cisions involving municipal maintenance and operation of airports, it is apparent that in this area the doctrine of municipal immunity still exists in several states. Airports are said to be as important to commerce as are terminals to railroads or harbors to navigation.[71] The possession of an airport by a modern city is essential if it desires opportunities for increased prosperity.[72] It is truly an anomaly in the law that some courts allow the municipality to reap the enormous benefits from maintaining and operating an airport and yet through the invocation of the doctrine of municipal immunity allow the municipality to escape the burdens of such a function.[73] The majority of states which deny immunity to a municipality in the maintenance and operation of an airport on the basis that such a function is proprietary in nature present an enlightened approach in this area of the law. The Iowa position may well present an even more enlightened view in that it allows compensation for one injured through the tortious conduct of the city without regard to the governmental or proprietary nature of the function[74] thereby avoiding the problems and confusion which courts encounter when attempting to apply the divergent rules which govern the distinction.

A survey of the general status of the law with respect to the liability of a municipality in the maintenance and operation of an airport reveals a curious patchwork of responsibility and immunity.[75] The states left with partial tort liability of municipalities should adopt a stricter and more complete rule of responsibility, because considerations of fair play and justice suggest that those injured by the negligence of a municipality or its agents should be compensated on equal terms with those injured by individuals or private corporations.[76]

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bility in Tort, V, 36 YALE L.J. 757 (1927), and Borchard, *Government Liability in Tort,* 34 YALE L.J. 1 (1924).

71 City of Wichita v. Clapp, 125 Kan. 100, 263 P. 12 (1928).

72 *Id.*

73 Daniels v. County of Allegheny, 145 F. Supp. 358 (W.D. Pa. 1956).

74 Ch. 405, § 2, [1967] Iowa Acts 794.

75 James, *Tort Liability of Government Units and Their Officers,* 22 U. CHI. L. REV. 610 (1954).

76 Kirksey v. City of Fort Smith, 227 Ark. 630, 300 S.W.2d 257 (1957).

Case Notes

Civil Rights—FEDERAL DISTRICT COURT HAS JURISDICTION UNDER RECONSTRUCTION CIVIL RIGHTS ACTS TO ENJOIN HUMAN RIGHTS DEMONSTRATORS FROM INTERFERING WITH CHURCH SERVICES—*Gannon v. Action* (E.D. Mo. 1969).

On four Sundays in June and July 1969, defendants, members of Action, a voluntary unincorporated association, entered the Roman Catholic Cathedral in St. Louis, Missouri, to read a list of demands and to disrupt church services. Plaintiffs, the pastor and members of the congregation, brought this action to enjoin further demonstrations. *Held*, the district court had jurisdiction under 42 U.S.C. §§ 1981, 1982, 1983 and 1985(3) to grant a preliminary injunction.[1] *Gannon v. Action*, 303 F. Supp. 1240 (E.D. Mo. 1969).

In the summer of 1969 members of Action and the Black Liberation Front conducted demonstrations in several churches in the St. Louis area. In the demonstrations at the Roman Catholic Cathedral the members of Action entered the church dressed in black pants and sweatshirts; some were naked to the waist. They stated that the demonstrations would last for six months, occurring without warning. They threatened to use symbolic gestures such as spitting in the communion cup and taking the holy bread to distribute to the black poor. Their demands, which were also addressed to the Episcopal and Lutheran churches, were that all property be made public; that the church act as a nonprofit bonding agency for blacks; that the churches publicly discipline police who fired at black fleeing suspects; that the church remove its investments from industries which practice discrimination; that 75% of the church's receipts be turned over to Action; and that a clergyman be removed from the St. Louis Housing Authority Board and be replaced by a black male rent strike tenant. During the demonstrations, those inside the church were in communication with others outside by walkie-talkie. On one occasion the service was cancelled, and on another the police were called to remove the demonstrators, but there was no serious violence.

The Reconstruction Civil Rights Acts, originally enacted between 1866 and 1871, have recently been widely used to combat racial discrimination against Negroes.[2] In this case, the court used these acts to protect the church

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[1] A permanent injunction was granted in December 1969, and the case went on appeal to the Eighth Circuit Court of Appeals and was subsequently dismissed. Gannon v. Action, No. 19917 (8th Cir. June 2, 1970).

[2] *See, e.g.*, Sullivan v. Little Hunting Park, Inc., 90 S. Ct. 400 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); United States v. Price, 383 U.S. 787 (1966); United States v. Guest, 383 U.S. 745 (1966).

against a largely black group of demonstrators. However, although the trend is toward an increasingly broad interpretation of these statutes, there is still insufficient authority for the very broad interpretation adopted by the court.

In *Gannon*, the court held that it had jurisdiction under 42 U.S.C. §§ 1981 and 1982. Section 1981 provides, "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ."[3] Section 1982 provides, "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[4] The court held that the defendants violated plaintiffs' rights to hold property, to use it for religious purposes, and to have it protected, all in violation of these statutes. To support its jurisdiction, the court made two assumptions: first, that the statutes apply to discrimination against all citizens, regardless of race, and second, that since the United States Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*,[5] the statutes apply to private discrimination as well as discrimination in which the state is involved.

In support of the first of these assumptions—that the statutes apply to discrimination against all citizens regardless of race—the court cited *Kentucky v. Powers*,[6] a 1905 case from the Federal Circuit Court of Kentucky. This case, brought under a statute[7] allowing removal of an action from state to federal court when the defendant's civil rights could not be enforced in the state court, held that the federal court had removal jurisdiction because the defendant's right to due process of law under the fourteenth amendment had been violated. The defendant, a Republican, was charged with being an accessory before the fact in the assassination of the Democratic Governor of Kentucky. He was tried twice and both convictions were overturned on appeal. The removal action was brought during the third trial after the judge refused to quash the jury panel. Because of the inflamed atmosphere after the assassination, impartial jury commissioners had been replaced by Democrats, and only the names of Democrats were drawn for jury service. The court held that it was a violation of the fourteenth amendment to exclude prospective jurors simply because they belonged to a particular class.[8] This decision was reversed by the Supreme Court,[9] on the grounds that the discrimination in jury selection was done by state officers in violation of state law, and there was no remedy in the federal courts unless the highest court of the state upheld the discrimination. The Supreme Court stated that the fourteenth amendment applied to all races, not just the African race.

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3 42 U.S.C. § 1981 (1964).
4 42 U.S.C. § 1982 (1964).
5 392 U.S. 409 (1968).
6 139 F. 452 (C.C.E.D. Ky. 1905).
7 Rev. Stat. § 641 (1875), now 28 U.S.C. § 1443(1) (1964).
8 139 F. 452, 462 (C.C.E.D. Ky. 1905).
9 Kentucky v. Powers, 201 U.S. 1 (1906).

Aside from the difficulty of applying the language of sections 1981 and 1982 to discrimination against white persons ("the same right . . . as is enjoyed by white citizens"), other problems arise. The *Powers* case is concerned with deprivation of due process of law under the fourteenth amendment, an issue which does not arise in *Gannon*. *Powers* also involves discrimination by state officials in the selection of a jury, while the members of Action were private citizens. Another difficulty is whether the demonstrations can be considered as racial rather than religious discrimination. There is no evidence in the opinion as to the racial composition of the cathedral congregation, but Action states in its demands that it is an interracial organization.

In support of the second assumption—that these statutes apply to private as well as public discrimination—the court relied on *Jones v. Alfred H. Mayer Co.*[10] Prior to this decision, these statutes were applied only to interference by the states with the rights enumerated, but the Supreme Court in *Jones* held that section 1982 prohibited all racial discrimination, public or private, in the sale or rental of real property, and that the statute was a valid exercise of the power of Congress to enforce the thirteenth amendment.

> At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.[11]

The court stated specifically that the statute applied only to racial discrimination, not discrimination based on religion or national origin,[12] and declined to rule whether private racial discrimination violated the equal protection clause of the fourteenth amendment.[13] The restrictions of the *Jones* holding to racial discrimination and enforcement of the thirteenth amendment have been followed in later decisions.[14]

The court in *Gannon* extended *Jones* well beyond the limits set in that opinion. *Jones* is limited to section 1982 and to racial discrimination; the case involved the refusal of a private housing developer to sell a home to a Negro. Even if the actions of the demonstrators can be construed as racial rather than religious discrimination, the plaintiffs' rights under the thirteenth amendment as protected by these statutes were not violated. Their right to "the full and equal benefit of all laws . . . for the security of persons and property" under section 1981 was not denied; on the contrary, they exercised that right by calling the local police to remove the demonstrators. Their right to "hold" property under section 1982 was not challenged by the demonstrators. The right of the plaintiffs which was violated, the right to freedom of worship, is not

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10 392 U.S. 409 (1968).
11 *Id.* at 443.
12 *Id.* at 413.
13 *Id.* n.5.
14 *See, e.g.*, Sullivan v. Little Hunting Park, Inc., 90 S. Ct. 400 (1969).

one of the rights secured by the thirteenth amendment which these statutes protect. The court in *Gannon* does not discuss the thirteenth amendment basis of the *Jones* decision. Nevertheless, *Jones* does seem to indicate a trend towards applying these civil rights acts to private discrimination.

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[15]

Unlike the other statutes considered here, section 1983 specifically requires action under color of state law to impose liability. Relying on dictum in *Giles v. Harris*,[16] a 1903 Supreme Court case, the court said that action under color of state law may also mean action under color of a state constitution. The court reasoned that the demonstrators were acting under the provision of the Missouri constitution[17] which protects freedom of worship, and were therefore acting under color of state law. Similarly, freedom of worship is a custom and usage of the State of Missouri and the demonstrators were acting under color of this custom and usage when they entered the church. Other than *Giles v. Harris*, no authority was cited to support this argument.

Color of state law under this statute is the same as state action under the fourteenth amendment,[18] and has been the subject of many decisions of the Supreme Court. While state action means more than official acts by state employees or agencies, or discriminatory state statutes, all of the cases require some close involvement by the state in the discriminatory activity, such as judicial enforcement of discrimination,[19] municipal services provided by private parties,[20] joint action by state officials and private citizens,[21] or state financial support of discrimination.[22] The test is well stated in *Burton v. Wilmington Parking Authority*:[23] "The State has so far insinuated itself into a position of interdependence with Eagle [the defendant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."

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15 42 U.S.C. § 1983 (1964).

16 189 U.S. 475, 485 (1903). "We assume further, for the purposes of decision, that § 1979 [§ 1983] extends to a deprivation of rights under color of a state constitution, although it might be argued with some force that the enumeration of 'statute, ordinance, regulation, custom, or usage,' purposely is confined to inferior sources of law."

17 Mo. CONST. art. 1, § 5.

18 United States v. Price, 383 U.S. 787, 794, n.7 (1966); Adickes v. S.H. Kress & Co., 409 F.2d 121, 125 (2d Cir. 1968).

19 Shelley v. Kraemer, 334 U.S. 1 (1948).

20 Evans v. Newton, 382 U.S. 296 (1966).

21 United States v. Price, 383 U.S. 787 (1966).

22 Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

23 *Id.* at 725.

In *Gannon*, there is no allegation that the state in any way, other than by this constitutional provision, encouraged or assisted the demonstrators. No state officials were involved, and the state provided no facilities or financial support. The purpose of the state constitutional provision protecting freedom of worship was certainly not to encourage discrimination.[24] On the contrary, disrupting a church service is a violation of the state law of Missouri,[25] and there is no indication that the state was unwilling to enforce this law. The evidence does not indicate that the State of Missouri was a "joint participant" in the demonstrations.

On August 25, 1969, eleven days before the date of the *Gannon* decision, the same court decided another case arising from the same series of demonstrations, *Central Presbyterian Church v. Black Liberation Front*.[26] Members of the Black Liberation Front, who are also defendants in *Gannon*, had demonstrated at the Central Presbyterian Church in St. Louis at the same time. The church sought an injunction, which was granted. The court made the same arguments for jurisdiction under 42 U.S.C. §§ 1981, 1982 and 1985(3) which it made in *Gannon*, often in the same words. But in *Central Presbyterian Church*, the court held that section 1983 did not apply because the demonstrators were not acting under color of state law.

Section 1985(3) provides civil sanctions for conspiracy to deprive any person of the equal protection of the laws or of equal privileges and immunities under the laws, if there is an act in furtherance of the conspiracy whereby another is deprived of having and exercising any rights or privileges of a citizen of the United States.[27] In *Gannon*, the court held that the logic of the *Jones* decision should also be applied to this section, and therefore, state action is not required. The court also compared this section with 18 U.S.C. § 241, the criminal conspiracy section of the civil rights acts, and applied the holding of *United States v. Price*[28] interpreting that statute to section 1985(3). In the *Price* decision, the Supreme Court held that section 241 protects all of the rights and privileges secured by the Constitution and laws of the United States, not only those which are conferred by the Federal Government.[29] The right to freedom of worship is secured by the first amendment of the Constitution, and therefore a conspiracy to deprive anyone of this right is a violation of section 1985(3). The court found evidence of conspiracy in the defendants' use of walkie-talkie equipment, pre-printed lists of demands, and concerted action at several churches in St. Louis.

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[24] *Cf.* Reitman v. Mulkey, 387 U.S. 369 (1967), in which the Supreme Court found an amendment to the California Constitution permitting private racial discrimination in housing to be a violation of the fourteenth amendment. One of the reasons for the decision was that the only purpose of the amendment was to encourage discrimination.

[25] V.A.M.S. § 562.250 (1953).

[26] 303 F. Supp. 894 (E.D. Mo. 1969).

[27] 42 U.S.C. § 1985(3) (1964).

[28] 383 U.S. 787 (1966).

[29] *Id.* at 800.

Whether state action is a necessary element of a cause of action under this section is the most difficult issue presented by this case. In view of the restricted application of *Jones* to section 1982, racial discrimination and enforcement of the thirteenth amendment, it does not eliminate the state action requirement under this section. However, the recent interpretations of 18 U.S.C. § 241, the criminal conspiracy statute, indicate that there is at least a strong minority on the Supreme Court which feels that state action is not necessary under that statute. In *United States v. Guest*,[80] four separate opinions were written expressing differing views. Although the majority held that sufficient state action was shown to prevent dismissal of the indictment,[81] three justices said that section 241 reached all conspiracy, public or private, interfering with fourteenth amendment rights, and three others felt that Congress had the power under section 5 of the fourteenth amendment to punish private conspiracy. It is unclear whether this decision represents a trend toward the removal of the state action requirement. There is also a difference in language between 18 U.S.C. § 241 and 42 U.S.C. § 1985(3) which compounds the difficulty. Section 241 speaks of conspiracy "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Section 1985(3) punishes conspiracy "for the purpose of depriving . . . any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws . . . ."

The leading case in the interpretation of section 1985(3), *Collins v. Hardyman*,[82] requires state action under this statute. In that case defendants disrupted a meeting of plaintiffs' political club. Plaintiffs alleged that defendants conspired to deprive them of the equal protection of the laws and equal privileges and immunities under the laws by disrupting a meeting of a group whose views defendants disagreed with, while not disturbing meetings of political groups the defendants agreed with. Plaintiffs also alleged that as a result of this conspiracy they were deprived of their right to assemble and petition the government for redress of grievances. The Supreme Court, with three justices dissenting, held that the complaint failed to state a cause of action under 8 U.S.C. § 47(3).[83] The decision was based on construction of the statute, not its constitutionality as applied to private discrimination. A conspiracy to be actionable under this section must be for the purpose of depriving plaintiffs of the equal protection of the laws or equal privileges and immunities under the laws. Such a conspiracy must be shown independent of an overt act to deprive another of any rights or privileges of a citizen. Plaintiffs failed to show such a conspiracy. Their right to equal protection of the laws of Cali-

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[80] 383 U.S. 745 (1966).

[81] *Id.* at 756. The indictment alleged that one means of carrying out the conspiracy was "[b]y causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts."

[82] 341 U.S. 651 (1951).

[83] Now 42 U.S.C. § 1985(3) (1964).

fornia remained unimpaired. The wrong committed by defendants was in violation of state law, and there was no indication that the state would not enforce the law. "Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so."[34]

The facts in *Gannon* are very similar to those in *Collins*. Both concern rights secured by the first amendment. The defendants in both were acting in violation of state law. In neither case did plaintiffs show that they were deprived of the equal protection of the laws. The court in *Gannon* did not discuss *Collins* in its opinion.

The *Collins* decision has not been overruled; as recently as April 1969, it was held to be controlling by the Fifth Circuit Court of Appeals in *Griffin v. Breckenridge*.[35] In that decision Judge Goldberg discussed at length the effect of the *Jones* and *Guest* decisions on the interpretation of section 1985(3) and concluded that they did not apply. *Jones* applies only to section 1982 and is based on the thirteenth amendment. The majority of the justices in *Guest* held that state action was necessary under the equivalent criminal conspiracy statute.

In conclusion, it appears that the first amendment right of freedom of religion is protected by the Reconstruction Civil Rights Acts only from interference in which the state is involved, not from private discrimination. In view of the recent decisions of the Supreme Court, the requirement of state action in such cases may disappear in the near future, but it is now still in effect. ". . . [W]e recognize that the citadel of state action is under heavy attack, but we reluctantly concede that as yet it has not fallen."[36] Until it does, the victims of such demonstrations must seek their remedy in the state courts.

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Constitutional Law—CONDITIONS AND PRACTICES OF THE ARKANSAS PRISON SYSTEM CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT PROHIBITED BY THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.—*Holt v. Sarver* (E.D. Ark. 1970).

Petitioners, inmates of the Arkansas State prison system, brought class actions against the administrators of the system to have conditions and practices at the prisons declared unconstitutional and permanently enjoined. The United States District Court for the Eastern District of Arkansas *Held, inter alia,* that various conditions and practices of the Arkansas prison system

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34 Collins v. Hardyman, 341 U.S. 651, 661 (1951).
35 410 F.2d 817 (5th Cir. 1969).
36 *Id.* at 821.