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I. INTRODUCTION

One of the most heated battles raging in the federal district and circuit courts concerns the scope of 42 U.S.C. § 1985(3) and the use of this statute by abortion clinics against Operation Rescue's blockades. Operation Rescue is a pro-life organization that engages in civil disobedience by using the bodies of its members to block the entrances to abortion clinics. Their stated purpose is to

1Operation Rescue was founded in 1987 by Randall Terry. Within two years, behind Terry's leadership, Operation Rescue grew to 35,000 members in 200 cities. By 1989,
"rescue" the lives of the unborn children who would otherwise be aborted at the clinics on the days they are blockaded. In response, some of the clinics are attempting to stop the blockades by seeking federal remedies against the "rescuers" under § 1985(3).

Section 1985(3) provides for civil liability for conspiracies with the intent to deprive "any person or class of persons of the equal protection . . . or equal privileges and immunities under the laws." The Supreme Court interpreted this language as requiring a "racial, or perhaps otherwise class-based, invidiously discriminatory animus" as the motivation behind the conspiracy. Unfortunately, the Griffin Court's use of the phrase "perhaps otherwise class-based" has created much uncertainty in the lower courts concerning the scope of § 1985(3) and whether the statute applies to invidious discrimination against class-based groups other than racial groups.


Terry's childhood background was not what one might expect. Terry's mother and his two aunts were ardent feminists. At age 16, he dropped out of high school in New York and left home to become a rock star in Texas. Later, however, he became a "born-again" Christian and enrolled in a Bible college. At age 24, he became committed to the pro-life movement after a church prayer session focusing on abortion as "the Holocaust in America." At age 28, he founded Operation Rescue.

Operation Rescue draws its name from a passage in The Bible: "Rescue those who are being dragged to death, and from those tottering to execution withdraw not. If you say, "I know not this man!" does not he who tests hearts perceive it? He who guards your life knows it, and he will repay each one according to his deeds." Proverbs 24:11-12.


For a list of groups that the lower courts have held as falling or not falling within the class-based animus requirement of § 1985(3), see JOSEPH G. COOK & JOHN L. ŠOBIESKI, CIVIL RIGHTS ACTIONS § 13.09(A) (1991).

7Id. at 102.
8For a list of groups that the lower courts have held as falling or not falling within the class-based animus requirement of § 1985(3), see Joseph G. Cook & John L. Šobieski, Civil Rights Actions § 13.09(A) (1991).
of § 1985(3), but also left other questions unanswered. Significantly, they failed to resolve the lower courts' confusion over whether § 1985(3) applies to classifications other than race, and if so, to what groups it might apply.

It is this confusion that has helped to create the present legal battle over the applicability of § 1985(3) to the Operation Rescue blockades. The abortion clinics' position is that the blockades are conspiracies within the meaning of § 1985(3) and that they represent a form of class-based (in this instance, gender-based) invidiously discriminatory animus against women. Operation Rescue, on the other hand, argues that it opposes an activity (abortion) and not a class of persons (women). It also argues that it is questionable whether § 1985(3)'s class-based discriminatory animus requirement extends beyond racial groups to include gender-based groups. This battle between the clinics and Operation Rescue over the meaning of § 1985(3) may soon be resolved by the Supreme Court. The Court has granted certiorari in an Operation Rescue blockade case in Bray v. Alexandria Women's Health Clinic.

The purpose of this Note is to demonstrate that § 1985(3) is not applicable to Operation Rescue's blockade activities. Part II provides a brief survey of the history of § 1985(3) from its roots in the post-Civil War era to the 1950's. Part III examines the requirements for a § 1985(3) claim as delineated in the Griffin, Novotny, and Scott decisions. Part IV applies these requirements to the blockade controversy and argues that: (1) Gender-based animus should be accepted by the Court as a form of class-based animus within the meaning of § 1985(3); (2) the blockades do not fall within § 1985(3) because they are not motivated by a gender-based animus; and (3) the claims against Operation Rescue fail to meet § 1985(3)'s requirement of interference with an independently existing right as established by the Court in Novotny.

II. THE HISTORY OF § 1985(3)

In 1871, in response to increasing acts of violence by the Ku Klux Klan, the 42nd Congress passed the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. The Ku Klux Klan Act was one of several pieces of civil rights legislation enacted by the Reconstruction Congress from 1866-75 to combat problems related to racial discrimination in the South.

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16Four other civil rights acts were pushed through Congress in these years: Act of May 31, 1870, ch. 114, 16 Stat. 140 (codified at 42 U.S.C. § 1981-1982 (1982)) (protecting...
Klux Klan Act, now codified at 42 U.S.C. § 1985(3), provided for civil liability for 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." It did not take long, however, for the Supreme Court to dismantle Congress' grand scheme of federal civil rights protection. A series of Supreme Court decisions in the fifty years after the passage of the Ku Klux Klan Act rendered it and much of the other federal civil rights legislation passed by the Reconstruction Congress largely impotent. The Slaughter-House Cases limited the Privileges and Immunities Clause of the Fourteenth Amendment to "a small subset of rights arising from national citizenship, such as the right to travel to the national capital, the right to sue in federal court, and the right to use the navigable waters of the United States." The conspiracy section of the Ku Klux Klan Act used language that mirrors the Privileges and Immunities Clause of voting rights); Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (codified in part at 42 U.S.C. § 1984 (1882)) (prohibiting racial discrimination in public accommodations); Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified in various 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).

17 Section 2 also originally provided for criminal penalties, but this portion of the Act was held unconstitutional in United States v. Harris, 106 U.S. 629 (1882). For further discussion of the criminal penalty portion of Section 2, see JOSEPH G. COOK & JOHN L. SOBIESKI, CIVIL RIGHTS ACTIONS § 13.02 (1991).

18 Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13 (1871). The civil conspiracy portion was later codified as 8 U.S.C. § 47(3), and, for a short time, as 42 U.S.C. § 1985(c). For the purposes of this Note, it will be referred to in its present form, 42 U.S.C. § 1985(3). The statute reads, in relevant part:

If two or more persons . . . conspire or go in disguise on the highway or on the premises of another, 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 . . . 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 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.


1983 U.S. (16 Wall.) 36 (1873). The Slaughter-House Cases involved a constitutional challenge by a group of butchers to a Louisiana statute which gave one company a monopoly on cattle slaughtering in parts of Louisiana. The butchers claimed that the monopoly constituted a violation of the Privileges and Immunities Clause of the Fourteenth Amendment. The Supreme Court rejected the butchers' claim, holding that the butchers' right to carry on a business was not one of the rights of national citizenship protected by the Privileges and Immunities Clause. Id. at 78.

20 Gormley, supra note 15, at 542.
the Fourteenth Amendment. Thus, to the extent the Court limited that clause, it also limited the reach of the Ku Klux Klan Act.21

Perhaps the biggest blow to the reach of the Ku Klux Klan Act came in United States v. Harris,22 where the Court struck down the criminal portion of section 2 of the Act.23 The Court held that the Fourteenth Amendment did not give Congress the power to reach purely private acts of mob violence.24 It could only be invoked where the state itself had participated in the wrongdoing.25 Since the civil conspiracy section of the Ku Klux Klan Act was phrased in Fourteenth Amendment language, it too, by implication, would be limited by this state action requirement. Consequently, the ability of the Act to reach private conspiracies was rendered practically null and void. This is evidenced by the fact that from the date the Act was enacted until 1920, not one case involving the civil conspiracy section of the Ku Klux Klan Act (42 U.S.C. § 1985(3)) appeared in the Federal Reporter.26 The Supreme Court did not hear a § 1985(3) case until Collins v. Hardyman27 in 1951. In Collins, the Court made the state action requirement specifically applicable to § 1985(3).28

21Id. at 541-42.

22106 U.S. 629 (1883). In Harris, a group of white men took four black men out of a Tennessee jail and brutally beat them. The whites were indicted under the criminal conspiracy section of the Ku Klux Klan Act, which made it a crime for two or more persons to conspire to deprive someone of equal privileges and immunities or equal protection under the laws. The Court held that the criminal conspiracy section of the Act was unconstitutional. Id. at 640. The Court reasoned that the fourteenth amendment, from which the language of the criminal conspiracy section was taken, required state action and provided no protection against the infringement of equal privileges and immunities or equal protection by private individuals. Id. at 637-40.

23The criminal portion was codified at that time as Rev. Stat. § 5519 (1875).

24106 U.S. at 637-40.

25Id. at 638-39.


28Id. at 661.
III. Griffin, Novotny, and Scott: The Search for a Modern Interpretation of § 1985(3)

A. Griffin and Novotny

1. The Rebirth of § 1985(3)

In 1971, a century after the passage of the Ku Klux Klan Act, the Court, in Griffin v. Breckenridge, gave new life to § 1985(3). For the first time, the Court held that § 1985(3) provides a civil remedy for certain private conspiracies. In doing so, the Court rejected the state action requirement laid down in Collins v. Hardyman. While not explicitly overturning Collins, the Court concluded that most of the potential constitutional problems that formed the basis of the Court’s holding in Collins were simply nonexistent. The Collins Court had interpreted the Fourteenth Amendment language of § 1985(3) regarding "equal protection" and "privileges and immunities" to mean that the statute reached only conspiracies under color of state law. The Griffin Court, however, examined the historical background and the plain language of the statute and concluded that "all indicators - text, companion provisions, and legislative history - point unwaveringly to § 1985(3)'s coverage of private conspiracies." While recognizing the legislative intent of the Reconstruction Congress that § 1985(3) was intended to cover private conspiracies, the Court also recognized Congress’ intent that the statute not become a general federal tort law en-

30 Id. at 101.
31 341 U.S. at 651.
32 403 U.S. at 96. The Collins Court feared that removing the state action requirement on § 1985(3) would raise serious problems in regard 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 question of separability of the Act in its application to those two classes of rights." 341 U.S. at 659.
33 403 U.S. at 92 (interpreting the Court’s decision in Collins v. Hardyman, 341 U.S. 651 (1951)).
34 Id. at 101. In regard to § 1985(3)'s companion provisions, the Court explained: There appear to be three possible forms of a state action limitation of § 1985(3) - that there must be action under color of state law ... interference with or influence upon state authorities, or ... a private conspiracy so massive and effective that it supplants those authorities and thus satisfies the state action requirement. The Congress that passed the Civil Rights Act of 1871, 17 Stat. 13, § 2 of which is the parent of § 1985(3), dealt with each of these three situations in explicit terms in other parts of the same Act. ... Given the existence of these three provisions, it is almost impossible to believe that Congress intended, in the dissimilar language of the portion of § 1985(3) now before us, simply to duplicate the coverage of one or more of them.
Id. at 98-99.
compacting each and every private conspiracy. Therefore, the Court culled from the statute a four-part test for stating a cause of action under § 1985(3). To make his case, a plaintiff would need to prove:

(1) [A] conspiracy; (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) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

The Court interpreted the language in part two of the test regarding "equal protection" and "privileges and immunities" to require a "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." The Court viewed this requirement as giving effect to the congressional purpose behind part two of the test. This purpose - to limit the reach of the statute to conspiracies motivated by a class-based animus - was stated by several congressmen who were sponsors of the limiting amendment that placed part two of the test into the statute. The Court relied on remarks by Representative Shellabarger, the House sponsor of the bill that contained what is now § 1985(3):

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.

In addition to the four-part test, the Griffin Court established another requirement for claims under § 1985(3). For a claim to be valid, the trial court must find that Congress had the constitutional authority to impose liability for the alleged private conspiratorial conduct. This requirement was later

35Id. at 102.


37403 U.S. at 102.

38Id. at 100, 102. For a more extensive discussion of the congressional debate surrounding the limiting amendment, see Gormley, supra note 15, at 537-39 (analyzing the congressional purpose behind the limiting amendment in a manner similar to the Griffin Court). But see Neil H. Cogan, Section 1985(3)'s Restructuring of Equality: An Essay on Texts, History, Progress, and Cynicism, 39 Rutgers L. Rev. 515, 563-64 (1987) (disagreeing that the purpose of the limiting amendment was to confine § 1985(3) to conspiracies with a class-based animus).

39403 U.S. at 100 (quoting Rep. Shellabarger, Cong. Globe, 42d Cong., 1st Sess. 478 (1871)).

40Id. at 103.
clarified by the Court in *Great American Federal Savings & Loan Ass'n v. Novotny*, a § 1985(3) case involving Title VII of the Civil Rights Act of 1964. In *Novotny*, the Court held that § 1985(3) creates no substantive rights itself, but is purely a remedial statute. It provides "a civil cause of action when some otherwise defined federal right - to equal protection of the laws or equal privileges and immunities under the laws - is breached by a conspiracy in the manner defined by the section."  

The *Griffin* Court identified two sources of constitutional authority that provided a basis for the petitioners' § 1985(3) claim. First, the Court found a basis for imposing liability for private conduct in the Thirteenth Amendment. The Court reasoned that the Thirteenth Amendment prohibits not only state laws upholding slavery, but also private conduct. The Court then concluded that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."  

The second source of constitutional authority identified by the *Griffin* Court was the right of interstate travel. The Court noted that it is well established that the right of interstate travel is protected against private interference as well as interference by the State. Thus, the Court concluded that it was up to the petitioners to prove that one of the respondents' intentions was to discriminatorily interfere with the petitioners' right of interstate travel. Having proved that, there would be a basis of congressional power by which § 1985(3) could reach the private conspiratorial conduct. Significantly, the Court noted that by identifying the right of interstate travel and the Thirteenth Amendment as valid sources of congressional power for a § 1985(3) claim, it was not implying the absence of other possible sources of that power.  

2. The aftermath of *Griffin*

While the *Griffin* Court opened up the federal courts to § 1985(3) claims, it also left some important questions unanswered. In holding that § 1985(3)

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41 42 U.S. 366 (1979). The petitioner in *Novotny* was a male bank employee who sued his employer under both Title VII and § 1985(3). He claimed he was fired for standing up to his employer's discriminatory practices toward female employees. *Id.* at 368-69. The Court held that the deprivation of Title VII rights cannot form the basis for a § 1985(3) claim. The Court reasoned that to hold otherwise would permit plaintiffs to circumvent the detailed administrative provisions of Title VII. *Id.* at 378.


43 42 U.S. at 376.

44 403 U.S. at 105.

45 *Id.* (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968)).

46 *Id.*

47 *Id.* at 106.

48 *Id.* at 107.
requires a racial or perhaps otherwise class-based, discriminatory animus behind the conspiracy, the Court left open the question of whether the statute applied to classes other than race, and if so, to what classes.\(^\text{49}\) The facts of \textit{Griffin} were of no help in answering this question, since the situation in \textit{Griffin} involved racial animus and was factually quite similar to the racially motivated Klan violence that § 1985(3) was originally designed to address.\(^\text{50}\)

A second question left open by the Court was whether a § 1985(3) claim could be based on the deprivation of a right that normally is one protected only against state action. The cause of action in \textit{Griffin} rested on two rights that are protected against private as well as state conduct - the Thirteenth Amendment and the right of interstate travel. It was unclear what would happen if a plaintiff tried to rest his § 1985(3) claim on the deprivation of, for instance, a Fourteenth Amendment right, which is protected only against state action. In short, was there still some form of a state action requirement left, even after \textit{Griffin}?  

\textbf{B. United Bhd. of Carpenters & Joiners v. Scott}

\textbf{1. Class-Based Animus}

In \textit{United Bhd. of Carpenters & Joiners v. Scott},\(^\text{51}\) the Court declined to resolve the confusion over whether § 1985(3) applies to classifications other than race. In regard to this issue, the Court stated that "it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause."\(^\text{52}\) The Court gave no clear indication of how it might decide this issue in the future. On the one hand, the Court recognized that the legislative history of § 1985(3) might seem to


\(^{50}\) In \textit{Griffin}, the petitioners were three blacks who were stopped on a highway in Mississippi and forced out their car by the respondents, a group of white men. The whites pointed guns at the blacks and threatened to kill them. They then clubbed the black men brutally, inflicting serious injuries. The motivation (animus) behind the attack was the mistaken belief that the driver of the car was an out-of-state worker for a group called "Civil Rights for Negroes." 403 U.S. at 88-91.

\(^{51}\) 463 U.S. 825 (1983). The respondents in \textit{Scott} were an employer and two of his non-union employees. The employer, the head of a construction company, had been threatened with violence several times by union locals and their members. On one occasion, a protest at the construction site turned into an ugly mob scene. The mob stormed the site, brutally beating the employer and several of his employees with iron rods and wooden boards. The mob also set fire to the construction site office and vandalized company tools and equipment. \textit{Scott v. Moore}, 680 F.2d 979, 982-84 (5th Cir. 1982) (en banc), \textit{rev'd sub nom. United Bhd. of Carpenters, Local 610 v. Scott}, 463 U.S. 825 (1983).

\(^{52}\) 463 U.S. at 836.
support a broad view of what classes the statute could reach.53 The Court acknowledged the words of Senator Edmunds, Senate manager of the bill that contained what is now § 1985(3), who said if a man were conspired against "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."54 On the other hand, the Court discounted to some extent the significance of Senator Edmunds’ comments. The Court noted that the Senate had made only minor technical changes in the bill, and that the amendment which gave § 1985(3) its class-based animus limitation had actually been proposed, debated, and adopted in the House.55

While not shedding any light on what forms of class-based animus besides race might be included in § 1985(3), the Scott Court did make it clear that "conspiracies motivated by bias toward others on account of their economic views, status, or activities"56 were not reached by the statute. In denying relief to the respondents, the Court stated that it could find nothing in the legislative history to support extending the reach of § 1985(3) to economic or commercial animus.57 A four-person dissent, led by Justice Blackmun, disagreed. Based on certain congressional statements of concern regarding economic animus in the legislative history of 1985(3), they concluded that economic animus is within the reach of the statute.58

2. State Action Requirement

In addition to dealing with the issue of economic animus, the Scott Court provided an answer to the "state action" question. In Scott, the respondents, a non-union employer and two of its employees, sought a remedy under § 1985(3) by alleging that the petitioners, trade unions and their members, conspired to deprive them of their First Amendment right to freedom of association by attacking the employer’s non-union workers and vandalizing company equipment.59 The Court held that a "conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved that the State is involved in the conspiracy or that the aim of the conspiracy is to influence activity of the State."60 The reasoning of the Court took the following steps: (1) Despite the fact that its language resembles that of the Fourteenth

53 Id.
54 Id. at 837 (quoting Sen. Edmunds, CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871)).
55 Id.
56 Id. at 837.
57 463 U.S. at 837-38.
58 Id. at 852-53 (Blackmun, J., dissenting).
59 Id. at 828-30.
60 Id. at 830.
Amendment, there is no state action requirement inherent in § 1985(3);61 (2) § 1985(3) is purely remedial. Any rights that are protected by 1985(3) must come from elsewhere;62 (3) The respondents here allege a conspiracy to deprive them of their First Amendment rights. The First Amendment is made applicable to the states through the Fourteenth Amendment. The Fourteenth Amendment provides protection only from state action, not from private wrongs done by individuals;63 (4) When, as here, the right that the conspiracy allegedly interfered with is by definition a right that is protected only against state interference, the claimant is required to prove state involvement in the conspiracy.64

3. The Aftermath of Scott

The Scott decision drew criticism from scholars. Some were critical of the Court's continuing unwillingness to clarify once and for all the issue of whether § 1985(3) extends beyond conspiracies motivated by racial animus. A major concern was the effect of this lack of clarity on the lower courts,65 which were already badly in need of guidance on this issue.66 Others who wanted to see § 1985(3) expanded beyond racial animus questioned the Court's conservative reading of the statute and its legislative history. One such commentator, criticizing the Court's conservative analysis, stated:

A Court that does not discuss text, context, or connected statutory text, that discusses congressional debate with minimal references to that debate, and that discusses most fervently principles of federalism and judicial restraint, such a Court is unlikely to read the statute to protect equality beyond situations of egregious racial conflict.67

Some critics, however, thought the Scott Court should have clearly restricted the scope of § 1985(3) to conspiracies involving racial animus, or at least not much beyond that. One commentator noted why some might see the need for such an approach: "[F]ederal judges seemed to be ignoring the warning of . . . [§ 1985 (3)'s] framers against converting the statute into a general federal tort law . . . [and have] found causes of action in such unusual contexts as conspir-
acies aimed at environmentalists or members of a single family." Critics on both sides of the debate, though, seemed to agree on one thing: The Scott Court needed to clarify the class animus issue, and it failed to do so.

IV. THE MISUSE OF § 1985(3) AGAINST OPERATION RESCUE

There are two major issues in the debate over the applicability of § 1985(3) to the Operation Rescue blockades. The first is whether the blockades represent a form of class-based invidiously discriminatory animus against the class, "women seeking abortions." The important sub-issues here are: (1) Whether § 1985(3) provides protection against conspiracies motivated by a gender-based animus against women; and (2) if so, whether "women seeking abortions" qualify as a subset of women; and (3) whether the blockades represent an animus toward "women seeking abortions" or simply an animus toward the activity of abortion and the principle that it is moral and legal to abort an unborn human being. The second major issue in this debate is whether the claims against Operation Rescue meet the § 1985(3) requirement of interference with an independently existing right as stated in Great American Federal Savings & Loan Ass'n v. Novotny. The two rights which abortion clinics typically allege Operation Rescue interferes with are the right to abortion and right of interstate travel.

A. The Blockades: Invidiously Discriminatory Animus Against Women Seeking Abortions?

1. Section 1985(3) Reaches Gender-Based Animus

Notwithstanding the Scott Court's pronouncement that it is a "close question" whether § 1985(3) was intended to reach class-based animus other than racial animus, at least eight circuit courts have held that § 1985(3) reaches gender-based animus. Many district courts have come to the same

68 Gormley, supra note 15, at 557 (footnote omitted).
The justifications these courts have given for the inclusion of gender-based animus have generally focused on three aspects of § 1985(3): (1) legislative history; (2) text; and (3) historical context.

The legislative history of § 1985(3) strongly suggests that the 42nd Congress intended this statute to be interpreted broadly to protect classes other than racial classes. Several members of Congress made strong statements about the breadth of classes the statute was meant to cover. The statement most often quoted by the courts is that of Senator Edmunds, the manager of the bill in the Senate, who stated that, "If...it should appear that this conspiracy was formed against this man because he was a Democrat, ... [or] a Catholic, or ... a Methodist, or ... a Vermonter, ... then this section could reach it." 74 Representative Shellabarger, who introduced the bill in the House, also argued for a broad judicial interpretation of § 1985(3). He stated: "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficially construed." 75 Perhaps the most persuasive argument for the specific inclusion of women as a class within § 1985(3) is found in these words of Representative Buckley: "The 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...." 76

Some courts and commentators find a second argument for the inclusion of women as a class under § 1985(3) in the plain language of the statute. 77 There is nothing in the text of the statute itself that would lead one to a restrictive reading of § 1985(3). Section 1985(3) does not speak in terms of race. Instead, it uses broad language to describe the people the statute protects. The Second Circuit took note of this, stating:

The broad language of § 1985(3) does not exclude women from its protection. It speaks instead of "persons" and "class[es] of persons," and seeks to secure to them the "equal protection of the laws" and the "equal privileges and immunities under the laws."

... Distinctions based upon immutable characteristics such as sex have long been considered invidiously discriminatory. By its very

74 CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871). The Scott Court, as previously mentioned, discounted to some extent the importance of Sen. Edmunds' remarks. However, the Court also noted that "Senator Edmunds' views, since he managed the bill on the floor of the Senate, are not without weight." 463 U.S. at 837. The Court also noted that his remarks were the clearest expression in the legislative history of the broader view of § 1985(3). Id. at 836.
75 CONG. GLOBE APP., 42d Cong., 1st Sess. 68 (1871).
76 Id. at 190.
77 See generally Cogan, supra note 38 (outlining a method of reading and interpreting the text of § 1985(3), its legislative history, and its surrounding statutory texts).
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

In light of the plain text of § 1985(3), it is indeed difficult to understand how the Supreme Court sees it as a "close question" whether § 1985(3)'s protection extends beyond racial classes. 79

A third factor that has led many courts to conclude that women are protected as a class under § 1985(3) is the historical context of the statute. As originally enacted, the Ku Klux Klan Act of 1871 was entitled, "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 80 The Equal Protection Clause of the Fourteenth Amendment was, like § 1985(3), initially written to ensure equal treatment of the recently freed slaves. Section 1985(3)'s language concerning "equal protection" was taken directly from the Fourteenth Amendment. This led the Sixth Circuit to conclude in Browder v. Tipton, 81 that "[t]he distinction between classes protected by § 1985(3) and those that are unprotected must be rooted somewhere in traditional equal protection analysis." 82 In 1973, in

78 N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1358-59 (2d Cir. 1989) (citation omitted), cert. denied, 495 U.S. 947 (1990). The Court went on to state: "It is ... untenable to believe that Congress would provide a statutory remedy against private conspiracies, the purpose of which is to deny rights common to every citizen, and exclude women as a class from the shelter of its protection." Id. at 1359.

79 Cf. Cogan, supra note 38, at 517-18 (arguing that a novice reader of legal texts might do a better job of interpreting the language of § 1985(3) than the Supreme Court has done).


81 630 F.2d 1149 (6th Cir. 1980). The plaintiffs in Browder were truck drivers who were delivering fuel to a Tennessee company that was experiencing labor problems. When the plaintiffs attempted to cross the picket line in their trucks, an altercation developed between the plaintiffs and one of the defendants. Later, the defendants appeared before a county magistrate and falsely accused the plaintiffs of committing serious felonies. As a result, the plaintiffs were arrested. Subsequently, they filed a § 1985(3) claim against the defendants. The Court of Appeals for the Sixth Circuit affirmed the decision of the district court dismissing the suit. The appellate court explained its decision on the basis of an equal protection analysis of § 1985(3):

[T]he class of individuals protected by the "equal protection of the laws" language of the statute are those so-called "discrete and insular" minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics. The persons protected under the "equal privileges and immunities" language of the statute are those individuals who join together as a class for the purpose of asserting certain fundamental rights. These classes do not include picket line crossers who are falsely arrested.

Id. at 1150.

82 Id. at 1152.
Frontiero v. Richardson, the Supreme Court extended the reach of the Equal Protection Clauses of the First and Fourteenth Amendments to sex-based discrimination. Therefore, courts following this "equal protection" analysis of § 1985(3) have concluded that the statute's protection extends to women.

Of course, it can be argued that § 1985(3)'s protection should not be extended beyond racial classes. There is, after all, no affirmative intent expressed in the text of § 1985(3) to reach conspiracies based on gender. As stated in Scott, "[t]he predominant purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters." The name given to § 1985(3) - the Ku Klux Klan Act - further reinforces the purpose of the statute - to stop Klan violence in the post-Civil War South. Most courts and commentators, however, have rejected this narrow interpretation of the statute. They have, instead, concluded from the text, legislative history, and historical context of § 1985(3) that the broader reading of the statute is the more accurate interpretation.

2. "Women Seeking Abortions" Not a Gender-Based Class

To conclude that § 1985(3) affords protection against conspiracies motivated by an invidiously discriminatory animus against women, however, is not to conclude that § 1985(3) protects the subset of women, "women seeking abortions." Some courts have reasoned that there is no difference between these two classes. Therefore, they have concluded that Operation Rescue's blockades are class-based conspiracies against women seeking abortions within the meaning of § 1985(3). But there are two major flaws with this conclusion.

83411 U.S. 677 (1973). In Frontiero, the petitioner was a woman officer in the Air Force who was denied additional health and living allowance benefits for her husband. Under the prevailing laws, female spouses automatically qualified for these benefits. A male spouse of a female member of the armed forces, however, had to prove he was dependent on his wife for over one-half of his support in order to receive these benefits. The petitioner challenged the constitutionality of these laws. The Frontiero Court employed an "equal protection" analysis and concluded 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." Id. Applying strict scrutiny, the Court found the statutory scheme unconstitutional.

84Id. at 688.

85See, e.g., Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218, 224 (6th Cir. 1991).


87Most of the courts that have held that "women seeking abortions" is a class under § 1985(3) have done so on the basis of some form of Equal Protection Clause analysis. See Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218, 224 (6th Cir. 1991); N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1358-59 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990); Planned Parenthood Ass'n v. Holy Angels Catholic Church, 765 F. Supp. 617, 623 (N.D. Cal. 1991); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 712 F. Supp. 165, 169 (D. Or. 1988). The clearest statement of this viewpoint is found in Volunteer Medical Clinic, Inc. The court responded to the defendant's argument that since their blockade affected only women seeking abortions, and not women generally, § 1985(3) was not applicable:
First, it is very questionable whether "women seeking abortions" is truly a class protected by § 1985(3). Second, even if "women seeking abortions" is a § 1985(3) class, the activities of the blockaders are not motivated by an invidiously discriminatory animus against this class. Therefore, the blockades do not fall within the ambit of § 1985(3).

A number of courts have refused to recognize "women seeking abortions" as a § 1985(3) class. In *National Abortion Federation v. Operation Rescue,* the court indicated its difficulty with accepting "women seeking abortions" as a § 1985(3) class:

[If] the animus is directed at a particular class of women, then, by definition, it is not directed at . . . women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender from each other and, obviously, on a basis other than gender.

The court held that "women seeking abortions" is not a protected class under 1985(3).

Another problem with recognizing "women seeking abortions" as a class is that it is not truly a class. Rather, it is an activity - abortion - dressed up as a

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One of the primary purposes of § 1985(3), like that of the Equal Protection Clause, is not simply to accord an intangible, abstract protection to the targeted class, but to protect members of the class in the exercise of their individual rights.... 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.... To the extent that the defendant's conduct limits the ability of women to secure an abortion, it trenches upon the rights of all women. *Volunteer Medical Clinic, Inc.*, 948 F.2d 218, 224-25 (6th Cir. 1991). The Sixth Circuit’s comparison of Operation Rescue’s activities with opposition to blacks seeking to vote is flawed. Opposition to black voters is based on race. People who oppose the idea of blacks voting do so because the voters are black. They do not oppose the activity of voting itself. In the case of Operation Rescue, however, the opposition is solely to the activity of abortion.

88See Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788, 794 (5th Cir. 1989); National Abortion Fed'n v. Operation Rescue, 721 F. Supp. 1168, 1171 (C.D. Cal. 1989); cf. Lucero v. Operation Rescue, 772 F. Supp. 1193, 1205 n.37 (N.D. Ala. 1991) (stating that while it was not necessary to decide the class animus issue to resolve the case before it, the court found no animus directed at women as a group by the Operation Rescue blockade), aff'd, 954 F.2d 624 (11th Cir. 1992).


90Id.

91Id. at 1171-72.
The class of "women seeking abortions" has the same fatal flaw as did the class rejected in *Scott*:

This class . . . is not a "class" marked by historical oppression, by minority status, . . . by any political or religious belief, or by any of the indicia usually used to identify a class of persons who must be accorded special protection. The animus here was not directed at the membership of the plaintiffs in such a class or at their association together . . . but at their activities.93

The class rejected in *Scott* was "workers who refused to join a union."94 That class is similar to "women seeking abortions" in that it is defined by a common desire to exercise a legal right, rather than by an immutable characteristic, such as race. To allow such a class to invoke the protection of § 1985(3) would turn the class-based animus requirement into a contest of artful pleading. To bring one's self within § 1985(3), one would merely have to define herself, for instance, as a "woman seeking 'x'" or a "black person seeking 'y'." The possibilities would be limitless. Contrary to the expressed intentions of the Congress that enacted it, § 1985(3) would become a "general federal tort law."

3. Blockaders' Animus Against Abortion, Not Against Women

Even if one accepts "women seeking abortions" as a class under § 1985(3), Operation Rescue's blockades do not represent a form of invidiously discriminatory animus directed at this class. As the Alabama District Court noted in *Lucero v. Operation Rescue*,96 the animus of the blockades is not against the women seeking the abortions, but "against the principle that it is morally and legally right to abort a fetus."97 Operation Rescue does not target the women. Rather, it targets the practice of abortion. During a blockade, the rescuers bar access to the clinic to *everyone* involved in the abortion process—staff, doctors, nurses, and women seeking abortions and their companions.98 Thus, it is a mischaracterization of the blockades to describe them as motivated

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97 *Id.* at 1202 n.37. *Contra* Planned Parenthood Ass'n v. Holy Angels Catholic Church, 765 F. Supp. 617, 623 (N.D. Cal. 1991) (rejecting the argument that the blockades merely represent opposition to abortion).

by an animus against women seeking abortions. Indeed, the very creation of the class, "women seeking abortions," represents an attempt to mischaracterize the opposition to an activity as opposition to a class of persons. 99

There is little question that Operation Rescue's activities have an impact on the women who go to the clinics on the days they are blockaded. 100 However, even assuming that "women seeking abortions" is a protected class under § 1985(3), "impact" is not enough to establish an invidiously discriminatory animus. The legislative history of § 1985(3) and its interpretation by the Supreme Court in Scott make it clear that the essential element of a § 1985(3) claim is the presence of an invidiously discriminatory animus. 101 The Court of Appeals for the Fifth Circuit took note of this: "[T]he legislative history [of § 1985(3)] indicates that Congress wanted to evaluate "class-based invidious discrimination" through the lens of "animus or motivation, not impact." 102 Unfortunately, some courts have ignored or misunderstood this important requirement of § 1985(3) in the context of the blockade cases. As a result, they have granted remedies 103 to abortion clinics under § 1985(3) simply on the

99 Cf. Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788, 794 (5th Cir. 1989) (describing a class very similar to "women seeking abortions" as so under-inclusive as to mischaracterize the debate between the pro-life protestors and the clinic).

100 See, e.g., National Org. for Women v. Operation Rescue, 914 F.2d 582, 585 (4th Cir. 1990) (describing some of the possible physical consequences to the women whose appointments with an abortion clinic were delayed because of a blockade), cert. granted sub nom. Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991).


102 Mississippi Women's Medical Clinic, 886 F.2d at 794.

103 The most common remedy used by the courts has been the granting of injunctive relief to dissuade the blockaders from repeating their activities. See, e.g., National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1497 (E.D. Va. 1989) ("Operation Rescue, its officers, members, . . . and any persons acting in active concert . . . with it are ENJOINED and RESTRAINED from . . . trespassing on, blockading, impeding or obstructing access to or egress from any facility at which abortions, family planning, or gynecological services are provided . . .") (emphasis in original), aff'd, 914 F.2d 582 (4th Cir. 1990), cert. granted sub nom. Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991).

For the most part, courts have been careful to limit these injunctions in order to allow Operation Rescue to continue to carry on legitimate First Amendment activities outside the clinics, such as protesting and sidewalk counseling. In National Org. for Women, the court responded negatively to a request by the plaintiffs to grant extremely restrictive injunctive relief against Operation Rescue:

Plaintiffs' request is . . . overbroad in seeking to enjoin those "rescue" activities that tend to intimidate, harass, or disturb patients or potential patients of the clinics. Defendants have a significant First Amendment right to express their views on the vitally important issue of abortion and nothing in the permanent injunction should be construed to limit that right. Defendants' First Amendment right to express their own views cannot be curtailed or limited because some persons are timid or reluctant to hear expressions of defendants' views on the issue of abortion.

Id. at 1497.
basis of impact, without requiring any true showing of a class-based discriminatory animus on the part of the blockaders.

**B. The Independently Existing Right Requirement**

In addition to requiring class-based animus, the Supreme Court has held that § 1985(3) requires the deprivation of an independently existing right. Section 1985(3) itself provides no substantive rights. Rather, "[t]he rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere." Thus, to state a valid claim under § 1985(3), an abortion clinic must allege the deprivation of some independently existing right by the blockaders. Consistently, the clinics in the blockade cases have alleged the deprivation of one or both of two rights: The right to abortion and the right of interstate travel.

1. The Right to Abortion

There is both agreement and disagreement in the lower courts regarding the deprivation of the right to abortion by Operation Rescue. Nearly all of the courts considering the question agree that since the right to abortion is made applicable to the states through the Fourteenth Amendment, the deprivation of that right requires state action or involvement. The courts here are simply following the lead of the Supreme Court. In *Scott*, the Court held that § 1985(3) does not contain a state action requirement. However, the Court also held that when a § 1985(3) conspiracy is aimed at a right which is by definition only a right against state interference, such as a Fourteenth Amendment right, the plaintiff needs to show state action or involvement in the conspiracy. The disagreement in the lower courts revolves around whether in fact the blockades

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Similarly, in *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989), the court refused a request by an abortion clinic to grant an injunction "to prevent the protestors from approaching within 500 feet of the clinic and to control the language employed in their protests, forbidding the use of such terms as "kill," "murder," and "butcher." Id. at 790. Weighing the plaintiffs' rights against the defendants' First Amendment rights, the court concluded: "The Supreme Court's First Amendment jurisprudence tilts the scale . . . decisively in favor of the protestors." Id. at 796.


105 463 U.S. at 833.

106 The Supreme Court has not yet answered the question of what all of the permissible sources of such a right might be. It is clear that the deprivation of a federal constitutional right is enough to validate a § 1985(3) claim. However, in *Scott*, the Court declined to consider the issue of whether a conspiracy to deprive someone of her rights, privileges, and immunities under state law might be enough to sustain a § 1985(3) claim. Id. at 833-34.


108 463 U.S. at 832.

109 Id. at 833.
involve state action to a degree sufficient to justify allowing the clinics to invoke § 1985(3).

Only a few district courts (and no circuit courts) have held that Operation Rescue blockades involve state action sufficient to interfere with the right to abortion under § 1985(3). The rationale given for finding sufficient state action varied in each of these cases. In New York State National Organization for Women v. Terry, the court stated that the mere refusal of the blockaders "to notify the police of their next target... satisfies § 1985(3)'s requirement for state involvement." A district court in Kansas took an even more extreme position. In Women's Health Care Services v. Operation Rescue, the court held that to show state action, the plaintiff need not even prove that state actors were involved in the conspiracy. According to the court, the state action requirement could be met even when the State only "unwillingly or unwittingly... further[ed] the ends of the conspiracy." This very loose interpretation of the state action requirement, however, has been rejected by most of the courts that have dealt with this issue.

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112 Operation Rescue goes to great lengths to keep secret the location of the clinics it plans to blockade. If the police knew the location beforehand, they could arrange to have a large number of police officers there to quickly arrest the blockaders. If an abortion clinic finds out in advance that it is going to be blockaded, it will often simply shut down that day and reschedule all of its appointments for another day. Or, alternatively, a clinic might marshal pro-choice forces in an effort to hinder the blockade.

Consequently, Operation Rescue has developed several techniques to ensure that the clinics and the police do not learn the location of the blockade ahead of time. For instance, Operation Rescue makes appointments at various clinics, relying on cancellations to tell them which clinics are closing that day. The blockaders themselves are not informed of the location ahead of time. They normally meet in a parking lot and then proceed in a car and bus caravan to whatever clinic their leaders have chosen to blockade. Operation Rescue also scouts several clinic sites beforehand to make preparations and to keep the clinics guessing. Garry Wills, Save the Babies, TIME, May 1, 1989, at 26.


115 Id. at 265.

116 Some courts, presumably viewing this as a fairly simple issue, have just stated matter-of-factly, with little or no analysis, that the blockades do not involve state action...
The problem with this loose interpretation is that it ignores the important precedent set down by the Supreme Court in Lugar v. Edmonson Oil Co.\textsuperscript{117} In Lugar, the Court held that conduct alleged to have caused a deprivation of Fourteenth Amendment rights must be "fairly attributable to the State."\textsuperscript{118} The Court then set down a two-part test for determining "fair attribution":

First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the State or by a person for whom the State is responsible ... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.\textsuperscript{119}

The second part of this test reveals the problem with the loose interpretation of the state action requirement by the courts in New York State National Organization for Women and Women's Health Care Services. It is indeed difficult to see how failing to notify the police of future blockade locations or unwilling and unwitting police conduct could be construed as falling within the Supreme Court's requirement of state action by someone who may "fairly be said to be a state actor."\textsuperscript{120}

The lower courts that have applied the Lugar "fair attribution" test for state action to Operation Rescue have concluded that the blockades do not constitute state action.\textsuperscript{121} For example, in Volunteer Medical Clinic, Inc. v. Operation Rescue,\textsuperscript{122} the Sixth Circuit dealt with a fairly typical blockade. As usual, Operation Rescue blocked access to the clinic and forced the police to go through the laborious process of physically removing the "rescuers" one-by-one and charging each of them with criminal trespass.\textsuperscript{123} The plaintiff clinic alleged that this process involved state action sufficient to satisfy § 1985(3).\textsuperscript{124} The court disagreed. While acknowledging that part of the

\textsuperscript{117}457 U.S. 922 (1982).


\textsuperscript{119}457 U.S. at 937.

\textsuperscript{120}Id.


\textsuperscript{122}948 F.2d 218 (6th Cir. 1991).

\textsuperscript{123}Id. at 227.

\textsuperscript{124}Id. at 220.
blockaders' intent may well have been to overwhelm the ability of the local police to protect the patients' ability to enter the clinic for abortions, the court held that this was "insufficient to show a nexus between the state and the defendants." Using the Lugar test, the court concluded: "The protestors were neither acting under state authority, nor was the state in any sense "responsible" for their conduct at the clinic. Nor do we find any basis . . . for charging the defendant's actions to the state." 126

In Feminist Women's Health Center v. Roberts, 127 the court was faced with a fact situation similar to that in Volunteer Medical Clinic, Inc. Here, too, the court found that the state action requirement, as expressed in Lugar, was not met. 128 Significantly, the court pointed out that it is not enough to show that a blockade had an impact or an effect on the State. 129 Instead, under Lugar, plaintiffs must show that the acts violating their rights are fairly attributable to some state actor. 130

If the Lugar test is properly applied by the courts, clinics will rarely be able to show state action sufficient to prove that the right to abortion is being infringed upon under § 1985(3). Indeed, most clinics suing Operation Rescue recognize the difficulty of winning on this issue. 131 Therefore, in addition to

125 Id.
126 Id. at 227.
128 Id. at *9.
129 The plaintiff clinic made the following allegations in regard to the effect of the blockade on the local government: The police department would not allow off-duty officers to work as security guards for the clinic; the city adopted a neutral policy regarding the blockade situation; and the police failed to prosecute certain trespassers and makers of harassing phone calls. Id. at *8.
130 Id. at *9.

In general, these courts have relied on the Supreme Court's decision in Singleton v. Wulff, 428 U.S. 106 (1976). In Singleton, the Court held that physicians had standing to challenge a Missouri law excluding from Medicaid funding for all abortions except for those judged "medically indicated." Id. at 108-09. Ordinarily, one may not claim standing to assert the constitutional rights of someone else. McGowan v. Maryland, 366 U.S. 420, 429 (1961). In Singleton, however, the Court held that physicians could establish standing to sue on behalf of their patients if they could overcome two barriers. First, the physicians must allege an adequate "injury in fact." 428 U.S. at 112. Second, the physicians must show that, based on prudential considerations, they could properly assert not only their own legal rights, but also those of their patients. Id. at 113-15.
alleging the deprivation of the right to abortion under § 1985(3), they usually also allege the infringement of a right that does not require a showing of state action. Typically, they allege that Operation Rescue is infringing on the right of interstate travel.132

2. The Right of Interstate Travel

In Griffin v. Breckenridge,133 the Supreme Court "opened the door for litigants"134 to base their § 1985(3) claims on the interference with the right of interstate travel. The Griffin Court stated that the right of interstate travel "does

Most of the courts that have applied Singleton in the context of the blockades have concluded that these two barriers were sufficiently overcome by the clinics. Thus, they have permitted the clinics to sue Operation Rescue on behalf of their patients. For example, in N.Y. State Nat'l Org. for Women, the court found that the "injury in fact" barrier was overcome by the clinics' allegations that Operation Rescue had completely blockaded their facilities and interfered with their business. 866 F.2d at 1347-48. In regard to the second barrier, the court stated that it was proper for the clinics to assert their patients' rights to abortion and interstate travel, since "the enjoyment of those rights is 'inextricably bound up with the activity the litigant wishes to pursue.'" Id. at 1348 (quoting Singleton, 428 U.S. at 114).

Another issue present in the blockade cases is the question of whether associations such as the National Organization for Women and the National Abortion Rights Action League have standing to sue Operation Rescue on behalf of their members. As with the clinics, most of the courts addressing the issue have found that these organizations do have standing to sue Operation Rescue. See Roe, 919 F.2d at 865-66; N.Y. State Nat'l Org. for Women, 886 F.2d at 1348-49; National Org. for Women, 747 F. Supp. at 763. All of these courts found that these organizations met the requirements of associational standing set down by the Supreme Court of the United States in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977):

[An association has standing to bring suit on behalf of its members when:
(a) Its members would otherwise have standing to sue in their own right;
(b) the interests it seeks to protect are germane to the organization's purpose;
and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 343. For a detailed analysis of these requirements as applied to an organization seeking standing to sue Operation Rescue, see Roe, 919 F.2d at 865-66.


134Lucero, 772 F. Supp. at 1200.
not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference." Therefore, the Court held, a § 1985(3) plaintiff who alleges a defendant conspired to interfere with his right to interstate travel need not show the state was involved in the conspiracy. Through the right of interstate travel - and through other rights which do not require a showing of interference by a state actor - § 1985(3) could reach purely private conspiracies.

Abortion clinics eventually learned from the Griffin decision and began to allege in their complaints that the blockades were private conspiracies to interfere with their patients' right of interstate travel. Clinics with a significant number of clients from out of state argued that the blockades, by preventing these clients from gaining entrance to the clinics, were interfering with the right of interstate travel. Some courts have accepted this argument and have granted relief to clinics under § 1985(3), while other courts have rejected this argument.

The Supreme Court of the United States has shown a reluctance to definitively locate the right of interstate travel in any one particular constitutional provision. Over the years, the Court has identified many possible sources of the right of interstate travel, including: the Fourteenth Amendment equal protection clause, see Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982); the Commerce Clause, see Edwards v. California, 314 U.S. 160, 173 (1941); and the Fifth Amendment Due Process Clause, see Kent v. Dulles, 357 U.S. 116, 125 (1958).


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Most of the courts that have accepted the clinics' interstate travel argument have done so on the basis of a questionable interpretation of the Supreme Court's decision in Doe v. Bolton. In Doe, the Court held that a residency requirement in a state law regulating abortion violated the right of interstate travel. The residency requirement provided that one had to be a Georgia resident to obtain an abortion in Georgia. The courts which have held that the blockades violate the right of interstate travel generally interpret Doe to stand for the proposition that anything that impairs the right of nonresident women to an abortion violates the right of interstate travel. These courts appear to be drawing this interpretation from the statement by the Doe Court that the right of interstate travel "protects person[s] who enter . . . [a state] seeking the medical services that are available there." 

The problem with this interpretation is that it ignores the rationale of Doe, as stated in the next sentence of the opinion: "A contrary holding would mean that a State could limit to its own residents the general medical care available within its own borders." Thus, Doe simply holds that nonresidents may not be denied access to medical care to which residents have access. The Court in Doe was concerned with discrimination between residents and nonresidents under the Privileges and Immunities Clause of Article IV. The Operation Rescue blockades present no such problem of discrimination. They block access to residents and nonresidents alike. Therefore, under the rationale of Doe, they do not violate the right of interstate travel.


143 Id. at 200.


145 410 U.S. at 200.

146 Id.

147 Id.

148 The rationale expressed by the Doe Court for the right of interstate travel - the prevention of discrimination between residents and nonresidents - has been stated by the Court on several occasions. See Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982) (the right of interstate travel "protects new residents of a state from being disadvantaged . . . or from otherwise being treated differently from longer term residents."); Memorial Hospital v. Maricopa County, 415 U.S. 250, 261 (1974) ("[t]he right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents."); Toomer v. Witsell, 334 U.S. 385, 395 (1948) (stating the right of interstate travel means that "a citizen of State A who ventures into State B [has] the same privileges which the citizens of State B enjoy."); Hague v. Committee for Indus. Org., 307 U.S. 496, 511 (1939) (holding the Privileges and Immunities Clause of Article IV "prevents a State from discriminating against citizens of other states in favor of its own.").
Another reason that the blockades do not violate the right of interstate travel is that the blockades do not have as their purpose the interference with the right of interstate travel. In *United States v. Guest*, the Supreme Court upheld an indictment alleging a private conspiracy to interfere with the right of interstate travel in violation of 18 U.S.C. § 241 (the criminal analogue of § 1985(3)). In *Guest*, the Court emphasized that the conspiracy must be aimed at interfering with interstate travel, and must not just have coincidentally interfered with the movement of nonresidents:

Thus, for example, a conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then... the conspiracy becomes a proper object of the federal law.

In *Griffin v. Breckenridge*, a case involving allegations of a § 1985(3) conspiracy, the Court again stressed the need for proof that the purpose and intent of the conspiracy is to interfere with the right of interstate travel. The *Griffin* Court stated that plaintiffs must prove that "their right to travel interstate was one of the rights meant to be discriminatoirily impaired by the conspiracy, that the conspirators intended to drive out-of-state... [persons] from the State, or that they meant to deter petitioners from associating with such persons." The purpose of Operation Rescue is to prevent any abortions from taking place in the clinics on the days they are blockaded. The fact that some out-of-state persons happen to be prevented from entering the clinics on those days is purely coincidental. It does not by any stretch of the imagination reflect the "predominant purpose" or "intent" of the blockades, as required by *Griffin* and *Guest*. Therefore, the blockades do not interfere with the right of interstate travel.

For a more extensive discussion of the right of interstate travel and its rationale of preventing discrimination between residents and nonresidents, see generally Note, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557 (1989).


150 18 U.S.C. § 241 made it a federal crime for "two or more persons [to] conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same."

151 383 U.S. at 760 (emphasis added).


153 Id. at 106.
The history of § 1985(3) and its subsequent interpretation by the Supreme Court in Griffin, Novotny, and Scott lead to the conclusion that the statute is not applicable to the Operation Rescue blockades. The Fourteenth Amendment Equal Protection Clause language placed in § 1985(3) by the 42nd Congress suggests that the statute should be expanded to include conspiracies with a gender-based animus. But the blockades are not about discrimination against women as a class. They are about opposition to abortion. They are, in the eyes of the "rescuers," about issues of life and death, not issues of gender. Additionally, the clinics fail to meet the § 1985(3) requirement of an independently existing right as laid down in Novotny and Scott. The clinics' claims should not be able to rest on the right to abortion. This right is protected only against state action, not against civil disobedience by private individuals. Neither can the clinics' claims rest on the right of interstate travel, since the blockaders do not discriminate between residents and nonresidents. Nor do the blockades have the predominant purpose or intent to interfere with the right of interstate travel, as required by Griffin and Guest. Just as the blockades are not about gender discrimination, they are also not about interstate travel.

It is ironic that Operation Rescue, a group similar in many ways to the Underground Railroad, should be attacked under a statute originally designed to free black people from the remaining vestiges of slavery. Like Harriet Tubman and the others who ran the Underground Railroad, the "rescuers" break the law to protect the rights of those whom the law does not recognize as persons; they are criticized for their methods and are accused of trampling on the rights of others; they are branded as zealots because some of them are motivated by their religious faith; they are criticized for not respecting another's right to choose to engage in perfectly legal conduct. One may certainly disagree with the goals or the tactics of Operation Rescue, just as people once found fault with those of the Underground Railroad. But Operation Rescue is no more motivated by an animus against women than Harriet Tubman and the Underground Railroad were motivated by an animus.

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154 Randall Terry, the founder of Operation Rescue, has stated: "The rescue movement . . . takes inspiration from . . . examples of peaceful civil disobedience, such as the Underground Railroad before the Civil War." Randall Terry, Operation Rescue, the Civil Rights Movement of the Nineties, POLICY REVIEW, Winter 1989, at 82. Terry also cites Calvin Fairbanks as a personal hero. Fairbanks was a member of the Underground Railroad who served five years in prison for helping slaves flee to Canada. After his release, he immediately went back to rescuing slaves, was caught again, and was given a 15 year sentence. He was eventually pardoned and released just before the end of the Civil War. Id.

155 Some have also compared the Operation Rescue blockades to the lunch counter sit-ins by blacks in the South in the 1960's. There are problems with this analogy, however, since the blacks were standing up for their own civil rights, whereas the "rescuers" are standing up for the civil rights of someone else - the unborn child. There is also little question that the impact of the blockades on the clinics and their patients is much greater than the impact of the blacks on the restaurants and their patrons.
against white people. Employing the logic of the courts that have found the Operation Rescue blockades in violation of § 1985(3), Harriet Tubman would be in violation of the statute for engaging in a conspiracy with a class-based invidiously discriminatory animus against "whites seeking to keep slaves." The absurdity of the image of Harriet Tubman being held in violation of a civil rights statute reinforces the notion that certain courts, in applying § 1985(3) to Operation Rescue, have taken the statute far beyond where its framers intended it to go. The Operation Rescue blockades simply do not represent the sort of class-based invidiously discriminatory animus that § 1985(3) was designed to punish.

VI. EPILOGUE

On January 13, 1993, the Supreme Court ruled on the applicability of § 1985(3) to an Operation Rescue blockade. In Bray v. Alexandria Women’s Health Clinic, the Court held that § 1985(3) did not provide a federal cause of action against the blockades. While the Court again declined to answer the general question of whether § 1985(3) applies to classes beyond race, the Court did provide answers to several more specific questions regarding the use of § 1985(3) against groups like Operation Rescue. The Court ruled, inter alia, that:

1. "Women seeking abortions" does not qualify as a class under § 1985(3),
2. Even if women were a protected class under § 1985(3), Operation Rescue’s blockades represent an opposition to an activity (abortion), not an animus toward women as a class;

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157 Id. at 768.
158 Id. at 759.
159 Id. The Court reasoned that the term ["class"] unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors. Otherwise, innumerable tort plaintiffs would be able to assert causes of action under § 1985(3) by simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with.
160 Id. at 759-62. "Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself . . . does not remotely qualify for such harsh description [as representing an invidiously discriminatory animus], and for such derogatory association with racism." Id. at 762.
3. The clinic's 1985(3) claim failed to meet 1985(3)'s requirement of an independently existing right under either the right to abortion\textsuperscript{161} or the right of interstate travel.\textsuperscript{162}

\textbf{MICHAEL F. O'BRIEN}

\textsuperscript{161}113 S. Ct. at 764. Essentially, the Court concluded that the right to abortion requires interference by a state actor, and is not protected against purely private conspiracies like Operation Rescue. \textit{Id.}

\textsuperscript{162}\textit{Id.} at 762-63. According to the Court, the clinic failed to show, as required by United States v. Guest, 383 U.S. 745, 760 (1966), that the "predominant purpose" of the blockade conspiracy was to impede the right of interstate travel. \textit{Id.} at 762-63.