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Question of Class: Does 42 U.S.C. Section 1985(3) Protect Women Who Are Barred from Abortion Clinics

Mary F. Leheny

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A QUESTION OF CLASS: DOES 42 U.S.C. SECTION 1985(3) PROTECT WOMEN WHO ARE BARRED FROM ABORTION CLINICS

MARY F. LEHENY

INTRODUCTION

The ongoing battle between those who champion “freedom of choice” and those who advocate “right to life” has escalated in recent years as each side more vehemently, and often more violently, asserts its position on abortion. At the center of the controversy is the death of a right: to pro-life protestors, it is the right to life of a potential person; to pro-choice advocates, it is the destruction of a woman’s right to privacy and her right of choice. The battleground shifts as the combatants switch techniques to advocate their views. The combatants face ultimate denouement in the courtroom. The first skirmishes, however, take place at abortion clinics across the United States.

Between 1977 and 1990, abortion clinics reported 129 acts of violence to the National Abortion Federation (“NAF”)—thirty-four clinics were bombed, fifty-two clinics were set ablaze, and forty-three clinics were prey to attempted bombings or arson. Additionally, according to the NAF, there were “266 clinic invasions, 269 incidents of vandalism, 64 assaults and batteries, 77 death threats, 2 kidnappings, and 22 burglaries.” From January to March 1991, two more clinics were firebombed and arson destroyed or damaged another two. Along with these actively destructive methods, an increasingly popular technique advocated by anti-abortion organizations is to block clinic doors physically so that no one—neither patients nor non-patients—can enter the clinic. As a direct result, clinics shut down and women are forced to travel long distances in order to obtain abortions.

Physical and mental assault characterizes a patient’s visit to a block-
aded clinic. The following scenario is representative of an abortion clinic protest or "rescue" as it is called by Operation Rescue:  

[S]igns and objects are waved at clients and client escorts in a threatening manner and used to impede direct passage into the Center. Demonstrators scream and yell at Center clients, escorts, and staff, sometimes inches away from their faces, as they enter and exit the Center. Demonstrators press literature on clients and employees who have indicated they do not wish to talk or receive such literature. Demonstrators bump, grab, and push persons wishing to enter the Center in an effort designed to impede passage. Demonstrators chant, shout, and scream from the sidewalk alongside the Center in a manner which is calculated to be and is in fact heard inside the Center. 

In addition, locks have been "sabotaged by the insertion of foreign substances into the door keyholes, thereby rendering it impossible to open the doors." In yet another technique used by Operation Rescue, protestors move in a "slow motion, heel-to-toe fashion" to slow down the clearing process and often refuse to give their real names; such conduct is considered by some courts to rise to the level of state action because it frustrates or delays effective police action. Through the use of these techniques the protestors often achieve their goal of closing the clinic, if only for that day.

5. Operation Rescue is "a group of organizations and individuals whose purpose . . . is to 'organize and coordinate disruptions of abortion and family planning facilities.'" Roe v. Operation Rescue, 919 F.2d 857, 860 (3d Cir. 1990) (quoting fact-finding memorandum of the district court).


8. Id.

9. See id. State involvement, either through direct participation in the conspiracy or through a lesser involvement, is required when the clinic alleges a violation of the right to privacy. Although the Women's Health Care Services case held that the delaying of police action constituted state involvement, not all courts agree with that finding. See infra notes 40-52 and accompanying text for a discussion of the various standards of state involvement.

10. In a case that is now being decided by the Supreme Court, Operation Rescue wreaked havoc on Washington D.C. area clinics. During one of the biggest of the weekly demonstrations, occurring on October 29, 1988, the protestors closed the clinic from 7:00 a.m. to 1:30 p.m.:

'Rescuers' did more than trespass on to the clinic's property and physically block all entrances and exits [sic]. They 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. On this and other occasions, "rescuers" have strewn nails on the parking lots and public streets abutting the clinics to prevent the passage of any cars.

Abortion clinics have responded to this disruption and interference by bringing suits alleging a discriminatory conspiracy against women under 42 U.S.C. section 1985(3), also known as the Ku Klux Klan Act (the "Act"). Courts are divided, however, on whether section 1985(3) applies to prohibit right-to-life organizations from impeding women's rights to go to clinics to obtain abortions. Most courts that have addressed the issue have found a conspiracy under section 1985(3). A minority of courts, however, has held that section 1985(3) offers no protection, reasoning that there is either no cognizable, protectable class or be two main reasons for pursuing a federal action instead of merely relying on such state actions as trespass and conversion. The first is to avoid a multiplicity of suits that would be required to provide nationwide protection for clinics and abortion patients. The second is to provide one circuitwide or nationwide standard that courts throughout the circuit or United States would follow in such cases.

11. Clinics have standing to sue on behalf of their patients according to the Supreme Court's standard enunciated in Singleton v. Wulff. See Singleton v. Wulff, 428 U.S. 106, 113-18 (1976). The general rule is that standing cannot be claimed to vindicate the constitutional rights of a third party. Courts must look to two factual elements to determine whether this rule should be applied in a particular case: (1) whether the enjoyment of the third party's rights is "inextricably bound up with the activity the litigant wishes to pursue," and (2) whether the third party is able to assert the right, whether there is a "genuine obstacle" to such an assertion. Id. at 114-16. Here, the activity of the patients seeking abortion is inextricably bound up with the rights of the clinics. Further, the clinic patients face the same type of obstacles in asserting their own claim as did the women in Singleton. In that case, the Supreme Court held that doctors could bring an action on behalf of their abortion patients because a patient may be "chilled" from asserting her claims because of the privacy of her decision and because of the imminent mootness of an individual claim. See id. at 117. Clinic patients face the same types of obstacles. See also New York State Nat'l Org. for Women v. Terry, 697 F. Supp. 1324, 1337 (S.D.N.Y. 1988) ("Abortion providers have standing to sue on behalf of their patients as well as themselves.").

12. Section 1985(3) prohibits conspiracies, 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 . . . whereby another is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.


13. The Act was passed in 1871 to stop the persecution and murder of newly-emancipated Blacks in the South. See Cong. Globe, 42d Cong., 1st Sess. 158 (1871).

no constitutional violation. Thus, the current disagreement revolves around two issues: (1) whether women seeking abortions at clinics are exercising a constitutional right, and, more importantly, (2) whether women may be considered a class under the Act. The Supreme Court granted certiorari and heard arguments on these issues on October 7, 1991 in Bray v. Alexandria Women's Health Clinic.

Part I of this Note summarizes and explores the issues that confronted the parties in Bray. Part II explores the constitutional rights to interstate travel and to privacy that clinic protestors have abrogated. Part III urges that the Supreme Court protect, within the framework of section 1985(3), women who seek to enter clinics and obtain abortions; such protection should apply because the patients are members of the class of women. This Part explores the language and legislative history of section 1985(3) and past Supreme Court interpretations of the Act in order to examine its reach and possible limitations. Finally, this Note concludes that such protection is warranted by the Act's language, by congressional intent, and by Supreme Court interpretations.

I. Bray v. Alexandria Women's Health Clinic: A New Frontier for Women's Rights Under Section 1985(3)

A. Background

After extensive protests and organized rescues by Operation Rescue at abortion clinics in the metropolitan Washington D.C. area, the plaintiffs—medical facilities and women's organizations—in Bray v. Alexandria Women's Health Clinic applied for a permanent injunction to enjoin protestors from trespassing on, impeding or obstructing ingress into or egress from any facility in the Washington metropolitan area that offers and provides legal abortion services and related medical and psychological counseling. After oral arguments, the district court held that there was a section 1985(3) conspiracy against a class, consisting of a subset of women, which violated the class's right to travel. The court issued a permanent injunction.

Operation Rescue and the six individual defendants appealed the permanent injunction, while the National Organization for Women cross-appealed the district court's refusal to extend the scope of the injunction.

17. Bray was originally brought in the neighboring District Court for the Eastern District of Virginia and proceeded to the Fourth Circuit from which it was granted certiorari. See Bray I, supra note 10 at 1483; and Bray II, supra note 10 at 582.
19. See Bray I, supra note 10 at 1488.
20. See id. at 1493.
21. See id. at 1486.
The Fourth Circuit rejected both appeals and affirmed based on the district court's finding that the "activities of appellants in furtherance of their beliefs had crossed the line from persuasion into coercion and operated to deny the exercise of rights protected by law." 

B. Bray's Primary Issue: Class

Bray presents two issues to the Supreme Court. The Court must determine whether denying or impinging women's access to abortion clinics violates a constitutional right. The rights allegedly implicated in the blocking of an abortion clinic are the fundamental rights to travel interstate and the right to obtain an abortion. Then, assuming the Court finds a constitutional violation, the plaintiffs must establish that women exercising their fundamental rights constitute a class. The question of class is central to the determination of Bray. Both sides have focused their positions on this issue and, conceivably, the Supreme Court could resolve Bray solely on this issue thus short-circuiting a politically charged fundamental rights analysis.

The Bray parties address three main questions regarding this issue of class. First, are women a class within the meaning of section 1985(3)? Second, is there a valid class under section 1985(3) with the requisite invidious discriminatory animus? Central to this issue is whether people conspire against women as a class when they target specifically those women who elect to exercise their constitutional rights respecting abortion and related services, with a purpose to suppress the exercise of those rights by women generally. Those rights include the right to travel interstate to obtain such services. The parties to Bray also disagree as to whether the class is under-inclusive.

Third, do the protestor-petitioners' activities demonstrate an invidiously discriminatory animus against women?

Supreme Court section 1985(3) precedent allows the Supreme Court leeway in which to decide the issues it faces. Legislative intent, as well as later congressional action, however, direct the Court's resolution. The Court must look beyond personal beliefs on abortion to protect the freedom of all women to exercise their constitutional rights.

II. Initial Question: Implication of a Fundamental Right

Although the primary issue that has split the circuit and district courts is whether women who seek health care at abortion clinics can be considered a class under section 1985(3), this question is moot without a finding of a constitutional right violation—a prerequisite to receiving protection under section 1985(3). This two-part analysis is at the core of the test set
forth by the Supreme Court in Griffin v. Breckenridge. While the Court has not established a precise standard for class standing under section 1985(3), it did preclude a class based on “economic” traits in United Brotherhood of Carpenters and Joiners, Local 610 v. Scott and implied that women, as a class, are protected by section 1985(3) in Great American Federal Savings and Loan Association v. Novotny.

A. The Constitutional Right to Travel

Protestors violate clinic patients’ constitutional right of interstate travel when they blockade the entrances to clinics. Historically, the Supreme Court has considered the right to travel to be constitutionally guaranteed, even though such a right is not specifically enumerated in the Constitution. Moreover, the Supreme Court has invoked the right to travel to protect women seeking an abortion in Doe v. Bolton, which held that “[t]he constitutional right to travel includes the right to travel interstate to obtain an abortion.”

Of additional importance to women traveling between states to obtain abortions, the Court held in Griffin v. Breckenridge that section 1985(3) applied when the constitutional right to interstate travel was allegedly infringed. This fundamental right, unlike the right to privacy,

26. Griffin v. Breckenridge, 403 U.S. 88 (1971). From the Act, the Supreme Court created a four-part test that is employed today to determine whether a complaint falls within the purview of § 1985(3). The complaint must allege that the defendants:

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

Id. at 102. This standard is limited in application by the requirement that “there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.”

27. 463 U.S. 825, 827-28 (1983); see infra notes 98-106 and accompanying text.
31. Id. at 200.
33. See id. at 106. Here, the Supreme Court stated that § 1985(3) protects the right to interstate travel because it is “constitutionally protected, does not necessarily rest on
is protected from purely private as well as governmental interference.\textsuperscript{34} Thus, clinics and patients need not demonstrate state action or involvement.\textsuperscript{35} Further, the typical scenario at an abortion clinic, where a group of protestors conspires and stops the travel of a group of patients, can be analogized to the factual setting that led to the Supreme Court's holding that section 1985(3) protects Black car passengers from White, non-state involved attackers who violated their right to travel.\textsuperscript{36}

The constitutional right to interstate travel supports injunction of clinic demonstrations because many women travel to clinics located in other states.\textsuperscript{37} Protestors' blockades prevent these women from entering clinics and obtaining abortions. Thus, this interference demonstrates violation of patients' constitutional right to free travel.\textsuperscript{38}

B. \textit{Controversy Surrounds the Right to Privacy}

Protestors also impinge the patients' right to obtain an abortion. Unlike the right to travel, which has been accepted as a constitutional right,\textsuperscript{39} the right to privacy, which is based upon a penumbra theory,\textsuperscript{40} has been under attack since \textit{Roe v. Wade}\textsuperscript{41} recognized a woman's right to abortion. Those courts that have undertaken a privacy analysis have found that clinics and patients must prove state involvement in the con-

\begin{footnotesize}
\begin{enumerate}
\item[34.] See \textit{id.} at 96-97.
\item[36.] \textit{See Griffin v. Breckenridge, 403 U.S. 88, 95-96 (1971); infra note 83; Portland Feminist Women's Health Center v. Advocates For Life, Inc., 712 F. Supp. 165, 168 (D. Or.), aff'd as modified, 859 F.2d 681 (9th Cir. 1988).}
\item[37.] Women may travel because a clinic has better medical services or because there is not a clinic offering abortions in the patient's state of residence.
\item[38.] The Supreme Court held that women who seek medical services, particularly abortions, have the constitutional right to travel interstate to obtain such services. See \textit{Doe v. Bolton, 410 U.S. 179, 200 (1973).}
\item[40.] \textit{Roe v. Wade, 410 U.S. 113, 152 (1973).}
\item[41.] 410 U.S. 113 (1973). Among the Supreme Court decisions addressing the \textit{Roe} decision, \textit{Webster v. Reproductive Health Servs., 492 U.S. 490 (1989)} is the most significant harbinger of the Court's future direction. A plurality endorsed abandonment of \textit{Roe}'s trimester scheme allowing states to regulate abortions prior to the point of viability. \textit{Id.} at 517-20. The Court also upheld a bar on state employees performing abortions and a ban on the use of public facilities for abortions. \textit{Id.} at 492. \textit{See also City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983)} (upheld Ohio statute that, with certain exceptions, prohibited any person from performing an abortion on an unmarried, unemancipated minor without prior notice to one of her parents or receiving a court order of approval); \textit{Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983)} (upheld parental consent requirement as long as there is an alternative procedure for obtaining authorization for an abortion).}
\end{enumerate}
\end{footnotesize}
spiracy in order to sustain an action under section 1985(3). These courts reason that this right exists only against state interference.42

The state involvement required for a privacy action manifests itself in a variety of circumstances. A clinic may prove state involvement generally, simply demonstrating that the conspiracy is directed at influencing the activity of the state.43 "In certain circumstances," one court has written, "private action which inhibits or thwarts the ability of the state to guarantee equal protection may cause the state either unwillingly or unwittingly to further the ends of the conspiracy."44 Such state involvement may arise, for example, when protestors fail to inform local police of their intended protests, thus inhibiting the police from intervening in the protests.45 In such circumstances, a clinic need not prove that state actors actually formulated or initiated the conspiracy in order to establish state involvement under section 1985(3).46

An attempt to change state abortion laws may also constitute state involvement. For instance, a plaintiff’s allegations that a purpose of the conspiracy was to influence state legislative action may be sufficient to state a claim under section 1985(3).47 That reasoning, however, has been dismissed by one court which found that Operation Rescue's attempt to influence state and federal legislators to change abortion laws was insuffi-

42. See Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218, 227 (6th Cir. 1991); Portland Feminist Women's Health Center v. Advocates For Life, Inc., 712 F. Supp. 165, 168 (D. Or.), aff'd as modified, 859 F.2d 681 (9th Cir. 1988); Roe v. Operation Rescue, 710 F. Supp. 577, 583 (E.D. Pa. 1989). In Griffin v. Breckenridge, the Supreme Court held that § 1985(3) protects individuals or classes of people from private conspiracies, thus state involvement is not necessary. See 403 U.S. 88, 96 (1971). This holds true, however, only where the constitutional right is a fundamental right, i.e., not merely protected from state interference. Thus, protection of the right to privacy, which is founded in the fourteenth amendment, under § 1985(3) requires some form of state involvement.


45. See id. at 266.

46. See id. at 265. Taking the opposite view, the District Court for the Eastern District of Pennsylvania found that protestors' blockade of access to area clinics and their failure to notify the police of their next target did not satisfy the state involvement requirement. The court rejected the clinics' claim that these actions rendered police officials incapable of protecting the abortion clinic clients' rights to equal medical treatment. Therefore, the court found that the clinics did not meet the requisite showing of state involvement. See Roe v. Operation Rescue, 710 F. Supp 577, 583 (E.D. Pa. 1989).

47. See Portland Feminist Women's Health Center v. Advocates For Life, Inc., 712 F. Supp. 165, 168 (D. Or.), aff'd as modified, 859 F.2d 681 (9th Cir. 1988) (discussing Supreme Court decision in United Bhd. of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825, 830 (1983), which required that a plaintiff bringing a § 1985(3) action that is enforceable only against the state, such as the right to privacy, must allege and prove that the state is involved in or affected by the conspiracy).
cient to meet the state involvement requirement.\textsuperscript{48}

Further support for state involvement lies in protestors' defiance of arrest. Protestors often force police to arrest, charge, and physically remove each individual member of their group; such activity arguably inhibits police effectiveness such that the state unwittingly furthers the conspiracy. Although the protestors may have intended to overwhelm a given police force's ability to protect clinic patients, the Sixth Circuit has held that "this fact alone is insufficient to show a nexus between the state and the defendants, nor does it suggest joint or concerted action between the defendants and the police."\textsuperscript{49} However, when police protection is hindered by such techniques, causing clinic patients delay or deprivation of medical services, there is state involvement.\textsuperscript{50}

Most courts hold that a finding of state involvement should lead to the further finding of a constitutional violation, as the protestors' blockades impede women and often prevent them from exercising their right to an abortion. The most authoritative exception to the majority view is the Fifth Circuit; this court not only failed to acknowledge a constitutional


\textsuperscript{49} Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218, 227 (6th Cir. 1991).

\textsuperscript{50} Most courts have agreed that state involvement is required in order to support a finding of a violation of the right to privacy. The Eighth Circuit, however, in an opinion that was later vacated without discussion, took a completely different tack in Lewis v. Pearson Foundation, Inc., 908 F.2d 318 (8th Cir.), vacated 917 F.2d 1077 (8th Cir. 1990). It found that section 1985(3) does not contain a state action requirement where the claim rests upon the Supreme Court's Roe v. Wade, 410 U.S. 113 (1973), decision that a woman's right to decide to terminate her pregnancy is part of her right to privacy. See Lewis, 908 F.2d at 322. The court did find alternatively that there was state involvement in the plaintiff's allegation that the Missouri Attorney General participated in the conspiracy by publicly announcing that the pseudo-clinic's advertising did not constitute misrepresentation. See id. at 320. This case also differs from others because the protest organization went beyond merely blockading a clinic. In this case, the organization created its own mock clinic in order to deceive pregnant women into thinking they were at an abortion clinic and with the purpose of dissuading the women from going through with the procedure. See id. at 319. Perhaps it is because this case is so egregious that the Eighth Circuit initially took a more lenient view on the applicability of the right to privacy and allowed § 1985(3) protection without real state involvement. There are no other cases where a court has applied the right to privacy under § 1985(3) so progressively and this is probably the reason for the Circuit's subsequent vacating of the case. In reaching its initial decision, the Eighth Circuit relied upon several Supreme Court precedents. See id. at 321-22 (citing Roe v. Wade, 410 U.S. 113, 153 (1973), asserting the right to privacy as a fundamental right, and United States v. Guest, 383 U.S. 745, 757-58 (1966), holding that Congress has the power under the fourteenth amendment to enforce the rights guaranteed by that amendment against private conspiracies). It pointed to the existence of personal choice in marriage and family life in the first, fourth, fifth, ninth, and fourteenth amendments, reasoning that "[b]y their nature, these interests would be meaningless were they to be protected only from interference by the state." Lewis, 908 F.2d at 322. See generally, Beth E. Hansen, Note, "Invidiously Discriminatory Animals"—A Class Based on Gender and Gestation Under 42 U.S.C. § 1985(3): Lewis v. Pearson Foundation, Inc., 24 Creighton L. Rev. 1097 (1991) (asserting that § 1985(3)'s text, legislative intent, Supreme Court and Circuit precedent were ignored in the 8th Circuit's vacating of its earlier opinion in Lewis).
violation, but also claimed that the right to an abortion was preserved because patients were still able to obtain an abortion at the clinic despite the blockade. This assertion runs counter to the traditional protections afforded fundamental rights. Indeed, if the Fifth Circuit's logic were followed, it would be acceptable to blockade or close all houses of worship in the United States because worshipers could attend services elsewhere or at a later date. This reasoning is fallacious.

C. How a Conspiracy is Found to Violate a Fundamental Right

Once a fundamental right is found to have been violated, a conspiracy to impinge such a right must also be identified and proven. Engaging in a conspiracy to deny women a fundamental right, such as the right to travel to obtain medical and abortion-related services, is a violation of section 1985(3). Following Supreme Court precedent, clinics and patients do not need to demonstrate state involvement because the Act is applicable to private conspiracies, except in cases where the Constitution protects the fundamental right from only state intervention. Nonetheless, there are two limitations to such broad applicability. First, clinics must demonstrate "'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action'" because section 1985(3) must not be construed as a "general federal tort law." Secondly, section 1985(3) does not apply to all classes of persons; although the Supreme Court has left open the boundaries of the Act's reach, acknowledging that legislative history suggests a broad view, the Court has disallowed its use for animus based generally upon the class's economic views or commercial interests.

III. THE QUESTION OF CLASS

The question remains, then, whether section 1985(3) can be used to protect individuals or classes of people other than Blacks from types of invidiously discriminatory animus other than that which is racially motivated. The majority of the courts that have adjudicated abortion clinic protest cases have allowed the use of the Act to protect women as a class

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51. See id at 794.
on the basis of a gender-based discriminatory animus. This Note, as well, takes the position that section 1985(3) should protect women as a gender-based class. Although the Supreme Court has yet to rule explicitly that a gender-based conspiracy can be remedied under section 1985(3), an analysis of the legislative history of section 1985(3), of Congress's action in protecting pregnant women in Title VII, of the text of section 1985(3), and of the Supreme Court's interpretation of section 1985(3) leads to the unmistakable conclusion that women are a protected class under section 1985(3).

A. Legislative History of 42 U.S.C. Section 1985(3)

Examination of congressional history and legislative intent strongly suggests that Congress intended the Act's reach to extend protection beyond Blacks to other classes of people including women. Representative Shellabarger introduced the Civil Rights Act of 1871 (the "Civil Rights Act") on March 28, 1871, to "enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes." The second section of the Civil Rights Act, also known as the Ku Klux Klan Act, was the precursor to today's section 1985(3). The Act had as its central purpose the protection of newly emancipated Blacks from Ku Klux Klan activities in the post-Civil War South. The breadth of the Act, however, was subject to debate; although the Act was introduced as a corollary to the fourteenth amendment, Congress intended to go beyond the state action requirements of that amendment to


58. Monell v. Department of Social Servs., 436 U.S. 568, 665 (1978) (quoting Representative Shellabarger's speech to Congress as recorded in the Congressional Globe, 42d Cong., 1st Sess. 522 (1871)). There were four sections of the Civil Rights Act of 1871 and section 2 was the basis for § 1985(3). See id. at 665 n.11; Novotny, 442 U.S. at 370. Originally, the section was introduced as a criminal provision outlawing certain conspiratorial acts done with intent "to do any act in violation of the rights, privileges, or immunities of another person." Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871). See also Griffin v. Breckenridge, 403 U.S. 88, 99-100 (1971) (discussing the section's legislative history). Because of the "enormous sweep of the original language," an amendment creating the present-day civil remedy was added that same year. Id. at 100. The criminal section was later found unconstitutional by the Supreme Court. See United States v. Harris, 106 U.S. 629, 642-44 (1882).
include private conspiracies.60 The Act’s draftsman’s explanation of the amendment as reaching “any violation” of a right, for example, supports a broad reach of enforcement.61

Other evidence exists that Congress intended the Act to protect the rights of all citizens, not limiting its protection to Blacks who were being persecuted by the Klan. Members of the House, where the original Civil Rights Act of 1871 was introduced, indicated in their discussion of the bill that the reach of their legislation went beyond racially based conspiracies to include all races, and all citizens62 including women.63 The intention to include women under the Act’s protection, at a time when

60. “I do not want to see [this measure] so amended that there shall be taken out of it the frank assertion of the power of the national Government to protect life, liberty, and property, irrespective of the act of the State.” Cong. Globe, 42d Cong., 1st Sess., App. 141 (1871) (statement of Representative Shanks).

61. 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. Cong. Globe, 42d Cong., 1st Sess., 478 (1871) (statement of Representative Shellabarger).

62. According to Representative Perce, Congress intended to protect the rights of “citizens throughout the entire country, without regard to the condition, race, or party affiliation of the individual citizen.” Id. at 512. Protection was provided to “all classes in all States; to persons of every complexion and of whatever politics.” Id. at 376 (statement of Representative Lowe). Representative Wilson said that Congress would secure to all persons the equal protection of the laws. Id. at 482. He later added that “there is not of all the thirty-eight millions [sic] of the citizens of this nation one so humble that his rights under the Constitution and [the] laws can be [ignored].” Id. at 484. Further, numerous Representatives also pronounced the intent to protect specific groups and persons, in addition to Blacks and their “champions.” See, e.g., Cong. Globe, 42d Cong., 1st Sess. 486 (1871) (Representative Cook)(citizens of other states); id. at 339 (Representative Kelley)(same); id. at 517 (Representative Shellabarger)(Republicans); id. at 570 (Senator Ames)(same); id. at 567 (Sen. Edmunds)(a Democrat, a Catholic, a Methodist, a Vermonter); id. at 335 (Representative Hoar)(Indian tribes). The opponents to the Act generally did not discuss what classes might be covered by the section. The main focus of their discussion was the perceived penalization of the southern states by northern Republicans. See generally Cong. Globe, 42d Cong., 1st Sess., at app. (1871) (discussing the roles of Republicans in the post-Civil War South); Brief for Petitioners Bray III, supra note 10 (brief does not address the Congress members’ remarks, suggesting that there was no congressional intent that these groups not be covered). See also Kaczorowski, Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 N.Y.U. L. Rev. 863, 897-98 (1986) (discussion of framers’ intent in the related Civil Rights Act of 1866 to protect and enforce the rights of White, as well as Black, citizens). See generally R. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights 1866-1876 (1985) (analyzing the effect of federal, judicial interpretation of the Reconstruction Amendments on civil rights legislation, and how these interpretations further affected the legal theory of national authority over citizens and citizens’ rights).

63. Representative Buckley said “[t]he proposed legislation . . . is not to protect Republicans only in their property, liberties, and lives, but Democrats as well, not the colored only, but the Whites also; yes, even women.” Cong. Globe, 42d Cong., 1st Sess., at app. 190 (1871) (emphasis added).
women were not even considered citizens, indicates the broad reach that the framers intended to give the Act. In addition, the Civil Rights Act, and thus section 1985(3) as well, was particularly tied to the Equal Protection Clause of the fourteenth amendment. The Clause, while written principally to ensure equality of treatment for the newly freed slaves, has long since been held to protect women.

B. The Statutory Language

On its face, the language of section 1985(3) is broad and unconfining. When interpreted literally, the Act is not limited to Blacks and their champions, although it was clearly written with them in mind.

Accordingly, women are not excluded as a possible class. Mentioned instead are "persons" and "class[es] of person[s]," rather than more specific categories of people. The protection of section 1985(3) extends to "any right or privilege of a citizen of the United States," and although the Act was principally written to protect Black citizens and those who championed them, the Act's congressional supporters emphasized the idea of preventing "'deprivations which shall attack the equality of rights of American citizens.'" In addition, one court has asserted that "[b]y its very language section 1985(3) is necessarily tied to evolving notions of equality and citizenship."

A literal reading of the statute is logical considering the Supreme Court's treatment of other civil rights legislation. For instance, in construing the criminal analogue to section 1985(3), the Supreme Court stated that it "must accord it a sweep as broad as its language." Significantly, section 1983, also enacted in 1871 as part of the Civil Rights Act, and containing the same language, has been interpreted as protecting a broad range of persons in addition to Blacks. Thus, a literal interpretation that offers class status to the female gender would be in keeping with traditional tenets of civil rights statutory construction.

Further support for including women within the ambit of the Act can be found in many circuit court decisions that have given section 1985(3)
a broader reach than simply limiting it to Blacks. Among the groups that have been protected are women as a class and classes based on political associations or on ethnicity.  

C. The Supreme Court’s Interpretations of Section 1985(3)

The Supreme Court’s decisions indicate that it recognizes gender discrimination as protected by section 1985(3). The Court first addressed section 1985(3) in the context of a civil case in Collins v. Hardyman nearly 70 years after the Act was passed. In its initial interpretation, the Supreme Court limited the breadth of section 1985(3) to conspiracies that involved the state as a conspirator. Furthermore, the Supreme Court made clear that it was avoiding constitutional questions in order to avert potential federalism problems. Because Collins hinged on the is-

73. New York State Nat’l Org. for Women v. Terry, 886 F.2d 1339, 1359 (2d Cir. 1989), cert. denied, --- U.S. ---, 110 S. Ct. 2206 (1990); see, e.g., Volk v. Coler, 845 F.2d 1422, 1434 (7th Cir. 1988) (“§ 1985(3) extends . . . to conspiracies to discriminate against persons based on sex, religion, ethnicity or political loyalty”); Conklin v. Lovely, 834 F.2d 543, 549 (6th Cir. 1987) (political views); McLean v. International Harvester Co., 817 F.2d 1214, 1218-19 (5th Cir. 1987) (section protects classes characterized by “some inherent or immutable characteristic” or by “political beliefs or associations” (citing Kimble v. D.J. Mc Duffy, Inc., 623 F.2d 1060, 1066 (5th Cir. 1980))); Hobson v. Wilson, 737 F.2d 1, 21 (D.C. Cir. 1984) (political affiliations with racial overtones), cert. denied, 470 U.S. 1084 (1985); Keating v. Carey, 706 F.2d 377, 386-88 (2d Cir. 1983) (political affiliation); Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979) (women purchasers of disability insurance); Novotny v. Great Am. Fed. Sav. & Loan Ass’n., 584 F.2d 1235, 1241-43 (3d Cir. 1978) (en banc) (women), vacated on other grounds, 442 U.S. 366 (1979); Conroy v. Conroy, 575 F.2d 175, 177 (8th Cir. 1978) (sex and ethnicity).

74. 341 U.S. 651 (1951).

75. See id. at 651. Plaintiff political club members met to adopt a resolution opposing the Marshall Plan and to send copies of the resolution to appropriate federal officials. The political club members alleged that the defendants, apparently members of the American Legion, conspired to deprive the club members of their rights as citizens of the United States to peaceably assemble and to enjoy equal privileges and immunities under the laws of the United States. In furtherance of this conspiracy, the American Legion members proceeded to the meeting site and, by threats and violence, broke up the meeting, thus interfering with the fundamental right of the club members to petition the government for the redress of grievances. The American Legion members did not interfere or conspire to interfere with the meetings of other political groups with whose opinions they agreed. See id. at 652-54.

76. The Supreme Court reversed the court of appeals and upheld dismissal stating that “[s]uch private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so.” Id. at 661. This was overruled by the Court twenty years later. See Griffin v. Breckenridge, 403 U.S. 88, 95-96 (1971). Involvement by the state in the conspiracy has been defined differently by different courts. See supra notes 68-76 and accompanying text. Here, the Supreme Court interpreted § 1985(3) as requiring active involvement by the state in the conspiracy, for example by passing discriminatory laws.

77. It is apparent that, if this complaint meets the requirements of this Act, it raises constitutional problems of the first magnitude that, in the light of history, are not without difficulty. These would include issues as to congressional power under and apart from the Fourteenth Amendment, the reserved power of the States, the content of rights derived from national as distinguished from state citizenship, and the right of separability of the Act in its application to those two classes of rights.
sue of state involvement, the *Collins* Court did not reach the question of whether the plaintiffs constituted a class under the statute.\(^7\)

Justice Burton, dissenting in *Collins*, took a more literal view, arguing that state action was not required to sustain a section 1985(3) cause of action. Relying on the statute's language,\(^7\) he asserted that Congress had created a federal cause of action for a private act abridging federally created constitutional rights,\(^8\) and argued that while section one of the Civil Rights Act contained language requiring state action, section two did not contain such language. This dissimilarity, argued Justice Burton, indicated that Congress did not intend a state action requirement in that portion of the Civil Rights Act.\(^8\)

Twenty years later, the Supreme Court overruled *Collins* and adopted Justice Burton's more literal view in *Griffin v. Breckenridge*.\(^2\) The federalism problems that the Court had earlier predicted had not in fact materialized.\(^8\) The Court looked to the plain meaning of the statute's language and held that it provided protection from private conspiracies.\(^8\) Other Reconstruction Era civil rights statutes in the previous twenty years had been given "a sweep as broad as [their] language," and accordingly the Court gave section 1985(3) the same treatment.\(^8\) It did add a cautionary note, however. Even though the statute reached private action, "it was [not] intended to apply to all tortious, conspiratorial interferences with the rights of others." Instead, the Court counseled, "[t]he

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\(^7\) *Collins v. Hardyman*, 341 U.S. 651, 659 (1951). The Court found in *Griffin* that these federalism concerns had not materialized. See *Griffin*, 403 U.S. at 95-96. In its next major section 1985(3) decision, the Court found that such separation of powers problems no longer existed. See *Griffin*, 403 U.S. at 94; infra notes 83, 84.

\(^8\) See *Collins*, 341 U.S. at 652-53.

\(^79\) "The language of the statute refutes the suggestion that action under color of state law is a necessary ingredient of the cause of action which it recognizes." *Id.* at 663.

\(^80\) See *id.* at 664.

\(^81\) See *id.* at 663-64.

\(^82\) 403 U.S. 88, 95-96 (1971). Plaintiffs were Black passengers in a car driven in DeKalb, Mississippi, when defendants, who were White, mistakenly believing that the driver was a Civil Rights for Negroes worker, blocked the passageway of the car, stopped and detained the car passengers, then beat and injured them. *See id.* at 90-91. The Supreme Court overruled *Collins* to allow § 1985(3) protection to victims of private conspiracies. *See id.* at 96.

\(^83\) Justice Stewart, writing for the Court, stated that:

> It is clear, in the light of the evolution of decisional law in the years that have passed since [Collins] was decided, that many of the constitutional problems there perceived simply do not exist. Little reason remains, therefore, not to accord to the words of the statute their apparent meaning.

*Id.* at 95-96.

\(^84\) See *id.* at 96.

\(^85\) *Id.* at 97; see, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968) (42 U.S.C. § 1982 (1988)); *United States v. Price*, 383 U.S. 787, 801 (1966) (same); *United States v. Williams*, 341 U.S. 70, 76 (1951) (plurality opinion) (concluding that the purpose of 18 U.S.C. § 241 (1988), the closest remaining criminal counterpart to § 1985(3), was to reach private action); *United States v. Harris*, 106 U.S. 629, 639-44 (1883) (construing criminal counterfeit to § 1985(3) to include protection from invasion by private persons, but also holding that the section was unconstitutional).
constitutional shoals that would lie in the path of interpreting section 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose.86

Thus the Court left unresolved the question "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of section 1985(3) before us."87 Yet the Griffin decision suggests an affirmative response to this question because the Griffin Court held that section 1985(3) protected not only the Black victims of racial attacks, but also supporters of Blacks, such as civil rights workers, because they too are victims of the conspirators' invidious animus.88

Shortly thereafter, the Supreme Court in Great American Federal Savings & Loan Association v. Novotny89 held that rights created by Title VII of the Civil Rights Act of 196490 could not be asserted through the remedial framework of section 1985(3).91 If victims could rely on Title VII as the basis for a section 1985(3) action, they would, in effect, bypass the congressionally created administrative and judicial processes, thus wholly undermining Title VII.92

A vital aspect of the Novotny decision is that the Supreme Court assumed, without so stating, that a conspiracy to discriminate in employment on the basis of sex came within the scope of section 1985(3).93 Although not addressed by the other courts, this inference has merit, especially when Justice Stewart's closing remarks of the majority's opinion are examined:

It is true that a § 1985(3) remedy would not be coextensive with Title VII, since a plaintiff in an action under § 1985(3) must prove both a conspiracy and a group animus that Title VII does not require. While this incomplete congruity would limit the damage that would be done to Title VII, it would not eliminate it.94

87. Id. at 102 n.9 (citation omitted).
88. See id. at 103. "Invidious" is defined as "offensively or unfairly discriminating; harmful; injurious." Random House College Dictionary (rev. ed.) (1988).
91. See Novotny, 442 U.S. at 377. A savings and loan association intentionally and deliberately pursued a course of conduct that denied female employees equal employment opportunities. When respondent, an officer, director, and loan officer of the savings and loan, expressed support for the female employees at a board of directors meeting, he was immediately terminated. The loan officer alleged that his support for female employees was the cause of the termination. He filed a complaint with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act and received a right-to-sue letter authorizing suit against the savings and loan and its directors claiming damages under § 1985(3). See id. at 368-89.
92. See id. at 375-76, 378.
93. "All of [the Court's] analysis of the relationship of section 1985(3) and Title VII was unnecessary unless there was a section 1985(3) 'class' of women to begin with." Brief for Respondents at 21, Bray III, supra note 10.
A "group animus" does not have to be proven within a Title VII case because the statute is administered to stop discrimination based on "race, color, religion, sex, or national origin"—the same classes within which a plaintiff in a section 1985(3) case must prove membership. Because the Court addressed the possibility of whether sex discrimination could be remedied by section 1985(3), and found only that the administrative requirements imposed by Congress prohibit its application, apparently the Court believed that gender was a class protected by section 1985(3). Additional evidence of the Court's position is Justice White's statement, in dissent, that "[i]t is clear that sex discrimination may be sufficiently invidious to come within the prohibition of section 1985(3)." Thus, Novotny suggests that section 1985(3) reaches beyond racially motivated conspiracies.

In its most recent section 1985(3) decision, United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott, the Supreme Court limited the statute's reach. It held that a class based upon "economic" traits was not the type of class protected by section 1985(3). The Court also held that section 1985(3) could not protect victims of a private conspiracy infringing upon a constitutional right that is by definition a right only against state interference. Therefore, concluded the Scott Court, "an alleged conspiracy to infringe First Amendment rights is not a violation of section 1985(3) unless it is proved that the State is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the State."

Again, left unanswered by Scott was the question of whether section 1985(3) was intended to reach beyond class-based animus held against Blacks. The Court acknowledged Senator Edmunds's 1871 statement that section 1985(3) would reach any conspiracy, even against a

96. Novotny, 442 U.S. at 389 n.6.
97. 463 U.S. 825 (1983). A construction company hired non-union workers for a project, and a citizen protest against the company's hiring practice was organized. During the protest, company employees were assaulted and beaten and construction equipment was burned and destroyed. The construction company asserted that the union members had conspired to deprive the non-union members of their legally protected rights under § 1985(3). See id. at 827-28.
98. The Court found that there was no history of a legislative intent for the provision to "reach conspiracies motivated by bias towards others on account of their economic views, status, or activities." Id. at 837.
99. See id. at 833.
100. Id. at 830.
101. The lower court held that § 1985(3) prohibits class-based animus other than race-based animus, therefore, the non-union laborers and employers were protected as a class under the Act. See Scott v. Moore, 461 F. Supp. 224, 230 (E.D. Tex. 1978), aff'd in part, rev'd in part, 640 F.2d 708 (5th Cir. 1981), rev'd sub nom. United Bhd. of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825 (1983). The court of appeals affirmed holding that the purpose of the conspiracy was to deprive the non-union workers of their first amendment right not to associate with a union. See Moore, 640 F.2d at 731. The Fifth Circuit also held that § 1985(3) reached conspiracies motivated by either political or economic bias. See id. at 719.
“Vermont,” as an indication that the Congress of 1871 may have intended to give the Act a broader sweep than protecting only Blacks. The Court refrained from definitively resolving this ambiguity, however. It argued, instead, that although “Senator Edmunds’s views, because he managed the bill on the floor of the Senate, are not without weight,” the fact that the Act was introduced in the House was of greater importance. Additionally, the Court noted that in its prior section 1985(3) cases, it had been aware of the Senator’s remarks and had refrained from rendering judgment on the reach of the Act. Accordingly, the Court refrained in Scott, as well. This rationale is flawed, however, because the Court failed to investigate statements made by the many Members of the House who supported a broad reach.

In sum, while section 1985(3) is now available as protection from private conspiracies, it cannot be invoked to supersede a congressionally created remedial scheme, nor can it be applied to economically based groups. The limits of its reach, however, have not been definitively drawn by the Court, thus leaving latitude for lower courts in their interpretations of the Act.

Although the Supreme Court has specifically left unanswered the question of whether section 1985(3) reaches beyond racial bias, the Court has also had other concerns, such as disrupting existing congressionally mandated remedial schemes when reaching its decisions. These concerns do not exist in the context of abortion clinic protests. In these situations, according to clinics, “petitioners’ conspiratorial campaigns of intimidation are not regulated by a more specifically tailored federal remedy, and they are precisely the sort of private deprivation of rights at which Congress was aiming in adopting section 1985(3).”

This examination of text, history, and precedent demonstrates the wide scope of protection that section 1985(3) offers. Now, more than a century after this broad-minded statute was passed, the Court should preserve the statute’s meaning and openly declare that women are a class to be protected under section 1985(3). Furthermore, this protection should follow congressional intent and protect pregnant women who choose to exercise their right to obtain an abortion as a member of the class of women.

103. Id. at 837.
104. Id.
105. See id. at 837-39; supra notes 61-64 and accompanying text discussing House Members’ statements that § 1985(3) would reach such disparate groups as women, Indians, Republicans, and Vermont citizens.
The class of women who are seeking abortions is well-tailored and analogous to other classes that have been afforded protection under the Act.\textsuperscript{109} A class can be as broadly designed as to reach women purchasers of disability insurance\textsuperscript{110}—a class that has been found to be "analytically indistinguishable from a class of women" seeking to exercise their constitutional right to an abortion.\textsuperscript{111} Additionally, section 1985(3) protection has been extended to other groups besides Blacks and their champions, so there is no principled reason for denying women who seek health care at abortion clinics class status under section 1985(3).\textsuperscript{112}

Admittedly, there are limitations on how a class can be defined. The members of the class cannot be members simply because they are victims of the same conspiracy.\textsuperscript{113} Nor can definition of the class be based upon characteristics of the conspirators.\textsuperscript{114} Nevertheless, the circumstances of abortion clinic blockade suits rise above these restrictions because the female class is self-defining.

Protestors have attempted to circumvent women's legitimate status as a class under section 1985(3) by distinguishing "women who seek abortions" as a subset of the class of women. This attempt at eliminating the patients' class status, however, has proved ineffective for most courts\textsuperscript{115} and has been discredited as a "strained distinction [that is] wholly

\textsuperscript{109} See Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218, 224 (6th Cir. 1991).
\textsuperscript{110} See Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979).
\textsuperscript{112} See, e.g., Volk v. Coler, 845 F.2d 1422, 1434 (7th Cir. 1988) (§ 1985(3) "extends . . . to conspiracies to discriminate against persons based on sex, religion, ethnicity or political loyalty" (citation omitted)); Conklin v. Lovely, 834 F.2d 543, 549-50 (6th Cir. 1987) (holding that § 1985(3) extends to animus directed against political views); McLean v. International Harvester Co., 817 F.2d 1214, 1218-19 (5th Cir. 1987) (section protects classes characterized by "some inherited or immutable characteristic" or by "political beliefs or associations"); Conroy v. Conroy, 575 F.2d 175, 177 (8th Cir. 1978) (woman had properly pleaded jurisdiction under the statute by alleging discrimination on the basis of her sex as well as race); Means v. Wilson, 522 F.2d 833, 839 (8th Cir. 1975) (section protects the right to vote in Indian tribal elections against interference with private conspiracies), cert. denied, 424 U.S. 958 (1976); Action v. Gannon, 450 F.2d 1227, 1232-35 (8th Cir. 1971) (en banc) (extended to members of a predominantly White religious group whose services were disrupted by Blacks demanding that the parish alter its investment policies).
\textsuperscript{113} See Lucero v. Operation Rescue of Birmingham, No. 91-7685, 1992 WL 19204, at *4 (11th Cir. Feb. 5, 1992); Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788, 793-94 (5th Cir. 1989); Portland Feminist Women's Health Center v. Advocates For Life, Inc., 712 F. Supp. 165, 169 (D. Or.) (citing Lopez v. Arrowhead Ranches, 523 F.2d 924 (9th Cir. 1975), aff'd as modified, 859 F.2d 681, 687 (9th Cir. 1988). It should be noted that until 1981, the Southern States within the 11th Circuit's jurisdiction were part of the 5th Circuit; thus, it is predictable that decisions like Lucero and Mississippi Women's would be closely similar. It is also ironic to note that the Act was passed to protect citizens suffering Ku Klux Klan attacks in these same states.
\textsuperscript{114} See Portland Feminist, 712 F. Supp. at 169.
\textsuperscript{115} See Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218, 224-25
The ability to be pregnant is a defining characteristic of womanhood, and the choice of whether to remain pregnant is common to all women. Thus, a conspiracy against women who choose to terminate pregnancy does not create a class separate from that of women. The Supreme Court has supported this rationale.\textsuperscript{117} It found that a classification or policy that burdens some but not all women is gender-based even though many women are unaffected.\textsuperscript{118} Furthermore, it is not necessary that the conspirators' animus be directed at every individual member of the class. This kind of reasoning would have permitted defendants in \textit{Griffin v. Breckenridge} to eschew the racial animus behind their conspiracy by praising blacks who knew their place and expressly limiting their acts to those blacks seeking to enjoy the full autonomy guaranteed them by the Constitution.\textsuperscript{119}

Just as Congress established in amendments to Title VII that discrimination on the basis of pregnancy is the same as discrimination on the basis of gender, the Supreme Court should find that a conspiracy against pregnant women, who elect to terminate the pregnancy, is the same as conspiracy against women. In the Pregnancy Discrimination Act of 1978,\textsuperscript{120} Congress stated that for purposes of Title VII, discrimination "because of or on the basis of pregnancy" is discrimination "on the basis of sex."\textsuperscript{121} A recent Supreme Court case supported gender discrimination on the basis of pregnancy discrimination and, importantly, went even further to find gender discrimination independent of Title VII.\textsuperscript{122}

\footnotesize
\begin{itemize}
\item \textsuperscript{116} \textit{Volunteer Medical Clinic}, 948 F.2d at 224-25. The court explained that:
\begin{quote}
The fact that only women who "choose" to become pregnant (no doubt a dubious characterization in many cases) may actively exercise the right to an abortion free from governmental interference in no way entails that the class is undeserving of § 1985(3) protection. A statute that disenfranchised African Americans would be no less a deprivation of equal protection of the laws simply because it was intended to affect only that class of African Americans who wish to vote. Virtually any conduct that violates equal protection under § 1985(3) can be characterized as impacting only those members of the class seeking to exercise the predicate statutory or constitutional right. The Supreme Court has clearly held, however, that the defendant's conduct need not affect every member of the class to make out a § 1985(3) violation.
\end{quote}
\item \textsuperscript{117} \textit{Id.} at 224-25.
\item \textsuperscript{118} See \textit{id.; Phillips v. Martin Marietta Corp.}, 400 U.S. 542, 544 (1971) (per curiam).
\item \textsuperscript{119} Brief Amicus Curiae of the American Civil Liberties Union in Support of Respondents at 23, \textit{Bray III, supra} note 10 (citation omitted).
\item \textsuperscript{120} 42 U.S.C. § 2000e(k) (1988).
\item \textsuperscript{121} \textit{Id.}
\end{itemize}
This precedent, although dealing with gender discrimination in the workplace, can readily be applied to the gender discrimination that takes place in clinic protests. In both cases, the gender discrimination was based on pregnancy.

In addition, neither the Constitution nor section 1985(3) contain a requirement that a majority of women be affected before a governmental practice or private conduct may be analyzed as gender-based. The choice to have an abortion or to continue the pregnancy to term is still a constitutionally protected right of women as a class. Purposefully pursuing the denial of this right to all women, and the right to travel to effectuate it, is to conspire against women as a class.

The judicial system as a whole treats women as a semi-suspect class, and gender-discrimination laws are given heightened scrutiny. As the Sixth Circuit has stated:

Gender is precisely the type of "immutable characteristic" that has consistently been held an improper basis upon which to differentiate individuals in the allocation of rights. Sex discrimination, whether overt or invidious, offends the fundamental notion that our nation's legal protections extend equally to all citizens and is repugnant to the values of civil rights and liberties upon which our Constitution rests. Thus, courts should enjoin any conspiracy that discriminates against women for a choice they can make because they are women.

Additionally, it is irrelevant that a class of women seeking abortions is a subset of the class of women because "[a]side from the fact that only women get pregnant, Congress has legislated in Title VII to protect pregnant women from discrimination." Pregnancy is an immutable characteristic of womanhood. Thus, discrimination against pregnancy or pregnant women is gender discrimination.

Protestors argue further that the class is under-inclusive because patients are not the only ones whose entrance to the clinics is barred. They also assert that because their actions are not directed at women in general but against an activity, or only a "subgroup" of women, there can be no class and thus no class-based animus. The Second Circuit has labeled

124. See, e.g., Craig v. Boren, 429 U.S. 190, 197-99 (1976) (Court applied an intermediate level of scrutiny for gender-based classifications); Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (Court held that classifications based on gender are suspect); Planned Parenthood Ass'n v. Holy Angels Catholic Church, 765 F. Supp. 617, 623 (N.D. Cal. 1991) (women seeking an abortion given "semi-suspect class status;;" it does not matter that women seeking abortion is a subset of women as a class).
this argument mere "sophistry . . . because [the protestors'] actions are directed only against those members of a class who choose to exercise particular rights, . . . not against class members whose actions do not offend them." The protestors' under-inclusive argument is also irrelevant. The Supreme Court in *Griffin v. Breckenridge* held that the car driver, a person who was conspired against—not for being Black but rather because the conspirators thought he was a civil rights worker—was protected under the section. The doctors, nurses, and friends that have been barred from abortion clinics can likewise be protected by likening them to the "champions" of Blacks in *Griffin*.

There is a gender-based conspiracy regardless of whether protestors block everyone who tries to enter a clinic or whether they simply stop the patients. Operation Rescue has argued otherwise, alleging that discrimination cannot be gender-based because it separates persons of the same gender from one another—obviously, on a basis other than gender. This argument is, in the words of the District Court of Kansas, "facile and irrelevant," because the group's goal was to eliminate the right to obtain an abortion, something only a woman can exercise. The Supreme Court in *Novotny* found that Title VII protection against gender discrimination could be extended to protect a male champion of women workers. Such an extension is yet another reason to reject the protestors' argument that their actions are not gender-based because they bar men as well as women. Also, the fact that the conspiracy has an impact on some men does not negate the application of section 1985(3).

Of great significance is the different effect that the conspiracy has on those people whose entrance is impeded. While men may be barred, it is only women who are at risk for the serious health consequences that can result from a delayed or prevented abortion. According to the Supreme Court, where women suffer a "substantial burden that men need not suffer," the challenged conduct is gender-based. That standard certainly applies here where only women can suffer this burden associated with pregnancy.

Also immaterial is the fact that women are involved in the protests against patients. It is clearly conceivable that women could conspire against other women. A nearly analogous situation was recently consid-

128. Id.
130. See id. at 103.
131. See id.
135. See, e.g., id. at 378 (man affected by gender-discrimination against women employees); Griffin v. Breckenridge, 403 U.S. 88, 103 (1971) (holding that someone who was helping Blacks, such as a civil rights worker, could be protected by § 1985(3)).
ered involving the issue of whether a dark-skinned Black could discriminate against a light-skinned Black. Because Congress has differentiated between "race" and "color" in such protective statutes as section 1981 and Title VII, and because the Supreme Court in *Saint Francis College v. Al-Khazraji* found that the legislative history of section 1981 indicated that it protects all types of ethnic groups within the caucasian race, "[i]t would take an ethnocentric and naive world view to suggest that we can divide caucasians into many sub-groups but somehow all blacks are part of the same sub-group."  

Discussing the implications of racial discrimination under section 1981, the Supreme Court concluded that:

Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended section 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.

Findings that one member of a race can discriminate against another member of a race on the basis of "physiognomical" distinctions are analogous to gender discrimination and thus are applicable to section 1985(3) actions.

**CONCLUSION:** THE SUPREME COURT SHOULD AFFIRMATIVELY GUARANTEE WOMEN'S RIGHTS UNDER SECTION 1985(3)

The Supreme Court should answer the question of class affirmatively by establishing that women are a protected class under the aegis of section 1985(3), that women who seek entry to abortion clinics are members of that class, and that the class's fundamental rights of travel and privacy have been violated by protestors at abortion clinics.

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142. "Physiognomic" is defined as "the face or countenance, especially when considered as an index to the character." The Random House College Dictionary (rev. ed. 1988). See also *Recent Case*, 103 Harv. L. Rev. 1403, 1406-08 (1990) (suggesting that the decision is a "double-edged sword" because it recognizes the invidious nature of intraracial discrimination while diluting the legislative intent of the Civil Rights Act of 1866).