Buffalo Law Review

Volume 39 | Number 3 Article 5

10-1-1991

Injunctive Relief and Section 1985(3): Anti-Abortion Blockaders Meet the "Ku Klux Klan Act"

Bruce Brown

COMMENTS

Injunctive Relief and Section 1985(3): Anti-Abortion Blockaders Meet the "Ku Klux Klan Act"

Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy.

Justice Blackmun[1]

If you think abortion is murder, then act like it's murder. If your child or my child were in danger, we would physically intervene, with violence, if necessary, or — I should say — force.

Randall Terry[2]

I. INTRODUCTION

Anti-abortion activists have employed various tactics in their campaign against abortion. One tactic has been direct action against clinics providing this service to women by blockading doors, interfering with customer ingress and egress, destroying equipment, and intimidating clinic employees.[3] Civil actions to dissuade these activities have included

1. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986).

2. Wilkinson, *The Gospel According to Randall Terry*, ROLLING STONE, Oct. 25, 1991, at 85, 91. Randall Terry is the National Director and Founder of Operation Rescue, an unincorporated association whose members oppose abortion and its legalization. To advance its principle goals of stopping abortion and ending its legalization, Operation Rescue engages in demonstrations it terms "rescues." Generally a "rescue" takes place at a facility where abortions are performed. Demonstrators, whom Operation Rescue refers to as "rescuers," intentionally try to prevent women from having abortions by blockading the clinic's entrances and exits. By effectively closing clinics in this manner "rescuers" view their blockades as "rescues" of fetuses scheduled for abortion. National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1487-88 (E.D. Va. 1989), *aff'd per curiam*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991).

3. *See, e.g.*, Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989). Plaintiff-appellant, the Northeast Women's Center, Inc., presented

allegations of anti-trust violations,[4] third party tortious interference with contractual relations,[5] and RICO[6] violations based on a claim that these tactics exhibit a pattern of extortionate acts as defined under the Hobbs Act.[7]

The purpose of this Comment is to explore the recent use of the federal civil rights statute, 42 U.S.C. § 1985(3), to obtain injunctive relief against anti-abortion protestors who interfere with patient ingress and egress at facilities which provide abortion services.[8] The importance of this discussion took on an added dimension, February 25, 1991, when the Supreme Court granted certiorari in *Bray v. Alexandria Women's Health Clinic*.[9] The questions presented by this case include: (1) Do "women seeking abortions" constitute a valid class for the purposes of the "class animus" requirement of 42 U.S.C. § 1985(3); (2) Is opposition to abortion per se discrimination against women for the purpose of the "class animus" requirement of 42 U.S.C § 1985(3); and (3) Do purely private actors who hinder access to abortion facilities violate the federal constitu-

---

evidence at trial establishing that employees had been knocked down and injured while attempting to prevent defendants and others from forcing their way into the clinic. Once inside the facility, defendants damaged and dismantled clinic equipment. One employee resigned as a result of this harassment and would not resume her position until the Center installed a sophisticated security system; another lost work time as a result of injuries. During another demonstration at the Center, witnesses testified that they observed:

> [d]efendants photographing patients, chanting through bullhorns, blocking building entrances, and surrounding and pounding on the windows of employees' cars. In fact an assistant district attorney who witnessed a demonstration testified that the demonstrators' activity rose to a "frenzy" and that he delayed leaving the Center out of fear for his physical safety. Videotape evidence revealed demonstrators pushing, shoving and tugging on patients as they attempted to approach the Center, knocking over and crossing beyond police barricades and blocking the ingress of cars.

Id. at 1345-46. Two employees testified that repeated picketing at their homes, and disruptive demonstrations at the Center, caused them to resign their positions with the clinic. *Id.* at 1346.

4. *See generally* Note, *The Scope of* Noerr *Immunity for Direct Action Protestors: Antitrust Meets the Anti-Abortionists*, 89 COL. L. REV. 662 (1989).

5. *McMonagle*, 868 F.2d at 1347.

6. The Racketeer Influenced and Corrupt Organizations Act (RICO) provides for a private cause of action at 18 U.S.C. 1964(c):

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the costs of the suit, including a reasonable attorney's fee. *Id.*

7. 18 U.S.C. § 1951 (anti-racketeering act making it a crime to interfere with interstate commerce by extortion, robbery, or physical violence). For an application of Civil RICO in the context of militant anti-abortion actions, see *McMonagle*, 868 F.2d at 1342.

8. *See, e.g.*, New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).

9. 111 S. Ct. 1070 (1991), *appealed from*, National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1487-88 (E.D. Va. 1989), *aff'd per curiam*, 914 F.2d 582 (4th Cir. 1990).

tional right to interstate travel merely because some patrons of the facility come from out of state?[10] The following exploration of 42 U.S.C. § 1985(3) will conclude that the answer to each of these questions is affirmative.

This Comment will begin with a brief history of the Act. Next the Comment provides an overview of the requirements for establishing a claim under the act in the context of a clinic trying to protect itself from militant anti-abortion co-conspirators. In particular, this Comment will focus on the class-based animus requirement of § 1985(3) and the necessity of establishing a violation of separate rights which the Act can remedy. The central thesis of this Comment is that using § 1985(3) in a civil action against militant anti-abortion conspirators is consistent with the text of the statute, and that the problem faced by women and their supporters today — the inability of state and local authorities to secure the legal option to willfully terminate their pregnancy — is analogous to the problems faced by newly emancipated blacks and their supporters which the framers of the Ku Klux Klan Act intended to redress.

II. HISTORY OF THE ACT

In the aftermath of the Civil War, the Reconstruction Congress produced a series of legislation intended to protect civil rights at the federal level.[11] A portion of this legislation was in direct response to "clandestine bands of private conspirators" which the southern states were either unwilling or unable to control.[12] Hard fought freedoms were being made ineffective by "[k]lansmen [who] rode over the countryside at night, particularly in the South, intimidating, scourging, and murdering [African-

10. 59 U.S.L.W. 3576 (Feb. 26, 1991). The other two questions presented in *Bray* are: (4) Are the respondents' claims under 42 U.S.C. 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction; and (5) Did the court of appeals err by sustaining the award of attorney's fees against petitioners? *Id.* This Comment will not address the jurisdiction or attorney's fees questions.

11. During the ten years that followed the Civil War, five important pieces of legislation were passed to enforce the newly ratified thirteenth, fourteenth and fifteenth amendments. They were: Act of May 31, 1870, ch. 114 , 16 Stat. 144 (codified at 42 U.S.C. §§ 1981-1982 (1982)) (protecting voting rights); Act of Mar. 1, 1875, ch. 114, 18 Stat. 335, *overruled in part*, 109 U.S. 3 (1883) (The Civil Rights Cases) (codified in part at 42 U.S.C. § 1984 (1982)) (prohibiting racial discrimination in public accommodations); Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1985(3) (1982)) (the Ku Klux Klan Act); Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C.) (outlawing Black Codes in the former Confederate states); Act of Feb. 28, 1871, ch. 99, 16 Stat. 433, *repealed by* Act of Feb. 8, 1894, ch. 25, 28 Stat. 36 (protecting voting rights).

12. Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 536 (1985).

Americans] in an attempt to overthrow the Reconstruction policy of the Republican Congress."[13] The situation prompted President Ulysses S. Grant to "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."[14]

On April 20, 1871, in an effort to "enforce the provisions of the Fourteenth Amendment to the Constitution,"[15] an indignant Congress responded to conditions in which "the Klan and other lawless elements were rendering life and property insecure."[16] This statutory response came to be known as the Ku Klux Klan Act. The statute provided both civil and criminal penalties[17] for the deprivation of rights. Classes of people were to be extended a federal remedy for private conspiracies[18] which the state was either unwilling or unable to prevent.

Section 1985(3) of the Ku Klux Klan Act provides in part that:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or

---

13. *Id.* at 534.

14. CONG. GLOBE, 42d Cong., 1st Sess. 236 (1871) (message of President Grant to Congress as relayed in remarks of Sen. Scott).

15. U.S. CONST. amend. XIV, § 1. The Act was originally entitled "An Act to Enforce the Provisions of the Fourteenth Amendment." *See* Act of Apr. 20, 1871, ch.22, 17 Stat. 13 (codified at 42 U.S.C. 1985(3) (1982)). This Act comprises only part of the list of conspiratorial acts which were prohibited by section 2 of the original Ku Klux Klan Act of 1871. *See supra* note 11.

16. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH L. REV. 1323, 1334 (1952).

17. The closest remaining criminal analog to § 1985(3) is 18 U.S.C. § 241 (1982) which in pertinent part makes it criminal:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . .

Id. Section 241 was originally enacted as § 6 of the Enforcement Act of 1870, 16 Stat. 141, § 6 (1870). For a discussion of § 241 and its use within the abortion controversy, see generally Copelon, *The Applicability of Section 241 of the Ku Klux Klan Acts to Private Conspiracies to Obstruct or Preclude Access To Abortion*, 10 NAT'L BLACK L.J. 183 (1987).

18. "A conspiracy is a combination of two or more persons, by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means." 3 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS, § 103.23 (4th ed. 1987).

> property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.[19]

The principal concern of the statute's sponsors in the Reconstruction Congress was to protect newly emancipated blacks and their political allies from private conspirators,[20] but "[t]he Congressional debates evinced concern for all groups subject to the organized lawlessness of the Ku Klux Klan."[21] Comments by the Senate sponsor, George Edmunds of Vermont, illustrate that the Forty-Second Congress' approach to the class-based animus requirement was not directed exclusively to actions taken against African-Americans. Senator Edmunds stated that if "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 . . . then this section could reach it."[22]

The early promise of the Ku Klux Klan Act quickly evaporated when a hostile Supreme Court declared the important criminal conspiracy section of the Act void in *United States v. Harris*,[23] removing private action from the reach of the Fourteenth Amendment. The *Harris* Court construed the newly adopted Fourteenth Amendment to limit only state action and held that it could not be used to sustain such a statutory proscription of private action.[24]

The *Harris* decision left the Ku Klux Klan Act lying dormant for almost one hundred years. In 1971, § 1985(3) was rejuvenated by the

---

19. 42 U.S.C. § 1985(3) (1982).

20. The central theme of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate [African-Americans] and give them equal access to political power. The predominant purpose of § 1985(3) was to combat the prevalent animus against [African-Americans] and their supporters. The latter included Republicans generally, as well as others, such as Northerners who came South with sympathetic views towards the [African-American].

United Bhd. of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825, 836 (1983).

21. In addition to African-Americans and Republicans, others threatened by Klan activity included Unionists and certain religious groups. Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979). *See* CONG. GLOBE, 42d Cong., 1st Sess., at 567, 695-96 (1871) (remarks of Sen. Edmunds). *See also id.* at 426 (remarks of Rep. McKee); *Id.* at 437-39 (remarks of Rep. Cobb).

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

23. 106 U.S. 629 (1883). The *Harris* Court followed a rule of severability which caused the entire statute to be mechanically struck down if any part were to be found constitutionally overbroad. *See id.* at 641-42.

24. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1340 (1952). This was one of a series of cases in which the Supreme Court used strict contructionalism to systematically dismantle the Reconstruction era's Civil Rights Acts. *See generally id.* at 1323.

United States Supreme Court in the landmark decision *Griffin v. Breckenridge*.[25] By relaxing the *Harris* Court's inflexible state action requirement, the *Griffin* majority "accord[ed] the words of the statute their apparent meaning."[26] After a one-hundred year lag, the statute would now provide the cause of action for private conspiracies[27] that its drafters envisioned for the Reconstruction era.

III. ESTABLISHING A § 1985(3) CLAIM

The *Griffin* majority established a four-prong test for sustaining a § 1985(3) claim. To prevail a plaintiff must prove that the defendants: (1) engaged in a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons the equal protection of the laws, or the equal privileges and immunities under the laws; (3) acted in furtherance of the conspiracy; and (4) deprived such person or class of persons the exercise of any right or privilege of a citizen of the United States.[28]

The *Griffin* court stressed that § 1985(3) may not be construed as a "general federal tort law,"[29] because the limiting "language requiring intent to deprive of *equal* protection, or *equal* immunities" necessitates a demonstration of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[30] That limiting language, the Court determined, was a response to congressional concern over the enormous sweep of the original language of the "criminal provision outlawing certain conspiratorial acts done with intent 'to do any act in violation of the rights, privileges, or immunities of another person.' "[31] Representative Shellabarger, the House sponsor of the bill, explained the limiting effect of the amendment:

---

25. 403 U.S. 88 (1971).

26. *Id.* at 96.

27. It is well settled that § 1985(3) provides a cause of action for private conspiracies. *See* United Bhd. of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825, 832-33 (1983); Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979); *Griffin*, 403 U.S. 88, 101, 104 (Congress may constitutionally provide a cause of action for private conspiracies).

28. *Griffin*, 403 U.S. at 102-03.

29. *Id.* at 101-02.

30. *Id.* at 102 (emphasis in original). The Court saw the animus requirement as essential:

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

Id.

31. *Id.* at 99-100 (citing CONG. GLOBE, 42d Cong., 1st Sess., App. 68 (1871)).

> The object of the amendment is . . . 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.[32]

However, as Justice White has noted, this addition does not restrict the scope of the rights protected under § 1985(3), but does limit the scope of the Act itself by adding the requirement that a class-based animus motivate the conspirators' actions.[33]

In *Great American Federal Savings & Loan Ass'n v. Novotny*,[34] the Court noted that, while creating a cause of action against private conspirators for recovery of damages, § 1985(3) is exclusively remedial and itself provides no substantive rights.[35] Section 1985(3) claims must, therefore, be based upon other alleged infringements of federally protected rights.[36] The remedial nature of § 1985(3) requires that the rights, privileges, and immunities which it protects have their sources outside of the statute.[37] Therefore, to establish the second element of a claim — that the conspiracy was for the purpose of depriving, either directly or indirectly, any person or class of persons the equal protection of the laws, or the equal privileges and immunities of the laws — a plaintiff must establish: (1) the violation of a protected right; and (2) an invidiously discriminatory class-based animus which motivates the violation.[38]

A. *Fulfilling the Class-Based Animus Requirement*

The threshold issue in any cause of action brought to invoke the protection of § 1985(3) is whether the conspirators' actions were motivated by a class-based animus. This subsection will address two issues: (1) which classes are protected by the Act; and (2) a characterization problem specific to anti-abortion conspiracies to prevent women from willfully terminating their pregnancies — whether the class should be drawn narrowly to envelop only "women seeking abortions," or if the

32. *Id.* at 100 (citing CONG. GLOBE, 42d Cong., 1st Sess., App. 478 (1871)).

33. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 388 n.5 (1979) (White, J., dissenting).

34. 442 U.S. 366 (1979).

35. *Id.* at 372.

36. *Id.*

37. United Bhd. of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825, 833 (1983).

38. Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 502-03 (9th Cir. 1979).

animus is more appropriately described as a gender-based discrimination against all "women."

1. *To Have and To Have Not: Protected Classes Under § 1985(3).* It is difficult for plaintiffs organizing a cause of action to determine which classes or persons fall within the protective scope of the Ku Klux Klan Act. The Supreme Court has specifically left open the question of whether § 1985(3) will secure rights against conspirators motivated by any class-based animus other than that directed at African-Americans and their supporters.[39] The lack of an authoritative explication of which classes of people are protected by the Ku Klux Klan Act has led to confusion within the judiciary.[40] One court noted the inconsistent treatment of the class-based animus requirement by stating that a "[c]hanging interpretation has been the only constant."[41] Section 1985(3) decisions rendered by lower federal courts have included classes of people which traditionally have been found by courts to suffer societal prejudices based upon race,[42] gender,[43] and religious affiliation.[44] However, some courts

39. "We need not decide, given the facts of this case, 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.

40. This confusion is highlighted by two distinct lines of cases within the Ninth Circuit. The first is represented by Schultz v. Sundberg, 759 F.2d 714 (9th Cir. 1985):

> [W]e have extended [§ 1985(3)] beyond race only when the class in question can show that there has been a governmental determination that its members "require and warrant special federal assistance in protecting their civil rights." (citing DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 333 (9th Cir.1979); *accord* Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 711, 720 (9th Cir.1981)). More specifically, we require either that the courts have designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny or that Congress has indicated through legislation that the class required special protection. (citing *DeSantis*, 608 F.2d at 333).

Id. at 718.

The second line of cases is represented by Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987). In *Gibson*, the Ninth Circuit interpreted *Carpenters* as "having explicitly restricted [§ 1985(3)] coverage to conspiracies motivated by racial bias." 781 F.2d at 1341. The court then affirmed the District Court's dismissal of the plaintiffs' § 1985(3) claim, because they had "failed to allege that the law enforcement abuses they claim they suffered were on account of their race." *Id.*

41. Stevens v. Tillman, 855 F.2d 394, 405 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989).

42. Fisher v. Shamburg, 624 F.2d 156 (10th Cir. 1980) (conspiracy to assault a black man at a roadside diner); Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979) (conspiracy by law enforcement officials against Black Panthers), *rev'd in part on other grounds*, 446 U.S. 754 (1980); Bergman v. United States, 551 F. Supp. 407 (W.D. Mich. 1982) (conspiracy by members of K.K.K. and others to attack "Freedom Riders" during trip through Alabama).

43. Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499 (9th Cir. 1979) (conspiracy against female insurance policy holder); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1243-44 (3d Cir. 1979) (male employee injured in furtherance of a conspiracy against female em-

construing § 1985(3) have not limited its protection to racial or otherwise suspect classifications and have applied it in more unusual contexts, such as conspiracies against environmentalists,[45] members of a family,[46] or political opponents.[47] Other courts have been more strict in limiting the coverage of the Ku Klux Klan Act and dismissed claims lodged by handicapped individuals,[48] debtors,[49] homosexuals,[50] and parents who wished to school their children at home.[51]

As recently as 1983, the Supreme Court in *United Brotherhood of Carpenters & Joiners v. Scott*,[52] declined to describe the particular groups, or establish a specific methodology for determining classes protected under part two of the *Griffin* test, stating that it was a "close question whether § 1985(3) was intended to reach any class-based animus

---

ployees had proper standing under § 1985(3) to bring action), *rev'd on other grounds*, 442 U.S. 366 (1979).

44. St. Agnes Hosp. v. Riddick, 688 F. Supp. 478 (D. Md. 1987) ("Religious group" as represented by Roman Catholic affiliated hospital, was a class falling within the ambit of § 1985(3) as an alleged object of discriminatory animus); Taylor v. Gilmartin, 686 F.2d 1346 (10th Cir. 1982) (conspiracy to "deprogram" member of religious cult), *cert. denied*, 459 U.S. 1147 (1983); Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973) (conspiracy against person of Jewish faith).

45. Westberry v. Gilman Paper Co., 507 F.2d 206 (5th Cir. 1975) (because of employee's anti-pollution efforts and activities directed against the company, the individual defendants, acting for the company, conspired to take his life and conspired to and did effectuate his dismissal from his job, in violation of his equal protection and due process rights to an extent sufficient to merit remand), *vacated en banc per curiam as moot*, 507 F.2d 215 (5th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976).

46. Azar v. Conly, 456 F.2d. 1382 (6th Cir. 1972) (a single family is a sufficient class).

47. Means v. Wilson, 522 F.2d 833 (8th Cir. 1975) (political opponents are a sufficient class), *cert. denied*, 424 U.S. 958 (1976); Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973) (supporters of a political candidate are a sufficient class).

48. D'Amato v. Wisconsin Gas Co., 760 F.2d 1474, 1485-87 (7th Cir. 1985) (protection of the statute denied to handicapped individuals). The Court stated:

> Being handicapped is not a historically suspect class such as race, national origin, or sex nor is the right claimed, employment, a fundamental Constitutional right. Thus handicaps differ significantly from classes based on race, ethnic origin, sex, religion and political loyalty that have previously been recognized as possibly supporting a [§] 1985(3) claim.

Id. at 1486 (citations omitted); *see also* Wilhelm v. Continental Title Co., 720 F.2d 1173 (10th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984).

49. Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979) (debtors denied protection under § 1985(3)). *But see* McLellan v. Mississippi Power & Light Co., 526 F.2d 870 (5th Cir. 1976) (debtors seeking relief under the bankruptcy laws a valid class).

50. DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (homosexuals are not a class within the meaning of § 1985(3)). "The courts have not designated homosexuals a 'suspect' or 'quasi-suspect' classification so as to require more exacting scrutiny of classifications involving homosexuals." *Id.* at 333.

51. Clonlara, Inc. v. Runkel, 722 F. Supp. 1442 (E.D. Mich. 1989) (people who wish to provide for their children's education at home are an insufficient class).

52. 463 U.S. 825 (1983).

other than animus against [African-Americans] and those who championed their cause, most notably Republicans."[53] The oft-quoted phrase from *Carpenters*, that the conspiracy be motivated by "some racial or perhaps otherwise class-based, invidiously discriminatory animus"[54] appears to open the door to other types of discrimination, but it has been interpreted by some courts as limiting the classes cognizable under the Ku Klux Klan Act to African-Americans.[55] Essentially, Justice White's opinion clarified only one limited issue: that the *Carpenter* majority was unwilling to extend § 1985(3) protection "to reach conspiracies motivated by bias towards others on account of their *economic* views, status, or activities."[56] This construction of the statute was based on the Court's interpretation that the Forty-Second Congress did not intend to "extend § 1985(3) into the economic life of the country . . . ."[57] The Court found that the animus which concerned the legislature was directed "against [African-Americans] and their sympathizers, and perhaps against Republicans as a class, but not against economic groups as such."[58]

In the wake of *Carpenters*' failure to clarify the issue, a question remains as to the proper analysis for determining which classes of persons will be afforded protection under § 1985(3). A first impression review of the statute indicates that women are not excluded from the Act. The statute's language is broad and speaks of "persons" and "class[es] of persons" that are provided with a remedy for conspiracies which would seek to deny them "equal protection of the laws" and "equal privileges and immunities under the laws."[59] The primary import of this language limits actionable conspiracies to those motivated by a malice toward the

53. *Id.* at 836.

54. *Id.* at 829. The Court specifically refused to affirm the lower courts' ruling that § 1985(3) reaches conspiracies other than those motivated by racial bias. *Id.* at 835.

55. *See* Gibson v. United States, 781 F.2d 1334, 1341 (9th Cir. 1986) (*Carpenters* "explicitly restricted the statutory coverage to conspiracies motivated by racial bias."), *cert. denied*, 479 U.S. 1054 (1987); Grimes v. Smith, 776 F.2d 1359, 1365-68 (7th Cir. 1985) (*Carpenters* questions the ability of victims of non-racial conspiracies to recover under § 1985(3)). The court held that § 1985(3) does not reach non-racial political conspiracies, stating that:

> Since its decision in *Griffin*, the [Supreme] Court has not expressly provided a remedy to a group or class other than blacks. The import of both *Griffin* and [*Carpenters*] is that the legislative history of § 1985(3) does not support extending the statute to conspiracies other than those motivated by a racial, class-based animus against "[African-Americans] and their supporters."

Id. at 1366.

56. 463 U.S. at 837 (emphasis in original). Furthermore, animus based generally on the economic views or commercial interests of a class was beyond the statute's ambit. *Id.* at 837-39.

57. *Id.* at 837.

58. *Id.* at 838.

59. 42 U.S.C. § 1985(3) (1982).

victims because of their membership or affiliation with a particular class.[60] An additional limitation is that the class is not defined in terms of the defendants' actions, but must exist independently of their action.[61] As indicated by Justice Blackmun, "[a]side from this initial rule of exclusion . . . the types of classes covered by the statute are far from clear."[62]

The statutory language of § 1985(3) is reminiscent of the Equal Protection Clause of the fourteenth amendment. The Equal Protection Clause has been interpreted by the Supreme Court to require laws which draw classifications based upon gender, race, illegitimacy, alienage, and national origin to receive some form of heightened judicial scrutiny as to their propriety.[63] Taking its cue from the similar wording of the Equal Protection Clause, the Sixth Circuit has interpreted the language of the Ku Klux Klan Act to find that the distinction between classes protected by § 1985(3) and those that are unprotected is rooted in traditional equal protection analysis.[64] The classes of individuals protected by the "equal

60. *Carpenters*, 463 U.S. at 850 (Blackmun, J., dissenting).

61. *Id.* (citing Askew v. Bloemker, 548 F.2d 673, 678 (7th Cir. 1976); Lopez v. Arrowhead Ranches, 523 F.2d 924 (9th Cir. 1975)). For a further discussion of this issue, see *infra* notes 105-111 and accompanying text.

62. *Carpenters*, 463 U.S. at 850. Unlike the *Carpenters* majority, the dissent viewed Klan violence as politically rather than racially motivated. The Forty-Second Congress acted to remedy this violence because they recognized that it would "fester because the general opposition to Reconstruction policies in the South rendered local law enforcement authorities less likely to protect the rights of persons affiliated in any way with those policies." *Id.* at 851. Rather than providing a list of class traits, the dissent argued that § 1985(3) was "intended to provide a federal remedy for all *classes* that seek to exercise their legal rights in unprotected circumstances similar to those of the victims of Klan violence." *Id.* at 851 (Blackmun, J., dissenting).

This view of the Reconstruction era Ku Klux Klan as using violence to promote its political agenda echoes the conclusion of a majority report of the Senate Select Committee to Investigate Alleged Outrages in the Southern States: "[I]t is clearly established . . . [t]hat the Ku-Klux organization does exist, has a political purpose, is composed of members of the democratic or conservative party, [and] has sought to carry out its purpose by murders, whippings, intimidations, and violence." H.R. REP. NO. 1, 42d Cong., 1st Sess., xxx-xxxi (1871). *See generally* Comment, *A Construction of Section 1985(3) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402, 408-10 (1979). Although the characterization of the Klan as a racist organization is true today, in 1871 the Klan:

> [W]as primarily a political organization. Understood in the light of its history, the Ku Klux Klan Act was not an antidiscrimination statute. Its drafters intended instead to proscribe conspiracies having the object or effect of frustrating the constitutional operations of government through assaults on the person, property, and liberties of individuals.

Id. at 403.

63. *See generally* 2 J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 18 (1986).

64. Browder v. Tipton, 630 F.2d 1149, 1152, 1154 (6th Cir. 1980) (denying protection to picket line crossers). *See also* Askew v. Bloemker, 548 F.2d 673, 678 (7th Cir. 1976) (class-based animus requirement must be that kind of animus where the discrimination can be said to be "invidious," that is, that the class is "based on race, ethnic origin, sex, religion, [or] political loyalty."). *Cf.*

protection of the laws" language of § 1985(3) "are those so-called 'discrete and insular' minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics."[65] This holding was reaffirmed in *National Communication v. Michigan Public Service*,[66] in which the Sixth Circuit drew a distinction along the lines of equal protection analysis, finding that groups which have traditionally received special protection under suspect classification analysis[67] are protected by § 1985(3).[68] However, the court noted that the statute "clearly does not reach all torts or equal protection violations measured by the rationality test."[69]

Applying this reasoning to gender under traditional equal protection analysis, distinctions based upon gender are considered invidiously discriminatory.[70] Thus, gender-based animus should fall under the scope of

---

Schultz v. Sundberg, 759 F.2d 714, 718 (9th Cir. 1985) (stating "[W]e require either that the courts have designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny *or* that Congress has indicated through legislation that the class required special protection." (emphasis added)).

65. *Browder*, 630 F.2d at 1150. The "discrete and insular" minorities language is taken from the famous footnote 4 of United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1934).

66. 789 F.2d 370 (6th Cir 1986) (denying the protection of the statute to small telephone companies), *cert. denied*, 479 U.S. 852 (1986).

67. Government classifications which distinguish between persons upon some "suspect" basis, or affect people in terms of their ability to exercise a fundamental right, make up the two categories of civil liberties cases which receive the "strict scrutiny test" under equal protection review. When utilizing this test, the Justices will not defer to the decisions of the other branches of government, but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling or overriding end which justifies the limitation of fundamental constitutional values. 2 J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 18.3 (1986).

68. *National Communication*, 789 F.2d at 374.

69. *Id.* Traditionally the "rational relationship test" is the first standard employed in equal protection analysis:

> The Court will not grant any significant review of legislative decisions to classify persons in terms of general economic legislation. In this area the justices have determined that they have no unique function to perform; they have no institutional capability to assess the scope of legitimate governmental ends in these areas or the reasonableness of classifications that is in any way superior to that of the legislature. Thus, if a classification is of this type the Court will ask only whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution.

2 J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 18.3 (1986).

70. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 687 (1973) (discrimination against women in military service claiming increased benefits for dependent spouse invidious). In *Frontiero*, a plurality comprised of Justices Brennan, Douglas, White, and Marshall supported elevated scrutiny of gender-based classifications. Justice Stewart concurred without reaching the level of scrutiny question. *Id.* at 677. The plurality concluded that gender classifications are inherently suspect: "[W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."

§ 1985(3). This view is consistent with recent lower court rulings that, under the *Griffin* test, both women and blacks are cognizable classes able to bring actions calculated to protect their civil rights from private conspiracies under § 1985(3),[71] and that gender-based animus satisfies the class-based animus requirement.[72]

The Supreme Court has not given clear guidance on this issue. Its only brush with the question of whether women constitute a class cognizable under the Ku Klux Klan Act came in *American Federal Savings & Loan Association v. Novotny*.[73] In *Novotny*, a male employee who alleged that he had been fired for opposing his employer's discrimination against women brought suit under both § 1985(3) and Title VII.[74] Reviewing a Third Circuit ruling that "sex discrimination [is] within the categories of

---

Id. at 688. *See also* Craig v. Boren, 429 U.S. 190 (1976) (state's 3.2% beer statute invidiously discriminates against males); Reed v. Reed, 404 U.S. 71, 75 (1971) (gender-based discrimination in the appointment of administrators).

71. *See, e.g.*, Chambers v. Omaha Girls Club, 629 F. Supp 925 (D. Neb. 1986) (women constitute a class cognizable under civil rights conspiracy statute 42 U.S.C. § 1985(3)), *affirmed*, 834 F.2d 697 (8th Cir. 1987), *rehearing denied en banc*, 840 F.2d 583 (8th Cir.1988) .

72. Volk v. Coler, 845 F.2d 1422, 1434 (7th Cir. 1988) (section 1985(3) extends beyond conspiracies to discriminate against persons based on race, to conspiracies to discriminate against persons based on sex); Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979) (women purchasers of disability insurance are a sufficient class under § 1985(3)); Hunt v. Weatherbee, 626 F. Supp. 1097 (D. Mass. 1986); Skadegaard v. Farrell, 578 F. Supp. 1209 (D.N.J. 1984) (discriminatory conspiracies motivated by sex-based animus are within intended scope of 42 U.S.C. § 1985(3), and may be remedied in action for damages brought under that statute).

However, some division has occurred as to the applicability of the Ku Klux Klan Act to sex discrimination issues. Some courts have denied § 1985(3) protection to women by limiting statutory coverage to race-based claims. Knott v. Missouri Pac. R.R., 389 F. Supp. 856 (E.D. Mo. 1975) (the remedies granted by the Civil Rights Acts only protect against discrimination on the basis of race and have never been construed to ban gender-based discrimination), *aff'd*, 527 F.2d 1249 (8th Cir. 1975). *Cf.* Gibson v. United States, 781 F.2d 1334, 1341 (9th Cir.1986); Grimes v. Smith, 776 F.2d 1359 (7th Cir. 1985). *But see* Keating v. Carey, 706 F.2d 377, 386-87 (2d Cir. 1983) ("A narrow interpretation of the statute as protecting only blacks and other analogously oppressed minorities is untenable in light of the history of the Act." *Id.* at 387.). Other courts have precluded use of § 1985(3) in situations more appropriately addressed by Title VII. *Novotny*, 442 U.S. 366 (1979); Torres v. Wisconsin Dep't of Health & Social Servs., 592 F. Supp. 922 (E.D. Wis. 1984); Snow v. Nevada Dep't of Prisons, 582 F. Supp. 53 (D.C. Nev. 1984).

As expressed in his *Carpenters* dissent, Justice Blackmun's conclusion as to which classes of persons should be within the protective ambit of the Act was more expansive than the majority's. He concluded that § 1985(3) should protect persons in danger of not receiving the equal protection of the laws. This qualification would be satisfied when plaintiffs possessed traits which *per se* meet this requirement — race, religion, gender, and national origin — and in situations in which persons with other traits are subjected to "a systematic maladministration of [the laws], or a neglect or refusal to enforce their provisions." *Carpenters*, 463 U.S. 851-853 (Blackmun, J., dissenting).

73. 442 U.S. 366 (1979).

74. 42 U.S.C. § 2000e (1964).

animus condemned by section 1985(3),"[75] the Supreme Court avoided the class-based animus problem by reversing the lower court decision on the separate ground that § 1985(3) could not be used to assert Title VII rights.[76]

Recently, however, in a case brought against anti-abortion blockaders, the Second Circuit squarely concluded that women are a protected class for § 1985(3) purposes. In this case the New York State National Organization for Women successfully used the Ku Klux Klan Act against "Operation Rescue."[77] Writing for a panel of the Second Circuit, Judge Cardamone noted that, "by its very language § 1985(3) is necessarily tied to evolving notions of equality and citizenship. As conspiracies directed against women are inherently invidious, and repugnant to the notion of equality of rights for all citizens, they are therefore encompassed under the Act."[78] Judge Cardamone juxtaposed this notion with the evolving status of women in society:

> Admittedly, the 42nd Congress' principal concern was to protect newly emancipated blacks, and those who championed them, against conspiracies. But the Act's supporters in Congress repeatedly stressed the theme of preventing "deprivations which shall attack the equality of rights of American citizens."
>
> In reviewing history, we should not forget that women in 1871 were not accorded the full rights of citizenship. Today they are.[79]

---

75. Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1243-44 (3d Cir. 1978), *rev'd on other grounds*, 442 U.S. 366 (1979). The action in *Novotny* was brought by a male employee who alleged that his discharge was a result of a conspiracy to deprive him of equal protection and equal privileges and immunities under the laws because of his support for female employees. The Third Circuit ruled that "members of a conspiracy to deprive women of equal rights are liable under § 1985(3) to persons who are injured in furtherance of the object of the conspiracy, whether male or female." *Id.* at 1244. The Supreme Court did not reach this issue.

76. 442 U.S. at 378 (reasoning that to hold otherwise would be to subvert the detailed enforcement and procedural provisions of Title VII).

77. New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2206 (1990). *N.Y.N.O.W.* stems from a series of temporary restraining orders (TRO's) issued during April, May and October 1988, and a permanent injunction issued in January 1989, to enjoin Operation Rescue from blocking access to medical facilities in and around the New York metropolitan area. The injunctions as well as court orders compelling discovery were ignored. *Id.* at 1343-45. Randall Terry, the founder of Operation Rescue, wrote a letter to his followers which acknowledged his intention to disobey the district court by asking, "[w]ill we let this N.Y.C. court intimidate us back into silent cooperation with the killing . . . [o]r will we face down this judge's order . . .?" *Id.* One of the demonstrations which were the subject of the lawsuit took place on May 2, 1988. That day demonstrators, some of whom came from as far away as Alaska, blockaded the office of a Manhattan gynecologist. Five-hundred and three of the demonstrators were arrested. New York Times, May 3, 1988, at B1, col. 1.

78. *N.Y.N.O.W.*, 886 F.2d at 1359.

79. *Id.* at 1358-59 (citations omitted).

The idea that women would be excluded from a statute which Congress intended to be a remedy against private conspirators was found to be "untenable."[80]

Originally intended as a limiting strategy, the class-based animus requirement now results in a haphazard and unpredictable application of § 1985(3). Rather than a methodology for describing classes, the cases have produced long lists of protected and unprotected groups[81] which often appear interchangeable. As the following section will show, the anti-abortion blockader cases illustrate that virtually identical fact patterns can produce opposite results.

2. *Drawing Class Lines: "Women" vs. "Women Seeking Abortions."* If women constitute a proper class for the purposes of § 1985(3), is there a distinction between "women," a group worthy of protection from conspiracies motivated by a gender-based animus, and the category "women seeking abortions" when judging conspiracies to deny access to that service? A significant litigation history involving gender-based discrimination within the context of the equal protection clause[82] has allowed the federal courts to develop a methodology for analyzing the classification "women"; but "women seeking abortions" is not as familiar. Since not all classes or persons fall within the protective scope of § 1985(3), the result of this categorization may decide the outcome of the litigation. If a court concludes that "women" is not an accurate description of the class and decides that "women seeking abortions" is the proper class definition, the latter class may be distinguished by their desire to obtain a particular medical procedure — historically not an indicia of equal protection denial — and, therefore, be denied § 1985(3) protection.

In *Roe v. Operation Rescue*[83] the court concluded that the proper class definition was "women seeking abortions." The *Roe* court cited

80. *Id.* at 1359.

81. Some courts have gone so far as to include long lists of protected and unprotected groups in their opinions. *See, e.g.*, Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 711, 719 n.15 (9th Cir. 1981), *cert. denied*, 454 U.S. 967 (1981).

82. *See generally* 2 J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 18.20-24 (1986).

83. 710 F. Supp. 577 (E.D. Pa. 1989) (granting plaintiffs' motion for summary judgment on the § 1985(3) right to travel claim and granting defendants' motion for summary judgment on the § 1985(3) right to abortion claim). On appeal the Third Circuit affirmed on state law grounds and did not address either the class-based animus requirement or the district court's grant of summary judgment for the defendant on the § 1985(3) right to abortion claim. Roe v. Operation Rescue, 919 F.2d 857 (3d Cir. 1990).

Novotny's finding that § 1985(3) is applicable to gender-based animus, but then relied on a series of cases in which various subclasses of women were found to have been afforded protection from private conspiracies under the Act.[84] Based on these precedents the court found that " 'women seeking abortions' [is] a class entitled to protection under § 1985(3), and that a conspiracy to deprive women seeking abortions of their constitutional rights is actionable under [the Act]."[85]

The defendant in *Roe*, Operation Rescue, contested the validity of the plaintiff's § 1985(3) claim on the ground that "women seeking abortions [had] made a conscious choice to conceive and were not forced to become pregnant[;] therefore, they were not a proper § 1985(3) class of individuals."[86] This defense was rejected by the court which found that "it is clear that not all women seeking abortions made a conscious, or even an inadvertent, choice to become pregnant."[87]

It is not apparent from the opinions why the *Roe* court isolated "women seeking abortions" as a class separate from "women" in general, while the *N.Y.N.O.W.* court did not. In *N.Y.N.O.W.* Judge Cardamone drew no distinction between the generic "women" and the subclass "women seeking abortions" for the purpose of finding a § 1985(3) class-based animus.[88] The defendants had argued that their actions were not a demonstration of class-based animus because there was no "ill will," and because their actions were directed at an activity, or a subgroup of women, rather than women in general.[89] The *N.Y.N.O.W.* court rejected these arguments:

> [A]nimus merely describes a person's basic attitude or intention, and because defendants' conspiracy is focused entirely on women seeking abortions, their activities reveal an attitude or animus based on gender. . . . In most cases of invidious discrimination, violations of constitutional rights occur only in response to the attempts of certain members of a class to *do* something that the perpetrators found objectionable. . . . It is sophistry for

84. Dudosh v. City of Allentown, 629 F. Supp. 849, 853 (E.D. Pa. 1985) (class of abused women denied adequate protection came within the scope of 1985(3)); Skadegaard v. Farrell, 578 F. Supp. 1209, 1217-19 (D.N.J. 1984) (class of female employees sexually or otherwise harassed by supervisor came within scope of § 1985(3)).

85. *Roe*, 710 F. Supp. at 581.

86. *Id.* at 581 n.3.

87. *Id.* The other defense to the 1985(3) claim was that defendants' conspiracy was motivated by economic animus (i.e., "to close down profit-making abortion clinics") and should be exempt under *Carpenter*. The court rejected this argument stating that "the notion that defendants' motive was 'economic' is simply not believable in light of the record" which indicated that one of the target clinics was a nonprofit organization. *Id.*

88. *N.Y.N.O.W.*, 886 F.2d 1339, 1360 (2d Cir. 1989).

89. *Id.* at 1359.

> defendants to claim a lack of class-based animus because their actions are directed only against those members of a class who choose to exercise particular rights, but not against class members whose actions do not offend them. The denial of ill-will towards the women they target and the claim that defendants' actions will benefit these women amount to an argument that "we are doing this for your own good"; a contention that usually shields one's actual motive.[90]

From the two plaintiffs' perspectives on the threshold issue of class-based animus, the outcomes of *N.Y.N.O.W.* and *Roe* were the same; class-based animus was found. However, when a variety of such subclasses are drawn, the resulting interpretations can cloud the issue of who will be protected by § 1985(3) and produce inconsistent holdings. For example, two district courts in the Ninth Circuit have reached opposite conclusions. In *Portland Feminist Women's Health Center v. Advocates For Life, Inc.*,[91] the court held that the plaintiffs constituted "a class of women who choose to exercise their constitutional right of privacy by having an abortion . . . [that was] analytically indistinguishable from a class of women who purchase disability insurance."[92] The court reasoned that in light of a Ninth Circuit decision in which women purchasers of disability insurance were found to be a sufficient class for § 1985(3) protection,[93] and because the complaint alleged discrimination against a particular class of women, "women seeking abortions" would comprise

---

90. *Id.* at 1359-60 (emphasis in original).

The leaders of the militant anti-abortion movement deny any animus or ill will toward the women they blockade. The affidavit of Randall Terry, founder of Operation Rescue, is typical of their expressed attitude:

> Nothing could be further from the truth than a claim that I act with an invidiously discriminatory animus toward women, generally, or toward abortion-bound women, particularly. Jesus did not condemn the woman at the well. As a follower of Jesus Christ, I do not have the luxury of condemning others who share my common human frailties.
>
> . . . .
>
> My abortion-related protest activities have nothing to do with hatred for any woman or a desire to treat any woman or grouping of woman [sic] in a discriminatory fashion. Rather, rescue is a form of repentance for my personal failures that led to abortion on demand in this country, and that permit abortion on demand to continue in this country.
>
> . . . .
>
> When I have participated in abortuary blockades in the past, I have never acted in a way fairly described as discriminatory toward women or abortion-bound women.

National Org. of Women v. Operation Rescue, 726 F. Supp. 300, 313-14 Attachment B (D.D.C. 1989).

91. 712 F. Supp. 165 (D. Or. 1988), *aff'd*, 859 F.2d 697 (9th Cir. 1988).

92. *Id.* at 169.

93. Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499 (9th Cir. 1979).

"a class of women that may be protected under § 1985(3)."[94]

Distinguishing between "women" and "women seeking abortions" when drawing class lines for a § 1985(3) action against anti-abortion activists has meant the difference between a viable § 1985(3) action and one precluded by the class-based animus requirement. In another Ninth Circuit decision, *National Abortion Federation v. Operation Rescue*,[95] the court concluded that "women seeking abortions is *not* a class intended to be protected by the Ku Klux Klan Act."[96] Citing *Portland Feminist*, Judge Tashima interpreted that holding as implying that "any 'particular [sub]class of women' is a protected class."[97] He criticized this approach because:

> [I]f the animus is directed at a particular class of women; then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based[;] it separates persons of the same gender from each other and, obviously, on a basis other than by gender. The inquiry, thus, must be made without respect to gender, *i.e.*, it is the "seeking abortion" trait which animates the defendants' actions and must be the basis for making the § 1985(3) analysis.[98]

Judge Tashima then concluded: "Although women, under certain circumstances, still have a constitutional right to seek an abortion, the courts have never designated 'abortion seekers' as a class requiring exacting scrutiny."[99]

Tashima's characterization of "women seeking abortions" as a gender neutral classification distinguishes the target of the anti-abortion protestors' actions from all other classifications. If the line for the class-based animus requirement is drawn in this manner, then, following equal protection guidelines, the protective ambit of § 1985(3) would not cover the target group only if the non-targeted class extended beyond the generic "men" to included "women not seeking abortions." Thus, Tashima's reasoning concludes that there are two groupings: (1) the tar-

94. *Portland Feminist*, 712 F. Supp. at 169 (D.Or. 1988), *aff'd*, 859 F.2d 697 (9th Cir. 1988).

95. 721 F. Supp. 1168 (C.D. Cal. 1989).

96. *Id.* at 1170 (emphasis added).

97. *Id.* at 1171 (citation omitted). The opinion states that:

> If this principle were carried to its logical conclusion, the following illogical result would obtain: Because women are a protected class, any subclass of women is also a protected class. Because men are not a protected class, any subclass of men is also an unprotected class. Therefore, *e.g.*, a class of homosexual women would be protected, but a class of homosexual men would not be.

Id. at 1171 n.4.

98. *Id.* at 1171.

99. *Id.*

get group, "abortion seekers"; and (2) the non-target group, "those not seeking abortions," which includes both women and men. This sophistry refuses to recognize that the harm done by anti-abortion blockaders is not limited to the subset "women seeking abortions." Rather, blockaders harm *all* women by trying to deny them reproductive control.

This reasoning is similar to the conclusion reached by a majority of the Supreme Court in *Geduldig v. Aiello*.[100] That case was an equal protection challenge to the validity a California state-run disability system which did not cover any work loss resulting from normal pregnancy. The Court held that, in the absence of a showing of an intent to discriminate against women, laws which make pregnancy classifications do not constitute gender-based discrimination.[101] In an infamous footnote, Justice Stewart wrote that the "program divides potential recipients into two groups — pregnant women and nonpregnant persons[;] . . . the first group is exclusively female the second includes members of both sexes."[102] The Court concluded that pregnancy is "an objectively identifiable physical condition with unique characteristics" that lacks an identity with gender.[103] Thus, all non-pregnant people were thought to be similarly situated.

This decision has been heavily criticized.[104] The most compelling argument that pregnancy-based classification is in fact gender classification is the capacity argument posited by scholars such as Ruth Colker. Professor Colker states:

> The category of non-pregnant persons does include both women and men; however, the Court's error was in not recognizing that women and men are not similarly situated in their non-pregnant status. Nearly all women are affected by pregnancy-based discrimination irrespective of whether they are pregnant, because nearly all women have the capacity to become pregnant. . . . A man, however, cannot become pregnant and is not affected by the presence or absence of maternity leave in the same way.[105]

Thus, the Court's reasoning failed to recognize that the treatment of pregnancy affects gender equality.

Applying this reasoning to Judge Tashima's notion that "abortion

100. 417 U.S. 484 (1974).

101. *Id.* at 496-97, 497 n.20.

102. *Id.* at n.20.

103. *Id.*

104. *See, e.g.*, Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984) (noting that criticism of *Geduldig* had risen to the level of "a cottage industry").

105. Colker, *The Female Body and the Law: On Truth and Lies*, 99 YALE L.J. 1159, 1174 (1990) (review of Z. EISENSTEIN, THE FEMALE BODY AND THE LAWS (1988)).

seekers" is a gender-neutral classification, it is clear that the other implied category, "those not seeking an abortion," is composed of men and women that are not similarly situated. Men do not have the capacity to become pregnant, thus they will never seek an abortion, and as a result they can never be subjected to the discriminatory conduct of the anti-abortion blockaders. For the most part all of the women that are in Judge Tashima's "not seeking an abortion" category, will at some point during their lives, have the capacity to become pregnant and, therefore, may choose to exercise their option to have an abortion. Thus, the anti-abortion blockaders' actions impact women in a sex-specific way, and, as such, is gender-based discrimination. The option to have an abortion exists independently of the desire to exercise it and does not come into being just at the moment a woman elects to exercise that option; just as the right to vote does not evaporate with the closing of the polls.

In addition to its conclusion that "abortion seekers" can be appropriately described as a gender-neutral classification, Judge Tashima's holding raises another important issue: the propriety of defining the class solely on the basis of the defendants' actions. To allow the defendants' actions to exclusively determine the § 1985(3) class analysis is effectively to remove from the judiciary the ability to determine the proper class. Thus a savvy conspirator in a potential § 1985(3) action has much room to determine his own fate.

This issue was first addressed in *Carpenters*:

> [T]he intended victims must be victims not because of any personal malice the conspirators have toward them, but because of their membership in or affiliation with a particular class. Moreover, the class must exist independently of the defendants' actions; that is, it cannot be defined simply as the group of victims of the tortious action.[106]

In *Askew v. Bloemker*,[107] the court concluded that, for the purposes of § 1985(3), a "class" is a group of individuals sharing "common characteristics," and can not be created *solely* by the challenged action.[108] Thus, in *Askew*, the court found that § 1985(3) did not extend to the class of persons whose homes were raided by the defendants in a lawsuit challenging raids on the plaintiffs' home.[109] Although the class must exist independently of the conspirators' actions, nevertheless:

106. 463 U.S. at 850 (Blackmun, J., dissenting) (citation omitted).

107. 548 F.2d 673 (7th Cir. 1976).

108. *Id.* at 678. *Accord* Rogers v. Lincoln Towing Service, Inc., 771 F.2d 194, 203 (7th Cir. 1985) (a § 1985(3) class is a readily identifiable group).

109. 548 F.2d at 678.

> [C]ases now make it plain that it is the agreement *vel non* among the alleged conspirators to single out a particular group or class for discriminatory interference with constitutional rights that should itself define the class for purposes of section 1985(3). If a conspiracy actionable under section 1985(3) does exist, it will have defined for itself the group or class or persons it intends to victimize.[110]

In *Volk v. Coler*,[111] the court found that "proving a violation of one's right to be free from . . . sexual harassment does not require proof of discrimination against an entire class of women (or men). Likewise to succeed under § 1985(3), Volk need not prove that there was an agreement to discriminate against an entire class of women."[112]

The agreement among the anti-abortion blockaders is to act in a manner that will result in the denial of abortion to all women. Their action may target only women who may be seeking that procedure, but the intended effect is to eliminate this procedure as an option for any and all women. An analogous situation would be if African-Americans were subjected to blockading activities when they tried to enter a polling place. Voting rights exist independently of the exercise of that right. Although a portion of the African-American population may elect not to exercise their right to vote, few would argue that interfering with African-Americans in the exercise of that right is somehow limited to "African-Americans seeking to vote." The action clearly impacts the entire race and, therefore, the proper class for § 1985(3) purposes would be African-Americans.

The analysis in *Roe* indicates that the court viewed the class "women seeking abortions" as distinct from the generic "women" because of an unpredictable circumstance — an unwanted pregnancy. This reasoning begs the question of whether distinguishing between women seeking abortions and women not seeking abortions is appropriate when drawing lines for the class-based animus requirement. The two categories are differentiated only by the operation of a chance event coupled with a desire to exercise a legal option. The temporal nature of pregnancy also clashes with the notion of "immutable characteristics" because all "women seeking abortions" will return to the class "women," regardless of the out-

110. Hobson v. Wilson, 556 F. Supp. 1157, 1167 (D.D.C. 1982). *See* Scott v. Moore, 640 F.2d 708, 718-19 (5th Cir. 1981). *Cf.* Kimble v. McDuffy, 648 F.2d 340, 346-47 (5th Cir. 1981) (en banc), *cert. denied*, 454 U.S. 1110 (1981). *See also* Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 711, 719 n.15 (9th Cir. 1981), *cert. denied*, 454 U.S. 967 (1981). *See generally* Hampton v. Hanrahan, 600 F.2d 600, 624 (7th Cir. 1979), *cert. denied on these grounds, rev'd in part on other grounds*, 446 U.S. 754 (1980).

111. 845 F.2d 1422 (7th Cir. 1988).

112. *Id.* at 1434.

come of their search for an abortion. The permeability of this boundary suggests that the distinction between the two groupings is artificial because the only operative "discrete and insular" classification based on an *inherent* characteristic is the generic "women." Necessarily, since only women get pregnant and therefore only women will seek abortions, animus against a class of women seeking abortions is animus against women. The "women seeking abortions" classification also ignores the fact that women who go to the clinics for other reproductive health care are interfered with as well. Tashima's conclusion effectively eliminates from the class women who successfully had an abortion at a clinic the day before it was blockaded. It also ignores a major premise of the women's movement, namely, that to control their lives, career, or status, women require the option of a safe and secure abortion.[113] In short, only the female of any species is the one that bears young or produces eggs. Consequently, it is absurd to differentiate among women based on how they attempt to exercise control over the event of pregnancy.[114]

When Operation Rescue targets a clinic, it seeks to prevent women seeking abortions from exercising a right that is available only to their gender. Operation Rescue is trying to deprive women of precisely that right. Thus, as the Second Circuit recognized, "women seeking abortions" is a tautological description of the generic "women" with a redundancy caused by the fact that only women can seek abortions and, consequently, the ability to "seek abortions" is gender-specific. Therefore, the answer to the question presented in *Bray*, "[d]o 'women seeking abortions' constitute a valid class for purposes of the 'class animus' requirement of § 1985(3)" is yes. That classification is no more than a tautological extension of the class "women" which is a group covered by the protective ambit of § 1985(3). Finally, because abortion is a gender-

113. *See generally* K. LUKER, ABORTION & THE POLITICS OF MOTHERHOOD 110-121 (1984). Although tangential to this discussion, reproductive control extends beyond the right to safe and secure abortion and contraceptives. As the feminist legal scholar Catherine MacKinnon has described it:

> The right to reproductive control . . . would include the abortion right but would not center on it. Women would have more rights when they carry a fetus: sex equality rights. Women who are assaulted and miscarry, women who are forced to have abortions and women who are denied abortions, women who are sterilized, and women who are negligently attended at birth all suffer deprivation of reproductive control.

MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1318 (1991).

114. Congress has recognized that discrimination on the basis of pregnancy is gender-based discrimination even though pregnant women form a subclass of women. *See* Pub. L. 95-555, 92 Stat. 2076 (1978) which adds § 701(k) to Title VII in order to proscribe discriminatory treatment of employees based on pregnancy or childbirth as sex discrimination.

specific right, opposition to abortion which physically interferes with the free exercise of that legal option is per se discrimination against women for the purposes of the "class animus" requirement.

B. *§ 1985(3) as a Remedy: Establishing Rights Interfered with by Anti-Abortion Blockaders*

The United States Supreme Court has defined § 1985(3) as a remedial statute which creates no substantive rights.[115] Therefore, once class-based animus has been established as a motivation for the conspirators' actions, plaintiffs must demonstrate that separate rights have been hindered as a result of the conspiracy. A threshold issue then arises as to whether a plaintiff must show that state action has infringed a right or whether an infringement by private actors will suffice to state a claim.

The Equal Protection Clause of the fourteenth amendment prohibits any State from denying any person the equal protection of the laws, but the United States Supreme Court has determined that this protection is "against *state action*, not against wrongs done by *individuals*."[116] The majority opinion in *Griffin* recognized a similarity between the § 1985(3) provision requiring that the conspiracy be "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,"[117] and the wording of the Equal Protection Clause of the fourteenth amendment prohibiting a State from denying to "any person within its jurisdiction the equal protection of the laws."[118] The Court

115. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 372, 376 (1979). Justice Blackmun's thoughtful dissent in *Carpenters* challenges the *Novotny* Court's construction of § 1985(3) as exclusively remedial. *See Carpenters*, 463 U.S. at 847 n.10. The original intent of the Forty-Second Congress was to provide a list of actionable crimes which would allow enforcement of the equal protection of the laws in the face of state inaction. *Id.* at 844. During the house debates, concerns were raised about whether the bill would "usurp state authority over local and individual crimes." *Id.* at 842-43. The remarks of Representative Garfield indicate that:

> [He] did not believe that Congress had the power to displace the criminal jurisdiction of the States. In his view, however, the Fourteenth Amendment provided citizens with an affirmative and congressionally enforceable right to equal protection of the laws: "the provision that the States shall not 'deny the equal protection of the laws' implies that they shall afford equal protection."

Id. at 843 (citing CONG. GLOBE, 42d Cong., 1st Sess., App. 153 (April. 4, 1871)).

116. United States v. Williams, 341 U.S. 70, 92 (1951) (emphasis in original) (Douglas, J., dissenting).

117. 42 U.S.C. § 1985(3) (1982).

118. U.S. CONST. amend. XIV, § 1: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

noted that "[a] century of Fourteenth Amendment adjudication has . . . 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."[119] The broader ambit of § 1985(3) was demonstrated in *Griffin*, where the facts[120] allowed the Supreme Court to premise federal jurisdiction on the thirteenth amendment[121] and the right of interstate travel,[122] both of which are constitutionally protected from private and official infringement. By so doing, the Court avoided addressing the scope of § 1985(3) under the fourteenth amendment,[123] and, consequently, did not explicate a specific state action requirement for private conspiracies to deprive rights which have their source in that amendment.

Twelve years later in *United Brotherhood of Carpenters & Joiners v. Scott*,[124] the United States Supreme Court specifically endorsed the four-part test developed in *Griffin*[125] and reaffirmed the holding that the Ku Klux Klan Act was "intended to reach private conspiracies which in no way involved the state."[126] However, the majority opinion contained some potentially confusing dicta in which Justice White noted that § 1985(3) does not extend to private conspiracies to interfere with first amendment rights unless there is some state involvement.[127] The major-

119. *Griffin*, 403 U.S. at 97. The Court continued by saying, "[i]ndeed, 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." *Id.* (emphasis in original).

120. *Griffin* arose from an incident in 1966. Three African-American citizens of Mississippi were passengers in a car being driven in Tennessee when the two white defendants, who mistakenly believed that the driver of the car was a civil rights worker, forced the car to stop. The white men then held the occupants of the car at bay with firearms and maliciously clubbed them all, causing each to be severely injured. *See* 403 U.S. 88, 90-91 (1971).

121. U.S. CONST., amend. XIII.

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

> Some privileges and immunities of citizenship, such as the right to engage in interstate travel and the right to be free of the badges of slavery, are protected by the Constitution against interference by private action, as well as impairment by state action. Private conspiracies to deprive individuals of these rights are, as the Court held in [*Griffin*], actionable under § 1985(3) without regard to any state involvement.

Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 383 (1979).

123. *Griffin*, 403 U.S. at 107.

124. 463 U.S. 825 (1983).

125. *Id.* at 829-30.

126. *Id.* at 834.

127. *Id.* at 833. It is important to note that the state involvement requirement is neither the same as the state action requirement of 42 U.S.C. § 1983, *nor* is it the traditional "state action" required to enforce many individual rights contained in the text of the Constitution, the Bill of

ity reasoned that the first and fourteenth amendments "restrain only official conduct."[128] Therefore, the Constitution cannot guarantee such privileges as freedom of speech or the right of assembly *vis-a-vis* private individuals.[129] If the source of the rights to be vindicated by § 1985(3) is either the first or fourteenth amendment, then it is "necessary for [a plaintiff] to prove that the State was somehow involved in or affected by the conspiracy."[130]

Therefore, the substantive rights which a plaintiff can assert in a § 1985(3) cause of action fall into two categories: (1) those that are so fundamental in nature as to be asserted against purely private conspiracies; and (2) those rights which restrain only official conduct and require an additional demonstration of state involvement to be asserted against private conspirators.

1. *The Right to Travel.* Recent § 1985(3) litigation against anti-abortion conspirators has centered around two possible rights denied to women: (1) the right to travel, which can be asserted against purely private conspiracies; and (2) the right to an abortion, which has the attendant state involvement requirement. Pro-choice advocates have effectively invoked the protective ambit of § 1985(3) by asserting that anti-abortions blockaders interfere with the right to travel of women whose passage they hinder or prevent. However, one of the questions presented by *Bray* is whether purely private actors who hinder access to a clinic providing abortions violate the federal constitutional right to interstate travel because some of its patients come from out of state to receive its services.

The right to free and unimpeded interstate travel is guaranteed by the Constitution against both private and official encroachment. The Supreme Court has firmly established that this right does not rest on the fourteenth amendment, but is protected from purely private interference.[131] As stated in *Griffin*, "[the Supreme Court's] cases have firmly

Rights, and the various amendments to the Constitution which protect individual liberties. For an explanation of the state action requirement, see generally 2 J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 16 (1986). *See also infra* notes 154-57 and accompanying text.

128. *Carpenters*, 463 U.S. at 833. Although the *Carpenters* dicta discusses the state involvement requirement it is important to note that the Court did not rule on this issue. Rather, the dispositive ground for overruling the case was a failure to fulfill the class-based animus requirement. *Id.* at 834.

129. *Id.* at 833. This would appear to be the same as the "state action" requirement. However, this similarity is specious. For a discussion of the "state involvement requirement," see *infra* § III.B.2.

130. *Carpenters*, 463 U.S. at 833.

131. *Griffin*, 403 U.S. at 105-06; Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969); United States v. Guest, 383 U.S. 745, 758 (1966).

established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and can be assert[ed] against private as well as governmental interference."[132] Therefore, rather than being a restraint on state action, deprivations of the right to interstate travel are actionable under § 1985(3) without establishing any form of state involvement in the conspiracy.[133]

In the landmark right to travel case of *Shapiro v. Thompson*,[134] the Supreme Court determined that, to assert interference with the right to travel, a plaintiff need not demonstrate that the defendant completely thwarted the right to travel. Rather, the Court concluded that is necessary to show only that the right to travel was somehow penalized. The *Shapiro* Court struck down three statutes which denied welfare benefits to people who had not lived within the jurisdiction for at least a year. The court found that the interference with interstate travel stemmed from the deterrent effect the statute had on the entry of indigent persons.[135] Thus, under *Shapiro* there is no requirement that the right to travel be physically impeded, only that it be deterred. The Supreme Court has also specifically held that the right to travel includes the right to travel interstate to receive abortion services, and "protects persons who enter [a state] seeking the medical services that are available there."[136]

Women denied entrance into a clinic because of blockading activity are severely penalized. Randall Terry, founder of Operation Rescue,[137] has stated that the purpose of these "rescue" demonstrations is to prevent any activity from taking place at a targeted clinic and that "while the child-killing facility is blockaded, no one is permitted to enter past the rescuers . . . [d]octors, nurses, patients, staff, abortion-bound women, families of abortion-bound women — all are prevented from entering the abortuary while the rescue is in progress."[138]

In its finding of facts, the *National Organization for Women v. Oper-*

132. *Griffin*, 403 U.S. at 105 (Justice Harlan dissented on the right to travel issue).

133. *Carpenters*, 463 U.S. at 832-33.

134. 394 U.S. 618 (1969).

135. *Id.*

136. Doe v. Bolton, 410 U.S. 179, 200 (1973) (in-state residence requirement as prerequisite to abortion services violates right to travel).

137. *See supra* note 2.

138. National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1488 (E.D. Va. 1989), *aff'd per curiam*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991).

By preventing women from entering the facility, Operation Rescue claims to have "rescued" fetuses scheduled for abortion. *Id.* at 1488.

ation Rescue court found that blockades effectively accomplished Operation Rescue's stated goal of preventing both patients and medical personnel from entering the clinic.[139] In addition to physically blockading all of the clinic's entrances and exits, "rescuers" also "defaced clinic signs, damaged fences and blocked ingress into and egress from the clinic's parking lot by parking a car in the center of the parking lot entrance and deflating its tires."[140] Finally, the court found that members of Operation Rescue had "strewn nails on the parking lots and public streets abutting the clinics to prevent the passage of any cars."[141]

The effect of this purposeful action was the creation of a "substantial risk that existing or prospective patients may suffer physical or mental harm."[142] Evidence was introduced which showed that, "for some women who elect to undergo an abortion, clinic medical personnel prescribe and insert a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications."[143] These facts clearly indicate the substantial harm to the victims of Operation Rescue's blockading actions.

In *N.Y.N.O.W.*, the Second Circuit found that women seeking abortions often travelled to New York to avail themselves of its superior medical facilities.[144] Blockades of clinics, therefore, "constitute an infringement upon these women's right to travel. Thus, plaintiffs [were] entitled to summary judgment on their § 1985(3) claim due to the deprivation of the individual right of a citizen to unhindered interstate travel to seek medical services."[145] The circuit court thus affirmed the district court ruling that interstate travel need not actually be thwarted. Rather, to satisfy the injury element, plaintiffs need only show that the exercise of the right to travel was penalized.[146] In *N.Y.N.O.W.*, this was demonstrated by undisputed facts which established that the "defendants' activities obstruct[ed] access to medical facilities to women who have traveled from out-of-state" and that defendants "have repeatedly forcibly denied

139. *Id.* at 1489.

140. *Id.*

141. *Id.* at 1489-90.

142. *Id.* at 1489.

143. *Id.*

144. New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1360 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).

145. *Id.* at 1361.

146. New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247, 1260, n.15 (S.D.N.Y. 1989).

access to abortion facilities in the New York area, and they intend to continue to do so."[147]

In *National Organization for Women*, the court found that "substantial numbers" of the patients utilizing the services of clinics in the Washington Metropolitan area came from out of state.[148] The court concluded that " '[r]escue' demonstrations, by blocking access to clinics, therefore have the effect of obstructing and interfering with the interstate travel of these women."[149] The court was unpersuaded by defendant blockaders' argument that "clinic closings affect only intra-state travel, from the street to the doors of the clinics."[150] Rejecting this line of reasoning, the court stated: "[w]ere the court to hold otherwise, interference with the right to travel could occur only at state borders. This conspiracy . . . effectively deprives organizational plaintiffs' non-Virginia members of their right to interstate travel."[151]

The § 1985(3) anti-abortion cases demonstrate that militant anti-abortion groups which engage in blockading activity generate substantial risks to patients seeking the various medical services available at these clinics. It is reasonable to conclude that this substantial risk is a deterrent to those women that travel from out-of-state to the clinics. As a result, the answer to the question presented by *Bray* — whether purely private actors who hinder access to a clinic providing abortions violate the federal constitutional right to interstate travel because some of its patients come from out of state to receive its services — is yes.

Establishing that anti-abortion conspirators have interfered with the right to travel has been an effective strategy which allows clinics that offer pregnancy-related services to invoke the protection of § 1985(3) and it should continue to be so if the Supreme Court respects the holding of *Shapiro* and recognizes that militant anti-abortion blockaders have a deterrent effect on women who travel interstate to receive pregnancy related services.

---

147. *Id.* at 1259-60.

148. National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1489 (E.D. Va. 1989), *aff'd per curiam*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* Bray v. Women's Health Clinic, 111 S. Ct. 1070 (1991). The court noted that,"[f]or example twenty (20) to thirty (30) percent of patients served at the Commonwealth Women's Clinic in Falls Church, Virginia come from out of state. Records for these patients reflect permanent residence addresses in Maryland, the District of Columbia, Pennsylvania, Texas, West Virginia, New Jersey, New York, and Florida." *Id.*

149. *Id.*

150. *Id.* at 1493.

151. *Id.*

2. *The Right to an Abortion.* Civil plaintiffs seeking injunctive relief from militant "right to life" conspirators by alleging interference with the right to abortion[152] have encountered two difficulties: (1) overcoming the state involvement requirement; and (2) a reluctance on the part of the judiciary to decide a perceived constitutional issue when other grounds for disposition are available.

Unlike the right to unimpeded interstate travel, a plaintiff alleging interference with a right protected only against state interference must prove that the "State was somehow involved in or affected by the conspiracy."[153] The concept of the state involvement requirement is somewhat elusive. The Supreme Court's most succinct description came in *Novotny* where it stated that "if private persons take conspiratorial action that prevents or hinders the constituted authorities of any State from giving or securing equal treatment, the private persons would cause those authorities to violate the fourteenth amendment; the private persons would then have violated § 1985(3)."[154]

The state involvement requirement is not the same as the state action requirement found in traditional equal protection analysis.[155] The

152. *E.g.*, National Org. for Women v. Operation Rescue, 726 F. Supp. 1483 (E.D.Va. 1989), *aff'd per curiam*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991).

153. *Carpenters*, 463 U.S. at 833. In response to the concerns about federal encroachment into the states' criminal jurisdiction, the list of actionable crimes was replaced with a civil cause of action for persons injured by the conspiracy under § 1985(3). *Id.* at 844. Blackmun's dissent concludes:

> [B]y limiting [§ 1985(3)] to deprivations of equal protection and of equal privileges and immunities, the Forty-Second Congress avoided the constitutional problems . . . of a general federal criminal law. The effect of that language was to limit federal jurisdiction to cases in which persons were the victims of private conspiracies motivated by the intent to interfere in the equal exercise and enjoyment of their legal rights.

Id. at 847.

To buttress his construction of the statute (see *supra* note 114), Blackmun refers to the Court's statement in *Griffin* that "there is nothing inherent in the [wording of the statute] that requires the action working the deprivation to come from the State." 403 U.S. 88, 97 (1971). Blackmun argues that this dicta "implicitly recognizes that the Members of the Forty-Second Congress believed that the right to equal protection of the laws could be violated by private action." *Carpenters*, 463 U.S. at 848 n.12. The dissent asserts that § 1985(3)'s limiting language was designed to prevent the creation of a "general federal criminal or tort law" not to impose a "state-action or state-involvement requirement." *Id.* at 849. Justice Blackmun would find this source of congressional power in the commerce clause. *Id.* at 849 n.14.

154. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 384 (1979) (Stevens, J., concurring). *See also* Portland Feminist Women's Health Center v. Advocates for Life, 681 F. Supp. 688 (D. Or. 1988) (conspiracy to deprive women of their federal constitutional right to choose abortion was actionable under § 1985(3) only upon showing of state action; purely private conspiracy by "right to life" group was not actionable).

155. Regarding this difference, the Supreme Court has stated:

> Had § 1985(3) . . . prohibited conspiracies to deprive any person of the Equal Protection

fourteenth amendment specifically addresses itself to limiting the action that can be taken by either the federal government or the states. If a deprivation of rights guaranteed by the Equal Protection Clause occurs, a private citizen will only be protected if the alleged wrongdoer is either a person or entity acting on behalf of the government.[156] The state action requirement of the fourteenth amendment means that if an alleged wrongdoer does not have sufficient contacts with the government, then the activity is free from constitutional limitation and the aggrieved party will receive no relief from the federal courts.[157] The difference between the state action requirement and § 1985(3)'s state involvement requirement was best described in Justice Blackmun's dissent in *Carpenters*:

> The Court does not require that the conspirators be state officials or act under color of state law. Instead, the requirement is that the conspiracy intend to cause the State or a person acting under color of state law to deprive the victims of the conspiracy of their constitutional rights.[158]

The Supreme Court has said that a woman's right to choose to have an abortion "is fundamental."[159] However, this right is based on the right to privacy which is protected from state interference by the Fourteenth Amendment. Therefore, most courts have interpreted *Carpenters* to require a plaintiff to demonstrate some state involvement.[160] The District Court in *N.Y.N.O.W.* found this requisite state involvement when police were rendered incapable of securing equal access to medical services for women seeking abortions. The conspirators caused the state involvement in two ways: 1) by blockading clinics; and 2) by refusing to notify police of their next target clinic.[161] These acts were found to have

---

> of the laws guaranteed by the Fourteenth Amendment or freedom of speech guaranteed by the First Amendment, it would be untenable to contend that either of those provisions could be violated by a conspiracy that did not somehow involve or affect a state.

Carpenters, 463 U.S. at 831.

156. Justice Rehnquist developed a test for determining the presence of state action in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). Justice Rhenquist stated that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 358.

157. 2 J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 16.1 (1986).

158. *Carpenters*, 463 U.S. at 840 n.2 (Blackmun, J., dissenting).

159. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986). The impact of Webster v. Reproductive Health Services, 110 S. Ct. 3040 (1989), is unclear. *See infra* notes 171-72 and accompanying text.

160. *Carpenters*, 463 U.S. at 833.

161. *N.Y.N.O.W.*, 704 F. Supp. at 1260. The ruling by the district court in *N.Y.N.O.W.* is inconsistent with the finding in *Roe v. Operation Rescue* that the failure of anti-abortion protestors to notify police of the intended sites of their blockade was too minimal to satisfy the state involvement requirement. *See Roe*, 710 F. Supp. at 583.

satisfied the *Novotny* test by preventing the local authorities from being able to secure equal protection for the clinics' patients.

Many of the fact patterns found in today's § 1985(3) claims demonstrate the inability of local authorities to cope with Operation Rescue's militant protests. A week's worth of protests triggered *N.Y.N.O.W.*[162] Based on assurances by the New York City Police Department that they would be able to ensure access to any targeted clinic, a temporary restraining order (TRO) did not include any specific language prohibiting blockades. On Monday May 2, 1988, despite the previous assurance by the police, the gynecologist's office in Manhattan targeted by Operation Rescue was closed until 1:15 P.M. when the demonstration ended. For most of the day police were either unwilling or unable to invoke the first TRO, prohibiting protestors from physically interfering with patients trying to enter the building, despite the fact that pro-choice counter demonstrators pleaded with them to do so.[163] Five-hundred and three blockaders sat on the sidewalk for five hours before finally being arrested by the police.[164]

The paralysis of police in the face of anti-abortion blockades is analogous to the inability or unwillingness of the states to enforce their own laws which prompted Congress to pass § 1985(3).[165] Indeed, the district court in *N.Y.N.O.W.* found "quite persuasive plaintiffs' analogy between defendants' activities, seeking forcibly to prevent women from exercising their constitutional right to decide whether to terminate a pregnancy, and the organized actions of the Ku Klux Klan that inspired the Forty-Second Congress to enact section 1985(3)."[166]

Although the district court in *N.Y.N.O.W.* held for the plaintiffs on their right to abortion claim, the Second Circuit declined to rule on this issue on appeal. Instead, the circuit found that because "the interference with a right to travel [was] an independent constitutional ground upon which to affirm the district court's § 1985(3) holding, it [was] unneces-

162. *N.Y.N.O.W.*, 704 F. Supp. at 1250-51. The protests took place between April 30 and May 7, 1988. *Id.*

163. *503 Held in Abortion Protest on E. 85th St.*, N.Y. Times, May 3, 1988, at B1, col. 2.

164. *N.Y.N.O.W.*, 704 F. Supp. at 1251.

165. Representative Garfield described the Act as a remedy for the "systematic maladministration of [the laws], or a neglect or refusal to enforce their provisions." CONG. GLOBE, 42d Cong., 1st Sess., App. 153 (Apr. 4, 1871). *See also id.* at 317 (statement of Rep. Shellabarger) (expressing a fear that local law enforcement authorities in the South were unlikely to protect the rights of people affiliated with Reconstruction policies).

166. New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247, 1259 n.13 (S.D.N.Y. 1989).

sary . . . to rule on this constitutional claim."[167]

In *National Organization for Women*, a Virginia district court found that Commonwealth Women's Clinic had been the target of "rescue" demonstrations "on almost a weekly basis for the last five years."[168] During "rescue" demonstrations protestors often overwhelm local police forces which rarely, if ever, have occasion to deal with disturbances of a similar magnitude. In the Virginia case, trial testimony determined that on October 9, 1988, the thirty members of the Falls Church Police Department were unable to prevent a clinic from being closed down for over six hours, notwithstanding the fact that the police managed to arrest two hundred and forty protestors.[169] The court concluded that "[l]imited police department resources combined with the typical absence of any advance notice identifying a target clinic renders it difficult for local police to prevent rescuers from closing a facility for some period of time."[170] This blockade was not an isolated incident. For example, the facts of *National Organization for Women* show that one of the targeted clinics had been subjected to "rescue" demonstrations "on almost a weekly basis for the last five (5) years."[171]

Despite this hinderance of state enforcement, the district court declined to rule on the right to abortion claim because of uncertainty about the security of that right following the recent Supreme Court ruling in *Webster v. Reproductive Health Services*.[172] Discussing plaintiffs' argument that the right to an abortion is of such a fundamental character as to be guaranteed against private interference, the Virginia district court stated that:

> Such a claim is problematic, both because it is novel and because *Webster* suggests that the law concerning a putative abortion right is in a state of flux. Given this and given that there is another independent basis for relief under Section 1985(3), the Court conclude[d] that it is unnecessary and imprudent to venture into this thicket. Courts should avoid constitutional questions where other grounds are available and dispositive of the issues presented.[173]

---

167. New York State National Organization for Women v. Terry, 886, F.2d 1339, 1361 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).

168. 726 F. Supp. at 1489.

169. *Id.* at n.4.

170. *Id.*

171. *Id.* at 1489.

172. 492 U.S. 490 (1989).

173. 726 F. Supp. 1483, 1494 (E.D. Va. 1989) (citations omitted). The Court continued this discussion in a footnote saying:

> Although the [Supreme] Court noted that the facts of *Webster* did not present an appro-

Another view has found limited support in the Eighth Circuit. In *Lewis v. Pearson Foundation, Inc.*[174] the court addressed the state action requirement of § 1985(3) and found that a cause of action had been stated against a "mock abortion clinic" run by an anti-abortion group. The facts of this case illustrate another method used by anti-abortion conspirators to prevent abortions. Warna Lewis, a woman wishing an abortion, answered an advertisement for the "AAA Pregnancy Problem Center" which she had found listed in the Yellow Pages under "Abortion Information and Services." After arriving for her appointment, she was offered a free pregnancy test. She provided the "Center" with a urine sample and was asked to wait for the results. During this period she was shown slides which were "said to illustrate the abortion process. These included pictures of dismembered fetuses and abortions being performed by means of crude-appearing instruments. The slide show also contained intermittent family scenes."[175] After being confronted by Lewis, a staff member suggested she "rely on religious faith." Lewis' insistence that she still wanted an abortion caused the staff member to offer to "arrange an abortion with a 'respectable doctor.' "[176] Lewis arrived at the arranged place and time only to discover that it was a Roman Catholic Hospital which did not perform abortions. A week later she had her pregnancy terminated elsewhere. A month later the staff member called "to find out when the baby was due." Lewis sued.[177]

The court found that the right asserted by Lewis — the right to choose to have an abortion — was based on the "rights of privacy recognized by *Roe v. Wade* . . . which are incorporated under [*Carpenters*] into section 1985(3)" and, therefore, is not limited to protection "against only

---

priate occasion to overturn *Roe*, its decision left *Roe* ripe for attack. *See* Webster v. Reproductive Health Services, 492 U.S. 490, 521 (1989). Justice Rehnquist, speaking for the Court in *Webster*, explained, "*[s]tare decisis* is a cornerstone of our legal system, but is has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. We have not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice.' " We think the *Roe* trimester framework falls into that category. . . . Since the bounds [of *Roe*] are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine.

Id. at n.13 (citing *Webster*, 492 U.S. at 518-19).

174. 908 F.2d 318 (8th Cir. 1990),*rehearing granted, en banc, vacated*, 1990 U.S. App. LEXIS 15937, *rehearing denied*, 917 F.2d 1077 (8th Cir. 1991) (by an equally divided court the judgment of the district court was affirmed), *petition for cert*, Docket 90-1575 (April 10, 1991).

175. *Id.* at 319.

176. *Id.*

177. *Id.*

official conduct."[178] As a result the court specifically held that "§ 1985(3) does not contain a state action requirement where, as here, a plaintiff's claim finds its course in the right announced in *Roe v. Wade*."[179]

The *Lewis* court also found that the plaintiff's claim stated a cause of action arising under state law which prohibits the intentional infliction of emotional distress. "Since section 1985(3) contains no independent state action requirement, it is possible that, if the rights at issue give rise to a private right of action under state law, state involvement is not required under section § 1985(3)."[180] This finding was based on the import of the *Griffin* Court's holding that the conspiracy must intend to deny the plaintiff "the equal enjoyment of rights secured by the law to all."[181] Although vacated on remand, this holding is the proper interpretation of § 1985(3).

In contrast, by seizing on the interference with the right to travel claim, the *National Organization for Women* court was able to dispose of the action in favor of the plaintiffs without having to decide the right to abortion issue. However, had the court properly construed the statute, it would have found that, whether the "putative abortion right is in a state of flux" is irrelevant to deciding a § 1985(3) claim. The text of § 1985(3) does not limit itself to the protection of constitutional rights. It is direct

178. *Id.* at 321-22.

179. *Id.* at 322.

180. *Id.* at 323.

181. *Id.* (citing Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)). Calling it "particularly insightful," the *Lewis* court quoted Professor Ken Gormley's article *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527 (1985). *Lewis*, 908 F.2d at 323. The court found persuasive Professor Gormley's observation that:

> [S]ection 1985(3) — unlike section 1983 — does not require the deprivation of some constitutional or federally protected right. It speaks only of the deprivation of the equal protection of the laws. Thus, the rights at stake in section 1985(3) cases need not be the more familiar first or fourteenth amendment guarantees, or any other right found in the United States Constitution. Instead, the right at stake will normally be the equal protection of *state* laws — trespass laws, contract laws, property laws, and tort laws. These sorts of rights have a life all their own, with or without state action. Properly framing a complaint in this fashion prevents the obvious *faux pas* committed by the litigants in [*Carpenters*] — namely, drawing up a complaint that rests on rights which do not even exist. Properly framed, a complaint alleging a conspiracy by private individuals to strip a member of some traditionally disadvantaged class of the equal protection of the laws states a valid claim under section 1985(3). In a world where state action and private conduct often intersect, Congress is empowered to reach such discriminatory conduct to assure that "equal protection" is not just a phrase in the back of the Constitution, but something which all groups in America can actually enjoy.

64 TEX. L. REV. at 587 (emphasis in original).

and simple, prohibiting a conspirator to do or "cause to be done, any act in furtherance of the object of [a] conspiracy whereby another is . . . deprived of having and exercising any right or privilege of a citizen of the United States."[182] *Webster*'s impact on a woman's fundamental right to obtain an abortion may be unknown, but abortion remains a civil liberty for women today. It exists as a right under state law. The language of the statute is unambiguous, regardless of whether abortion is characterized as a "fundamental right" arising under the United States Constitution or a "legal privilege" arising under state law. If militant anti-abortion protestors successfully prevent the State from being able to secure for women their legal option to have an abortion, then the claim is actionable under the Ku Klux Klan Act.

IV. CONCLUSION

The organized lawlessness of militant anti-abortion conspirators has left many state and local authorities unable to secure for women the legal option to voluntarily terminate pregnancy. This problem, which currently confronts women and advocates of women's rights, is analogous to the problems confronting African-Americans and their supporters during the aftermath of the Civil War. Using § 1985(3) to prevent anti-abortion conspirators from attempting to restrict women's reproductive freedom by blockading facilities that offer pregnancy-related services is consistent with both the text of the statute and the remedy which the framers of the Ku Klux Klan Act intended to provide. Although § 1985(3) provides an appropriate vehicle for such a remedy, two primary obstacles reduce the likelihood of successful action. First, the Supreme Court's failure to explicate a methodology for determining classes which warrant the protection of the Ku Klux Klan Act has left the potential for inconsistent and haphazard application of the statute. Second, clinics unable to demonstrate an interstate patient-base must overcome the barrier created by the obscure state involvement requirement.

BRUCE BROWN

182. *Lewis*, 908 F.2d at 321.