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Protection Of Constitutional Guarantees Under 42 U.S.C. Section 1985(3): Operation Rescue'S "Summer Of Mercy"

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PROTECTION OF CONSTITUTIONAL GUARANTEES UNDER 42 U.S.C. SECTION 1985(3): OPERATION RESCUE'S "SUMMER OF MERCY"

"[I]f you believe abortion is murder, you must act like it's murder."¹ These words, uttered by Randall Terry, the National Director and Founder of the antiabortion group Operation Rescue, are but one example of the intensity and passion that continue to permeate the abortion debate.² Although the Supreme Court has long revered freedom of speech and freedom of association,³ when such rights incite unlawful conspiratorial actions

1. *Nightline: Kansas Judge vs. Operation Rescue and Bush Administration* (ABC television broadcast, Aug. 6, 1991) (statement attributed to Randall Terry) [hereinafter *Nightline*] (unofficial transcript of television show available on LEXIS, Nexis library). During a recent talk show appearance, Randall Terry ended the interview on a highly emotional note crying "Abortion is murder! If we don't bring an end to it, our country is going to be destroyed!" Randall Terry on *Donahue: War in Wichita: Pro-Life versus Pro-Choice* at 16 (Multimedia Entertainment television broadcast, Sept. 6, 1991) [hereinafter *Donahue*].

2. See Susan B. Apel, *Operation Rescue and the Necessity Defense: Beginning a Feminist Deconstruction*, 48 WASH. & LEE L. REV. 41, 41 n.1 (1991) (noting that Randall Terry founded Operation Rescue); See *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1488 (E.D. Va. 1989) (recognizing Randall Terry as Operation Rescue's National Director), *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). Operation Rescue is an association whose immediate goal is the prevention of abortions and whose ultimate goal is the eventual illegalization of abortions. See *NOW*, 914 F.2d at 584 (describing organizational purposes of Operation Rescue). As defined in the antiabortion organization's literature, "rescues" entail "physically blockading abortion mills with [human] bodies, to intervene between abortionists and the innocent victims." *NOW*, 726 F. Supp. at 1488 (quoting from pamphlet entitled OPERATION RESCUE, NATIONAL DAY OF RESCUE—OCTOBER 29, 1988). The purpose of these "rescues" is to shut down the targeted facilities completely. See *id.* (noting that design of rescue demonstrations is to prevent abortion clinic facilities from operating). Because Operation Rescue members truly believe that abortion is the brutal murder of innocent children, they do not hesitate risking their bodies during the demonstrations. See *Donahue*, *supra* note 1, at 3 (describing actions of Operation Rescue demonstrators during abortion clinic blockades). Although the current debate centers around the prevention of abortions only, Randall Terry and Operation Rescue's ultimate agenda includes the illegalization of so-called abortifacient devices including the birth control pill and the intrauterine device or IUD. *Id.* at 4. According to Terry, because the medical community does not view the condom as an abortive form of contraception, in the eyes of Operation Rescue, its use is permissible. *Id.* at 5.

This Note focuses on the activities of the antiabortion group Operation Rescue because of its highly controversial tactic of blockading access to abortion clinics beginning during the 1988 Democratic National Convention held in Atlanta, Georgia. See LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 172 (1990) (discussing Operation Rescue). This Note does not assess any of the civil disobedience or free speech issues associated with the tactics employed by the organization in its nationwide effort to prevent abortions. For a discussion of such topics, see John W. Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 WASH. & LEE L. REV. 77 (1991).

3. See *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (noting that Fourteenth Amendment embraces freedom of speech and recognizing close nexus between freedom of speech and

designed to infringe upon other constitutionally protected rights, it is not only the province but also the duty of the federal judiciary to remedy the situation.⁴

The date is July 15, 1991, and the setting is Wichita, Kansas, a city that is rife with antiabortion support.⁵ The main players and their actions include Operation Rescue members blockading abortion clinics; women seeking entrance into abortion clinics; the Justice Department and the Bush Administration arguing that federal law does not protect women from such conspiratorial activities; and District Judge Patrick Kelly, attempting to maintain law and order in the city of Wichita.⁶ Dubbed the "Summer of Mercy," Operation Rescue's antiabortion blockades lasted forty-two days and successfully prevented twenty-nine abortions.⁷ On August 5, 1991, Judge

freedom of assembly). In *NAACP*, the Supreme Court emphasized the importance of the freedom to associate for the advancement of beliefs and ideas by describing the freedom as an inseparable aspect of the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment. *Id.* In addition, the Court pointed out that any evidence of state action having a chilling effect on the freedom to assemble is subject to the closest judicial scrutiny. *Id.* at 460-61.

4. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (noting that federal judiciary is supreme authority on interpreting Constitution and that by oath, Article VI, clause 3, solemnly commands judicial officers to support Constitution); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (stating principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is."); see also *Nightline*, *supra* note 1 (recognizing inherent judicial power to preserve peace). According to Professor Tribe, the federal judiciary has the inherent power to issue injunctions in order to maintain law and order. *Id.* He bases his argument in part on the 1957 incident in Little Rock, Arkansas during which President Eisenhower called upon the United States marshals to enforce the federal court decision calling for the integration of public school systems nationwide. *Id.*; see *Cooper*, 358 U.S. at 9-12 (describing Little Rock incident in detail). Consequently, Professor Tribe criticizes the Justice Department for taking the "legally irresponsible position that the [district] court is without jurisdiction to preserve the peace." *Nightline*, *supra* note 1.

As Judge Kelly emphatically stressed, Operation Rescue members have every right to demonstrate and promote their cause; however, as Operation Rescue members admitted, their purpose in Wichita was not to protest, but to close abortion clinics down. *Id.*; see *Women's Health Care Servs. v. Operation Rescue*, No. 91-1303-K at 2 (D. Kan. Aug. 5, 1991) (order granting preliminary injunction) (noting that potential damage to plaintiffs and their patients resulting from defendants' conspiracy greatly outweighs any potential damage to defendants from enforcing preliminary injunction); Mimi Hall, *Justices Consider Abortion Foes' Tactics: Protesters Want State Jurisdiction*, USA TODAY, Oct. 17, 1991, at 6A (noting that abortion rights supporters believe federal courts should step in when local authorities are ineffective in stopping Operation Rescue demonstrators' intimidation of women seeking abortions).

5. See Eric Harrison, *25,000 Abortion Opponents Cap Wichita Protests; Rally: Speakers Call on Residents to Continue Their Opposition. Operation Rescue Is Leaving the City.*, L.A. TIMES, Aug. 26, 1991, at A14 (noting date in which Operation Rescue's "Summer of Mercy" protests began); Mimi Hall & Steve Wieberg, *U.S. Joins Wichita Abortion Fray: Kansas Town 'Tied Up' by Fierce Debate*, USA TODAY, Aug. 7, 1991, at 1A (reporting that at least one reason for Operation Rescue's selection of Wichita, Kansas as setting for "Summer of Mercy" was because of apparent public sympathy towards antiabortion movement).

6. See *Nightline*, *supra* note 1 (listing main parties involved in "Summer of Mercy" antiabortion protests).

7. See David Maraniss, *Lessons of a Summer of Abortion Protests*, WASH. POST, Aug.

Kelly granted a preliminary injunction pursuant to section 1985(3) of the United States Code⁸ in favor of two organizations and a doctor providing abortion services in Wichita that Operation Rescue targeted during its summer demonstrations.⁹ Although in issuing the injunction Judge Kelly restricted certain Operation Rescue activities,¹⁰ he emphasized the fact that the relief did not infringe upon Operation Rescue members' legitimate rights to free speech.¹¹ Judge Kelly found that the antiabortion protesters were conspiring to prevent clinic patients and staff from gaining access to abortion facilities and that such conspiratorial activities warranted his decision to enjoin the protesters.¹² However, when Judge Kelly brought federal marshals

26, 1991, at A1 (describing Operation Rescue's activities in Wichita during "Summer of Mercy"). During the antiabortion protests, Operation Rescue reportedly shut down Wichita's three abortion clinics. Isabel Wilkerson, *Drive Against Abortion Finds a Symbol: Wichita*, N.Y. TIMES (Special to N.Y. TIMES), Aug. 4, 1991, § 1, at 20.

8. 42 U.S.C. § 1985(3) (1988).

9. See *Women's Health Care Servs. v. Operation Rescue*, No. 91-1303-K at 2 (D. Kan. Aug. 5, 1991) (order granting plaintiffs' motion for preliminary injunction pursuant to 42 U.S.C. § 1985(3)). Judge Kelly granted the preliminary injunction based upon the finding that absent the requested relief, the plaintiffs would suffer immediate and irreparable injury due to Operation Rescue's abortion clinic blockade activities. *Id.*

10. *Id.* at 2-4. Specifically, Judge Kelly's injunction enjoined Operation Rescue demonstrators from:

- a. trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions, family planning, or gynecological services are provided by plaintiffs in Wichita, Kansas;
- b. harassing, intimidating or physically abusing persons entering, leaving, working at, or using any services at any facility at which abortions, family planning or gynecological services are provided by plaintiffs in Wichita, Kansas; provided, however, that: (1) "sidewalk counseling" of a reasonably quiet conversation of a nonthreatening nature by not more than two persons with the person they are seeking to counsel shall not be prohibited if limited to public sidewalks; (2) no one is required to accept or listen to "sidewalk counseling," and should anyone decline such counseling, that person shall have the absolute right to leave or walk away without harassment; and (3) "sidewalk counseling" as defined herein shall not limit the right of the Wichita Police Department or the United States Marshal to maintain public order by reasonably necessary rules and regulations which they decide are necessary at any particular demonstration site;
- c. obstructing the work of the persons located in any facility at which abortions, family planning or gynecological services are provided by the plaintiffs in Wichita, Kansas, by producing noise by any means—including singing, chanting, yelling, shouting, or screaming—that substantially interferes with the provision of medical services, including counseling, within any such facility;
- d. inducing, encouraging, or directing others to take any of the actions described in paragraphs a.-c. above;
- e. trespassing upon, sitting in, blocking, impeding or obstructing ingress into or egress from 16966 Citation Road, in Butler County, Kansas;
- f. harassing or intimidating or physically abusing Dr. George R. Tiller and his family.

Id.

11. *Id.* at 4.

12. *Id.* at 2.

into Kansas to enforce both the preliminary injunction and a previously issued restraining order, there were cries from many, including the Justice Department, that Kelly had abused his discretion.¹³ Upon the issuance of the preliminary injunction, counsel for Operation Rescue confidently filed for an emergency appeal, requesting a stay of the equitable relief granted.¹⁴ On August 23, 1991, however, the United States Court of Appeals for the Tenth Circuit upheld Judge Kelly's decision to grant the motion for preliminary injunctive relief.¹⁵ Currently the parties are preparing for disposition of the case on appeal.¹⁶

Operation Rescue's summer demonstrations in Wichita resulting in Judge Kelly's injunction represent the culmination of the legal dispute over whether courts have jurisdiction to grant injunctive relief under section 1985(3) in the context of abortion clinic blockades. In light of the absence of adequate common-law remedies and the history and development of the statute, section 1985(3) should apply to protect women in abortion clinic blockade cases. The class-based animus requirement of section 1985(3) is met in this area because conspiring to prevent women from obtaining abortions is a form of gender discrimination. Therefore, section 1985(3) should apply to protect the constitutional rights implicated in the clinic blockade context. Although there is a state action requirement to protect privacy rights under section 1985(3), the peculiar circumstances associated with abortion clinic blockades call for a minimal showing of state activity to satisfy the requirement. This Note concludes that the right to privacy deserves federal protection from private conspiracies and that section 1985(3) is the proper mechanism for providing such relief.

13. See *Nightline*, *supra* note 1 (reporting that in issuing injunction, Judge Kelly had taken law into his own hands). The Justice Department expresses the view that § 1985(3), a Reconstruction Era civil rights law used to protect blacks from racial harassment, does not protect women seeking abortions. *U.S. Backs Wichita Abortion Protesters*, N.Y. TIMES, Aug. 7, 1991, at A10, col. 4 [hereinafter *U.S. Backs Protesters*]. Despite the Justice Department's denial that it has taken any position on the tactics of Operation Rescue, prochoice advocates strongly disagree, stating that the Justice Department supports "terror and lawlessness instead of rights and liberties." *Id.* (quoting Kate Michelman, executive director of National Abortion Right Action League). Law enforcement officials arrested over 2,700 protesters during the antiabortion demonstrations for failure to obey Judge Kelly's injunction. See Hall, *supra* note 4 (reporting Wichita arrest statistics stemming from Operation Rescue abortion clinic blockade activities).

14. See Maraniss, *supra* note 7 (reporting Operation Rescue's confident feeling that United States Court of Appeals would overturn Judge Kelly's injunction).

15. See *84 Wichita Abortion Protesters Arrested; Blockade Ban Upheld*, L.A. TIMES, Aug. 24, 1991, at A20 (reporting that appeals court upheld district court's protection order).

16. Telephone interview with Clerk of the United States Court of Appeals for the Tenth Circuit (Oct. 4, 1991). In addition to filing the emergency appeal for an automatic stay of Judge Kelly's preliminary injunction, Operation Rescue has appealed to the United States Court of Appeals for the Tenth Circuit the decision granting the preliminary injunction. *Id.* The Tenth Circuit has yet to schedule the case for hearing and the case's status is pending. *Id.* Both parties have yet to file their briefs. *Id.*

I. REMEDIES IN THE CONTEXT OF ABORTION CLINIC BLOCKADES

Operation Rescue and its supporters argue that the proper forum for relief in the context of abortion clinic blockades is the state court system.¹⁷ Such a contention is somewhat misleading, however, because in assuming that federal court jurisdiction turns upon whether or not the state court system provides adequate remedies to the aggrieved parties, the argument ignores the possibility of a choice of forum. Furthermore, absent section 1985(3) protection, women seeking abortions would have no opportunity to enforce their constitutionally protected rights against private conspiratorial infringement regardless of the forum.¹⁸

During oral arguments before the Supreme Court in *NOW v. Operation Rescue*,¹⁹ Deputy Solicitor General John G. Roberts, Jr., of the Justice Department emphasized that because state law remedies afford relief to those targeted by the protests, federal judges should not hear complaints regarding abortion clinic blockades.²⁰ However, in the case of conspiracies designed to infringe upon the constitutional right to privacy and, more specifically, the fundamental right to have an abortion, state court remedies are inadequate because they do not directly provide relief for women.²¹ During the oral arguments, counsel for NOW recognized the inadequacy of relief in the context of widespread abortion clinic blockades.²² Women seeking abortions do not have a trespass claim against the demonstrators because the women do not own the blockaded property.²³ Furthermore, a

17. See 60 U.S.L.W. 3331, 3332 (U.S. Nov. 5, 1991) (noting that plaintiffs in abortion clinic blockade cases have state law remedies).

18. But see John H. Henn & Maria Del Monaco, *Civil Rights and RICO: Stopping Operation Rescue*, 13 HARV. WOMEN'S L.J. 251, 268-77 (1990) (recognizing and describing application of Racketeer Influenced and Corrupt Organizations Act (RICO) in context of abortion clinic blockades).

19. 914 F.2d 582 (4th Cir. 1990), cert. granted sub nom. *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). Oral arguments in *NOW v. Operation Rescue* took place on October 16, 1991. For purposes of this Note, the author cites to the case as either *NOW v. Operation Rescue* or *NOW* even when referring to oral arguments made before the Supreme Court under the name *Bray v. Alexandria Women's Health Clinic*.

20. 60 U.S.L.W. 3331, 3332, (U.S. Nov. 5, 1991).

21. See *infra* notes 22-26 and accompanying text (recognizing deficiencies of state law remedies in addressing harm caused to women by abortion clinic blockades).

22. See Ruth Marcus, *Use of KKK Law Against Antiabortion Protesters Argued Before Court*, WASH. POST, Oct. 17, 1991, at A11 (noting inadequacies of bringing suit based on trespass or interference with contractual relationship in cases involving abortion clinic blockades). Counsel for NOW, John G. Shafer argued to the Supreme Court that state law remedies were inadequate in handling large abortion clinic protests for a number of reasons. *Id.* For example, because a woman does not own the blockaded property, she has no trespass action. *Id.* Also, because she does not know any of the names of the demonstrators, she has no action for interference with a contractual relationship. *Id.*

23. See Hall, *supra* note 4 (recognizing inherent deficiencies of state law remedies in abortion clinic blockade cases). During oral arguments in *NOW v. Operation Rescue*, counsel for NOW stressed the significant inadequacies of state law remedies such as trespass, public nuisance, and tortious interference with business relationships as applied to women seeking

suit based upon a contractual interference or tortious interference with business relationship theory is not feasible because of the number of nameless protesters involved in the blockades.²⁴

When Operation Rescue denies women access to abortion clinics, the women risk losing more than the power to exercise their constitutionally protected right to travel interstate or right to choose. For instance, shutting down abortion facilities creates a substantial risk of patients suffering from physical or mental harm.²⁵ Physically, patients who elect to use a pre-abortion laminaria for dilation purposes require timely removal of the device in order to avoid infections associated with prolonged insertion while mentally, patients must endure the stress and anxiety associated with the abortion clinic blockades.²⁶ Therefore, although a state court system can provide a remedy against abortion clinic blockades by means of a trespass action, the relief targets the property owners and is not specifically directed to women seeking abortions.²⁷ Because women seeking abortions have no direct relief under common law, the need for protection under section 1985(3) is apparent.²⁸

II. THE HISTORY AND DEVELOPMENT OF SECTION 1985(3)

Section 1985 is a federal statute providing relief against private conspiracies designed to deprive any person or class of persons from equal protection under the laws.²⁹ Enacted in 1871, along with other Reconstruc-

abortions. *Id.* Emphasizing the inadequacies of state law, counsel asked the Court: "For a young lady trapped in a car, bleeding, in a parking lot, would she have a trespass action?" *Id.*

24. See Marcus, *supra* note 22 (noting inadequacies of relief under state law).

25. NOW v. Operation Rescue, 726 F. Supp. 1483, 1489 (E.D. Va. 1989), *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).

26. *Id.*

27. See *supra* notes 22-26 and accompanying text (discussing inadequacies of relief under state law as applied to women).

28. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (recognizing that every individual who suffers injury has right to claim protection of laws). The Court reasoned in *Marbury* that, because the government of the United States consisted of laws and not of men, the system needed to furnish a remedy for any violation of a vested legal right in order to preserve the integrity of the government. *Id.*

29. See 42 U.S.C. § 1985 (1988) (describing overall statute as addressing conspiracies designed to interfere with civil rights and dividing statute into three situational sections). The applicable part used in the abortion protest context is § 1985(3) which provides in full:

If two or more persons in any State or Territory 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; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat,

tion Era civil rights statutes, section 1985(3) originally attempted to protect black citizens from conspiratorial Ku Klux Klan activities.³⁰ In 1951 the Supreme Court determined that the language of section 1985(3) reached only conspiracies involving state action.³¹ However, twenty years later, in *Griffin v. Breckenridge*,³² the Court held that in certain contexts the statute could reach private conspiracies as well.³³ In *Griffin*, the Court explained that limiting the reach of section 1985(3) solely to instances involving state conspiratorial action was an unnecessarily narrow interpretation of the

any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more person 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.

Id.

30. See Henn & Del Monaco, *supra* note 18, at 252 n.3 (1990) (describing historical origin of § 1985). Operation Rescue argues that the only purpose of the statute is "to protect black people in America from the Ku Klux Klan." *Nightline*, *supra* note 1 (quoting Jay Sekulow, counsel for Operation Rescue). However, as Professor Tribe notes, § 1985(3), on its face, is a very broad statute; moreover, in at least two dozen cases, federal judges have applied the statute in an effort to secure women the opportunity to exercise their rights free from physical harassment. *Id.*; see Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 *TEX. L. REV.* 527, 530-46 (1985) (outlining early history of statute and noting decade of disuse). In order to prevail under section 1985(3), a plaintiff must prove the following:

[T]hat the defendants did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . ." [T]hen . . . that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971); see also *NOW v. Terry*, 886 F.2d 1339, 1358 (2d Cir. 1989) (describing evidentiary findings required under § 1985(3) and citing *Griffin*), *cert. denied*, 110 S. Ct. 2206 (1990).

31. *Collins v. Hardyman*, 341 U.S. 651, 660-61 (1951).

32. 403 U.S. 88 (1971).

33. *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971). In *Griffin*, black petitioners alleged, among other claims, that the white respondents had conspired to deprive them of their right to travel by assaulting them on a highway, motivated by a mistaken belief that one of the petitioners was a civil rights advocate. *Id.* at 90, 92. The district court, relying on *Collins*, had dismissed the petitioners' complaint because it failed to allege the essential state action element. *Id.* at 92. Although the Fifth Circuit affirmed the lower court's dismissal of the suit, the opinion expressed reservations about the Supreme Court precedent established in *Collins*. *Id.* at 92-93. Contrary to both the lower court decisions and *Collins*, the *Griffin* Court determined that Congress was within its power to protect the right to interstate travel under § 1985(3) even absent evidence of state action. *Id.* at 106. Upon reversal, the Supreme Court

statute.³⁴ In upholding the application of the statute to private conspiracies, the Court identified both the Thirteenth Amendment³⁵ and the constitutional right to interstate travel³⁶ as sources of legislative power giving Congress the ability to reach private conspiracies by means of a federal remedial statute.³⁷ According to *Griffin*, Congress' creation of a statutory cause of action designed to remedy victims of conspiratorial, racially discriminatory private action was well within its power under the Thirteenth Amendment.³⁸ The Court also determined that Congress was within its power to protect the constitutional right to interstate travel due to a previous Supreme Court opinion that insulated the right to travel from both governmental and private interference.³⁹

Because *Griffin* left open the possibility of applying section 1985(3) to conspiracies centered upon class-based discrimination other than race,⁴⁰ a number of plaintiffs desiring federal relief have argued that the statute applies to cases involving abortion clinic blockades because such activities violate either the right to travel, the right to privacy, or both.⁴¹ However,

remanded the case for fact-finding purposes in order to determine whether the petitioners were travelling or at least were intending to travel interstate and whether the respondents intended to discriminatorily impair their right to travel by means of a conspiracy. *Id.* at 106-07.

34. *Id.* at 96.

35. *Id.* at 105. The Court recognized that § 2 of the Thirteenth Amendment provides Congress with the power to reach private conduct by means of legislation. *Id.* The Thirteenth Amendment provides in full:

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII, §§ 1-2.

36. *Griffin*, 403 U.S. at 105. In *Griffin*, the Court first explained that because the right to interstate travel does not necessarily rest upon the Fourteenth Amendment, violation of the right is actionable against both private and governmental infringement. *Id.* The Court then reasoned that as an explicitly recognized right of national citizenship, Congress had the power to protect the right to interstate travel legislatively by means of the rights and privileges language of § 1985(3). *Id.* at 106.

37. *Id.* at 104-05.

38. *Id.* at 105.

39. *Id.*; see *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (recognizing foundation and describing sacredness of right to interstate travel); *id.* at 642-44 (Stewart, J., concurring opinion) (noting that right to interstate travel is actionable against private infringement) (citing *United States v. Guest*, 383 U.S. 745, 760 n.17 (1966)). In *Guest*, the Court noted the firm establishment and repeated recognition of the right to travel as a basic right under the Constitution, despite the fact that the Constitution makes no explicit reference to it. *Guest*, 383 U.S. at 757-58. The *Guest* Court speculated that the lack of specific language within the Constitution mentioning the right to travel was an indication of the right's elementary nature. *Id.* at 758.

40. See *Griffin*, 403 U.S. at 102, 102 n.9 (leaving open question of whether conspiracies based upon biases other than race satisfy class requirement under § 1985(3)).

41. See *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 226-27 (6th Cir. 1991) (reviewing § 1985(3) claim that abortion clinic blockade violated right to travel and

applying section 1985(3) to abortion clinic blockade cases has created much controversy.⁴² In fact, on October 6, 1991, the Supreme Court heard oral arguments in *NOW v. Operation Rescue*,⁴³ a Fourth Circuit case addressing a number of issues relating to the appropriateness of the statute's application in the context of abortion clinic blockades.⁴⁴

NOW involved a clash between the National Organization for Women (NOW), an organization dedicated to the preservation of the constitutional right to have an abortion,⁴⁵ and Operation Rescue, an organization whose main goals include both the prevention and eventual illegalization of abortions.⁴⁶ By blockading abortion facilities' entrances and exits, Operation Rescue essentially prevents abortions by shutting down clinics.⁴⁷ In anticipation of Operation Rescue's demonstrations, NOW successfully obtained a temporary restraining order from the United States District Court for the Eastern District of Virginia in order to protect Northern Virginia from abortion clinic blockades scheduled for November 1989.⁴⁸ Subsequently, NOW applied for a preliminary injunction, and the district court consolidated the hearing on the application and the trial on the merits into one proceeding.⁴⁹

Together with various abortion clinics, NOW alleged that Operation Rescue and its supporters engaged in conspiratorial activities designed to infringe upon the right to have an abortion and the right to interstate

right to privacy); *NOW v. Operation Rescue*, 914 F.2d 582, 586 (4th Cir. 1990) (reviewing right to travel claim and refusing to address right to privacy claim under § 1985(3)), *cert. granted sub nom.* *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991); *NOW v. Terry*, 886 F.2d 1339, 1360-61 (2d Cir. 1989) (same), *cert. denied*, 110 S. Ct. 2206 (1990).

42. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-13, at 333 (2d ed. 1988) (recognizing inherent problems associated with reconciling ambiguous century-old legislative history with contemporary conceptions of individual rights).

43. 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* *Bray v. Alexandria Women's Health Clinic*, 111 S.Ct. 1070 (1991).

44. *NOW v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). The pertinent questions presented were:

(1) Do "women seeking abortions" constitute [a] valid class for purposes of "class animus" requirement of 42 U.S.C. 1985(3)? (2) Is opposition to abortion per se discrimination against women for purposes of "class animus" requirement of 42 U.S.C. 1985(3)? (3) Do purely private actors who hinder access to abortion facilit[ies] violate federal constitutional right to interstate travel merely because some patrons of [seeking services at the] facility come from out of state? (4) Are respondents' claims under 42 U.S.C. 1985(3) so insubstantial as to deprive federal courts of subject matter jurisdiction?

U.S.L.W. Daily Ed., July 5, 1991.

45. *NOW*, 914 F.2d at 584.

46. *Id.*

47. *Id.*

48. *Id.* Although Operation Rescue did not demonstrate in Northern Virginia during the month of November, clinics in Maryland and the District of Columbia did shut down because of the organization's activities in those areas. *Id.*

49. *Id.*

travel.⁵⁰ NOW claimed that Operation Rescue had violated the constitutional right to interstate travel because some of the patients who were unable to gain access to the abortion clinics were from out of state.⁵¹ After a two-day proceeding, in which Operation Rescue chose not to testify, the court granted a permanent injunction enjoining Operation Rescue and six named individuals from blockading patients' access to abortion clinics, pursuant to section 1985(3) and the constitutional right to interstate travel.⁵² Subsequently, Operation Rescue appealed the district court's decision while NOW cross-appealed, specifically questioning the court's refusal to extend the scope of the injunctive relief.⁵³ The Fourth Circuit, however, rejected both appeals and upheld the district court's decision in full.⁵⁴ Therefore, in light of the history and development of section 1985(3), the statute should apply in the abortion clinic blockade context.

III. THE CLASS-BASED ANIMUS REQUIREMENT OF SECTION 1985(3)

The language of section 1985(3) encompasses conspiratorial activities that effectively prevent any person or protected class of persons from exercising rights guaranteed under the law regardless of the conspirators' alleged motivation for the deprivation.⁵⁵ Therefore, the essential showing under the plain meaning of section 1985(3) is not the existence of a conspiracy to discriminate, but rather the existence of a conspiracy to *deprive*.⁵⁶ However, in *Griffin*, upon reviewing the statute's legislative

50. See *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1492-94 (E.D. Va. 1989) (addressing plaintiffs' right to travel and right to privacy claims under § 1985(3)), *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).

51. *Id.* at 1493.

52. *Id.*

53. *NOW v. Operation Rescue*, 914 F.2d 582, 584 (4th Cir. 1990), *cert. granted sub nom.* *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991).

54. *Id.*

55. 42 U.S.C. § 1985(3) (1988). See *supra* note 29 (citing statutory language of § 1985(3)). Examining the protected class of native American Indians provides a useful analogy to the abortion clinic blockade context. The federal government by means of the Indian Reorganization Act guarantees native American Indians the right to own land on reservations if they so desire. See 25 U.S.C. §§ 461-79 (1988) (detailing protection of Indians and conservation of resources). However, the federal government does not guarantee all persons the right to live on a reservation. *Id.* If a group of private citizens made up of native American Indians, as well as people of other descents, wished to promote assimilation and conspired to shut down all reservations, could the group successfully argue that its actions were not discriminatory because it was denying all people access to reservations, regardless of their national origin? To answer the question affirmatively would mean that conspirators could avoid the label of discrimination simply by including within their target group, people that have no federally protected rights at stake and consequently do not suffer in a legal sense from the conspirators' deprivation of the protected class's rights or at least do not suffer in the same legal sense that the protected class suffers.

56. 42 U.S.C. § 1985(3) (1988); see *supra* note 29 (setting forth statutory language of § 1985(3), which includes no mention of motivation element).

history, the Court pointed out that although Congress did intend to cover private conspiracies under section 1985(3), it did not intend for the statute to encompass all conspiratorial interferences with the rights of others.⁵⁷ Therefore, both to avoid the constitutional problems inherent in construing section 1985(3) as a general federal tort law and to interpret the statute consistently with its congressional purpose, the Court grafted a requirement of invidious discrimination motivation onto the section 1985(3) cause of action.⁵⁸ As a result, section 1985(3) requires a finding that discrimination motivated the conspirators to purposely deprive a particular class of people the enjoyment of rights guaranteed to all under the law.⁵⁹

Under *Griffin*, women seeking abortions must satisfy two elements to qualify as a viable class under section 1985(3).⁶⁰ The first element is whether section 1985(3) includes gender discrimination within its purview; the second element is whether blocking access to abortion clinics constitutes gender discrimination.⁶¹ The federal district court in *NOW* reasoned that section 1985(3) does protect persons from gender-based discrimination because a person's sex has certain distinct and immutable characteristics comparable to those of race and national origin.⁶² Consequently, the court determined that women seeking abortions constitute a valid subset of gender-based animus under the statute's protected class requirements.⁶³ After finding that Operation Rescue's blockade activities violated the substantive provisions of section 1985(3), the court issued permanent injunctive relief in favor of *NOW*.⁶⁴ Although the United States Court of Appeals for the Fourth Circuit upheld the district court's determinations that evidence of gender-based discrimination satisfies the class-based animus requirement of section 1985(3), and that *NOW*'s members and abortion clinic patients constituted a valid subset of the gender-based class,⁶⁵ not all jurisdictions have drawn the same

57. *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971).

58. *Id.* at 102. The current Court recognizes that the invidiously discriminatory motivation element of § 1985(3) is a creature of the *Griffin* Court. 60 U.S.L.W. 3331, 3332 (U.S. Nov. 5, 1991). As Justice Scalia in *NOW* reminded counsel for Operation Rescue during oral arguments, the statutory language of § 1985(3) has no class-based animus requirement as such and that the Court had simply made it up. *Id.*

59. *Griffin*, 403 U.S. at 102.

60. See Beth E. Hansen, Note, "Invidiously Discriminatory Animus"—A Class Based on Gender and Gestation Under 42 U.S.C. § 1985(3): *Lewis v. Pearson Found., Inc.*, 24 CREIGHTON L. REV. 1097, 1106-07 (1991) (describing class-based animus requirement of § 1985(3) as developed under *Griffin*).

61. See *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 223-25 (6th Cir. 1991) (detailing class-based animus requirement of § 1985(3) and finding that statute encompasses women seeking relief against abortion clinic blockades).

62. *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1492 (E.D. Va. 1989), *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).

63. *Id.*

64. *Id.* at 1493.

65. *NOW v. Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). See *NOW v. Terry*,

conclusion.⁶⁶ The Fourth Circuit's opinion, however, is consistent with the majority of jurisdictions addressing the issue of whether women constitute a valid class under section 1985(3).⁶⁷

Even if one follows the majority view that section 1985(3) does provide relief against gender discrimination,⁶⁸ a second potential stumbling block exists as to whether blockading abortion clinics constitutes gender discrimination. It is difficult to address whether shutting down abortion clinics constitutes discrimination against women because the right to have an abortion is a right associated solely with females.⁶⁹ Therefore, because only a woman can make the abortion choice, it is impossible to argue that Operation Rescue allows men to have the choice while denying the right to

886 F.2d 1339, 1358-59 (2d Cir. 1989) (finding that women seeking abortions constitute protected class under § 1985(3)), *cert. denied*, 110 S. Ct. 2206 (1990). Among other observations, the Second Circuit in *Terry* noted the broad statutory language used in § 1985(3) and concluded that women were not excluded from the statute's reach. *Id.* at 1358. The Second Circuit also found that the very nature of § 1985(3)'s language ties it to evolving notions of equality and citizenship, and that the legislative history of the statute favors a broad construction of its language as a law applicable not just to blacks but to women as well. *Id.* at 1359.

66. See *Lewis v. Pearson Found., Inc.*, 908 F.2d 318, 324-25 (8th Cir. 1990) (finding originally that § 1985(3) protects women seeking termination of pregnancies but vacating judgment upon rehearing en banc), *vacated*, 917 F.2d 1077, *petition for cert. filed*, 59 U.S.L.W. 3726 (U.S. Apr. 23, 1991) (No. 90-1575); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 793-94 (5th Cir. 1989) (concluding that class defined as women of childbearing age seeking medical attention was too under-inclusive to warrant protection under § 1985(3)); *Roe v. Abortion Abolition Soc'y*, 811 F.2d 931, 934-37 (5th Cir.) (determining that patients, doctors, abortion clinics and staff defining themselves as people in disagreement with defendant's view on abortion did not constitute valid protected class under § 1985(3) because class was over-inclusive), *cert. denied*, 484 U.S. 848 (1987). See also *National Abortion Fed. v. Operation Rescue*, 721 F. Supp. 1168, 1170 (C.D. Cal. 1989) (holding that language of § 1985(3) did not encompass women seeking abortions).

67. See *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 224-25 (6th Cir. 1991) (finding that women constitute cognizable class under § 1985(3)); *NOW v. Terry*, 886 F.2d 1339, 1355-59 (2d Cir. 1989) (holding that women qualify as valid protected class under § 1985(3)), *cert. denied*, 110 S. Ct. 2206 (1990); *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988) (concluding that § 1985(3) encompasses conspiratorial discrimination based upon sex); *Stathos v. Bowden*, 728 F.2d 15, 20-21 (1st Cir. 1984) (applying § 1985(3) to award damages in sexual discrimination case); *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979) (finding that legislative history of § 1985(3) supports extending application of statute to women); *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1243-44 (3d Cir. 1978) (holding that conspiratorial discrimination based upon sex is actionable under § 1985(3)), *vacated on other grounds*, 442 U.S. 366 (1979).

68. *But see* 60 U.S.L.W. 3331, 3332 (U.S. Nov. 5, 1991) (acknowledging fact that Supreme Court has yet to determine whether § 1985(3) protects women). Realizing that the Supreme Court has yet to decide whether women are a cognizable class under the statute, counsel for NOW asserted that because women are a class identified by immutable characteristics, they deserve § 1985(3) protection. *Id.* Counsel also suggested that the Court's decision in *Novotny* indirectly supports the conclusion that § 1985(3) encompasses gender-based conspiracies within its purview. *Id.*

69. See *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 225 (6th Cir. 1991) (recognizing that preventing women from gaining access to abortion clinics encroaches upon rights of all women).

women. However, Operation Rescue, by shutting down abortion clinics, does discriminate against women by preventing them from exercising their constitutionally protected privacy rights, which the organization would permit others to exercise.⁷⁰ For example, Operation Rescue does not attempt to interfere with a male's right to privacy, because such interference would not serve the organization's purpose—to prevent abortions.⁷¹ Likewise, the group does not interfere with men travelling from out of state to obtain contraception for the same reason—to do so would serve no organizational purpose.⁷² In essence, Operation Rescue discriminates against women because it views discriminatory activities as essential to fulfillment of the organization's overall goal of preventing abortions.⁷³

Because the right to have an abortion is exclusively a woman's right, separating the right from the protected class is difficult. Furthermore, because an abortion clinic blockade is an example of an infringement upon a right integrally related to the protected class associated with it, such a situation should call for the courts to exercise an even greater level of judicial scrutiny than if the right infringed upon were a right guaranteed to all persons regardless of status as a protected class. In other words, Operation Rescue's tactical infringement upon the constitutional right to choose is especially suspect because the right to have an abortion is a right biologically restricted to women and because women are a protected class under equal protection analysis.⁷⁴

70. *But see infra* notes 83-84 and accompanying text (noting that in terms of abortion clinic blockades, Operation Rescue denies both women and men access to clinics).

71. *See Donahue, supra* note 1, at 4-5 (noting that interference with use of condoms does not serve Operation Rescue's ultimate agenda).

72. *Id.*

73. *Id.*

74. *But cf. Geduldig v. Aiello*, 417 U.S. 484, 497 (1974) (holding that California's disability insurance program which denied benefits to pregnant women was constitutional), *overruled by statute* as stated in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983). In *Geduldig*, the Court held that excluding pregnant women from a state disability insurance program was not violative of the Fourteenth Amendment. 417 U.S. at 497. Pregnant persons and nonpregnant persons were the two classes of people implicated in the case. *Id.* at 489-90. Although the first class consisted exclusively of women, the second group did not; consequently the Court ruled that because both sexes benefitted from the insurance proceeds, the state program was not discriminatory. *Id.* at 494. *Geduldig*, however is distinguishable from the abortion clinic blockade cases for two reasons. First, the abortion clinic blockade cases involve the deprivation of a constitutionally protected right. There is no constitutional right to receive disability payments. Moreover, there is no guarantee that all disabled persons, pregnant or otherwise, will receive benefits as other plan qualifications may exist. In other words, both classes defined in *Geduldig* were a pool of potential insurance recipients while abortion clinic blockades involve a class of persons whose constitutional rights have vested. Second, because abortion clinic blockades deprive women alone of a right that at least some wish to exercise, it is difficult to characterize the deprivation as affecting both sexes equally. Therefore, unlike the state disability program, Operation Rescue's tactics are discriminatory against women.

Although the Fourth Circuit in *NOW*, following the Second Circuit's lead in *NOW v. Terry*,⁷⁵ found that Operation Rescue's activities were discriminatorily motivated,⁷⁶ such a position is not without criticism.⁷⁷ For example, abortion protesters contend that abortion clinic blockades cannot constitute gender discrimination because many people, and more specifically, many women, support the antiabortion movement.⁷⁸ Jay Sekulow, counsel for Operation Rescue, contends that the abortion protest situation is quite unlike instances of racial discrimination because no black person would ever support acts of racial bigotry,⁷⁹ while many women, like Jayne Bray, one of the petitioners in *NOW*, are fighting abortion on a daily basis and support the Operation Rescue movement wholeheartedly.⁸⁰ However, the point that not all women support the right to have an abortion does not alter the fact that blocking access to clinics denies women as a protected class the opportunity to exercise their constitutionally protected right⁸¹ to choose whether or not to have an abortion.⁸²

Another criticism noted during oral arguments before the Supreme Court in *NOW* is that the focus of the abortion protesters' hostility or animus is on the "activity" of abortion, not on the women who are seeking abortions.⁸³ Accordingly, gender does not factor into the protesters' minds when

75. 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990).

76. *NOW v. Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991).

77. *See infra* notes 78-80, 83-84 and accompanying text (arguing that Operation Rescue's activities are not discriminatory against women).

78. *See Hall, supra* note 4 (reporting that many women oppose abortion).

79. Operation Rescue's distinction between racial and gender discrimination fails even if a black person supports acts of conspiratorial racial bigotry because the acts are still constitutionally invalid. In other words, the constitutionality of an act does not turn upon the race or sex of those who are in support of it.

80. *See Hall, supra* note 4 (recognizing Bray's association and sympathy with antiabortion movement). Jayne Bray's alliance with Operation Rescue is apparent as she was one of the petitioners in *NOW v. Operation Rescue*. *NOW v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). Her husband, Michael Bray, spent four years in jail because of his association with the 1985 Washington area abortion clinic bombings. *Hall, supra* note 4.

81. *See infra* note 160 (summarizing current cases challenging constitutional right to abortion).

82. *See Hall, supra* note 4 (arguing that protected class is that of women in general). The protection of constitutional rights should not turn upon the number or gender of the people actively supporting the rights. For instance, not all women take advantage of their right to vote, but that does not make the right to vote any less fundamental to women as a class nor should that enable private citizens to conspire to prevent any woman from exercising her right to vote.

83. 60 U.S.L.W. 3331, 3331 (U.S. Nov. 5, 1991) In addition to arguing that Operation Rescue's class-based animus is directed toward the activity of abortion and not against women as a class, the organization contends that its activities are not discriminatory because of its worthy intentions behind every abortion clinic blockade. *See NOW v. Terry*, 886 F.2d 1339, 1360 (2d Cir. 1989) (noting Operation Rescue's denial of ill-will towards women and rejecting antiabortion group's "this is for your own good" argument), *cert. denied*, 110 S. Ct. 2206 (1990).

blockading access to abortion clinics because rescue demonstrations deny entrance to all persons, regardless of their sex.⁸⁴ The counter argument as articulated by counsel for the clinics is that by targeting abortion, protesters are in essence targeting women, because the right to have an abortion is solely a woman's right.⁸⁵ Furthermore, even if Operation Rescue members do not target women specifically during their rescue demonstrations, the fact remains that the organization's tactics deny women the opportunity to exercise their rights.⁸⁶ Even though Operation Rescue's target group includes other individuals besides women seeking abortions, this should not diminish the validity of a section 1985(3) claim.⁸⁷ As Justice O'Connor noted, such strange reasoning then would apply equally to a mob conspiring to prevent black children and white children from entering an integrated school.⁸⁸

In fact, Justice O'Connor's example suggests a two-fold parallel to Operation Rescue's argument: first, the analogy of the make-up of the target groups and second, the "activity" of integration as compared to the "activity" of abortion.⁸⁹ Under Operation Rescue's construction of section 1985(3), private conspirators whose alleged animus is not against black persons but rather against the activity of integration could, under federal law, deprive black people from gaining access to public school systems.⁹⁰ Similar to Operation Rescue's contention that women are not the only target of its abortion blockades, an anti-integration group could argue that black children were not the only target of integration blockades because white children were denied access to the school as well. In upholding such a construction, all private conspirators could escape the purview of section 1985(3) simply by alleging that their animus is not class-based but rather activity-based. Permitting such an easily accessible escape hatch would destroy the efficacy of section 1985(3).⁹¹ Therefore, denying women access to abortion clinics should satisfy the class-based requirement of section 1985(3).

84. See Marcus, *supra* note 22 (noting lack of hostility towards women as motivation behind abortion clinic blockades).

85. See *id.* (disputing argument that Operation Rescue does not target women during protests).

86. See *infra* notes 88-91 and accompanying text (assessing Operation Rescue's argument that women are not specifically targeted during abortion clinic blockades).

87. See *id.* (refuting Operation Rescue's contention that targeting mixed group means no discrimination). In addition to targeting women seeking abortions, Operation Rescue prevents abortion clinic staff from gaining entrance to facilities. *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1488 (E.D. Va. 1989), *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).

88. See Marcus, *supra* note 22 (questioning Operation Rescue's reasoning during oral arguments in *NOW v. Operation Rescue* as applied to preventing black and white children from attending integrated school).

89. 60 U.S.L.W. 3331, 3332 (U.S. Nov. 5, 1991) (drawing from Justice O'Connor's school house analogy).

90. See *supra* notes 83-84 and accompanying text (noting Operation Rescue's argument that its animus is directed towards activity of abortion and not towards women).

91. See Hall, *supra* note 4 (noting strangeness of Operation Rescue's argument that its animus is towards activity of abortion).

IV. CONSTITUTIONAL GUARANTEES UNDER SECTION 1985(3)

At least two constitutional guarantees—the right to interstate travel and the right to privacy—provide a basis for relief under section 1985(3) in the context of abortion clinic blockades.⁹² The inherent benefit in arguing that section 1985(3) protects the right to interstate travel is that such a construction does not require any evidence of state action.⁹³ As for the constitutionally protected right to privacy, most jurisdictions have indicated, without actually deciding the issue,⁹⁴ that evidence of state action is an essential prerequisite to even proposing such a claim.⁹⁵

The district court in *NOW v. Operation Rescue* refused to determine whether section 1985(3) provides relief for violations of the constitutional right to privacy.⁹⁶ Instead, the court relied upon the clinic's convenient location in the Washington, D.C., metropolitan area and the constitutional right to interstate travel as the vehicle to bring the antiabortion blockades within the statute's purview.⁹⁷ Because the right to interstate travel serves as an independent basis for relief under section 1985(3),⁹⁸ and the right to an abortion would require evidence of state action to trigger the statute,⁹⁹

92. See *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1492-94 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990) (analyzing § 1985(3) claims based upon right to travel and right to privacy), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991).

93. See *supra* notes 36-39 and accompanying text (noting that right to interstate travel is actionable against both private and governmental infringement).

94. See *NOW v. Terry*, 886 F.2d 1339, 1361 (2d Cir. 1989) (finding that right to travel provided independent constitutional claim rendering decision as to right to privacy claim unnecessary), *cert. denied*, 110 S. Ct. 2206 (1990). See also *NOW*, 726 F. Supp. at 1494.

95. See *Terry*, 886 F.2d at 1361 (citing district court's determination that protection of right to privacy guarantee requires demonstration of state involvement). *But see* *Lewis v. Pearson Found., Inc.*, 908 F.2d 318, 322 (8th Cir. 1990) (holding initially that privacy claim based upon *Roe v. Wade* did not require evidence of state action under § 1985(3)), *vacated*, 917 F.2d 1077, *petition for cert. filed*, 59 U.S.L.W. 3726 (U.S. Apr. 23, 1991) (No. 90-1575).

96. *NOW*, 726 F. Supp. at 1494.

97. *Id.* at 1493. The district court in *NOW v. Operation Rescue* relied upon the right to travel as a basis for granting relief under § 1985(3) because of the evidence that the clinics in question provided services to patients travelling across state lines. *Id.*

98. *Id.* at 1494. See *Terry*, 886 F.2d at 1361 (deciding not to rule on § 1985(3) right to privacy claim).

99. *NOW*, 726 F. Supp. at 1493-94. See *Terry*, 886 F.2d at 1358 (citing and quoting in part *United Brotherhood of Carpenters & Joiners Local 610 v. Scott*, 463 U.S. 825, 833 (1983)). In *NOW v. Terry*, the court stated that "[w]hen the asserted constitutional deprivation is based upon a right guaranteed against government interference—for example, rights secured by the Fourteenth Amendment—plaintiffs must demonstrate some 'state involvement.'" *Id.* Therefore, because the cornerstone of the right to privacy is the Fourteenth Amendment, invoking the protection of § 1985(3) requires a showing of state involvement. See *id.* at 1361 (noting that right to privacy claim requires showing of state involvement). Although the district court had determined that there was a sufficient showing of state action, especially given an agreement between *Operation Rescue* and the local New York police that officers would not arrest any demonstrators, the Second Circuit found it unnecessary to rule on the right to privacy claim given the availability of the right to travel as an independent basis for affirming the district court's decision to grant relief under § 1985(3). *Id.*

the court reasoned that evaluation of a claim based upon the right to privacy was not essential to its holding.¹⁰⁰

The court based its decision to grant injunctive relief in part on *Doe v. Bolton*,¹⁰¹ in which the Supreme Court established that the constitutional right to travel encompasses the right to travel interstate in order to obtain an abortion.¹⁰² As the district court pointed out in *NOW*, courts should avoid constitutional questions where other grounds are available and dispositive of the issues presented.¹⁰³ This maxim concerning judicial restraint provided the *NOW* court with the necessary support to refuse to pass on the contention that section 1985(3) protects women from conspiratorial activities that infringe upon the fundamental right to have an abortion.¹⁰⁴ In issuing the injunction, the district court refrained from extending the application of section 1985(3) into both the right to privacy area and the scope of the relief granted based upon the right to interstate travel for fear of creating an apparent imbalance in the equitable relief granted warranting a reversal.¹⁰⁵

By basing the injunction upon a conspiracy to violate the right to travel interstate, the district court in *NOW*, along with other jurisdictions ruling the same way,¹⁰⁶ has in essence established the groundwork for abortion

100. *NOW*, 726 F. Supp. at 1494. Given the alternative independent basis for granting relief pursuant to § 1985(3) using the right to travel and the realization that the right to have an abortion is in a state of flux, the district court in *NOW v. Operation Rescue* determined that it was unnecessary and imprudent to venture into the fundamental right to abortion thicket. *Id.*

101. 410 U.S. 179 (1973).

102. *Doe v. Bolton*, 410 U.S. 179, 200 (1973). In *Doe*, the Court found that the residence requirement in Georgia's abortion law violated the constitution. *Id.*

103. *NOW*, 726 F. Supp at 1494 (citing *Hurd v. Hodge*, 334 U.S. 24 (1948)).

104. *Id.* The district court's use in *NOW* of the maxim that courts should avoid constitutional questions where other grounds are dispositive of the issue is questionable, however, for two reasons. First, because the district court based its decision to issue the injunction under § 1985(3) upon finding a violation of the right to interstate travel, the court did not avoid all constitutional issues. In other words, the other grounds that the district court used to avoid addressing the right to privacy question were themselves constitutional grounds. Second, the fact that the Supreme Court is reviewing the application of the right to interstate travel under § 1985(3) in the abortion protest context means that the other grounds relied upon by the district court are no longer dispositive of the issues at stake in the case.

105. *See id.* at 1497 (finding *NOW*'s requests for nationwide injunctive relief and for prohibition of Operation Rescue's intimidation tactics overly broad). The Fourth Circuit in *NOW* reviewed the district court's issuance of the permanent injunction according to an abuse of discretion standard. *See NOW v. Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990) (citing *Prendergast v. New York Telephone Co.*, 262 U.S. 43, 50-51 (1923)), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). As a result, the entry, scope and duration of the equitable relief granted by the district court in *NOW* was subject to the Fourth Circuit's examination. *See id.* (describing standard of review regarding injunctive relief). Therefore, the greater the reach of the federal injunction, the greater the likelihood of an appellate finding of discretionary abuse on the part of the district court. *See id.* at 586 (upholding district court's decision not to extend scope of injunction indefinitely).

106. *See NOW v. Operation Rescue*, 726 F. Supp. 300, 304 (D.D.C. 1989) (basing § 1985(3)

“zones” or “hubs”—certain geographical areas or cities in which clinics may continue to operate unhindered.¹⁰⁷ More than likely, clinics located in these abortion “hubs” will have the opportunity to charge significant premiums for their services, due to the limited number and locations of available facilities.¹⁰⁸ Abortions could thus become prohibitively expensive for many women.¹⁰⁹ In other words, if the only basis for section 1985(3) protection is the constitutional right to travel, then the ability of a given clinic to draw interstate travellers will determine whether the federal statute offers the facility any protection.¹¹⁰ Arguably, such a disparity in treatment, based solely upon a clinic’s ability to draw interstate patients, in itself creates an equal protection problem, as women accessing clinics in rural or central areas are without any federal protection under the statute, while federal relief is available to their female counterparts accessing clinics situated in highly travelled or state-borderline areas.¹¹¹

A further complication to basing a section 1985(3) claim upon the right to interstate travel is determining how large an interstate draw is necessary to implicate the constitutional guarantee. Although section 1985(3) facially provides relief to any person or class of persons deprived of a right, Operation Rescue contends that the organization does not purposely deprive out-of-state women from gaining access to abortion clinics because the real purpose of the blockades is to prevent all people from accessing clinics regardless of their respective state residencies. In other words, Operation Rescue does not treat women seeking abortion services who come across state lines differently from in-state residents seeking the same services.¹¹² However, an additional way to implicate the right to travel interstate is

relief upon right to travel); *Cousins v. Terry*, 721 F. Supp. 426, 429-30 (N.D.N.Y. 1989) (same); *Roe v. Operation Rescue*, 710 F. Supp. 577, 581-82 (E.D. Pa. 1989) (same); *NOW v. Terry*, 704 F. Supp. 1247, 1260 (S.D.N.Y. 1989) (same), *aff’d*, 886 F.2d 1339 (2d Cir.), *cert. denied*, 110 S. Ct. 2206 (1990).

107. See *Henn & Del Monaco*, *supra* note 18, at 265 (recognizing limitations of § 1985(3) claim based upon right to travel because it presents problems for clinics located far away from state borders).

108. See *Maraniss*, *supra* note 7 (recognizing potential impact of Operation Rescue’s abortion clinic blockades). According to the National Abortion Rights Action League, since 1985, the availability of abortion providers has decreased in 33 states. *Id.* At least one clinic that no longer provides abortion services attributes its decision to threats by Operation Rescue. *Id.*

109. See *NOW*, 726 F. Supp. at 1489 n.3 (recognizing that some clinics offer services to indigent patients free of charge).

110. See *Volunteer Medical Clinic, Inc. v. Operation Rescue* 948 F.2d 218, 226 (6th Cir. 1991) (upholding dismissal of § 1985(3) claim based upon right of interstate travel because clinic offered no evidence of patients travelling from outside of state in order to obtain clinic services).

111. Compare *id.* (upholding district court’s dismissal of § 1985(3) claim based upon right to interstate travel due to clinic’s lack of out-of-state patients) with *NOW v. Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990) (affirming district court’s finding of § 1985(3) claim based upon right to interstate travel due to sufficient evidence of clinic’s interstate clientele), *cert. granted sub nom.* *Bray v. Alexandria Women’s Health Clinic*, 111 S. Ct. 1070 (1991).

112. 60 U.S.L.W. 3331, 3332 (U.S. Nov. 5, 1991).

actual interference with the right.¹¹³ If one woman travelling across state lines to seek an abortion is prevented from entering an abortion clinic by means of a private conspiracy, and her status as a solitary interstate traveller affects the outcome under section 1985(3), then clinics not willing to run the risk of a blockade will need to market themselves to out-of-state patients.¹¹⁴ Two conceivable means for satisfying the interstate draw requirement are through (1) geographical location,¹¹⁵ or (2) the availability of specialized medical services at the clinic.¹¹⁶ Abortion clinics lacking these attributes and therefore unable to draw interstate travellers will tend to shut down in order to avoid Operation Rescue blockades, while new clinics opening up will tend either to cluster around convenient "zones" or to provide specialized medical services in an effort to attract interstate patients.¹¹⁷ Therefore, the *NOW* court's decision to grant injunctive relief based solely upon the right to interstate travel has inherent weaknesses and inappropriate consequences.

In reviewing the district court's decision to grant an injunction, the United States Court of Appeals for the Fourth Circuit noted with approval the geographical limitation of the injunctive relief to the specific site in question, Northern Virginia.¹¹⁸ Furthermore, the appellate court emphasized that neither court had addressed the controversial question of whether section 1985(3) provides relief against conspiracies designed to infringe upon a woman's right to privacy.¹¹⁹ The Fourth Circuit upheld the trial court's injunction, finding no abuse of discretion in the entry, scope, or duration of the equitable relief.¹²⁰

113. *Id.*

114. See U.S.L.W. Daily Ed., July 5, 1991 (questioning whether purely private actors blocking access to abortion facility violates federal constitutional right to interstate travel merely because some patrons of facility come from out of state). Consider replacing the scenario of one woman travelling from out-of-state who is unable to obtain abortion services due to Operation Rescue's abortion clinic blockade activities with a single black person who is a victim of a conspiracy designed to keep him from gaining entrance to a restaurant after travelling interstate. Seemingly, the lack of group status would not make the civil rights violation under § 1985(3) any less reprehensible or actionable.

115. See *NOW v. Operation Rescue*, 726 F. Supp 1483, 1493 (E.D. Va. 1989) (citing testimony indicating that clinic offered services to patients who travelled from out of state), *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). Two situations in which the geographical location of a clinic can implicate the constitutional right to travel are when the clinic is situated close to an interstate border or when the clinic is located in a conveniently accessible area.

116. See *U.S. Backs Protesters*, *supra* note 13 (noting scarcity of clinics performing late term abortions). The staff at Women's Health Care Services, one of the abortion clinics involved in the Wichita controversy, performs third trimester abortions. *Id.* Because the clinic is one of the few facilities in the nation providing such a service, women do travel to Wichita from out of state seeking late term terminations of pregnancies. *Id.*

117. See *supra* notes 107-16 and accompanying text (assessing right to travel as basis for relief under § 1985(3)).

118. *NOW v. Operation Rescue*, 914 F.2d 582, 586 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991).

119. *Id.*

120. *Id.* at 585-86.

An understandable level of judicial trepidation exists in addressing the controversial issue of whether section 1985(3) protects the right to have an abortion from private conspiracies.¹²¹ However, the judiciary creates a gap in legal protection by failing to address situations involving noninterstate facilities. The implicit message is that women seeking abortions in clinics that serve only one state will receive no federal protection under section 1985(3) simply because the facilities they visit lack interstate clientele.¹²² Because the majority of federal courts continue to avoid the real underlying right at stake in the antiabortion blockades,¹²³ private conspiracies will force many women seeking abortions to travel to protected abortion clinics in order to avoid demonstrations designed to infringe upon their constitutional freedom of choice.¹²⁴ Therefore, as long as the right to have an abortion remains constitutionally protected, federal courts have a duty to protect the right from private conspiratorial infringement under section 1985(3).

V. STATE ACTION REQUIREMENT UNDER SECTION 1985(3)

Given that section 1985(3) does encompass the protection of the right to privacy, the majority of cases provide that evidence of private interference alone is not sufficient to make out a prima facie case under section 1985(3) because deprivation of the right to privacy, unlike deprivation of the right to interstate travel, requires evidence of state involvement.¹²⁵ In fact, after

121. Compare *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1493-94 (E.D. Va. 1989) (failing to address right to privacy "thicket" and potential application of right under § 1985(3)), *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) with *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 227-28 (6th Cir. 1991) (analyzing right to privacy claim under § 1985(3) and finding insufficient evidence of state action to warrant relief under statute). In *Volunteer Medical Clinic*, the district court properly dismissed the § 1985(3) claim based upon the right to travel, and, therefore, neither the district court nor the appellate court had the opportunity to avoid addressing the right to privacy argument by relying upon the alternative constitutional grounds maxim. *Id.* at 226.

122. See *supra* notes 107-16 and accompanying text (addressing inherent weaknesses of § 1985(3) claim based upon constitutional right to interstate travel).

123. But see *Volunteer Medical Clinic*, 948 F.2d at 227-28 (evaluating § 1985(3) claim based upon deprivation of right to privacy and reversing district court's decision to grant injunctive relief). In *Volunteer Medical Clinic*, although the appellate court affirmed the district court's determination that women were a cognizable class under § 1985(3), the Sixth Circuit reversed the district court's finding of sufficient state action and held that the alleged state involvement in the case did not meet the level required under the Fourteenth Amendment. *Id.* at 225, 228.

124. See *supra* notes 107-16 and accompanying text (speculating on impact of basing federal protection under § 1985(3) upon right to interstate travel). Federal protection under § 1985(3) based solely upon the right to interstate travel might force women to go as far as the nearest "hub" clinic in order to have an abortion, resulting in significant expenditures that typically accompany travelling to such locations. For some women, such additional travelling costs would make having an abortion prohibitively expensive, leaving them without any realistic opportunity to exercise their constitutionally protected right to choose.

125. See *supra* note 99 and accompanying text (analyzing § 1985(3) claim based upon

determining that section 1985(3) did encompass a right to privacy, the United States Court of Appeals for the Sixth Circuit in *Volunteer Medical Clinic, Inc. v. Operation Rescue*¹²⁶ dismissed the section 1985(3) lawsuit because the claim lacked the requisite basis of state action.¹²⁷ The rationale behind the Sixth Circuit's decision stems from the Supreme Court's interpretation in *United Brotherhood of Carpenters & Joiners Local 610 v. Scott*¹²⁸ of section 1985(3) as solely a remedial statute that fails to create any substantive federal rights in and of itself.¹²⁹ In other words, any section 1985(3) claim turns upon the violation of the underlying right associated with the lawsuit.¹³⁰ Because the right to privacy, the cornerstone of which is the Fourteenth Amendment, is by definition a right actionable only against state interference, a valid section 1985(3) claim based upon such a violation requires evidence of state action.¹³¹

Therefore, following the Sixth Circuit's approach in *Volunteer Medical Clinic*, determining what level or amount of state action or inaction constitutes sufficient state involvement to trigger the remedial provisions of the statute is a critical issue to any section 1985(3) claim involving an alleged deprivation of the right to privacy.¹³² In *Scott*, the Supreme Court held that a section 1985(3) claim involving a deprivation of a Fourteenth Amendment right requires either a showing of state involvement in the conspiracy or a showing that the conspiracy's goal is to influence state activity.¹³³ In *Lugar v. Edmondson Oil Co.*,¹³⁴ the Court defined the state action requirement of the Fourteenth Amendment as conduct that is fairly attributable to the state.¹³⁵ Examining abortion clinic blockade cases in particular, there is some

right to privacy). *But cf.* *Lewis v. Pearson Found., Inc.*, 908 F.2d 318, 320-22 (8th Cir. 1990) (finding originally that § 1985(3) claim based upon right to privacy need not include evidence of state action), *vacated*, 917 F.2d 1077, *petition for cert. filed*, 59 U.S.L.W. 3726 (U.S. Apr. 23, 1991) (No. 90-1575). In a panel decision, the *Lewis* court determined that § 1985(3) encompassed private conspiracies that implicated the principles of *Roe v. Wade*, and as a result, a showing of state involvement was unnecessary. *Id.* However, upon rehearing the case en banc, the Eighth Circuit vacated the panel opinion and affirmed the district court's dismissal of the complaint. *Lewis*, 917 F.2d at 1077.

126. 948 F.2d 218 (6th Cir. 1991).

127. *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 228 (6th Cir. 1991).

128. 463 U.S. 825 (1983).

129. *United Brotherhood of Carpenters & Joiners Local 610 v. Scott*, 463 U.S. 825, 830 (1983); *see also* *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979) (emphasizing remedial nature of § 1985(3)).

130. *Scott*, 463 U.S. at 830.

131. *Id.*

132. *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 225 (6th Cir. 1991).

133. *Scott*, 463 U.S. at 830.

134. 457 U.S. 922 (1982).

135. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). The test developed in *Lugar* as to whether conduct is fairly attributable to the state as required under the Fourteenth Amendment has two parts. *Id.* First is whether some right or privilege created by a state or

authority recognizing that Operation Rescue's failure to notify law enforcement officials about abortion clinic blockades constitutes the necessary state action element under section 1985(3).¹³⁶ Likewise, an agreement that the police will not arrest any antiabortion demonstrators arguably is sufficient evidence of state involvement.¹³⁷

Throughout the abortion clinic blockades in Wichita, Operation Rescue members received encouraging state and local support.¹³⁸ In fact, one of the reasons Randall Terry chose Wichita as the setting for the "Summer of Mercy" was because of its conservative, religious, and apparently sympathetic residents.¹³⁹ Not only did the protesters receive free food and drinks from local restaurants, but also Kansas Governor Joan Finney appeared during one of their rallies and spoke to the group, demonstrating her sympathy and alliance with the movement.¹⁴⁰ Although the Governor asked the demonstrators to refrain from breaking the law, she nevertheless informed Operation Rescue members that she supported their cause, thus bringing into question the effectiveness of her request for members not to break any laws.¹⁴¹

Furthermore, both the Mayor of Wichita and the local United States attorney praised Operation Rescue for its noble cause.¹⁴² In fact, during the initial days of the "Summer of Mercy," the Mayor, a noted antiabortionist, along with Wichita's City Manager, instructed the Chief of Police and fellow officers first to give abortion protesters the opportunity to block clinic gates and then to arrest the demonstrators using minimum force.¹⁴³

a rule of conduct imposed by a state or a person for whom a state is responsible causes the alleged deprivation of rights. *Id.* Second is whether the party charged with the deprivation of rights is a state actor. *Id.*

136. See *NOW v. Terry*, 886 F.2d 1339, 1361 (2d Cir. 1989) (noting district court's determination that failure to notify police satisfied state involvement requirement), *cert. denied*, 110 S. Ct. 2206 (1990).

137. *Id.*

138. See *Nightline*, *supra* note 1 (highlighting instances of local authorities and businesses supporting Operation Rescue's presence in Wichita).

139. Hall & Wieberg, *supra* note 5.

140. See *Nightline*, *supra* note 1 (noting presence of Kansas Governor Joan Finney at Operation Rescue demonstrations).

141. See *id.* (recognizing Governor Finney's support of Operation Rescue's antiabortion movement).

142. *Id.*

143. *U.S. Marshals Ordered to Clear Out Abortion Protesters*, CHI. TRIB., July 30, 1991, at M5 [hereinafter *U.S. Marshals Ordered*]. In addition to receiving praise from local government officials, Operation Rescue also formed alliances with Roman Catholic Bishop Eugene Gerber as well as 84 local pastors during the demonstrations. See Sandra Sanchez, *U.S. Judge Warns Gov. Abortion Foes*, USA TODAY, Aug. 6, 1991, at 3A (noting religious support of Operation Rescue's "Summer of Mercy" in Wichita). Cf. *Lombard v. Louisiana*, 373 U.S. 267, 273-74 (1963) (treating official statements condemning sit-ins as city law even though city in reality had no such ordinance on its books and reversing petitioners' convictions accordingly). Viewing the official commands as discriminatory, the *Lombard* Court reasoned that the city deserved the exact same treatment as those localities with ordinances directing the continuation of segregation. *Id.* at 273.

Judge Kelly's subsequent restraining order effectively overruled the Mayor's instructions.¹⁴⁴ As Operation Rescue's leader Randall Terry observed, Wichita received the antiabortion movement warmly, as evidenced by the many residents supporting the organization's cause.¹⁴⁵ Terry also noted the important transition occurring in Wichita (and elsewhere) in which local leadership, dissatisfied with federal approaches dealing with abortion, was taking over the highly controversial abortion issue by actively supporting the antiabortion movement.¹⁴⁶ Because Judge Kelly recognized the significant impact that these state and local leaders were having on Operation Rescue's demonstrations and morale, he warned the leaders not to expect immunity from arrest if they participated in any abortion clinic blockades.¹⁴⁷

Although neither side addressed the state action issue in *NOW v. Operation Rescue*, Justice O'Connor suggested one final way to encompass Operation Rescue's activities under section 1985(3).¹⁴⁸ Her argument turns upon conspiracies designed "for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws."¹⁴⁹ Because the goal of Operation Rescue is to prevent abortions, many of its tactics prevent enforcement officials from effectively ensuring women access to abortion clinics.¹⁵⁰ For example, demonstrators usually overwhelmingly outnumber policemen on the scene.¹⁵¹ During the "Summer of Mercy," police reportedly arrested over 2,300 antiabortion protesters.¹⁵² Also, in many instances, protesters pay their fines upon arrest and return to repeat

144. *U.S. Marshals Ordered*, *supra* note 133.

145. See Wilkerson, *supra* note 7, at 20 (quoting Randall Terry) (noting responsiveness of Wichita residents during "Summer of Mercy").

146. See Tom Morganthau, *Target: Wichita*, NEWSWEEK, Aug. 19, 1991, at 18 (quoting Randall Terry).

147. See *id.* (reporting that police arrested at least 70 clergy for participation in abortion clinic blockades and noting Judge Kelly's warning to any leaders participating not to expect governmental immunity).

148. See 60 U.S.L.W. 3331, 3332 (U.S. Nov. 5, 1991) (questioning relevance of evidence under § 1985(3) claim that purpose of Operation Rescue's tactics is to hinder police).

149. 42 U.S.C. § 1985(3) (1988); see *supra* note 29 (setting forth text of § 1985(3)). At least one circuit has already held, however, contrary to Justice O'Connor's suggested argument that Operation Rescue's activities might fall within the "for the purpose of preventing or hindering" language of § 1985(3), that evidence of interference with the ability of law enforcement to secure equal access to medical treatment for women seeking abortions is not sufficient evidence of state action to warrant a remedy under § 1985(3). *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 245 (6th Cir. 1991).

150. See Maraniss, *supra* note 7 (reporting number of abortions allegedly prevented during "Summer of Mercy").

151. See Hall & Wieberg, *supra* note 5 (describing effects of "Summer of Mercy" upon police force). During the "Summer of Mercy," Operation Rescue's tactic of effectively outnumbering law enforcement officials forced police in Wichita to work overtime, resulting in significant city expenditures. See *id.* (reporting that residents of Wichita collectively face paying over \$500,000 in taxes because of police overtime during summer demonstrations).

152. Colman McCarthy, *Overreaction in Wichita*, WASH. POST, Aug. 24, 1991, at A27.

the identical offense during the same demonstration.¹⁵³ The "Summer of Mercy" marked the use of a highly controversial tactic, as children participated in the Operation Rescue movement.¹⁵⁴ The antiabortion demonstrations in Wichita physically and mentally exhausted the police force, because of the long hours of work and the stress and intimidation involved.¹⁵⁵

While a number of states have attempted to regulate abortion by means of legislation challenging the validity of *Roe v. Wade*,¹⁵⁶ Kansas is not one of them.¹⁵⁷ However, by offering Operation Rescue encouragement in its antiabortion movement, state leaders in a sense have attempted to prevent abortions through encouraging the illegal acts of private citizens.¹⁵⁸ The Justice Department insists that section 1985(3) does not protect women seeking abortions from abortion clinic protests;¹⁵⁹ yet relying on the state court system to grant discretionary relief seems counterintuitive when authorities in the state support, or at least sympathize with, the antiabortion movement. By arguing that the federal courts have no jurisdiction to protect women under section 1985(3), the Justice Department is stating that although *Roe v. Wade* is still good law,¹⁶⁰ state leaders, by encouraging unlawful acts, can ignore the right to have an abortion because the women seeking abortions are without federal protection.¹⁶¹ Prochoice advocates perceive this latest move by the Justice Department and the Bush Administration simply as another effort to chip away at *Roe v. Wade* without an outright overruling by the Supreme Court.¹⁶²

153. *1 Imprisoned, 10 Freed in Abortion Clinic Protests*, CHI. TRIB., Aug. 13, 1991, at C3 (noting that law enforcement officials arrested many offenders more than once and that Judge Kelly threatened to jail repeat offenders).

154. *See id.* (noting that at least one offender had directed children to lie in front of moving vehicles at sites of abortion clinics).

155. Morganthau, *supra* note 146.

156. 410 U.S. 113 (1973).

157. *See infra* note 160 (noting cases challenging *Roe* decision); *Nightline*, *supra* note 1 (observing legality of abortion in Kansas).

158. *See supra* notes 138-47 and accompanying text (discussing official support and involvement during "Summer of Mercy").

159. *See Nightline*, *supra* note 1 (quoting Jackie Judd of ABC News) (arguing that federal courts do not have jurisdiction to hear cases involving abortion clinic blockades).

160. *See Hall*, *supra* note 4 (recognizing that six abortion cases challenging validity of *Roe v. Wade* are currently in federal court system). The jurisdictions that currently have cases challenging *Roe v. Wade* and their respective legislative enactments include: Guam, which passed a law prohibiting abortions except in instances necessary to save the woman's life; Louisiana, which enacted a law banning abortions except in cases of rape, incest, and saving the woman's life; Utah, which adopted a law restricting abortions except in situations of rape, incest, severe fetal deformity, and saving the woman's life; Pennsylvania, which passed a law establishing parental consent, spousal notification, and a 24-hour waiting period as prerequisites to having an abortion; North Dakota and Mississippi, which enacted laws designating waiting periods of 24 and 72 hours, respectively, before permitting an abortion. *Id.*

161. *See supra* notes 138-47 and accompanying text (discussing official support and involvement during "Summer of Mercy").

162. *See Nightline*, *supra* note 1 (quoting Jackie Judd of ABC News) (recognizing decline of *Roe v. Wade*'s significance during Bush Administration). *But see Will Justices Answer the*

For a number of reasons, section 1985(3) should require only a minimal showing of state action when the basis for the suit is an alleged deprivation of a woman's right to privacy.¹⁶³ First, no matter how courts dress up the claim, the real underlying right at stake in abortion clinic blockade cases is the right to privacy. Moreover, basing recoveries upon right to privacy violations avoids creating gaps in federal protection as the alternative ground for providing relief under section 1985(3)—interstate travel—is not available to everyone. Also, because the right to have an abortion is a right belonging solely to women, any physical interference with the right becomes especially suspect, warranting federal intervention at the first sign of state support of the private infringement. Finally, given Operation Rescue's acknowledgment that it intentionally fills jails or makes agreements with police in an effort to stymie effective enforcement,¹⁶⁴ such tactics should trigger the application of section 1985(3), as the conspiracy's admitted design is to influence and affect state activity.¹⁶⁵

CONCLUSION

In light of Operation Rescue's abortion clinic blockades during the "Summer of Mercy" and the level of official support they received, a federal check upon the group's activities is needed. Because the Equal Protection Clause requires the uniform application of the laws,¹⁶⁶ section 1985(3) should insulate every woman seeking an abortion from private conspiratorial activities designed to infringe upon her right when the evidence shows that such activities are state supported. Given that *Roe v. Wade* is still good law,¹⁶⁷ the constitutional right to have an abortion deserves federal

Abortion Question?, NAT'L L.J., Feb. 3, 1992, at 5 (questioning whether Supreme Court will overrule *Roe v. Wade* upon hearing oral arguments concerning Pennsylvania's abortion law).

163. See Henn & Del Monaco, *supra* note 18, at 266 (stating that precedent exists supporting argument that § 1985(3) requires only minimal state involvement in conspiracies).

164. See *id.* at 266-67 (describing minimal state involvement requirement); *supra* notes 150-55 and accompanying text (discussing tactics of Operation Rescue during abortion clinic blockades).

165. See *United Brotherhood of Carpenters & Joiners Local 610 v. Scott*, 463 U.S. 825, 833 (1983) (noting required showings of state action when basis for deprived right is Fourteenth Amendment). When bringing a claim under § 1985(3), a plaintiff satisfies the state action requirement if the plaintiff proves that the state was involved in the conspiracy or affected by the conspiracy. *Id.*

166. See TRIBE, *supra* note 42, § 16-1, at 1436 (suggesting that equal justice under law indirectly guards virtually all constitutional values).

167. *But see Webster v. Reproductive Health Servs.*, 492 U.S. 490, 533-35 (1989) (Scalia, J., concurring in part and concurring in the judgement) (indicating that overturning *Roe* is very conceivable); *supra* note 160 (listing current cases challenging validity of *Roe*). In *Webster*, Justice O'Connor suggested that unless state laws regarding abortion are unduly burdensome, then the right to privacy is not sufficiently implicated to warrant invalidation of the state regulations. *Webster*, 492 U.S. at 525-26 (O'Connor, J., concurring). Furthermore, Justice Rehnquist, in reference to *Roe*, noted that *stare decisis* is not nearly as binding in constitutional cases as it is in others. *Id.* at 518.

protection from illegal conspiratorial infringement. Moreover, section 1985(3) is the proper mechanism for enforcing this right, based not only upon the constitutional right to interstate travel, but also, and more appropriately, upon the constitutional right to privacy. As Professor Ken Gormley observes, “[i]n a world where state action and private conduct often intersect, Congress is empowered to reach . . . discriminatory conduct to assure that ‘equal protection’ is not just a phrase in the back of the Constitution, but something which all groups in America can actually enjoy.”¹⁶⁸ To decide that the federal courts are without jurisdiction to protect women seeking abortions from antiabortion blockades under section 1985(3) will promote anarchy and discrimination, as state-supported private citizens, unchecked by the federal judiciary, conspire to take away constitutionally protected rights.

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168. Gormley, *supra* note 30, at 587.