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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 75-3031 & 75-3032

MARTHA ELLEN REICHARDT,

Plaintiff-Appellee

v.

WESLEY J. KINDER,

Defendant-Appellant

LIFE INSURANCE COMPANY OF NORTH AMERICA, ET AL.,

Defendants-Appellants

On Appeal from the United States District Court for the Northern District of California

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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MARTHA ELLEN REICHARDT,

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MOTION OF THE UNITED STATES TO FILE
BRIEF AMICUS CURIAE OUT OF TIME

Pursuant to Rules 26(b) and 29 of the Federal Rules of Appellate Procedure, the United States of America hereby respectfully moves this Court for an order granting the United States leave to file the attached brief amicus curiae in support of plaintiff-appellee in the above cases. The following are grounds for the instant motion:

1. Defendants-appellants in No. 75-3031 have drawn in question the constitutionality of an Act of Congress affecting the public interest (42 U.S.C. §1985(3)). This fact was not certified to the Attorney General, see 28 U.S.C. §2403(a). The Division of the Department of Justice which is responsible for filing a amicus curiae brief on behalf of the United States first learned of the district court's judgment and of the issues presented on appeal well after plaintiff-appellee had filed her briefs.

2. The briefs and record in these cases were not received from counsel for plaintiff-appellee until September, 1977. The complex questions presented required a great deal of research into the legislative history and case law concerning the 1871 Civil Rights Act. Necessary approval from the Office of the Solicitor General further delayed the filing of this brief. We have addressed both cases on appeal (Nos. 75-3031 and 75-3032) in a consolidated brief. No. 75-3031 presents several very difficult issues concerning the construction and constitutionality of 42 U.S.C. §1985(3). Each of these issues is of first impression for this Court and has produced a division among other federal courts. Although we support the judgment of the district court, the conclusions which we reach on each of the issues presented in Nos. 75-3031 and 75-3032 rest on grounds which are different than those asserted by the district court and plaintiff-appellee. The arguments presented in our brief are not repetitive of any arguments made by the parties, and

we present and analyze relevant cases which were decided after the parties submitted their briefs.

3. The United States has a substantial interest in the outcome of this case. As noted, the constitutionality of an Act of Congress has been drawn into question. Furthermore, these appeals present important questions concerning the construction and scope of the civil provisions of the 1871 Civil Rights Act, 42 U.S.C. §§1983, 1985(3). These questions relate to the extent of official liability under §1983 and the power of Congress to reach private action under §1985(3) and the fourteenth amendment. Although the Attorney General is not charged with enforcing these statutes directly, he does have responsibility for enforcing similarly worded criminal counterparts in the Civil Rights Acts. E.g., 18 U.S.C. §§241, 242, 243, 245. The Attorney General also has been assigned enforcement responsibility over a variety of civil provisions in the Civil Rights Acts which are sometimes used in conjunction with the statutes under review in these appeals. E.g., 42 U.S.C. §§1971 et seq., 2000a et seq., 2000b et seq., 2000c-6 et seq., 2000e et seq., 3601 et seq. Consequently, a decision in these cases may affect the ability of the United States to enforce various provisions of the Civil Rights Acts. For these reasons, the United States has heretofore participated as amicus curiae in other cases relating to the scope of §§1983 and 1985(3), including

Griffin v. Breckenridge, 403 U.S. 88 (1971), in which we filed an amicus brief and participated in the oral argument.

4. Oral argument has not yet been scheduled on these appeals, and adequate time remains for the parties to file any reply they may wish to the views expressed in our brief.

Wherefore, the United States prays that this Court grant us leave to file the attached brief amicus curiae.

Respectfully submitted,

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Defendant-Appellant

On Appeal from the United States District Court for the Northern District of California

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether the California Insurance Commissioner is liable under 42 U.S.C. §1983 for approving private disability insurance policies containing provisions which discriminate against women.

2. Whether private insurance companies are liable under 42 U.S.C. §1985(3) for entering into a sexually motivated conspiracy to (a) induce the Insurance Commissioner to approve policies which discriminate against women and (b) issue such discriminatory policies in violation of state law.

3. Whether §1985(3), as construed to reach the conduct alleged, is appropriate legislation under the Commerce Clause and §5 of the fourteenth amendment.

INTEREST OF THE UNITED STATES

The United States' interest in these appeals has been set forth in the Motion of the United States for Leave to File Brief Amicus Curiae Out of Time.

STATEMENT OF THE CASE

These are interlocutory appeals from the district court's denial of defendants' motion to dismiss the Complaint for failure to state a claim upon which relief can be granted. Reichardt v. Payne, 396 F.Supp. 1010 (N.D. Cal. 1975). In summary, the basic facts of this case are as follows[1/]:

The named and class defendant insurance companies, operating in the State of California, have entered into a conspiracy to discriminate against women in the issuance of disability insurance policies. Through concerted action, the insurance companies have drafted form insurance policies which on their face discriminate against women in the following respects (C.R. 6-8, 477-79):

(1) Women are charged higher premium rates than men of the same age, health, income and occupation;

(2) Women cannot obtain coverage for as long a period of disability as can men;

(3) Women must wait a longer period of time than men for benefit payments to begin once a disability has occurred; and

(4) Women are subject to a lower ceiling on monthly benefits than men of the same age, health, income and occupation.

1/ Inasmuch as this matter arises on a motion to dismiss, the facts alleged in the Complaint are assumed to be true. Unless noted otherwise, all factual statements in this Brief are taken from the Complaint (C.R. 1-22) and First Amended Complaint (C.R. 472-88).

This differential treatment is motivated solely by discrimination on account of sex and does not have any valid actuarial or other factual basis. (C.R. 8, 479).

Under California law, the policies themselves cannot be issued unless they are approved in writing by the Insurance Commissioner, or unless the Commissioner takes no action within thirty days of their submission to him. Cal. Ins. Code §§10290, 10291. Although the Insurance Commissioner does not have the power to "fix or regulate rates for disability insurance," id., §10291.5(g), he is not allowed to approve any disability policy which "fails to conform in any respect with any law of this state." Id. §10291.5(b)(13). California law prohibits any disability insurer from discriminating between insureds of the same class; such discrimination is punishable as a misdemeanor. Id., §10401. And California's Civil Rights Act provides inter alia that:

> "No business establishment of any kind whatsoever shall discriminate against, ...refuse to buy from, sell to, or trade with any person in this state because of the race, creed, religion, national origin, or sex of such person..." Cal. Civil Code §51.5. See also id., §§51, 52.

The insurance companies have acted in concert to secure the Insurance Commissioner's approval of these facially discriminatory policies. (C.R. 14-15). The Commissioner states that California law (§10401, supra) prohibits "discrimination of the kind plaintiff attempts to allege." (Opening Brief of Appellant Insurance Commissioner, at 16). Nevertheless, the Commissioner routinely approves disability insurance policies which on their face contain sexually discriminatory and admittedly unlawful rates, terms and other conditions. (C.R. 4, 7-8, 476, 478-79). Having secured this approval, the insurance companies have issued the policies and collected

excessive premium payments from the plaintiff and the class of women she represents. (C.R. 6-8, 14-15, 477-79).

On a motion to dismiss filed by the Insurance Commissioner, the district court held that the actions of the Commissioner as alleged in the Complaint violate §1 of the Civil Rights Act of 1871, 42 U.S.C. §1983, and that the court has pendent jurisdiction to consider claims against the Commissioner arising out of Article I, §§11 and 21, of the California Constitution. Reichardt v. Payne, 396 F. Supp. 1010, 1014-15 (N.D. Cal. 1975).

On motions to dismiss filed by the insurance companies, the district court held that their actions as alleged in the Complaint do not come within the ambit of §1983 because they were not taken "under color of state law." Id. at 1015-16. However, the district court held that the Complaint does state a cause of action against the insurance companies under §2 of the Civil Rights of 1871, 42 U.S.C. §1985(3), which, in the court's view, prohibits all private conspiracies motivated by sex discrimination. Id. at 1016-19. Finally, the district court dismissed pendent state claims for intentional infliction of emotional distress against the defendant Life Insurance Company of North America (LINA), the company which sold a disability policy to Reichardt, the named plaintiff. Id. at 1019-20.

Interlocutory appeals have been filed by the Insurance Commissioner and by the named defendant insurance companies. The Commissioner argues that the district court erred in refusing to dismiss the §1983 claim against him. The companies argue that their conduct is not within the proper scope of §1985(3). Reichardt has not cross-appealed from the dismissal of her §1983 and pendent state claims against the insurance companies.[2/]

ARGUMENT

I. THE COMPLAINT STATES A VALID CLAIM FOR RELIEF AGAINST THE INSURANCE COMMISSIONER UNDER 42 U.S.C. §1983

The Insurance Commissioner is an active and essential participant in the issuance of disability insurance policies which discriminate on the grounds of sex. These policies could not be issued or take effect unless they receive his prior approval (Ins. Code §§10290, 10291), and he is specifically obligated to disapprove policies which do not "conform in any respect with any law of this state." (Id. at §10291.5(b)(13)). The Commissioner acknowledges that these policies in fact violate California's anti-discrimination

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2/ After the district court's opinion was issued, Reichardt filed an Amended Complaint which asserts a §1983 claim against the Insurance Commissioner only. (C.R. 472-88).

statute (id. at §10401) (see p. 3, supra).[3/] Discrimination against women in the issuance of insurance policies is also prohibited by the explicit terms of California's Civil Rights Act, Cal. Civil Code §§51, 51.5 (see p. 3, supra). Under these circumstances, the Commissioner's approval of disability policies which are discriminatory on their face is action taken under color of state law which deprives the plaintiff and the class she represents of constitutional rights in violation of 42 U.S.C. §1983. Our reasons for reaching this conclusion differ somewhat from those of the district court and the plaintiff.

1. The Insurance Commissioner's approval of these disability policies is action under color of state law. He approved these policies in his official capacity as Insurance Commissioner. Section 1983 reaches the actions of persons who carry a badge of authority of a state and represent it in some capacity, whether the discriminatory actions complained of are by the state's legislature, e.g.,

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3/ This view appears to be mandated by authoritative construction of §10401. "In referring to 'discrimination between insureds of the same class', in section 10401, the Legislature used the words 'in any manner whatsoever' without exception or specification of the particular kinds of discrimination. Therefore, it is clear that the term discrimination was used in the broadest sense reasonably possible." 41 Ops. Cal. Atty. Gen. 81, 84 (1963). The object of §10401 "is that uniform rates shall be established and maintained, so as to secure to all persons equality as to burdens imposed, as well as to benefits derived, by preventing discrimination by insurers in favor of individuals of the same class..." 7 Ops. Cal. Atty. Gen. 192, 194 (1946). Section 10401 has been held to prohibit insurers from giving special benefits to members of professional associations, 4 Ops. Cal. Atty. Gen. 231 (1944), and from allowing some insureds to pay premiums in the form of trading stamps which were redeemable at less than the face cash value of the policy premiums. 41 Ops. Cal. Atty. Gen. 81, 84-85 (1963). Under the allegations of the Complaint, there is no actuarial or other factual basis for this arbitrary discrimination, and men and women are thus insureds of the same class.

Peterson v. City of Greenville, 373 U.S. 244 (1963), by its executive officials, e.g., Lombard v. Louisiana, 373 U.S. 267 (1963), or by its judges, e.g., Shelley v. Kraemer, 334 U.S. 1 (1948).

That the California's statutes and regulations are fair and non-discriminatory on their face does not insulate the Insurance Commissioner from liability under §1983. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-79 (1972). The Civil Rights Act gives a remedy to persons deprived of constitutional rights by an official who abused his position; it does not matter whether he acted in accordance with or in violation of state law. Monroe v. Pape, 365 U.S. 167, 171-72 (1961). See Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 246 (1931).

2. The Equal Protection Clause prohibits state-imposed discrimination against women in the receipt of insurance benefits. Since the Supreme Court first held that gender-based classifications are "subject to scrutiny under the Equal Protection Clause," Reed v. Reed, 404 U.S. 71, 75 (1971), the Court has not upheld a single classification which allocated benefits to women in a less advantageous way than to men. Califano v. Goldfarb, 97 S. Ct. 1021 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v.

Richardson, 411 U.S. 677 (1973); Reed v. Reed, supra.[4/] If, as these cases hold, the government may not afford selectively less social security protection to women wage earners, or selectively less benefits to women in the armed forces, it follows that California presumptively may not discriminate against women in disability insurance coverage. Such discrimination could be justified only if it is shown to "serve important governmental objectives and...[is] substantially related to achievement of those objectives." Craig v. Boren, 97 S. Ct. 451, 457 (1976). Here, not only does the Complaint allege that the discrimination is not supported by any actuarial or factual basis, but California law (§10401 and the state Civil Rights Act) prohibits this form of discrimination.

3. Responsibility for the discrimination rests with both the Insurance Commissioner and the private insurance companies. The companies, and not the Commissioner, initiated the scheme to discriminate. But the companies could not put that scheme into effect without the Commissioner's sanction because they are powerless to issue any disability policy without his approval.

4/ The Court has upheld gender-based classifications only when it found that they were designed to remedy past discrimination against women. Califano v. Webster, 97 S. Ct. 1192 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974).

In Geduldig v. Aiello, 417 U.S. 484 (1974), the Court upheld an exclusion of pregnancy-related disabilities from disability insurance because the classification was based on physical condition and not on sex. Id. at 496 n. 20. Cf. Washington v. Davis, 426 U.S. 229 (1976) (invidious purpose rather than adverse impact is the touchstone of equal protection).

Cal. Ins. Code §§10290, 10291. The Commissioner is charged with the duty of scrutinizing the policies to determine, inter alia, if they contain any provisions which violate state law. Id. at §10291.5(b)(13). In other circumstances, the Commissioner has refused to approve disability policies on the ground that they contained clauses which violated state law, see, e.g., Pacific Employers Ins. Co. v. Carpenter, 52 P.2d 992, 10 C.A.2d 529 (1935), including policies with provisions in conflict with the state's antidiscrimination statute (§10401). See, e.g., 4 Ops. Cal. Atty. Gen. 231 (1944). Yet, in this instance, the Commissioner has made a judgment to approve policies containing provisions which facially discriminate against women and which, the Commissioner concedes, violate state law.[5/] By approving these policies the Commissioner is an active and indispensable actor in the discrimination; he has, in literal terms, denied the equal protection of state law.

This case is analogous to Shelley v. Kraemer, 334 U.S. 1 (1948). There, as here, private parties agreed on a course of

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5/ By contrast, in Pacific Employers Ins. Co. v. Carpenter, supra, the Commissioner disapproved a disability policy because, after careful scrutiny, he determined that the insurance companies would be unlawfully engaging in the practice of medicine and dentistry. The court sustained the Commissioner's actions. 10 C.A.2d at 603-04. In the matter relating to the 1944 Attorney General opinion, the Commissioner asked for a ruling on whether he could approve a disability policy which gave special benefits to members of particular professional societies, such as bar associations. The Attorney General ruled that this was prohibited by the anti-discrimination statute (Ins. Code §10401). (This is the same statute which the Commissioner concedes prohibits the sex discrimination clauses in the policies at issue here).

invidious discrimination (to deny blacks the right to buy land, through the device of racially restrictive covenants) which they could not effectuate without the knowing assistance of state officials. The state judges in Shelley did not automatically enforce all restrictive covenants,[6] and the racial discrimination was on the face of the contract. Yet the state judges decided to enforce racially restrictive covenants and thereby denied the equal protection of the laws.[7]

The consequences of state enforcement of private discrimination in this case are also analogous to Shelley. A state official has sanctioned the private discrimination and has allowed the private parties to accomplish an otherwise unattainable discriminatory end. And the state approval of the private discrimination is binding upon third parties. For

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6/ "The law favors the free and untrammelled use of real property. Restrictions in conveyances of the fee are regarded unfavorably and are therefore strictly construed." Mathews Real Estate Co., v. Nat'l Printing & Engr. Co., 330 Mo. 190, 197, 48 S.W.2d 911 (1932). See also, e.g., Pickel v. McCawley, 329 Mo. 166, 44 S.W.2d 857 (1931) (refusing to enforce restrictive covenant). Yet the Missouri courts decided that restrictive covenants to exclude blacks from buying homes were "not contrary to public policy." Kraemer v. Shelley, 355 Mo. 814, 822, 198 S.W.2d 679 (1947), rev'd, 334 U.S. 1 (1948).

7/ The "trespass cases" were not decided on the merits of the "state action" issue because of an intervening change of law. Bell v. Maryland, 378 U.S. 226 (1964). But see id. at 242 (Douglas, J., concurring); id. at 286 (Goldberg, J., concurring); id. at 318 (Black, J., dissenting). There is, however, a crucial fact which distinguishes Shelley and this case, on the one hand, from the trespass cases, on the other. In the trespass situation, the state has given private persons the absolute right to evict others from their property; the state official, in enforcing this right, does not have to inquire into or make policy judgments concerning the individual's motivation. Here and in Shelley, the discrimination is stated on the face of the contract; and the state officials must make a policy determination on the legitimacy of the discrimination.

§10291.5(i) of the California Insurance Code provides:

> (i) Effect of approval. Any such policy issued by an insurer to an insured on a form approved by the commissioner, and in accordance with the conditions, if any, contained in the approval, at a time when such approval is outstanding shall, as between the insurer and the insured, or any person claiming under the policy, be conclusively presumed to comply with and conform to the provision of this section. [Emphasis added].

This provision appears to mean that the Commissioner's approval of disability policies containing sexually discriminatory provisions is conclusively binding on any insured (such as Reichardt) who claims in any litigation with the insurer that those provisions do not "conform in any respect with any law of the state" (§10291.5(b)(13)). The Insurance Commissioner has therefore placed his imprimatur on the very actions of the insurance companies which he admits are discriminatory and illegal.

4. Neither Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) nor Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), supports the Insurance Commissioner.[8/] These cases hold that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the

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8/ The Commissioner correctly argues that the fact that a state official is a defendant here does not distinguish this case from Moose Lodge and Jackson. In Moose Lodge, both the Liquor Control Board and the private club were defendants in the district court, and injunctive relief was entered only against the Liquor Control Board. 407 U.S. at 165, 179.

regulated entity..." Jackson, supra, 419 U.S. at 351; Moose Lodge, supra, 407 U.S. at 176-77. There was no nexus in Moose Lodge between the liquor license and the discriminatory membership and guest policies. The Moose Lodge patrons could practice those policies whether they drank orange juice or scotch. The insurance companies, on the other hand, cannot issue discriminatory policies without the Commissioner's approval; there is a perfect correlation between the official action and the challenged conduct of the regulated parties. See Stern v. Mass. Indemnity & Life Ins. Co., 365 F. Supp. 433, 438-39 (E.D. Pa. 1973).

Furthermore, in Moose Lodge the Court did find a sufficient nexus in the Liquor Control Board's regulation which required that each licensee must adhere to the provisions of its by-laws. 407 U.S. at 177-79. The effect of this regulation would be "to invoke the sanctions of the State to enforce a concededly discriminatory private rule." Id. at 179. This factor is present in the instant case, for, as we have pointed out (supra, p. 11), California law provides that the Insurance Commissioner's approval of the challenged policies is conclusively binding on third party insureds or beneficiaries in any litigation with the insurers.

Although the Supreme Court stated in Jackson that the approval of a proposed practice by a state regulatory agency is not, in itself, sufficient "state action" to bring the fourteenth amendment into play, 419 U.S. at 357, this statement should not be read out of the factual context of that case. The Court took care to point out that (a) it was not clear that the regulated utility was even

required to file the challenged practice (termination of service after notice) with the state commission, or that the commission had any authority to disapprove it, 419 U.S. at 355; (b) the commission's approval did not place an imprimatur on the practice, id. at 357; and (c) the practice was not prohibited by state law, id. at 357-58. The converse is true with respect to the California Insurance Commissioner's approval of discriminatory disability policies.

5. The specific provisions of the Insurance Code referred to by the Commissioner (Br. 14-16, 22-23), do not detract from his obligation to disapprove these policies, and, therefore, from the nexus required by Moose Lodge and Jackson.

(a) Section 10291.5(g) prohibits the Insurance Commissioner from fixing or regulating rates. But disapproving different rates for similarly situated men and women is not the same as fixing or regulating rates. The companies have the option to charge all persons the same rate they now charge men, or that they now charge women, or some other rate. Cf. Ins. Code §10270.97(b), infra n. 9; Stanton v. Stanton, 97 S. Ct. 717 & n. 4 (1977). In any event, even if §10291.5(g) prevented the Commissioner from considering disparate rates, that section would have no relevance to the discriminatory provisions of the policy which relate to conditions and coverage (see p. 2, supra), as opposed to rates.

(b) Section 10291.5(b)(7) does not require the Insurance Commissioner to approve any policy which is of real economic benefit, regardless of the premium charged. Subsection (b)(7) directs the Commissioner to disapprove economically unsound policies; but there

are twelve other independent grounds for disapproval set forth in subsections (b)(1)-(6), (8)-(13). One of those reasons (subsection (b)(13)) is non-conformity with any law of the state. As we have pointed out (supra, p. 9 & n. 5), the Commissioner has disapproved policies for this reason alone. And if the Commissioner did not have authority to disapprove a policy which violated the anti-discrimination statute (§10401), other provisions of the Code relating to disability policies would be incomprehensible (see, e.g., §10270.95).[9/]

(c) Section 10291.5(a) states that the Commissioner's function is to prevent "fraud, unfair trade practices, and insurance economically unsound to the insured" (emphasis added). A violation of the anti-discrimination statute (§10401) and state Civil Rights Act would seem to be an unfair trade practice. And the Insurance Code specifically lists as an unfair trade practice discrimination in the rates, benefits, or any other terms or conditions of life insurance policies (§790.02(f)).[10/] Pursuant to other provisions, which

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9/ This provision and companion provisions in §10270 exempt family expense and selected group disability policies from the anti-discrimination statute. They were passed in response to a 1944 Attorney General Opinion (4 Ops. Cal. Atty. Gen. 231). See Employees Service Ass'n v. Grady, 52 Cal. Rptr. 831, 243 C.A.2d 817, 821-22, 829 (1966). If the Commissioner cannot disapprove policies which violate the anti-discrimination statute, then this exemption would be unnecessary:

> "Notwithstanding the provisions of Section 10401 insurers may be permitted to file (for use in connection with selected group disability insurance), rate schedules that reflect a differential from the rates charged for identical policies issued on the individual basis, provided they do not make or permit any discrimination between selected groups." §10270.97(b).

10/ (Footnote on next page).

allow the Commissioner to determine that non-specified unfair trade practices exist (§§790.06, 790.10), the Commissioner has now issued regulations prohibiting certain forms of sex discrimination in insurance contracts.[11/]

6. For these reasons, the district court did not err in refusing to dismiss the §1983 claim against the Insurance Commissioner.[12/] Our analysis as to the Insurance Commissioner's liability under §1983 may apply also to the insurance companies.

10/ While discrimination in disability insurance policies is not specifically covered by §790.03(f), such discrimination was already prohibited by §10401, which was in effect when §790.03 was enacted. Section 10401 was originally enacted in 1917, in the same statute which first gave the Commissioner the authority to disapprove disability policies which violated the law. Cal. Stats. 1917, c.614, p. 957, §1, p. 965, §14. Section 10401 was reenacted in its present form in 1935, with that statute also giving the Commissioner the authority to disapprove disability policies which violated the law. Cal. Stats. 1935, c.145, p. 643, §§10290-91, p. 651, §10401. The unfair trade practices section (§790.03) was first enacted in 1959. Cal. Stats. 1959, c. 1737, p. 4188, §1.

11/ These regulations were issued after the district court decision in this case. They are reproduced in Brief for Plaintiff-Appellee in No. 75-3052, Appendix "A". Despite these regulations, the Commissioner apparently continues to approve disability policies which contain sexually discriminating provisions. See Reply Brief of Appellant Insurance Commissioner 9-10.

12/ The Insurance Commissioner asks this Court to invoke the abstention doctrine so as to obtain a state court construction of the Insurance Code. Abstention is appropriate only when state law is ambiguous and uncertain. Lake Carriers' Assn. v. MacMullen, 406 U.S. 498, 510-11 (1972). We believe that there is no ambiguity or uncertainty in the material provisions of the Insurance Code (see pp. 8-15, supra). Furthermore, abstention should be avoided where, as here, the federal case has been pending for almost three years. See Hart & Wechsler, The Federal Courts and The Federal System 994 (2d Ed. 1973).

See Stern v. Mass. Indemnity & Life Ins. Co., 365 F. Supp. 433, 438-39 (E.D. Pa. 1973). However, Reichardt has not cross-appealed from the district court's dismissal of her §1983 claim against the insurance companies; and she has filed an Amended Complaint which asserts a §1983 claim only against the Insurance Commissioner. Therefore, it is necessary to address the §1985(3) claim against the insurance companies.

II. THE COMPLAINT STATES A VALID CLAIM FOR RELIEF AGAINST THE PRIVATE INSURANCE COMPANIES UNDER 42 U.S.C. §1985(3)

In Griffin v. Breckenridge, 403 U.S. 88 (1971), the Supreme Court held that 42 U.S.C. §1985(3) reaches purely private conspiracies. "[A]ll indicators--text, companion provisions, and legislative history--point unwaveringly to §1985(3)'s coverage of private conspiracies." Id. at 101. The Court set down the following test for determining whether a complaint stated a cause of action under this statute (id. at 102-03):

> To come within the legislation a complaint must allege that the defendants did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

In this case, the Complaint clearly satisfies elements (1) and (3) of this test. The private insurance companies have allegedly engaged in a conspiracy and committed a number of overt

acts in furtherance of the conspiracy--refusing to sell women non-discriminatory insurance policies; securing the Insurance Commissioner's approval of discriminatory policies; and collecting excessive premium rates from women. Likewise, although the Complaint need satisfy only element 4(a) or (4)b of the above test, it satisfies both. It alleges that women paid excessive premiums, thereby injuring Reichardt and her class in their property. It also alleges that as a result of the defendants' overt acts, the Commissioner approved the sexually discriminatory policies, thereby violating the constitutional rights of Reichardt and her class (see pp. 3-4, supra).

With respect to element (2) of the Griffin test, the Complaint alleges that the purpose of the conpiracy is to deny Reichardt and her class "the equal protection of the laws" in two ways. The insurance companies, motivated by sexual discrimination, conspired to take action which deprived women of the protection of state law (i.e., the California anti-discrimination statute, Ins. Code §10401, and the California Civil Rights Act, Cal. Civil Code §§51, 51.5). And the insurance companies, motivated by sexual discrimination, conspired to take action which induced the Insurance Commissioner to deprive women of the protection of the fourteenth amendment's Equal Protection Clause.[13/]

13/ Reichardt need not allege or prove that the insurance companies knew that issuing these policies would violate state law, or that the Insurance Commissioner's approval would violate the Equal Protection Clause. Under Griffin, "specific intent" to violate a state or federal law is unnecessary. 403 U.S. at 102 n.10. It is enough that the insurance companies conspired to take actions which would in fact violate a law. Cf. also Monroe v. Pape, 365 U.S. 167, 187 (1961).

The insurance companies argue that these allegations are insufficient to satisfy element (2) of the Griffin test. The insurance companies argue that §1985(3) is limited to racially motivated conspiracies, and, in the alternative, that if it extends beyond race it does not go as far as sex. Griffin left open the question of whether "a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable" under §1985(3). 403 U.S. at 102 n. 9. This is a matter of first impression for this Court. See Lopez v. Arrowhead Ranches, 523 F.2d 924, 927 n.2 (9th Cir. 1975)(noting but not deciding this issue). Other circuits have held that §1985(3) proscribes conspiracies based on motivations other than race.[14/] Although no court of appeals has yet to rule squarely on whether §1985(3) reaches conspiracies motivated by sexual discrimination,[15/]

14/ Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), cert. denied, 424 U.S. 958 (1976) (conspiracy to prevent political opponents from voting); Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), cert. denied, 423 U.S. 930 (1975) (conspiracy based on political expression); Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973)(conspiracy based on religious and national origin discrimination); Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (en banc) (conspiracy based on political expression and assembly discrimination); Richardson v. Miller, 446 F.2d 1247 (3rd Cir. 1971) (conspiracy based on political advocacy discrimination).

15/ In Johnson v. City of Cincinnati, 450 F.2d 796 (6th Cir. 1971), the complaint alleged that the plaintiff was denied public employment because of her sex and alleged a conspiracy to achieve this end. The court held that a cause of action was stated under §§1983 and 1985(3), id. at 798, but did not address the §1985(3) claim separately. Cohen v. Ill. Inst. of Technology, 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976), assumed that sex-based discrimination was covered by §1985(3) because it would violate the Equal Protection Clause if practiced by state officials. Id. at 822-23 & 829 n. 30. However, in two subsequent cases the Seventh Circuit stated that it has not decided whether discrimination on grounds other than race is covered by §1985(3). Askew v. Bloemker, 548 F.2d 673, 678 (7th Cir. 1976); Murphy v. Mt. Carmel High School, 543 F.2d 1189, 1192 n. 1 (7th Cir. 1976). This issue was also noted but not decided in Weise v. Syracuse University, 522 F.2d 397, 408 n. 16 (2d Cir. 1975).

a number of district courts have held that it does.[16/]

The insurance companies also argue that a complaint asserting a conspiracy to violate so-called "fourteenth amendment rights" must allege state participation in the conspiracy to be actionable under §1985(3). Decisions of the Fourth and Seventh Circuits support this argument. Murphy v. Mt. Carmel High School, 543 F.2d 1189 (7th Cir. 1976); Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976); Bellamy v. Mason's Stores, Inc. (Richmond), 508 F.2d 504 (4th Cir. 1974). But cf. Cohen v. Ill. Inst. of Technology, 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976); (stating that there must be some "state involvement" in the transaction, although not necessarily in the conspiracy itself); Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972) (same). However, the Third and Eighth Circuits have held that §1985(3) covers purely private conspiracies aimed at depriving a class of "fourteenth amendment rights." Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (en banc); Richardson v. Miller, 446 F.2d 1247 (3rd Cir. 1971). This Court has not ruled on this difficult issue.

16/ Curran v. Portland School Committee, 15 [BNA] FEP Cases 644, 659-60 (D. Me. July 18, 1977); Novotny v. Great American Fed. S. & L. Ass'n, 430 F.Supp. 227 (W.D. Pa. 1977); Beamon v. W.B. Saunders Co., 413 F.Supp. 1167, 1176-77 (E.D. Pa. 1976); Milner v. Nat'l School of Health Tech., 409 F.Supp. 1389, 1394 (E.D. Pa. 1976); Keller v. Univ. of Michigan, 411 F.Supp. 1055, 1058 (E.D. Mich. 1974); Pendrell v. Chatham College, 386 F.Supp. 341, 348 (E.D. Pa. 1974); Stern v. Mass. Indemnity & Life Ins. Co., 365 F.Supp. 433, 443 (E.D. Pa. 1973). Contra, Knott v. Missouri Pac. Ry. Co., 389 F.Supp. 856 (E.D. Mo.), aff'd on other grounds, 527 F.2d 1249 (8th Cir. 1975); Baker v. Stuart Broadcasting Co., 8 [BNA] FEP Cases 1240 (E.D. Mo. March 25, 1974), aff'd on other grounds, 505 F.2d 181 (8th Cir. 1974).

We believe that the Complaint in this case states a valid claim for relief under §1985(3); again, however, our reasons are somewhat different than those expressed by the district court or the plaintiff. In light of the fact that this case presents difficult and complex issues of first impression for this Court, we believe that an appropriate starting point is the legislative history of §1985(3). Portions of the legislative history were instrumental in the Griffin decision, 403 U.S. at 99-102. The legislative history also sheds considerable light on the extent to which Congress intended to reach non-racially motivated conspiracies and to reach private conduct which threatened the enjoyment of rights secured by state and federal law.

A. The Legislative History of §1985(3)

On March 23, 1871, President Grant reported to the Congress that a condition of virtual anarchy existed in the South, and he asked for emergency federal legislation:

> "A condition of affairs now exists in some of the States of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies, is not clear. Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States..." Cong. Globe 42d Cong., 1st Sess. 421 (1871).

One month later, Congress passed the Act of April 20, 1871, entitled "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. Section 1 provided a civil remedy against persons who "under color of" state law deprived any individual of "any rights, privileges, or immunities secured by the Constitution of the United States." 17 Stat. 13. As amended, this is now 42 U.S.C. §1983. Section 2 provided civil and criminal sanctions against private conspiracies, 17 Stat. 13-14. The civil portion of section 2 is now 42 U.S.C. §1985.[17/] Section 6, which is now 42 U.S.C. §1986, provided a civil remedy against persons knowing that overt acts arising out of section 2 conspiracies were to be committed and, having the power to prevent same, neglected or refused to do so. 17 Stat. 15. Sections 3 and 4 authorized the President to employ the armed forces and to suspend the writ of habeas corpus to repress "insurrections," and section 5 disqualified alleged conspirators from jury service. 17 Stat. 14-15.

1. The Necessity for Federal Legislation Against Private Conspiratorial Groups

To radical and moderate Republicans, there was an imperative need for federal legislation that operated directly on individual members of private conspiratorial groups (known generically as the Ku Klux Klan) operating in the reconstructed states. Congress had before it a 600-page report on the outrages committed by the Klan. S. Rep. No. 1, 42d Cong., 1st Sess. (1871). Republicans

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17/ The criminal portion of §2 was declared unconstitutional in United States v. Harris, 106 U.S. 629 (1883). It was repealed in 1909. 35 Stat. 1154. The Harris decision is discussed infra, pp. 66-68.

in both the House and Senate recited at length the evidence in this report that organized conspiratorial groups were tyrannizing the freedmen and their white supporters. E.g., Cong. Globe, 42d Cong., 1st Sess. 319-21, 437-39, 442-48, App. 283-99 (1871) (hereinafter cited as Cong. Globe). The evidence before Congress also showed that the Klan was not engaged in random violence, but was rather undertaking a concerted and organized campaign for political ends. The views expressed by Senator Edmunds, the bill's floor leader in the Senate, are typical:

> "The disorders in the South are not like the disorders in many other States, where there always are disorders, the results of private malice. The slaying of men there, as a rule, is not because the murderer and the assassin have any hostility or quarrel with the person who is the victim; but it is one step in the progress of a systematic plan and an ulterior purpose, and that is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a voter." Cong. Globe 702. 18/

The Republicans demanded federal intervention because they were convinced that the State governments were unable or unwilling to protect classes of citizens against abuse by the Klan.

> "It is well known that there are large districts in which life, liberty, and property are, to a portion at least of the people, insecure to an extent which is most alarming, and that yet the

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18/ To the same effect, see, e.g., Cong. Globe at 334 (remarks of Rep. Hoar); 413 (Rep. Roberts); 442-48 (Rep. Butler); 650 (Sen. Sumner); 686 (Sen. Schurz); App. 153 (Rep. Garfield); App. 175-76 (Sen. Pool).

> authors of this criminal disorder are not convicted, and the State whose laws they violate fails to protect their victims." Cong. Globe 369-70 (remarks of Rep. Monroe). 19/

Although some of the more radical Republicans accused the state governments of being actively or tacitly in league with the Klan, 20/ the more common position was that, while there were some instances of deliberate inaction, the States were generally impotent against the concerted power of the Klan. 21/ As Representative Coburn pointed out, the governors of eight States had invoked the aid of the federal government to repress the Klan between 1868 and 1870. Cong. Globe 456-57. He continued:

> "[T]here is a pre-concerted and effective plan by which thousands of men are deprived of the equal protection of the laws. The asserting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes free, the persecuted citizen looks in vain for redress. This condition of affairs extends to counties and States; it is, in may places, the rule, and not the exception." Id. at 459.

The Reconstruction Congress was therefore faced with a situation in which classes of citizens were being systematically deprived of their rights by private individuals, and the States did not provide the protection of their laws against these violations. To the majority in Congress, the failure or neglect of a State to enforce its laws on

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19/ See also, e.g., id. at 392 (remarks of Rep. Smith); App. 153 (Rep. Garfield); App. 300 (Rep. Stevenson).

20/ See, e.g., id. at 394 (remarks of Rep. Rainey); 429 (Rep. Beatty).

21/ See, e.g., id. at 368 (remarks of Rep. Sheldon); 608-609 (Sen. Pool); App. 195 (Rep. Snyder).

behalf of classes of its citizens amounted to a denial of equal protection of the laws.

> "Union men, white and black, are 'denied' the protection of the laws as completely as if the laws excepted from their operation 'all cases of outrage by Ku Klux upon Republicans, white and colored'". Cong. Globe App. 300 (remarks by Rep. Stevenson).

This in turn justified enforcement legislation by Congress:

> "A refusal to legislate equally for the protection of all would unquestionably be a denial [of equal protection]. This conceded, upon what ground can it be pretended that a refusal to execute, or a failure to do so, through inability, equally with reference to all persons, is not also a denial? I maintain, therefore, that the true meaning of this constitutional provision is that the State shall afford equal protection to all persons within its jurisdiction.
>
> "Failing to do this, whether the failure is the result of inaction or inability on the part of the one or the other of the coordinate branches of the State government, the remedy lies with Congress...Whenever it appears that any State has failed to discharge this high constitutional obligation to all of its citizens, it is not only within the power, but it is the solemn duty of Congress to enforce the protection which the State withholds." Cong. Globe 482 (remarks of Rep. Wilson).22/

Having determined that federal enforcement legislation was justified and necessary, the decision was made that this legislation should operate directly against the individuals who violated the law. By enforcing the laws directly against individuals, the federal government would assist the States in meeting their constitutional obligations. See, e.g., Cong. Globe 368 (remarks of

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22/ See also, e.g., id. at 321-22 (remarks of Rep. Stoughton); 334 (Rep. Hoar); 375 (Rep. Lowe); 392-93 (Rep. Smith); 448 (Rep. Butler); 459-61 (Rep. Coburn); 608 (Sen. Pool); App. 80 (Rep. Perry).

Rep. Sheldon). Moreover, a federal remedy would restore the protection of the laws to the persons victimized and would prevent future violations. See, e.g., id. at 608 (remarks of Sen. Pool); App. 85 (Rep. Bingham). Finally, punishment of individual violators of the law was seen as a more effective and less objectionable way of restoring equal protection than legislating against the States.

> "A systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection in the eye of reason and the law, and justifies, yes, loudly demands, the active interference of the only power that can give it...
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> "...How can this be done? Shall we deal with individuals, or with the State as a State? If we can deal with individuals, that is a less radical course, and works less interference with local governments. To punish a particular individual is less troublesome than to set aside a whole State government, declare martial law, suspend the writ of habeas corpus, and substitute, generally, national for State authority...It would seem more accordant with reason that the easier, more direct, and more certain method of dealing with individual criminals was preferable..." Cong. Globe 459 (remarks of Rep. Coburn).

2. The Original Versions of Section 2

Although there was a consensus among the Republicans in Congress that direct federal legislation against the Klan was necessary, drafting the appropriate language proved very difficult. The drafting was initially done by a special ad hoc committee of the House, headed by Representative Shellabarger, a radical Republican from Ohio. Cong. Globe, App. 188. Shellabarger proposed that section 2 of the bill would make it a federal criminal offense for:

> "...two or more persons...[to] conspire together to do any act against the person, property or rights of another, which act being committed within the limits of a State would not be punishable as a crime against the laws of the United States, but which, if committed in any place or district under the sole and exclusive jurisdiction of the United States, would be punishable as a crime under the laws thereof..." Ibid.

By its terms, this language would amount to the practical creation of a general federal criminal code in the states; it was vigorously opposed by moderate Republicans and did not obtain majority support in the ad hoc committee. Id. at App. 187-88 (remarks by Rep. Willard).

Shellabarger then offered a substitute draft, which made it a federal crime for:

> "two or more persons...[to] band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson or larceny..." Id. at App. 188.

This version passed the committee and was offered on the floor. Id. at 317, App. 188. Shellabarger told the House that the bill defined the federal offense with exactness and thereby cured the vagueness problems of the conspiracy section of the 1870 Act.[23/] Id. at App. 69.

23/ As amended, that is now 18 U.S.C. §241.

By its terms, the bill was not limited to proscribing racially motivated conspiracies. Its sponsors recognized that, for this reason, the thirteenth amendment was inadequate to support the legislation. Cong. Globe 695-96 (remarks of Sen. Edmunds). The bill was extended beyond racially motivated conspiracies (and a possible thirteenth amendment foundation) because the Klan's criminal outrages were directed at both blacks and white Unionists.[24/] Representative Roberts cogently summarized the evil to which the legislation was addressed:

> "But one rule never fails: the victims whose property is destroyed, whose persons are mutilated, whose lives are sacrificed, are always Republicans. They may be black or white...
>
> "These, then, are no common crimes... They are deliberate, systematic, instigated from a common source, seeking a common end. They have a political origin..." Id. at 413.

Consequently, supporters of the bill emphasized that it was not limited to the protection of blacks only:

> "I do not wish to be understood as speaking for the colored man alone when I demand instant protection for the loyal men of the South...The white Republican of the South is also hunted down and murdered or scourged for his opinion's sake, and during the past two years more than six hundred loyal men of both races have perished in my State alone [South Carolina]." Id. at 391 (remarks of Rep. Elliott).

The Republicans identified three classes of citizens in the

24/ Id. at 695-96 (remarks of Sen. Edmunds). See also, e.g., id. at 426 (Rep. McKee); 437-39 (Rep. Cobb); 609 (Sen. Pool); App. 194 (Rep. Buckley); App. 196 (Rep. Snyder); App. 228-29 (Sen. Boreman); App. 265 (Rep. Barry); App. 270 (Rep. Havens).

Southern states who were persecuted by the Klan and were in immediate need of federal protection: blacks, whites who held Unionist opinions, and whites who had emigrated from the North.[25/] And they were equally emphatic in relying upon the fourteenth amendment for authority to pass a bill which, of necessity, covered more than racially motivated conspiracies. As Senator Edmunds put it, the fourteenth amendment "secures the rights of the white man as much as the colored man"; it authorizes Congress:

> "to preserve the lives and liberties of white people against attacks by white people, against rapine and murder and assassination and conspiracy, contrived in order to drive them from the States in which they have been born or have chosen to settle, contrived in order to deprive them of the liberty of having a political opinion..." Cong. Globe 695-96.

Reliance on the fourteenth amendment to support the conspiracy section created two constitutional problems which dominated the debates. Although both problems implicated Congress' enforcement powers, the first problem was of a general nature and did not give the Republican majority difficulty; the second problem was much more specific and led to complete revision of section 2 of the bill.

The common ground for supporters and opponents alike was that section 2 proscribed purely private conspiracies commit-

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25/ See, e.g., id. at 321 (remarks of Rep. Stoughton); 334 (Rep. Hoar); 394 (Rep. Rainey); 413-14 (Rep. Roberts); 439 (Rep. Cobb); 609 (Sen. Pool); 650 (Sen. Sumner); 686 (Sen. Schurz); App. 228-29 (Sen. Boreman); App. 265 (Rep. Barry); App. 270 (Rep. Havens).

ted without color of state law or involvement.[26] There was a protracted constitutional debate on the general authority of Congress to reach private conduct under section 5 of the fourteenth amendment. The Democratic opponents of the conspiracy bill asserted that Congress could never regulate private conduct under the fourteenth amendment.[27] "[T]he whole constitutionality of our legislation has been made to turn...upon the denial of our right to exercise direct powers over the citizens as such..." Cong. Globe 695 (remarks of Sen. Edmunds). Responding to this total disclaimer of power, the radical Republicans argued, in equally generalized terms, that Congress had enforcement authority against private individuals, particularly when the States failed to meet their obligations under the Amendment.[28]

The moderate Republicans, whose support was essential for the passage of the bill, agreed with the radicals that as a general proposition Congress could regulate private conduct as a means of enforcing the fourteenth amendment.[29] However, the moderates objected to the breadth of Section 2 of the bill. While the moderates did not propose that the legislation should

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26/ Statements to this effect by supporters of the bill are quoted in Griffin v. Breckenridge, 403 U.S. 88, 100-01 (1971). For similar statements by opponents, see, e.g., Cong. Globe 395 (remarks of Rep. Rice); 429-30 (Rep. McHenry); 579 (Sen. Trumbull); App. 50 (Rep. Kerr); App. 208 (Rep. Blair); App. 218 (Sen. Thurman).

27/ See, e.g., Cong. Globe 395 (remarks of Rep. Rice); 431 (Rep. McHenry); 455 (Rep. Cox); App. 86-87 (Rep. Storm); App. 208 (Rep. Blair); App. 218-19 (Sen. Thurman).

28/ See pp. 23-25 & n. 22, supra.

29/ Cong. Globe 486 (remarks of Rep. Cook); App. 153 (Rep. Garfield); App. 187-90 (Rep. Willard).

be limited to racially motivated conspiracies, the radicals' bill extended federal jurisdiction over all conspiracies regardless of any motivation. Opponents of the legislation charged that it amounted to a general absorption of State criminal law into the federal sphere.[30/]

> "If a father and son agree or combine together to punish a supposed or actual trespasser by a simple assault and battery, is not this, under the bill, a violation of the rights of the persons, and as such made a felony?" Cong. Globe 337 (remarks of Rep. Whitthorne).

The moderates were inclined to agree; they were worried that the bill would punish a private conspiracy "to commit assault and battery upon a man, for the most trifling cause in the world." Id. at 383 (remarks of Rep. Hawley). They read the bill as extending the entire criminal code of the United States over the States and did not believe that Congress had such expansive authority. Id. at 382 (Rep. Hawley).

In response to this criticism of the breadth of the conspiracy bill, the radicals claimed that it was being misconstrued. Shellabarger defended his draft of §2 by stating:

> "I desire to state what I understand to be the effect of this section, to correct the misapprehension, if any such exists, which the gentleman [Rep. Hawley] says seems to exist in the minds of some. The whole design and scope of the second section of

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30/ See, e.g., id. at 385 (remarks of Rep. Lewis); 399 (Rep. Kinsella); 419 (Rep. Bright); 429-30 (Rep. McHenry); App. 50 (Rep. Kerr); App. 179 (Rep. Voorhees); App. 304-05 (Rep. Slater).

> this bill was to do this: to provide for the punishment of any combination or conspiracy to deprive a citizen of the United States of such rights and immunities as he has by virtue of the laws of the United States and of the Constitution thereof. The mentioning of these particular acts is simply resorted to as a convenient method of confirming the wrongs to the class of cases which would be in fact and in law an infraction of the rights of national citizens. They are limitations, and are not meant to intimate that the crime of murder or manslaughter or anything of that kind can be punished under this bill, if the crime be merely that. It is merely a method of nomenclature, of description." Id. at 382 (emphasis added).

And Shellabarger insisted that:

> "The gist of the offense is conspiring to do a particular act in violation of the rights of persons under the laws and Constitution, which act would constitute one of the offenses recited." Id. at App. 114.

However, the radicals had an extremely expansive view of the scope of the fourteenth amendment's Privileges and Immunity Clause. Relying on the ambiguous decision in Corfield v. Coryell,[31/] the radicals asserted that the Privileges and Immunities Clause included all "fundamental rights of national citizenship," including, among other things, "protection by the Government; the enjoyment of life and liberty, with the right to acquire and possess property," and that Congress could secure these rights against private invasion. Cong. Globe App. 69 (remarks of Rep. Shellabarger). To the radicals, any invasion of these "fundamental rights," by the State or by private persons, was ipso facto a violation of the Constitution which

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31/ 6 F. Cas. 546 (C.C.E.D. Pa. 1823)(No. 3,230) (Washington, J.).

Congress could punish. Id. at App. 113 (remarks of Rep. Shellabarger).

The moderate Republicans understood that the supposed limiting interpretation which the radicals were placing on the bill did not amount to a limitation at all. Thus, after tracing the drafting of section 2 and the radicals' expansive constitutional doctrine, Representative Willard concluded that the bill was in fact designed to extend the federal criminal code over the states. Cong. Globe App. 187-188. And, more specifically, Willard concluded that the reference to federally-secured rights in the bill was only a restatement of the radicals' view of the scope of the Privileges and Immunities Clause.

> "The words 'in violation of the rights, privileges, or immunities of any person to which he is entitled under the Constitution and laws of the United States' were inserted, no doubt, in definition of or limitation in some way upon the offense as described in the original bill. It still occurred to me and all the more it occurred to me after hearing the very able speech of the gentleman from Ohio [Shellabarger], that this limitation or definition was not, after all, intended on the part of those who recommended it to prevent the United States from having original jurisdiction of all offenses against life, property, or person, although such offenses might be committed within the limits of a State, but was rather intended as a declaration that the offenses specifically named in the section were offenses against the rights, privileges, and immunities of every person under the Constitution of the United States, and were therefore punishable as crimes against the Constitution." Id. at App. 188 (emphasis added).

The moderates made clear that their disagreement with the radicals was "more a difference as to the meaning of the constitutional provision...than a difference as to the remedy we may apply." Cong. Globe App. 188 (remarks of Rep. Willard). In particular, the moderates considered the radicals' broad construction of "privileges and immunities" to be "not warranted, and...far beyond the intent and meaning of those who framed and those who amended the Constitution." Id. at App. 152 (remarks of Rep. Garfield). To the moderates, the right to be protected from murder and the right to hold property without unjust interference were secured by state law and not by the fourteenth amendment. Id. at App. 188-89 (remarks of Rep. Willard). The moderates therefore refused to support Shellabarger's draft of section 2 and proposed an amended version which "will not impair the efficiency of the section, but will remove the serious objections that are entertained by many gentlemen to the section as it now stands." Id. at App. 153 (remarks of Rep. Garfield).

3. The Amended Version of Section 2

The moderates drafted a substitute for section 2, Cong. Globe App. 188 (remarks of Rep. Willard), which was reluctantly accepted as an amendment by the radicals. Id. at 477-78 (remarks of Rep. Shallabarger). The new section 2 provided criminal and civil remedies:

> "...if two or more persons...shall conspire together 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 the equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws..." Id. at 477.

In construing the intent of this provision, it is appropriate to recall again that the moderates were not concerned with arguments that regulation of private conduct was beyond the reach of Congress in enforcing the fourteenth amendment. On the contrary, the most influential of the moderates, Representative (later President) Garfield believed that:

> "...it is undoubtedly within the power of Congress to provide by law for the punishment of all persons, official or private, who shall invade these rights, and who by violence, threats, or intimidation shall deprive any citizen of their fullest enjoyment." Id. at App. 153 (emphasis added).

What led the moderates to offer their amendment to section 2 was their more limited view of the scope of rights which were protected by the Amendments, and not the question of whose conduct Congress could regulate to enforce those rights. Having rejected the radicals' expansive interpretation of the Privileges and Immunities Clause, the moderates focused on the equality of rights guaranteed by the Equal Protection Clause. In Repre-

sentative Willard's view, the fourteenth amendment was intended to secure only "equality of rights under the laws of the several States in matters within the jurisdiction of such States." Cong. Globe App. 189. The moderates' amendment was, according to Willard, designed to secure this equality of rights:

> "[T]he essence of the crime should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities under the laws; in other words, that the Constitution secured, and was only intended to secure, equality of rights and immunities, and that we could punish by United States laws a denial of that equality." Id. at App. 188.

Garfield similarly stated that the amended section 2 was aimed at securing to classes of persons the equal enjoyment of rights protected by state law. He first explained his understanding of the Equal Protection Clause:

> "It is not required that the laws of a State shall be perfect. They may be unwise, injudicious, even unjust; but they must be equal in their provisions...The laws must not only be equal on their face, but they must be so administered that equal protection under them shall not be denied to any class of citizens, either by the courts or the executive officiers of the State.
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> "It may be pushing the meaning of the words beyond their natural limits, but I think the provision that the States shall not 'deny the equal protection of the laws' implies that they shall afford equal protection." Cong. Globe App. 153.

Garfield then elaborated on how the amended section 2 could constitutionally punish private conspiracies and give relief to the victims of those conspiracies:

> "...[E]nough is known to demand some action on our part. To state the case in the most moderate terms, it appears that in some of the southern States there exists a wide spread secret organization, whose members are bound together by solemn oaths to prevent certain classes of citizens of the United States from enjoying these new rights conferred upon them by the Constitution and laws; that they are putting into execution their design of preventing such citizens from enjoying the free right of the ballot box and other privileges and immunities of citizens, and from enjoying the equal protection of the laws..."
>
> "But the chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is clearly made out, I believe the last clause of the first section [i.e., the equal protection clause] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection." Ibid.

And Willard likewise stated, explicitly and passionately, that the amended section 2 would reach the private conspirators who were attempting to deprive classes of citizens of their equal rights under state law:

> "Congress should not only declare, as is declared in this bill, that invasions of the right of a citizen of the United States to the equal protection of the laws under which he lives and to the same privileges and immunities as are enjoyed by other citizens are a crime against the United States, but it should provide for the enforcement of such a law; and this bill does that.
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> "...[I]f the United States leaves these emancipated slaves and these Union men, while it has the constitutional power to protect them, to the bullet, the torch, and the scourge of midnight conspirators and banded murderers, it will show to the world the saddest spectacle of our times, the spectacle of a great Republic refusing to do what it can to make liberty something more than a name, and equal rights something more substantial than a party catch-word." Id. at App. 189-90.

As noted earlier (p. 33), the moderates' substitute version of section 2 was accepted by the radicals. Shellabarger emphasized that the purpose of the change was to make the gist of the offense a deprivation of equality of rights, as opposed to individual deprivations:

> "The object of the amendment is, as interpreted by its friends who brought it before the House, so far as I understand it, to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section." Cong. Globe 478 (emphasis in original).

Senator Edmunds made much the same point in introducing the amended section 2 of the bill in the Senate. Referring to the prohibition against conspiracies to injure a person "for lawfully

enforcing the right of any person or class of persons to the equal protection of the laws," Edmunds stated:

> "This obstruction of the equal and impartial course of justice, however, must, under the provisions of all this bill, go so far as to deny and withhold from citizens of the United States that equality of protection in seeking justice which the Constitution of the United States gives to them. We do not undertake in this bill to interfere with what might be called a private 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, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter (which is a pretty painful instance that I have in my mind in the State of Florida within a few days where a man lost his life for that reason), then this section could reach it." Cong. Globe 567 (emphasis added).

As the above paragraph indicates, Edmunds shared the understanding of the bill's sponsors in the House that the bill would reach purely private conspiracies which sought to deprive a person or class of persons of equality of rights under the law.[32/] To Edmunds, it was self-evident that private individuals could violate the "protection of the laws":

> "What is protection of law? Do I need to weary the patience of the Senate with undertaking to define what is the protection of the law. I take it any, the humblest, citizen in the land knows what the protection of the law is. The meanest criminal in the land knows what it is to violate the protection of the law. I shall assume, therefore, that

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32/ (See footnote on next page.)

> if there has been any, or if there may be any of the offenses named in this act committed in any State, those offenses will deprive citizens of the United States and everyone else upon whom they are committed of the protection of the law, unless the criminal who shall commit those offenses is punished and the person who suffers receives that redress which the principles and spirit of the laws entitle him to have." Id. at 697.

Finally, it was asserted by opponents of the legislation that the alleged depredations of the Klan had been greatly exaggerated and that the bill was unnecessary. Senator Spencer responded that, although the Klan was the immediate evil with which Congress was concerned, the law would be of general applicability:

32/ As noted earlier, this construction of the bill was held by both supporters and opponents. See pp. 27-29, 34-37, supra. However, one member of Congress, Senator Trumbull, construed §2 differently. Trumbull had voted in favor of the earlier reconstruction legislation but opposed the 1871 Act. Cong. Globe 574-82. With respect to §2, Trumbull stated (id. at 579):

> "Those provisions were changed, and as the bill passed the House of Representatives, it was understood by the members of the body to go no further than to protect persons in the rights which were guarantied to them by the Constitution and laws of the United States, and it did not undertake to furnish redress for wrongs done by one person upon another in any of the States of the Union in violation of their laws, unless he also violated some law of the United States, nor to punish one person for an ordinary assault and battery committed on another in a State."

Trumbull apparently was confused by the House debate and may have been misled by Shellabarger's comments on the original drafts of §2, quoted supra, pp. 30-31. It is true that the amended §2 was not intended to reach ordinary assaults and batteries. But its focus was on violations of state laws against classes of persons, as opposed to artificial definitions of federally-protected rights (as was the case in the original drafts).

> "Laws are not generally made to cover special cases, but are enacted to provide for reasonable contingencies that may arise. The benefit to be derived from such laws is that they operate to deter the evil-doer; and it is an acknowledged maxim that punishment is not instituted in the furtherance of vengeance, but 'that others may see and be afraid'. " Id. at 665.

This point was not lost on opponents of the legislation. Id. at App. 218 (remarks of Sen. Thurman);[33/] 514 (Rep. Farnsworth).

Many Republicans in the House who had opposed the initial form of section 2 announced that they supported the moderates' substitute. See, e.g., Cong. Globe 514 (Rep. Poland); App. 153 (Rep. Garfield); App. 188 (Rep. Willard); App. 231 (Rep. DeLarge); App. 315 (Rep. Burchard). The section was further amended, by voice vote, to add the phrase "or go in disguise upon the public highway, or upon the premises of another." Id. at 515. The bill then passed the House by a vote of 118-91. Id. at 522. It was approved by the Senate, 45-19. Id. at 709.

B. The Motivation Requirement of §1985(3) is Satisfied by Allegations of Purposeful Sex-Based Discrimination

1. The Statute is Not Limited to Racially Motivated Conspiracies

As noted above, several Circuits have held that the scope

33/ "...It does not require that the combination shall be one that the State cannot put down; it does not require that it amount to anything like insurrection. If three persons combine for the purpose of preventing or hindering the constituted authorities of any State from extending to all persons the equal protection of the laws, although those persons may be taken by the first sheriff who can catch them or the first constable, although every citizen in the country may be ready to aid as a posse, yet this statute applies."

of §1985(3) covers conspiracies based on motivations other than race (p. 18 & n. 14, supra). These decisions are fully consistent with the language of the statute and the intent of its authors.

Section 1985(3) affords relief to "any person or class of persons" victimized by a conspiracy aimed at depriving "the equal protection of the laws." By its explicit terms, the statute is not limited to racially motivated conspiracies. In contrast, the Reconstruction Congress passed a number of statutes which specifically addressed acts of racial discrimination. See, e.g., §§1, 2 of the 1866 Civil Rights Act, 14 Stat. 27; §1, 2, 5, 16, 17 of the 1870 Civil Rights Act, 16 Stat. 140, 141, 144. The 1871 Act does not follow these earlier models but is drafted conspicuously in much more inclusive language.[34/]

The legislative history set forth above shows that the broad language of §1985(3) was deliberate. A constant theme of the debates was that racial discrimination was only part of the evil which necessitated federal enforcement legislation; of equal concern to Congress was the protection of whites who were subjected to conspiratorial outrages by other whites. And it was for this reason that Congress did not rely on the thirteenth amendment, but rather on the fourteenth amendment, to pass the legislation. (See

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34/ This is true not only of §2 of the 1871 Act (which is now §1985(3)) but also of the other sections. For example, §1 gives a civil remedy to "any person" whose constitutional rights are denied under color of state law. This section (now 42 U.S.C. §1983) has never been limited to acts of racial discrimination.

pp. 22-28, supra). To hold that §1985(3) covers only racially motivated conspiracies would be inconsistent with both the language of the statute and the expressed intent of Congress.

2. The Statute Covers Conspiracies Motivated by Forms of Class-Based Discrimination Which are Invidious Under Equal Protection Clause Standards

That §1985(3) reaches more than racially motivated conspiracies does not mean that it reaches all conspiracies regardless of motivation. Griffin v. Breckenridge, 403 U.S. 88 (1971), holds that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id. at 102 (footnote omitted). And Griffin informs that courts should look to "the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment." Id.

We believe that the proper standard has been articulated by the First Circuit--that Griffin's motivation requirement is satisfied when "the defendants conspired against the plaintiffs because of their membership in a class and...the criteria defining the class were invidious." Hahn v. Sargent, 523 F.2d 461, 469 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976). This standard inheres in §1985(3)'s language, objectives and legislative history.

The touchstone of §1985(3) is that the conspiracy must aim at the deprivation of "the equal protection of the laws." Of course, this language tracks exactly the third clause of the fourteenth amendment. As the legislative history shows, this conformance is not coincidental. The moderate Republicans did not believe that Congress had the power

to redress individual violations of the law. Disputing the radicals' extreme construction of the Privileges and Immunities Clause,[35/] the moderates insisted that §2 must rest upon, and be coextensive with, the Equal Protection Clause (see pp. 34-37, supra). The objective of the moderates' amendment was to protect classes of persons against the denial of rights, which they saw as the operative purpose of the Equal Protection Clause. (See pp. 35-36, supra).

Thus, both the language and legislative history of §1985(3) indicate that the same standards should be used in determining requisite motivation[36/] under the statute as are used with respect to the Equal Protection Clause.

Both pre- and post-Griffin case law are consistent with this standard. Before Griffin, the courts used Equal Protection Clause standards as controlling and refused to entertain claims of conspiracy unless the action complained of was "part of a general pattern of discrimination or...based on impermissible considerations of race or class." Kletschka v. Driver, 411 F.2d 436, 447 (2d Cir. 1969). These principles have been applied in post-Griffin cases as well. Most commonly, the courts have

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35/ The radical position on this clause was rejected in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

36/ Although the Court spoke of "animus" in Griffin, that term was used interchangeably with "motivation." 403 U.S. at 102 & n. 10. There is no indication that "animus" was used "in its secondary sense of personal hostility or enmity." Local No. 1 (ACA), etc. v. Int'l Bro. of Teamsters, 419 F.Supp. 263, 277 n. 23 (E.D. Pa. 1976). See also Means v. Wilson, 522 F.2d 833, 839-40 (8th Cir. 1975), cert. denied, 424 U.S. 958 (1976); Azar v. Conley, 456 F.2d 1382, 1384-86 & n. 5 (6th Cir. 1972) (dictum).

dismissed allegations that the conspiracy was motivated by malice, dislike or indifference towards individuals. See, e.g., McNally v. Pulitzer Pub. Co., 532 F.2d 69, 74-75 (8th Cir. 1976); Denman v. Leedy, 479 F.2d 1097 (6th Cir. 1973); Fallis v. Toastmasters Int'l, Inc., 467 F.2d 1389 (5th Cir. 1972); Hughes v. Ranger Fuel Corp., 467 F.2d 6 (4th Cir. 1972). This principle is drawn from Equal Protection Clause jurisprudence, which holds that the clause does not redress individual wrongs but reaches only class-based discrimination. See, e.g., Snowden v. Hughes, 321 U.S. 1, 7-11 (1944). Courts have also dismissed §1985(3) claims which retrospectively defined the plaintiff class according to the impact of the conspirators' actions. See, e.g., Askew v. Bloemker, 548 F.2d 673, 678 (7th Cir. 1976); Lopez v. Arrowhead Ranches, 523 F.2d 924, 928 (9th Cir. 1975); Arnold v. Tiffany, 487 F.2d 216 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974). This also finds its counterpart in the basic Equal Protection Clause principles that discrimination against a class must be intentional and that adverse impact, standing alone, is insufficient. See, e.g., Washington v. Davis, 426 U.S. 229 (1976). Finally, the courts in §1985(3) cases have required that, in addition to being intentional and class-based, the discrimination must turn on criteria which are invidious. See, e.g., Harrison v. Brooks, 519 F.2d 1358 (1st Cir. 1975); O'Neill v. Grayson County War Memorial Hosp., 472 F.2d 1140, 1144-45 (6th Cir. 1973). This too is a basic principle of Equal Protection Clause jurisprudence. See, e.g., Oyler v. Boles, 368 U.S. 448, 456 (1962); Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489 (1955).

This same pattern holds with respect to the kinds of invidious class-based discrimination which post-Griffin courts have found within the ambit of §1985(3). These are the same forms of discrimination which are impermissible under the Equal Protection Clause. Compare, e.g., Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975) (political expression discrimination under §1985(3)), with Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (same under Equal Protection Clause); compare Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973) (religious and ethnic discrimination under §1985(3)), with Hernandez v. Texas, 347 U.S. 475 (1954) (ethnic discrimination under Equal Protection Clause). And these are also among the very kinds of discriminatory motivations which the sponsors of §1985(3) mentioned in the legislative debates as coming within the ambit of the statute. (See pp. 27-28, 38, supra).[37/]

An anomalous result could occur if §1985(3) were held to require different motivation standards than the Equal Protection Clause. State officials who engage in class-based invidious discrimination violate "the equal protection of the laws" within the meaning of the fourteenth amendment and are liable for relief under §1983. But if different motivation standards were applied to §1985(3), state officials who conspire on the same basis might not be said to violate

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37/ The sponsors of §1985(3) also mentioned specifically discrimination against people because they had emigrated from other states. (See pp. 28,38, supra). This form of discrimination has also been held to be invidious and impermissible under the Equal Protection Clause. Shapiro v. Thompson, 394 U.S. 618, 629-33 (1969).

"the equal protection of the laws" within the meaning of §1985(3). This illogical end could not be supported by the language, legislative history or judicial construction of the 1871 Civil Rights Act.

We believe, therefore, that the motivation requirement of §1985(3) is satisfied when the Complaint alleges intentional class-based discrimination, and the class is "readily recognizable [and] among those traditionally protect by the Civil Rights Act." Cf. Hahn v. Sargent, 523 F.2d 461, 469 (1st Cir. 1975); Bricker v. Crane, 468 F.2d 1228, 1233 (1st Cir. 1972), cert. denied, 410 U.S. 930 (1973).

3. Intentional Discrimination Against Women Is a Form of Class-Based Invidious Discrimination Cognizable Under §1985(3)

The conspiracy in this case is motivated by intentional discrimination against women--a readily identifiable class. When the Supreme Court first stated that sex-based discrimination is "subject to scrutiny under the Equal Protection Clause," Reed v. Reed 404 U.S. 71, 75 (1971), it also held that preferences based solely upon sex involve "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." Id. at 76. Since Reed, the Court has struck down without exception legislation which intentionally discriminated against women (see pp. 7-8, supra). And the Court has explained that intentional discrimination against women represents an invidious judgment for three reasons: first, it is based on gross and outmoded stereotypes, see, e.g., Craig v. Boren, 97 S. Ct. 451, 457-58 (1976); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975); second, it is based

on an immutable characteristic and violates "the basic concept of our system that legal burdens should bear some relationship to individual responsibility...," Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion), quoting from Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972); and third, it is a form of discrimination which has been applied with "severity [and] pervasiveness" to the systematic detriment of the legal rights of women, see Mathews v. Lucas, 427 U.S. 495, 506 (1976). Thus, a normative judgment has been made in Equal Protection Clause jurisprudence that sex-based discrimination is ordinarily impermissible. Craig v. Boren, supra, 97 S. Ct. at 460.

The authors of §1985(3) did not mention sex discrimination specifically as one of the forms of invidious motivation covered by the statute.[38/] But, although the 1871 Act "was enacted because of the conditions that existed in the South at that time, it is cast in general language..." Monroe v. Pape, 365 U.S. 167, 183 (1961). This general language was chosen to achieve the broad purpose of reaching invidious class-based discrimination, and the statute's authors recognized that it would apply beyond the immediate evils which led to its enactment (see pp. 39-40, supra). The same is true for the Equal Protection Clause. We now recognize

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38/ They did not mention sex discrimination or national origin discrimination at all in the 1871 debates, perhaps because the Klan was not terrorizing people because of those traits (although it later did attack people because of ethnic origin).

that intentional discrimination against women is invidious in a similar manner as the forms of discrimination faced by the Reconstruction Congress. Equal Protection Clause jurisprudence now establishes that intentional discrimination against women violates "the equal protection of the laws." Section 1985(3) should also be so construed, for this statute is to be accorded a sweep as broad as its language. Griffin, supra, 403 U.S. at 97.

C. Section 1985(3) Reaches Private Conspiracies of the Nature Alleged in the Complaint

Assuming that the other elements of the Griffin test have been satisfied (see pp. 16-17, 40-48, supra), this case also involves the much-disputed issue of the extent to which "state action" is necessary under §1985(3) to state a claim that the purpose of the conspiracy is to deprive persons "of the equal protection of the laws." Griffin held in seemingly unequivocal language that §1985(3) reaches purely private conspiracies. 403 U.S. at 101. But certain of the rights violated by the conspiracy in Griffin were assertable directly against private persons under the thirteenth amendment and the constitutional right to travel. Where, as in the instant case, such constitutional rights are not involved, it has been argued that a "state action" requirement survives Griffin. The federal courts have taken four different positions on this question:

(a) In two opinions written by Judge (now Justice) Stevens, the Seventh Circuit held that, in addition to the requisite

invidious motivation, there must be come "state involvement" in the transaction, if not in the conspiracy itself. Cohen v. Ill. Inst. of Tech., 524 F.2d 818 (1975), cert. denied, 425 U.S. 943 (1976); Dombrowski v. Dowling, 459 F.2d 190 (1972);

(b) In a later opinion, the Seventh Circuit indicated that there must be "state action" in the conspiracy itself. Murphy v. Mt. Carmel High School, 543 F.2d 1189 (1976). This position has also been taken by the Fourth Circuit. Doski v. M. Goldseker Co., 539 F.2d 1326 (1976); Bellamy v. Mason's Stores, Inc., Richmond, 508 F.2d 504 (1974);

(c) The Third and Eighth Circuits have held that the requisite invidious motivation, by itself, is sufficient to state a claim against purely private conspiracies under §1985(3). Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (en banc); Richardson v. Miller, 446 F.2d 1247 (3rd Cir. 1971); but cf. Waits v. McGowan, 516 F.2d 203, 208 (3rd Cir. 1975). The district court adopted this position in the instant case. Reichardt v. Payne, 396 F.Supp. 1010, 1016-18 (N.D. Calif. 1975);

(d) In lengthy dictum, the Fifth Circuit has recently taken the position that, in addition to the requisite motivation, the conspiracy must aim at depriving the plaintiff of a right secured by state or federal law. McLellan v. Miss. Power & Light Co., 545 F.2d 919, 924-31 (1977) (en banc), rev'g, 526 F.2d 870 (1975).

We believe that the Fifth Circuit's construction of §1985(3) is substantially correct. In our view, neither "state action" nor "state involvement" need be alleged to state a claim under the

statute. However, more than just the requisite motivation is necessary; the object of the conspiracy must be to take action which would deprive a person or class of persons of a right protected by state or federal law. We believe that this standard was adopted in Griffin and is the only standard which is consistent with the language and intent of the statute, for the following reasons.

1. Neither the language nor the intent of §1985(3) requires "state action" or "state involvement". Nonetheless, the Seventh Circuit stated, in Cohen v. Ill. Inst. of Tech., supra, 524 F.2d at 828:

> "[T]here is no statutory requirement of State participation or support for the conduct of individual conspiracies proscribed by §1985(3). There is, however, a requirement that the conspiracy deprive the plaintiff of a federally protected right. That requirement would be satisfied if [the defendants were state officials] or if the constitutional right of the plaintiff at stake were one that is entitled to protection against anyone, rather than merely protection from impairment by a State." [emphasis added].

And the Fourth Circuit observed that some constitutional rights (e.g., the thirteenth amendments and the right to travel) may be asserted against private persons; but "there are no Equal Protection Clause rights against wholly private actions." Bellamy v. Mason's Stores, Inc., Richmond, supra, 408 F.2d at 507.

The fallacy in this reasoning is that §1985(3) does not contain a requirement that the object of the conspiracy must be to abridge federally-protected rights. The statute does not say that

the purpose of the conspiracy must be to deprive "any person ...of rights secured by the Constitution or laws of the United States"[39/] or "...of rights secured by the Equal Protection Clause." What the statute does say is that the object of the conspiracy must be to deprive "either directly or indirectly, any person...of the equal protection of the laws."

While private persons cannot by themselves violate the Equal Protection Clause, they can deprive other persons of "the equal protection of the laws." This point was made in Griffin (403 U.S. at 97):

> "[J]udicial thinking about what can constitute an equal protection deprivation has, because of the [Fourteenth] Amendment's wording, focused almost entirely upon identifying the requisite 'state action' and defining the offending forms of state law and official conduct. A century of Fourteenth Amendment adjudication has, in other words, made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons. Yet there is nothing inherent in the phrase that requires the action working the deprivation to come from the State. See, e.g., United States v. Harris, 106 U.S. 629, 643. Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in §1985(3) of all deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' whatever their source."

39/ Compare 18 U.S.C. §241, which is phrased in those terms and was construed to reach only federally-protected rights in United States v. Guest, 383 U.S. 745 (1966) and United States v. Cruikshank, 92 U.S. 542 (1875).

The Court held, therefore, that to state a claim under §1985(3), "[t]he conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." Id. at 102 (footnote omitted).

Griffin's reference in the above quoted passage to United States v. Harris is also instructive. On the page cited (106 U.S. at 643), the Harris Court explained how private persons could deprive other private persons of the equal protection of the laws.

> "A private person cannot make constitutions or laws, nor can he with authority construe them, nor can he administer or execute them. The only way, therefore, in which one private person can deprive another of the equal protection of the laws is by the commission of some offense against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault or murder."

This perception was also held by the Reconstruction Congress which passed the 1871 Act. The legislation was directed against conspiratorial groups who were systematically depriving classes of citizens of rights protected by state law, and a federal remedy was necessary because the states were unable or unwilling to redress those deprivations (see pp. 22-25, 35-36, supra). The evil addressed in the debates was class-wide violations of state law. Indeed, it was the radicals' attempt to phrase §2 of the bill in terms of "federally protected rights" which caused the moderates to introduce a limiting amendment so that the bill would focus on the deprivation of the protection of state law by the conspirators (see pp. 29-38, supra). The moderates thereby attempted to secure for the persecuted

classes "equality of rights under the laws of the several states in matters within the jurisdiction of such states." (see pp. 34-35, supra). This is not to suggest that the limiting amendment ignored private violations of federal law, for the phrase "the equal protection of the laws" is broad enough to encompass both state and federal law.[40/] But the major objective of the legislation was to provide a remedy against private conspirators who deprived classes of persons of their rights under state law.

To read a "state action" limitation into §1985(3) would therefore defeat the principal objective of the statute. Moreover, it would prevent the statute from achieving its immediate aims. Congress was intent on protecting whites as well as blacks against the ravages of the Klan, and thus chose the fourteenth amendment as its source of power (see pp. 27-28, supra). If a case arose where the Klan conspired to murder or assault a white person because he or she was a Republican, that would appear to fall within the central core of the statute. Yet courts adopting the "state action" theory would view this as a case involving "fourteenth amendment rights" and would dismiss the complaint unless state involvement were present. See Murphy v. Mt. Carmel High School, 543 F.2d 1189 (7th Cir. 1976). It is illogical to suppose that Congress was unable to draft a statute which would meet its

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40/ For example, a private conspiracy to deprive blacks of rights secured by 42 U.S.C. §§1981, 1982 is within the ambit of §1985(3). See, e.g., Jennings v. Patterson, 488 F.2d 436, 442 (5th Cir. 1974).

immediate objectives.

The language of the statute refutes the "state action" theory in two other respects. First, §1985(3) by its terms reaches conspiracies by two or more persons:

> "for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws..." [emphasis added].

The "equal protection of the laws" in this clause must refer primarily to state laws, and this clause cannot be read to require state participation in the conspiracy. See Brewer v. Hoxie School Dist. No. 46, 238 F.2d 91, 103-04 (8th Cir. 1956). There is no reason to infer a different congressional intent in the other clauses of the statute. Second, although the statute does not require a deprivation of federally protected rights as an element of the conspiracy, it does require that to recover damages there must be an overt act:

> "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" [emphasis added].

This disjunctive form means that the victim of the conspiracy must show that he or she suffered injury or was deprived of a federally protected right. The latter is not an indispensable element in the cause of action. Griffin, supra, 403 U.S. at 103.

2. Although state action or involvement is thus not a necessary allegation under §1985(3), the complaint in the instant

case does allege state involvement. In Cohen v. Ill. Inst. of Tech., supra, the court suggested:

> "It is clear that a private conspiracy to cause the plaintiff to receive unequal treatment from the State, or from a State agency, would violate §1985(3)." 524 F.2d at 828 n. 27; but see Bellamy v. Mason's Stores, Inc., Richmond, 508 F.2d 504, 507 (4th Cir. 1974).

Reichardt's complaint alleges that the object of the insurance companies' conspiracy was to induce the Insurance Commissioner into approving the discriminatory policies and thereby deny plaintiff and her class of their constitutional rights. Since the Insurance Commissioner's approval is essential for the issuance of the policies, and since his approval violates the Equal Protection Clause (see pp. 5-15, supra), this complaint would appear to satisfy the "state involvement" standard of Cohen.

3. Although state action is not a required element of a §1985(3) claim, invidious class-based motivation is not sufficient by itself to state a conspiracy claim under §1985(3). Under the statute, the purpose of the conspiracy must be to deprive a person or class of persons of "the equal protection of the laws." Invidious motivation is necessary because of the word "equal" in this phrase. Griffin, supra, 403 U.S. at 102. But even with the requisite motivation, the conspiracy must be aimed at deprivation of the "protection of the laws."

This construction of §1985(3) was substantially adopted in McLellan v. Miss. Power & Light Co., 545 F.2d 919, 924-31 (5th

Cir. 1977) (en banc). It is, we believe, consistent with both Griffin and the legislative history of §1985(3).

Griffin held that §1985(3) reached an invidious class-based conspiracy if the object of the conspiracy was the "deprivation of the equal enjoyment of rights secured by the law to all." 403 U.S. at 102. This standard would redress conspiracies to deprive persons of existing legal rights created by state or federal law. In Griffin itself, the defendants had conspired to assault and injure the plaintiffs and to prevent them from travelling because of their race. 403 U.S. at 89-92. These actions violated both state and federal law and were therefore redressable under §1985(3). Id. at 103.

Congress' purpose in passing the 1871 Act was to provide relief for classes of persons whose state-created rights were violated with impunity. (See pp. 21-25, supra). There was no concern expressed that state laws were facially deficient in protecting individual rights.[41/] "There was...no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty." Monroe v. Pape, 365 U.S. 167, 176 (1961).

Thus, §1985(3) redresses invidious class-based conspiracies whose object is to take action which deprives rights secured by

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41/ The notorious Black Codes had been eliminated by earlier legislation (i.e., the 1866 Civil Rights Act), and by 1871 the reconstructed legislatures had repealed racially discriminatory statutes. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 426-27, 432-33, 436 (1968).

state or federal law.[42/]

4. In sum, a complaint which alleges the following states a claim under §1985(3): (1) that two or more persons conspired (2)(a) with an invidious class-based motivation (2)(b) for the purpose of depriving a person or class of persons of any right protected by state or federal law (3) and committed an overt act whereby another was (4)(a) injured in his person or property or (4)(b) deprived of having or exercising a federal right.[43/]

42/ In this case, it is unnecessary to determine whether §1985(3) could be applied to situations in which existing state or federal rights are not violated. See McLellan, supra, 545 F.2d 919, 934 (Godbold, J., dissenting). Section 1985(3) reaches conspiracies to violate "either directly or indirectly" the equal protection of the laws. This language conceivably may be broad enough to encompass conspiracies which are designed to interfere with, but not actually deprive, the full exercise of legal rights. Since this is a deprivation rather than interference case, the outer limits of §1985(3) do not have to be defined.

43/ There is language in McLellan which might be read as requiring that the overt act must itself violate the law. 545 F.2d at 927 & nn. 34-35. In other portions of the opinion, the court states that the requisite element of the claim is that the object of the conspiracy must be to take action which would violate the law. Id. at 926, 929, 931. Only the latter is required by §1985(3); the overt act must only cause injury or violate a federal right.

Griffin also makes clear that a §1985(3) plaintiff does not have to prove "specific intent" to violate the law. 403 U.S. at 102 n. 10. It is enough that the conspirators were motivated by invidious class-based animus, intended to take an action which in fact would violate the law, and committed an overt act with the necessary consequences.

Reichardt's complaint fulfills these requirements. Elements (1), (3) and (4)(a) and (4)(b) have been met (see pp. 16-17, supra). The invidious class-based motivation requirement of element (2)(a) is satisfied by the allegation that the conspiracy is based on intentional sex discrimination (see pp. 40-48, supra). And element (2)(b) is also satisfied, for Reichardt alleges that the object of the conspiracy is to take action which would deprive her and her class of rights secured by both state and federal law. That is, the insurance companies objectives are to issue policies which violate the state anti-discrimination and civil rights laws,[44/] and to induce the Insurance Commissioner to take action (approval of the policies) which violates the Equal Protection Clause. Therefore, Reichardt's complaint states a claim for relief against the insurance companies under §1985(3).

III. SECTION 1985(3), CONSTRUED TO REACH THE CONDUCT ALLEGED IN THE COMPLAINT, IS APPROPRIATE LEGISLATION UNDER THE COMMERCE CLAUSE AND THE FOURTEENTH AMENDMENT

Since the complaint states a claim for relief under §1985(3), the final issue is "whether Congress had constitutional power to enact a

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44/ Although the Insurance Commissioner states that the issuance of these policies violates the anti-discrimination statute (Br. at 16), the insurance companies do not discuss this matter in their briefs. Our reasons for concluding that the policies violate both the state anti-discrimination and civil rights laws are set forth at pp. 5-6 & n. 3, supra. This conclusion is based on the allegations of the Complaint, which are assumed to be true on these motions to dismiss. Specifically, the Complaint alleges (see p. 3, supra) that the discrimination does not have any valid actuarial or other factual basis and is motivated solely on account of sex. Whether the state anti-discrimination or civil rights laws would be violated if there were an actuarial basis for the discrimination is a question which is not now before the Court.

statute that imposes liability under federal law for the conduct alleged in this complaint." Griffin, supra, 403 U.S. at 103. This issue is to be resolved on a case-by-case basis according to the facts in the particular case.

> "Our inquiry...need go only to identifying a source of congressional power to reach the private conspiracy alleged by the complaint in this case." Id. at 104.

There are two independent sources of Congressional power which support the application of §1985(3) to the conduct involved in this case--the Commerce Clause and section 5 of the fourteenth amendment.

A. The Commerce Clause

The Commerce Clause vests Congress with the power to reach conspiracies by insurance companies in the issuance of policies. United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944). That Congress did not mention specifically the Commerce Clause as a source of power in enacting §1985(3) is immaterial. The 1871 Act was passed "to Enforce the Provisions of the Fourteenth Amendment... and for other Purposes." 17 Stat. 13 (emphasis added). This is broad enough to support §1985(3)'s application in specific cases under sources of power apart from the fourteenth amendment.[45/] For example,

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45/ This principle has been regularly applied to 18 U.S.C. §241. That statute, which punishes conspiracies to deprive any person "of any right or privilege secured to him by the Constitution or laws of the United States," derives from §6 of the 1870 Civil Rights Act. That statute was "An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes." 16 Stat. 140. Section 241 has been consistently applied to conspiracies which did not implicate Congress' power to regulate voting in federal elections or to enforce the fifteenth amendment. See, e.g., United States v. Guest, 383 U.S. 745 (1966) (fourteenth amendment); In re Quarles, 158 U.S. 532 (1895) (rights of national citizenship); Logan v. United States, 144 U.S. 263 (1892) (same); United States v. Waddell, 112 U.S. 76, 77-81 (1884) (Art. IV, §3, cl. 2).

the Supreme Court accepted the thirteenth amendment and the right to travel as requisite sources of power in Griffin (403 U.S. at 104-07), although, as with the Commerce Clause, neither source was specifically relied upon in the enactment of the statute.

Nor is this conclusion affected by the McCarran-Ferguson Act, 15 U.S.C. §1012. The only court to consider this precise issue concluded, in a well-reasoned opinion, that the McCarran-Ferguson Act does not bar federal court enforcement of violations of the Civil Rights Acts, including §1985(3). Ben v. General Motors Acceptance Corp., 374 F. Supp. 1199, 1202-03 (D. Colo. 1974). Moreover, the McCarran-Ferguson Act would not by its terms apply under the facts of this case. Application of §1985(3) in this case does not "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance," 15 U.S.C. §1012(b). There is no California law which permits insurance companies to issue sexually discriminatory disability policies; on the contrary, California's anti-discrimination and civil rights statutes prohibit that practice (see pp. 5-6 & n. 3, p. 58 & n. 44, supra). The federal interest in enforcing §1985(3) is therefore compatible with California's interest in protecting insureds from unfair discrimination. See Securities & Exchange Comm. v. National Securities, Inc., 393 U.S. 453, 461-64 (1969).

B. Section 5 of the Fourteenth Amendment

1. Congress May Enact Legislation Under §5 of the Amendment which Reaches Beyond the Literal Scope of §1

Section 5 of the fourteenth amendment is an enumerated power which authorizes Congress "to exercise its discretion in determining

whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). Accord, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Ex parte Virginia, 100 U.S. 339, 345-46 (1879). This enumerated power was added to the Amendment to make Congress "chiefly responsible" for implementing the rights which it guarantees. See South Carolina v. Katzenbach, 383 U.S. 301, 325-27 (1966).

Whether legislation is "appropriate" under §5 of the fourteenth amendment is to be determined by the same standards which apply to the scope of all enumerated powers; these are the standards first set down in McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316 (1819). See Morgan, supra, 384 U.S. at 650-51; South Carolina, supra, 383 U.S. at 326. Thus, to consider the extent to which Congress may impose liability on private conduct under §5, we must return to fundamental doctrines.

First, although the literal scope of §1 of the fourteenth amendment applies only to the states, Congress is not limited to that exact scope in passing appropriate legislation under §5. Perhaps the most basic principle of American constitutional law is that the literal scope of the enumerated powers does not measure the boundaries of federal legislation. The enumerated powers specify only the permissible ends of Congressional legislation; they do not circumscribe the means which Congress may employ in achieving those ends. McCulloch v. Maryland, supra, 4 Wheat. at 405-15. The Necessary and Proper Clause was inserted in the Constitution to confirm the existence of

implied powers:

> "This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescibed the means by which the government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen, dimly, and which can be best provided for as they occur." Id. at 415.

If Congress' powers were delimited by the scope of the enumerated powers, the Bank of the United States would have been held unconstitutional. Not only is there no enumerated power allowing Congress to establish a bank, but this power was deliberately withheld in the Constitutional Convention.[46/] Yet in McCulloch the bank was upheld as within the implied powers of Congress, on the basis of principles which have not since been questioned. Neither could Congress, under such a restrictive theory, ever regulate local commercial activities, for these activities are not encompassed by the literal scope of the Commerce Clause. Yet Congress has the implied power to regulate local activities as a necessary means of effecting the enumerated power. E.g., Katzenbach v. McClung, 379 U.S. 294, 301-05 (1964); Wickard v. Filburn, 317 U.S. 111, 118-29 (1942).

46/ See 3 The Papers of James Madison 1576-77 (1840). In the 1791 intra-Cabinet debate, Jefferson opposed the bank's constitutionality on this ground among others. 5 The Writings of Thomas Jefferson 287 (Ford ed. 1895). Marshall was aware of this. See McCulloch, supra, 4 Wheat. at 402.

As another example, the thirteenth amendment by its terms prohibits slavery; the amendment is not violated when a white refuses to sell a house to a black. But Congress has the implied power to prohibit racial discrimination in the sale of housing as a means of eliminating the relics of slavery and preventing its recurrence. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443-44, (1968).[47/] To adopt a per se rule that the literal scope of §1 of the fourteenth amendment disables Congress from ever regulating private conduct under §5 is to deny the existence of implied powers in the Constitution.

Second, in a republican form of government it is the basic province of the legislature and not the courts to determine what means should be used to accomplish enumerated ends. The only constraints on the legislative choice of means are that they must be calculated to achieve a specified end and must not be prohibited by any provision in the Constitution:

> "The government which has a right to do an act, and has imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception...

47/ Similar examples with respect to other enumerated powers include Woods v. Miller Co., 333 U.S. 138 (1948) (upholding post-war national rent controls under the war power); Oklahoma v. United States Civil Service Comm., 330 U.S. 127 (1947) (upholding application of Hatch Act to state officials under the spending power); Sonzinsky v. United States, 300 U.S. 506 (1937) (upholding federal registration of firearms under the taxing power).

> "...But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power." McCulloch, supra, 4 Wheat. at 409-10, 423.

Therefore, the power of Congress to reach private conduct under §5 of the fourteenth amendment is to be determined according to Chief Justice Marshall's classic formulation:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Id. at 421.

2. Providing Remedies for Private Class-Based Conspiracies Is an Appropriate Means of Securing Rights Guaranteed by the Equal Protection Clause

Congress' end in passing §1985(3) was to remedy state violations of the Equal Protection Clause. Congress found that state governments were unwilling or unable to enforce their laws equally on behalf of classes of citizens (see pp. 21-24, supra). That situation is also present in this case. Although California statutes prohibit insurance companies from discriminating on the basis of sex, the Insurance Commissioner--who has enforced the statutes as to other classes (see p. 9, supra)--does not enforce those laws on behalf of women; instead, he assists the insurance companies in depriving women of their rights under the law. The end of §1985(3), as written in 1871

and as applied in this case, is to enforce the terms of §1 of the fourteenth amendment. This end is legitimate and is within the scope of the Constitution.

As a means of remedying state violations of the Equal Protection Clause, Congress legislated directly against the source of the problem. As in this case, state officials in 1871 did not initiate a scheme to enforce the laws discriminatorily. That result occurred because they were unwilling or unable to control private conspiratorial groups who were determined to abridge the rights of classes of citizens. Congress realized that if the conspiracies were eliminated, that would also eliminate the state's failure to enforce its laws equally. Imposing liability on the private conspirators is thus a direct means of remedying state violations of the Equal Protection Clause. It was on the basis of this remedial and preventive rationale that §1985(3) was passed (see pp. 24-25, 36-37, supra). And this case provides an apt example of its validity. If §1985(3) is enforced and the insurance companies do not submit discriminatory policies to the Insurance Commissioner, that will eliminate his practice of discriminating against women in his enforcement of the state insurance code.

Of course, it may be argued that Congress could have chosen other means which acted only upon the state. There are serious policy objections to the efficacy of such a Congressional solution. It would not afford compensation to the victims of the conspiracies, and the constitutional violation would not be remedied. Also, it may be less efficient (it is generally difficult for Congress

effectively to order state officials to enforce the laws with an even hand) and would intrude more greatly into state sovereignty See p. 25, supra. See also United States v. Cruikshank, 25 F. Cas. 707, 713 (No. 14,897) (C.C.D. La. 1874) (Bradley, J.), aff'd, 92 U.S. 542 (1875). But more fundamentally, Congress is the judge of the wisdom and necessity of the means chosen; as long as the means chosen are reasonably adopted to a legitimate end, a law cannot be declared unconstitutional because a court believes that a better means is available. See also, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964).

Finally, the means chosen are not prohibited by, but are consistent with, the letter and spirit of the Constitution. There is no provision in the Constitution which prohibits Congress from legislating against private conduct, and it could hardly be argued that these insurance companies have a constitutional right to discriminate against women.[48/]

3. The Decision in United States v. Harris Supports the Application of §1985(3) to the Private Conspiracy in this Case

The constitutionality of §1985(3) as applied to this case is not impaired by the decision in United States v. Harris, 106 U.S. 629 (1883). That case held unconstitutional §5519 of the Revised Statutes,

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48/ Cf., e.g., Runyon v. McCrary, 427 U.S. 160, 175-79 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443-44 (1968); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-61 (1964).

which was the criminal provision of §2 of the 1871 Act. But Justice Woods, writing for the Court, reached this conclusion only because there was no allegation or showing that the state had failed to provide equal protection of the laws:

> "When the State has been guilty of no violation of [the fourteenth amendment's] provisions;...when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power on Congress.
>
> "Section 5519 of the Revised Statutes is not limited to take effect only in case the State shall...deny to any person the equal protection of the laws. It applies, no matter how well the State may have performed its duty...
>
> "In the indictment in this case, for instance,...there is no intimation that the State of Tennessee has passed any law or done any act forbidden by the Fourteenth Amendment...
>
> "As, therefore, the section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the State or their administration by her officers, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution." Id. at 639-40 (emphasis added).

Thus, even under the Harris Court's construction of the fourteenth amendment,[49/] §1985(3) could be applied where (as here) state officials

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49/ The same rationale was the basis of the other major decisions during this era which are sometimes cited erroneously for the broad proposition that Congress can never reach private conduct under the fourteenth amendment. Civil Rights Cases, 109 U.S. 3, 14, 17-18 (1883); United States v. Cruikshank, 25 F. Cas. 707, 710-14 (No. 14,897) (C.C.D. La. 1874) (Bradley, J.), aff'd, 92 U.S. 542 (1875). See Frantz, Congressional Power To Enforce The Fourteenth Amendment Against Private Acts, 73 Yale L.J. 1353, 1377-81 (1964).

do not enforce the laws with equality.[50/] In fact, the author of Harris upheld the the constitutionality of a federal indictment against private conspirators, in just such a situation. United States v. Hall, 26 F. Cas. 79, 81 (No. 15,282)(C.C.S.D. Ala. 1871) (Woods, J.). See also United States v. Given, 25 F. Cas. 1324, 1326-27 (No. 15,210)(C.C.D. Del. 1873) (Strong, J.).

This case falls within the scope of Congressional power to regulate private conspiracies as set forth in Harris because the state, through its Insurance Commissioner, does not enforce its laws with equality. Given this state involvement, it is unnecessary to go beyond the Harris decision to support the constitutionality of §1985(3) as construed to reach this private conspiracy.

Even if state involvement were not present, Congress would have the power under §5 of the fourteenth amendment to reach this private conspiracy. The limitations which Harris places on Congress' powers are of doubtful validity today. See United States v. Guest, 383 U.S. 745, 761-62 (Clark, Black & Fortas, J.J., concurring); id. at 781-84 (Brennan & Douglas J.J., & Warren, Ch. J., concurring and dissenting). If private conspiracies threaten to lead to state infringements of the Equal Protection Clause, Congress should not have to wait until the constitutional harm is done. As a rational means of ensuring equal protection, Congress should be able to prohibit the conspiracies in the first place. A similar preventive rationale has been used to support Congress' power to reach local activities under the Commerce Clause. United States v. Darby, 312 U.S. 100, 118-24 (1941). There is no reason that a more restrictive standard

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50/ Harris held Rev. Stat. 5519 void on its face because of its possible unconstitutional application (to cases where the state provided adequate enforcement of its laws). This non-severability rule is no longer followed. Griffin, supra, 403 U.S. at 104.

should be applied to §5 of the fourteenth amendment,[51/] which, if anything, vests Congress with more far-reaching power than the Commerce Clause. Compare Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), with National League of Cities v. Usery, 426 U.S. 833 (1976). And we are not the first to suggest this rationale as a basis for supporting the constitutionality of §1985(3). These are the grounds upon which Representative John Bingham, who was the principal author of the fourteenth amendment, asserted that the 1871 Civil Rights Act was constitutional:

> "Are not laws preventive, as well as remedial and punitive? Is it not better to prevent a great transgression in advance, than to engage in the terrible work of imprisonment, and confiscation, and execution after the crime has been done?...Why, sir, if we pass this bill and these offenses are not attempted or actually committed anywhere, no man is hurt, no State is restrained in the exercise of any of the powers which rightfully belong to it. Why not in advance provide against the denial of rights by States, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people?
>
> "...Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of rights as these in States and by States, or combinations of persons?" Cong. Globe, 42d Cong., 1st Sess. App. 85 (1871).

51/ Cf. Katzenbach v. Morgan, 384 U.S. 641, 652-63 (1966), and South Carolina v. Katzenbach, 383 U.S. 301, 327-35 (1966), where analogous prophylactic theories were used to uphold legislation under the fourteenth and fifteenth amendments.

CONCLUSION

For the reasons stated above, Reichardt's complaint states a claim for relief against the Insurance Commissioner under 42 U.S.C. §1983. It also states a claim for relief under 42 U.S.C. §1985(3) against the insurance companies, and §1985(3) is constitutional as applied to the conduct alleged. The order below should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that I served two (2) copies of the Motion of the United States to File Brief Amicus Curiae and Brief of the United States as Amicus Curiae by mailing same, postage prepaid, on the 31st day of January, 1978, to the following counsel for the parties:

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