.²⁰³ If *Ward* was essentially an intra-family dispute, then the application of section 1985(3), which was designed to proscribe conspiracies to deprive equal protection of the laws motivated by "invidiously discriminatory class-based animus," was misconceived. The allegations in the *Ward* complaint claimed that it was the plaintiff's own family members who conspired to deprogram him.²⁰⁴ There were no factual allegations tending to show that the conspiracy was against Unification Church members generally, or that other members of the church were menaced.²⁰⁵ Nor was there any allegation that the conspiracy was fomented by a deprogramming organization.²⁰⁶ Rather, the complaint specifically claimed that the conspiracy was contrived and executed under the guidance of the plaintiff's family.²⁰⁷ Thus, *Griffin's* re-

²⁰³ See, e.g., *Sosna v. Iowa*, 419 U.S. 393 (1975) ("The regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact," *id.* at 404); in re *Burrus*, 136 U.S. (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States," *id.* at 593-94).

²⁰⁴ Brief for Respondent at 8a-9a, *Mandelkorn v. Ward*, 102 S. Ct. 1253 (1982).

²⁰⁵ *Id.* at 9a-20a. Indeed, the plaintiff alleged that the defendant family members had attempted unsuccessfully to deprogram him on a previous occasion, and would undoubtedly try again. *Id.* at 9a. The plaintiff thereafter alleged facts which only demonstrated the defendants' intent to deprogram him alone. *Id.* at 9a-20a. The conclusion that the conspiracy was directed at the plaintiff as an individual is buttressed by the form of relief sought by the plaintiff under the § 1985(3) claim. Along with money damages in the amount of \$15 million sought from the non-family defendants jointly, the complaint proved for injunctive relief from the efforts of the plaintiff's family to deprogram him. *Id.* at 20a-21a. That such specific relief was sought to restrain the actions of the defendants solely against the plaintiff reinforces the conclusion that the tortious conduct alleged was directed solely at the plaintiff as an individual, and was not aimed at depriving Unification Church members as a class of their equal rights.

²⁰⁶ *Id.* at 9a-20a.

²⁰⁷ *Id.* at 9a-10a. Thus, *Ward* is distinguishable from the two most salient cases relied upon by the appeals court in extending § 1985(3)'s protection to Unification Church members. See *Rankin v. Howard*, 457 F. Supp. 70 (D. Ariz. 1978), *rev'd on other grounds*, 633 F.2d 844 (9th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981), and *Baer v. Baer*, 450 F. Supp. 481 (N.D. Cal. 1978). In *Baer*, the district court declared that the presence of the Freedom of Thought Foundation, an organization dedicated to deprogramming "members of particular religious groups whose views the Foundation finds repugnant," in a conspiracy which also included the plaintiff's family, was sufficient to raise an inference of class bias to support a cause of action under § 1985(3). 450 F. Supp. at 491. "A fair and reasonable reading of the complaint demonstrates that the *Foundation* singled out the plaintiff because of his status as a member of such a group." *Id.* (emphasis added). In *Rankin*, members of the Foundation were also present in the conspiracy with family members. 457 F. Supp. at 74. The district court in *Rankin* agreed with the *Baer* court that from the overriding intent of the Foundation to abridge the rights of members of fringe religious groups generally, the class bias required for a § 1985(3) cause of action can be inferred. *Id.* See also *Cooper v. Molko*, 572 F. Supp. 563 (N.D. Cal. 1978). In *Cooper*, which was not cited by either court in *Ward*, the plaintiff was a member of the Unification Church who sued his parents and seven "deprogrammers" under facts otherwise similar to *Ward*. *Id.* at 565. Given these allegations, the court in *Cooper* held that an inference of class bias was warranted and denied the defendants' motion to dismiss. *Id.* at 570. All three of these cases are clearly distinguishable from *Ward* in that each relied on the presence of "deprogrammers" to establish the presence of invidious class bias, and not on the mere conjectural ground that the plaintiff's family might dislike the Unification Church.

Of the cases recognized by the two courts treating *Ward*, therefore, the case most closely

quirement of a valid inference of class bias, supported by factual allegations present in a plaintiff's complaint, was transformed in *Ward* to a presumption of bias, raised by a plaintiff's conclusory allegation of its presence.

Had the *Ward* court required the plaintiff to allege facts showing that he was a victim of systematic discrimination, the requirement of an invidiously discriminatory class-based animus would have been satisfied. Allegations that the plaintiffs harbored long-standing feelings of hatred towards minority religious groups, or that they were involved in a conspiracy to deprogram Unification Church members generally would thus support an inference of class-directed bias under the systematic pattern of discrimination test. Even allegations that the non-family defendants might have been involved in general discriminatory activity against such religious groups could be seen to support an inference of bias. The appeals court in *Ward*, however, did not deem such a test to be necessary, but instead held that notwithstanding the defendants' apparent good intentions, the mere possibility that class bias could have been present — a possibility apparently established by the plaintiff's membership in the Unification Church — satisfies *Griffin's* bias requirement.²⁰⁸ Indeed, as it was treated by the court in *Ward*, the bias aspect of *Griffin's* gloss is purely a question of fact to be presumed satisfied at the pleadings stage and apparently preserved solely for a fact-finder's determination.

In summary, the Fourth Circuit in *Ward*, after concluding that religious groups qualify as a protected class, did not engage in a second inquiry to determine whether the factual allegations in the complaint adequately alleged discrimination against a class. Instead, the court apparently deemed the class-directed motive to be presumed, and allowed the plaintiff's claim to survive a motion to dismiss on conclusory allegations. The circuit court's determination that an inference of class bias may be presumed because of the presence of a protected class, however, is not warranted in light of *Griffin's* requirement of an invidiously discriminatory class-based animus, nor does it comport with *Griffin's* efforts to avoid the federalization of state tort law.²⁰⁹ The *Ward* court

similar in facts is *Van Styn v. Van Styn*, No. 79-C-3468 (N.D. Ill. Feb. 7, 1980). In *Van Styn*, which was cited by the district court in *Ward* but ignored by the appeals court, a district court dismissed a claim under § 1985(3) in which the plaintiff, a member of the International Society for Krishna Consciousness, alleged only that her family conspired to abduct and deprogram her. *Id.* The issue presented in *Styn* was whether an inference of the requisite animus could be made out in the acts of the defendants, the plaintiff's family. *Id.* There was no allegation that any of the defendants in *Van Styn* were members of a deprogramming organization. The *Van Styn* court held that because the "defendants were motivated, not by their dislike of a particular religious group, but by concern for the well-being of a family member . . . a discriminatory motive is lacking, and there is no cognizable claim under [§] 1985(3)." *Id.* The court therefore granted the defendants' motion to dismiss. *Id.* But see *Augenti v. Cappellini*, 84 F.R.D. 73 (M.D. Pa. 1979). *Augenti*, which was not cited by either court treating *Ward*, involved the deprogramming of a Unification Church member by the plaintiff's parents and others. *Id.* at 76. There were no allegations that the parents' co-conspirators were members of a deprogramming organization, and in all other relevant respects *Augenti* was closely similar to *Ward*. *Id.* The defendants contended that the record lacked any factual allegations establishing class-directed bias, and moved for summary judgment. *Id.* at 78. The district court held that motivation is a factual issue and therefore was not ripe for disposition by summary judgment. *Id.* The district court therefore denied the defendants' motion. *Id.*

²⁰⁸ 657 F.2d at 49. See text and notes at notes 185-92 *supra*.

²⁰⁹ See text and notes at notes 110-112 *supra*.

should have required the allegation of some facts demonstrating that the plaintiff was singled out by the defendants for the tortious conduct alleged because of his class, and not simply because of his individual position as a relative of the defendants.

CONCLUSION

Section 1985(3) of the Civil Rights Act of 1871 provides a cause of action for individuals who are the victims of purely private conspiracies to deprive equal protection of the laws of the United States. In *Griffin v. Breckenridge*, the Supreme Court outlined a two-part test for actions under section 1985(3). First, the discriminatory act being challenged must be one which Congress has the constitutional authority to regulate. Second, to avoid federalizing state tort law claims, the conspiracy must be motivated by an invidiously discriminatory class-based animus in order to constitute an attempt to deprive equal protection of the laws.

In *Ward v. Connor*, the Fourth Circuit held that Congress' authority to reach certain private acts of discrimination rested in part on the constitutionally protected right to interstate travel. Consequently, where, as in *Ward*, the plaintiff alleged that his interstate travel was interrupted, Congress possessed the authority to redress such an injury even if it occurred contemporaneously with other private discriminatory acts not subject to proscription by the federal government.

The *Ward* court held that religious groups constitute a protected class within the scope of section 1985(3). The court based its conclusion on the characteristics religious classes share with other minorities accorded special protection under the equal protection clause. Turning to the question of whether a class-based bias existed in the case before it, however, the court departed from *Griffin's* interpretation of section 1985(3). Holding that conclusory allegations of discriminatory bias may survive a motion to dismiss, the court appeared to designate the issue as one to be resolved by the trier of fact. The *Ward* court seemed to indicate that the mere existence of a class protected under section 1985(3) raises a presumption of an invidiously discriminatory class-based animus sufficient to survive a motion to dismiss. This result does not accord with either the legislative history of section 1985(3) or the Supreme Court's interpretation of the statute in *Griffin*. It is only by requiring specific factual allegations to support the plaintiff's contention that the conspiracy is motivated by a class-directed bias that section 1985(3) can be restricted to those cases to which its framers intended it to be applied.

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