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Post v. Trinity Health-Michigan: Does 42 U.S.C. § 1985(3) Offer Protection from Disability Discrimination?

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INTRODUCTION

In August of 2022, the United States Court of Appeals for the Sixth Circuit in *Post v. Trinity Health-Michigan* grappled with whether 42 U.S.C. § 1985(3), a statute regarding conspiracy to interfere with civil rights, protects against disability discrimination.[1] The Sixth Circuit had not previously decided on this question.[2] Agreeing with the Seventh and Tenth Circuits, the Sixth Circuit held that § 1985 cannot reach disability discrimination.[3] This decision furthered an existing circuit split in courts' application of 42 U.S.C. § 1985(3) regarding disability discrimination.[4]

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* Joseph D. Burdine, Seattle University School of Law, Class of 2024. Thank you to my parents, John Burdine and Diane Evans, for their love and support.

1. *See* Post v. Trinity Health-Michigan, 44 F.4th 572, 574 (6th Cir. 2022).

2. *See id.*

3. *See id.* at 579–81.

4. *See, e.g.*, Lake v. Arnold, 112 F.3d 682, 686–88 (3d Cir. 1997); New York *ex rel.* Abrams v. 11 Cornwell Co., 695 F.2d 34, 42–43 (2d Cir. 1982), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc). *But see, e.g.*, D'Amato v. Wis. Gas Co., 760 F.2d 1474, 1486–87 (7th Cir. 1985); Wilhelm v. Cont'l Title Co., 720 F.2d 1173, 1176–77 (10th Cir. 1983).

The controversy in *Post* centered on Rachel Post, who worked at St. Joseph Mercy Oakland (St. Joseph), a hospital outside Detroit in Pontiac, Michigan, for thirty-three years.[5] She began working as a nurse in 1980, but in 2004, she transitioned to the anesthesiology department at St. Joseph.[6] Beginning in 2013, she continued to work at the hospital, but as an employee of Wayne State University Physician Group (Group).[7] On October 28, 2016, she suffered a severe concussion after hitting her head against an emergency room monitor that hospital personnel failed to properly push against a wall.[8] The injury resulted in Post suffering post-concussion syndrome, and she did not return to work until 2017.[9] Post's doctor recommended that she work her way back by "practice[ing] administering anesthesia in a 'simulation room,'" but the Group's chair did not allow her to do so.[10] Post also needed to renew her credentials before she could return to work, but a doctor working for the Group refused to do so because of her absence.[11] In October 2017, Post was terminated by the Group for "'budgetary' reasons" before resuming her work.[12] The Group eventually filed for bankruptcy; Post sought damages for her termination, alleging age and disability discrimination, but the claim was denied by the bankruptcy court.[13]

Subsequently, Post filed a lawsuit against St. Joseph for, among other things, interfering "with her right to a reasonable accommodation" under the American Disability Act (ADA)[14] and conspiring with the Group "to deprive her of her ADA employment rights."[15] Finding that precedent precluded Post's conspiracy claim under § 1985(3), the district court granted summary judgment to St. Joseph.[16] The court of appeals affirmed this decision and held that Post had not shown that any conspiracy deprived her of the "equal protection of the laws" or the "equal privileges and immunities under the laws."[17] The Sixth Circuit previously held in *Browder* that § 1985(3) only reaches conspiracies targeting a person based on a classification that would receive heightened scrutiny under the Supreme Court's

5. *Post*, 44 F.4th at 574.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 575.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*; *see* 42 U.S.C. § 12203(b).
15. *Post*, 44 F.4th at 575; *see* 42 U.S.C. § 1985(3).
16. *Post*, 44 F.4th at 575.
17. *Id.* at 580 (citing 42 U.S.C. § 1985(3)).

framework.[18] This classification includes racial discrimination.[19] In *Post*, the court reaffirmed that "§ 1985(3) does not 'cover' conspiracies grounded in 'disability-based discrimination' because that type of discrimination is subject to deferential rational-basis review."[20] Post asked the court to revisit the issue because other circuit courts held that § 1985 can reach disability discrimination.[21] Yet, the court held that only the Supreme Court or the United States Court of Appeals for the Sixth Circuit *en banc* can overrule the Sixth Circuit's decisions.[22]

This Note considers whether 42 U.S.C. § 1985(3) should apply to disability discrimination. Part I of this Note addresses 42 U.S.C. § 1985(3) and explores the historical context behind the statute. Part II discusses the current state of the statute, the various interpretations in different appellate circuits, and the statute's application for protection against disability discrimination. Part III explores how scholars have written about the statute. Part IV argues that the Sixth Circuit Court of Appeals should have held in *Post v. Trinity Health-Michigan* that 42 U.S.C. § 1985(3) does apply to disability discrimination.

I. 42 U.S.C. § 1985(3) AND ITS HISTORICAL CONTEXT

In 1864, during the Civil War, the United States Senate passed the Thirteenth Amendment.[23] Soon after the Civil War ended, Congress ratified the Fourteenth and Fifteenth Amendments.[24] These amendments greatly expanded the civil rights of Black Americans.[25] For instance, the Thirteenth Amendment abolished slavery; the Fourteenth Amendment guaranteed citizenship; and the Fifteenth Amendment granted Black males the right to vote.[26] The adoption of these amendments resulted in the

18. *Id.*; *see* Browder v. Tipton, 630 F.2d 1149, 1150 (6th Cir. 1980).

19. *Post*, 44 F.4th at 580; *see Browder*, 630 F.2d at 1150.

20. *Post*, 44 F.4th at 580.

21. *See, e.g.*, Lake v. Arnold, 112 F.3d 682, 686–88 (3d Cir. 1997); New York *ex rel.* Abrams v. 11 Cornwell Co., 695 F.2d 34, 42–43 (2d Cir. 1982), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc). *But see, e.g.*, D'Amato v. Wis. Gas Co., 760 F.2d 1474, 1486–87 (7th Cir. 1985); Wilhelm v. Cont'l Title Co., 720 F.2d 1173, 1176–77 (10th Cir. 1983).

22. *Post*, 44 F.4th at 580–81; *see also* Salmi v. Sec'y of Health & Hum. Servs., 774 F.2d 685, 689 (6th Cir. 1985) ("The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision").

23. *13th Amendment to the U.S. Constitution: Abolition of Slavery (1865)*, NAT'L ARCHIVES & RECS. ADMIN., https://www.archives.gov/milestone-documents/13th-amendment#:~:text=Passed%20by%20Congress%20on%20January,slavery%20in%20the%20United%20States [https://perma.cc/3GYR-2BRN].

24. *Id.*

25. *Id.*

26. *15th Amendment to the U.S. Constitution: Voting Rights (1870)*, NAT'L ARCHIVES & RECS. ADMIN, https://www.archives.gov/milestone-documents/15th-amendment [https://perma.cc/GF6W-CS3X].

implementation of additional protections for these civil rights, as well as others.[27]

For example, the Civil Rights Act of 1871 afforded greater protection.[28] 42 U.S.C. § 1985(3) dates to the Civil Rights Act of 1871.[29] The purpose of this act was to eliminate violence against and "protect the civil and political rights" of freed slaves.[30] President Grant signed the bill in 1871.[31]

Moreover, 42 U.S.C. § 1985(3) creates a damages action against "those who, as relevant here, 'conspire' 'for the purpose of depriving' 'any person or class of persons' of 'the equal protection of the laws' or 'equal privileges and immunities under the laws[.]'"[32] This statute states the following:

> 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, 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 persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.[33]

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27. *Id.*

28. *The Ku Klux Klan Act of 1871*, HIST. ART & ARCHIVES, https://history.house.gov/Historical-Highlights/1851-1900/hh_1871_04_20_KKK_Act/ [https://perma.cc/R6T3-ZUXS].

29. *See id.*

30. *Id.*

31. *Id.*

32. Post v. Trinity Health-Michigan, 44 F.4th 572, 579 (6th Cir. 2022) (quoting 42 U.S.C. § 1985(3)) (alterations in original).

33. *Id.* at 579–580 (quoting 42 U.S.C. § 1985(3)).

II. INTERPRETATION OF 42 U.S.C. § 1985(3) IN OTHER CIRCUITS

Although the Sixth Circuit in *Post* emphasized that precedent prohibited Post's claim under 42 U.S.C. § 1985(3),[34] Post argued that § 1985 can reach disability discrimination because this result has been reached by both the Second Circuit and the Third Circuit.[35] Conversely, the Seventh and Tenth Circuits have held that § 1985 cannot reach disability discrimination.[36] This Part analyzes the various courts holding and reasoning for the applicability and inapplicability of a § 1985 claim against disability discrimination.

A. 42 U.S.C. § 1985(3) in the Second Circuit

In 1982, the Second Circuit Court of Appeals in *Abrams* held that § 1985 reaches disability discrimination.[37] In that case, the State of New York filed suit on behalf of disabled citizens after a group of citizens in New York formed a partnership to prevent the Office of Mental Retardation and Developmental Disabilities (OMRDD) from purchasing property.[38] The State argued that refusal to sell to OMRDD, despite the property being for sale, constituted a conspiracy among the citizens to deny the mentally disabled equal protection of the laws under 42 U.S.C. §1985(3).[39] Neighbors held multiple meetings to discuss preventing OMRDD from purchasing the property.[40] The neighbors formed a partnership and purchased the property themselves, after which following attempts by OMRDD to purchase the property were met with negative responses.[41]

The partnership, 11 Cornwell, argued that the State's claim was insubstantial because 11 Cornwell's actions did not prevent the State from providing "equal protection of the laws" under §1985(3), as the mentally disabled were not a protected class.[42] Quoting *Griffin*, the court said that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions."[43] In response to the State's claim that the mentally disabled are protected by § 1985(3), the

34. *Id.*; *see also* Salmi v. Sec'y of Health & Hum. Servs., 774 F.2d 685, 689 (6th Cir. 1985).

35. *Post*, 44 F.4th at 580; *see* Lake v. Arnold, 112 F.3d 682, 686–88 (3d Cir. 1997); *see also* New York *ex rel.* Abrams v. 11 Cornwell Co., 695 F.2d 34, 42–43 (2d Cir. 1982), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc).

36. *See* D'Amato v. Wis. Gas Co., 760 F.2d 1474, 1486–87 (7th Cir. 1985); *see also* Wilhelm v. Cont'l Title Co., 720 F.2d 1173, 1176–77 (10th Cir. 1983).

37. New York *ex rel.* Abrams v. 11 Cornwell Co., 695 F.2d 34, 42 (2d Cir. 1982), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc).

38. *Id.* at 37.

39. *Id.*

40. *Id.*

41. *Id.* at 38.

42. *Id.* at 41.

43. *Id.* at 42 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)).

court noted that cases since *Griffin* "have been generous in applying section 1985(3) to nonracial classifications," including those which "would not receive strict scrutiny under the equal protection clause."[44] For example, classes have included "supporters of an insurgent candidate for a tribal council presidency,"[45] "supporters of a political candidate,"[46] "women purchasers of disability insurance,"[47] and "ethnic and religious groups."[48] Additionally, the court found cases holding that a class, such as the mentally disabled, is not protected under § 1985(3) unconvincing.[49] The court used those cases to conclude that § 1985(3) does reach people who are mentally disabled as a class.[50]

B. 42 U.S.C. § 1985(3) in the Third Circuit

In 1997, the Third Circuit in *Lake v. Arnold* agreed with the Second Circuit and came to the same conclusion that § 1985(3) reaches people who are mentally disabled.[51] In that case, a woman and her husband brought suit, alleging that their sixteen-year-old daughter could not provide informed consent to a tubal ligation operation because of illiteracy and mental disability.[52] The plaintiffs alleged that they only became aware of the nature of the operation when their daughter underwent a medical examination sixteen years after the operation.[53] A magistrate judge in the United States District Court for the Western District of Pennsylvania dismissed the plaintiff's claim under § 1985(3), concluding that "handicapped persons were neither intended to be a class nor reasonably [can] be considered to be a class for purpose of section 1985(3)."[54]

The Third Circuit Court of Appeals looked to *Griffin* and *Scott* and determined that under § 1985(3), a conspiracy must be "motivated by racial or class based discriminatory animus."[55] Here, the court of appeals concluded that people who are mentally disabled, as a class, are protected by § 1985(3).[56] In making this decision, the court considered times when

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44. *Id.*

45. *Id.* (citing Means v. Wilson, 522 F.2d 833, 839–40 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976)).

46. *Id.* (citing Cameron v. Brock, 473 F.2d 608, 610 (6th Cir. 1973)).

47. *Id.* (citing Life Ins. Co. of N. Am. V. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979)).

48. *Id.* (citing Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973); Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (en banc); Weiss v. Willow Tree Civic Ass'n, 467 F. Supp. 803, 812 n.15 (S.D.N.Y. 1979).

49. *Id.* at 43; *see also* Cain v. Archdiocese of Kan. City, 508 F. Supp. 1021, 1027 (D. Kan. 1981).

50. *Abrams*, 695 F.2d at 43.

51. *See* 112 F.3d 682, 684 (3d Cir. 1997), *as amended* (May 15, 1997).

52. *Id.*

53. *Id.*

54. *Id.* (alteration in original).

55. *Id.* at 685.

56. *Id.* at 686.

it had expanded protection under the statute to other classes beyond race.[57] For instance, in *Novotny*, the court held that women as a class are protected by § 1985(3).[58] The analysis in *Novotny* was important to the court's decision in *Lake* because the court acknowledged that recognizing other classes as protected classes moved beyond the initial meaning of the Civil Rights Act of 1871.[59]

The court made this decision by looking at how broadly the section was written—pointing out that it was written to protect equal protection and equal privileges for "any person or class of persons."[60] The court noted that even though the purpose of the statute was to prevent violence toward Black people and Union sympathizers, the bill did not limit the protection to those specific classes exclusively.[61] In particular, the court noted that "community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection."[62] Furthermore, the court emphasized that similar statutes of the time, including the Fourteenth Amendment, were similarly not limited by the authors.[63]

The court analyzed the passage of time has led to the development of classes deemed protected by the statute.[64] The court noted that there are many similarities between gender and disability, including mental disability, in that neither is a choice of the person.[65] The court looked to Congress's findings in enacting the Americans With Disabilities Act:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals . . .[66]

Furthermore, the court in *Lake* reiterated its previous holding from *Novotny*, which held that animus directed against people who are disabled

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57. *Id.*; *see* Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1241 (3d Cir. 1978), *vacated*, 442 U.S. 366 (1979) (writing that in determining the applicability of § 1985(3), the "initial inquiry must be whether the actions which form the basis for [the] case are the offspring of a 'class-based invidiously discriminatory animus' within the meaning of the *Griffin* test").

58. *See Novotny*, 584 F.2d at 1241.

59. *See Lake*, 112 F.3d at 686.

60. *Id.*

61. *Id.*

62. *Id.* at 687 (citing *Novotny*, 584 F.2d at 1243).

63. *Id.* at 686–87.

64. *Id.* at 687.

65. *Id.*

66. *Id.* at 687–88 (quoting 42 U.S.C. § 12101(a)(7)).

"includes the elements of a 'class-based invidiously discriminatory' motivation."[67]

C. 42 U.S.C. § 1985(3) in the Tenth Circuit

In 1983, the Tenth Circuit Court of Appeals previously held in *Wilhelm* the opposite way—that § 1985(3) does not protect people who are disabled as a class.[68] In that case, Robert L. Wilhelm brought suit against the Continental Title Insurance Company and its president, Angelo J. Visconti.[69] "[Wilhelm] worked as a real estate title insurance salesman at Continental."[70] In March of 1983, he was diagnosed with multiple sclerosis and subsequently demoted and discharged within a month after informing his employer.[71] Wilhelm then submitted a disability-based employment discrimination claim to the Colorado Civil Rights Commission.[72] The court's first issue on appeal was whether § 1985 entitles disabled persons as a class to its protection.[73]

The Tenth Circuit first looked to *Griffin* and noted that the lower court had used the parameters set by *Griffin* to justify denying Wilhelm's claim, citing his inability to demonstrate that the purported discrimination was not said to be invidious.[74] The Tenth Circuit previously held that § 1985(3) does not "cover conspiracies motivated by economic, political or commercial animus."[75] In this case, the court looked through the statute's history similar to the Third Circuit in *Lake*.[76] The court, however, read the statute in a much narrower manner,[77] focusing on the term "the narrowing amendment," as used in *Scott*:

> The narrowing amendment, which changed § 1985(3) to its present form, was proposed, debated, and adopted there, and the Senate made only technical changes to the bill. Senator Edmunds's views, since he managed the bill on the floor of the Senate, are not without weight. But we were aware of his views in [*Griffin*], and still withheld judgment on the question whether § 1985(3), as enacted, went any farther than its central concern—combatting the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments. Lacking

67. *Id.* at 688 (quoting *Novotny*, 584 F.2d at 1243).
68. Wilhelm v. Cont'l Title Co., 720 F.2d 1173, 1174 (10th Cir. 1983).
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 1175.
75. *Id.*
76. *See* Lake v. Arnold, 112 F.3d 682 (3d Cir. 1997).
77. *See Wilhelm*, 720 F.2d at 1175–78.

> other evidence of congressional intention, we follow the same course here.[78]

The court summarized this idea by finding nothing from the *Scott* decision would suggest § 1985 should extend to classes besides "those involved in the strife in the South in 1871," which Congress was concerned with at that time.[79]

In its conclusion, the court continued to emphasize there was no ascertainable class of disabled persons because people "are handicapped in vastly different ways, for different periods of time, and to very different degrees or extent."[80] Relying once again on the original intent and history, the court held that a class of "handicapped persons" was not considered by Congress in 1871, and, therefore, it could not be included as a class under protection by § 1985(3) in 1983.[81]

D. 42 U.S.C. § 1985(3) in the Seventh Circuit

In 1985, the Seventh Circuit similarly held in *D'Amato* that § 1985 does not protect people who are disabled as a class.[82] In that case, Joseph D'Amato brought suit against his former employer.[83] D'Amato joined Wisconsin Gas Company (Company) in 1980.[84] His job necessitated entering tall buildings, but his struggle with acrophobia prevented him from fulfilling this aspect of his responsibilities. He needed to go into tall buildings to fulfill his job requirements, but he could not do this because he suffered from acrophobia.[85] After discussing this with his employer, D'Amato resigned several months later.[86] The Company initially extended an offer for a different role that did not require entering tall buildings but withdrew it because of their policy against rehiring employees who had resigned or were fired.[87]

D'Amato brought his claim in January of 1981, alleging that the Company discriminated against D'Amato through its no-rehire policy.[88] By 1982, the Company had removed its no-rehire policy, and D'Amato accepted a new offer to begin work for them, but he was fired two days

78. *Id.* at 1176 (quoting United Bhd. of Carpenters v. Scott, 463 U.S. 825, 837 (1983)).
79. *Id.*
80. *Id.*
81. *Id.* at 1177.
82. *See* D'Amato v. Wis. Gas Co., 760 F.2d 1474, 1486 (7th Cir. 1985).
83. *Id.* at 1476.
84. *Id.*
85. *Id. See generally Acrophobia*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/acrophobia [https://perma.cc/4B5Y-JATH] (acrophobia is fear of heights).
86. *D'Amato*, 760 F.2d at 1476.
87. *Id.*
88. *Id.*

before the end of his initial probationary work period.[89] In January of 1983, D'Amato brought several claims against the Company, including an allegation of conspiracy under § 1985.[90] The district court granted the Company's motion to dismiss, and D'Amato filed a timely notice of appeal.[91]

The Seventh Circuit Court of Appeals began its analysis by noting that the predominate purpose of § 1985(3) upon its enactment was "to combat the prevalent animus against [Black people] and their supporters."[92] The court took a similar approach to the Tenth Circuit in *Wilhelm*, considering the history of the statute.[93] § 1985(3) was originally much broader in its wording upon its initial proposal, and it was narrowed down to its final form to avoid resemblance to a "general federal tort law."[94] The statute was interpreted with a limited scope when brought before the Supreme Court.[95] In response, the court aimed to constrain the statute's scope in this case, aligning it with the original congressional intent and preventing any expansion beyond that scope.[96] The court explained how disabled people are separate as a class from the racial class that § 1985 was originally written to protect.[97] The court emphasized that being disabled "is not a historically suspect class" along the lines of race, national origin, or sex.[98] The court also took a similar approach to the Tenth Circuit in *Wilhelm* by explaining that disabilities are a condition that may cease to exist, unlike the other previously listed classes of protected persons.[99] The court listed several other classes held as protected by § 1985(3), including religion and political loyalty, but did not mention that these are classes that could cease to exist, likely even more commonly than a person's disability.[100]

Next, the court considered the legislative intent behind the original writing of the statute that would place disability discrimination within the scope of § 1985(3).[101] For instance, in *Scott*, the Supreme Court held that there was a central question of whether the judgment in that case would push the scope of § 1985(3) beyond its central concern, which was to "combat[] the violent and other efforts of the [Ku Klux] Klan and its allies

89. *Id.* at 1476–77.
90. *Id.* at 1477.
91. *Id.*
92. *Id.* at 1486 (quoting United Bhd. of Carpenters v. Scott, 463 U.S. 825, 836 (1983)).
93. *See* Wilhelm v. Cont'l Title Co., 720 F.2d 1173, 1176 (10th Cir. 1983).
94. *D'Amato*, 760 F.2d at 1486 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *See id.*

to resist and to frustrate the intended [e]ffects of the Thirteenth, Fourteenth, and Fifteenth amendments."[102] The court in *D'Amato* did not find that the legislative history of § 1985(3) suggested a concern for the disabled.[103] Instead, the court noted that the disabled "as a class differ[ed] radically from the raciallly-based animus motivating the Ku Klux Klan and white supremacists against which Congress directed § 1985(3)."[104] The court continued by writing that disabilities vary greatly, from immediately noticeable physical disabilities to ones not at first obvious or those revealed only by a medical examination; disabilities are a condition that may be overcome depending on the individual and the disability.[105] The court also described the policy reasons behind its decision, noting that disabilities can be legitimate reasons for exclusion from some jobs—unlike discrimination based on race, ethnic origin, sex, religion, or politics.[106] The court did not elaborate by describing job situations in which there would be a legitimate reason for exclusion based on disability.[107]

Further, the court clarified that this statute was not appropriate for receiving the remedy sought.[108] The court looked to *Novotny* in deciding that § 1985(3) may be used only for protecting existing rights.[109] In *Novotny*, the Court wrote that § 1985(3) does not create any rights; instead, it is a remedial statute meant to provide equal protection "when some otherwise defined federal right . . . is breached by a conspiracy in the manner defined by the section."[110] In *D'Amato*, the court used this line of thinking to decide that allowing D'Amato to pursue his claim through the mechanism of § 1985(3) would impermissibly intrude on the statutory scheme of the statute.[111]

The court concluded by adding that deciding for D'Amato would be wrong because it would allow him to skip the important administrative process procedures he ought to pursue to achieve remedy.[112]

III. How Scholars Have Discussed These Decisions

The question of whether § 1985(3) protects people with disabilities as a protected class arose as circuit courts decided each of the cases

102. United Bhd. of Carpenters v. Scott, 463 U.S. 825, 837 (1983).
103. *D'Amato*, 760 F.2d at 1486.
104. *Id.*
105. *Id.*
106. *Id.* at 1486–87.
107. *See id.*
108. *See id.*
109. *Id.* at 1487.
110. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 366 (1979).
111. *D'Amato*, 760 F.2d at 1487.
112. *See id.*

mentioned in Part II.[113] Many questions emerged as scholars continued to question how classes that need protection may develop and protections might be expanded. Some courts may continue to determine that the statute was written to be broad and expand over time to include classes of people who continue to need increased protection and whom the original authors of the state may not have considered. Some may argue that the statute was initially crafted with a distinct purpose, specifically to protect against the Ku Klux Klan. As a result, they may contend that the statute should not be interpreted to extend protection to any other designated classes.

Courts have grappled with which classes of people the statute should apply to. For example, Scott Folkers wrote for the *South Dakota Law Review* in 1985 about whether § 1985(3) should apply to women as a class.[114] In that article, Folkers discussed how Warna Lewis's constitutional rights to privacy and reproductive freedom, guaranteed under *Roe v. Wade*, were violated by the Pearson Foundation, Inc. (Pearson Foundation).[115] The Pearson Foundation was an organization whose sole purpose was "to prevent as many women from obtaining abortions as possible."[116] Lewis attempted to redress the wrong done by the Pearson Foundation under 42 U.S.C. § 1985(3).[117] Folkers noted several pieces of evidence that could be used when interpreting the scope of § 1985(3) to determine whether the statute should protect women as a class.[118] Folkers noted that the Act was passed during the Reconstruction era following the Civil War in response to the Ku Klux Klan becoming extremely powerful.[119] He explains that Section 2 of the Ku Klux Klan Act could have been written to prohibit only state-sponsored discrimination, but instead, it was written to reach wholly private conspiracies as well.[120] This expansion helps to show that the Act was intended to have a broad scope.

Furthermore, Folkers argued that Section 2 of the Ku Klux Klan Act supported a broad reach because of the Act's legislative history.[121] Folkers noted a comment by Representative Samuel Shellabarger in 1870, where he explained that the object of an amendment to the law was to confine the

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113. *See, e.g.*, New York *ex rel.* Abrams v. 11 Cornwell Co., 695 F.2d 34, 42–43 (2d Cir. 1982), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc); Lake v. Arnold, 112 F.3d 682, 686–88 (3d Cir. 1997); Wilhelm v. Cont'l Title Co., 720 F.2d 1173, 1176–77 (10th Cir. 1983); D'Amato v. Wis. Gas Co., 760 F.2d 1474, 1486–87 (7th Cir. 1985).

114. *See* Scott Folkers, Lewis v. Pearson Foundation, Inc.*: Does 42 U.S.C. § 1985(3) Offer Protection to Women as a Class?*, 37 S.D. L. REV. 621 (1991).

115. *Id.* at 621.

116. *Id.*

117. *Id.*

118. *See generally id.*

119. *Id.* at 626.

120. *Id.*

121. *Id.*

authority of the law to any violation of the deprivation of the rights of American citizens.[122] Folkers also took note of Senator Edmunds's statements, as he explained that this section would reach a conspiracy formed against a man "because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist or because he was a Vermonter."[123] This is very broad language, wh\ich supports the idea that the statute was written to protect against discrimination, including disability discrimination.

In 2008, author Benjamin Lin noted that there was a current split of opinion among the circuits regarding the redressability of discrimination based on one's political affiliation under § 1985(3).[124] Lin first analyzed the methodologies employed by each circuit, offering an opinion on the matter and then proposing a solution based on a third method—the legal process school of adjudication developed by Harvard Law professors Henry Hart and Albert Sacks in the 1950s.[125] Lin noted that courts that have not held in favor of a plaintiff's right to sue under § 1985(3), which tended to emphasize that Senator Edmunds's statement on interpreting the statute should not be considered dispositive of the issue because the bill originated in the House and not the Senate, and Senator Edmunds was a Senator rather than a Representative.[126] Additionally, Lin explained that it seemed in cases where courts did not hold in favor of a plaintiff's right to sue under the statute, courts continued to emphasize the very specific situation of protecting Black Americans and their supporters in the South, which was the situation that the statute was originally written to address.[127]

This same type of issue also came up in the case of several other protected classes of people. For instance, in 1986, Janis L. McDonald considered the scope of the statute when considering whether the statute applies to class-based discrimination.[128] McDonald thought that the statute should provide a cause of action when a conspiracy by public or private perpetrators would "deprive *any* person or class of persons of equal protection of the laws or equal privileges and immunities under the Constitution or other laws."[129] McDonald expressed concern that courts may fail to interpret the statute in this manner and would instead limit the

122. *Id.* at 627.

123. *Id.*

124. Benjamin Lin, *Conspiracy! Section 1985(3) Political-Patronage Discrimination and the Quest for Purpose*, 9 J. L. IN SOC'Y 211, 211 (2008).

125. *Id.* at 211–12.

126. *Id.* at 216.

127. *Id.* at 217.

128. Janis L. McDonald, *Starting from Scratch: A Revisionist View of 42 U.S.C. § 1985(3) and Class-Based Animus*, 19 CONN. L. REV. 471, 472 (1987).

129. *Id.*

application of the statute to only a few unique and deserving classes of citizens rather than any person or class of persons.[130] McDonald referred to confusion that seemed to be created by the Supreme Court's decision in *United Brotherhood of Carpenters v. Scott*, a 5-4 decision where the Court suggested that only "cases of class-based racial animus instigated by Klan-like violence should be covered by § 1985(3)."[131] This would significantly limit the application of the statute and in a case like *Post v. Trinity Health-Michigan* or a future case involving disability discrimination under § 1985(3), this manner of interpretation would similarly limit the application of the statute to cases of disability-based racial animus instigated by Klan-like violence.

Furthermore, Michael Weingartner recently questioned the scope of § 1985(3) concerning voter discrimination.[132] The article provided "a novel analysis of the application of the support-or-advocacy clauses to voter disinformation and argue[d] that, despite certain obstacles, plaintiffs should embrace the clauses as a potentially powerful weapon against modern-day voter intimidation."[133] That article resulted from the 2020 election cycle, in which social media and online tools allowed the spread of disinformation at levels previously unseen.[134] Weingartner argued that there may be a stronger route to redressability for this voter discrimination under § 1985(3) than there would be under other potentially applicable statutes, including Section 131(b) of the Civil Rights Act of 1957 and Section 11(b) of the Voting Rights Act.[135]

Additionally, Steven Shatz considered that § 1985(3), a once broadly applicable statute, had been killed by courts limiting its use since its original adoption.[136] Shatz wrote that although Section 2 of the Ku Klux Klan Act at first provided criminal penalties and civil liabilities for conspiracies broadly, the Supreme Court reduced the scope of the statute's application as part of a larger dismantling of legal achievements of reconstruction soon after the adoption of the Act.[137] Shatz noted that circuit courts played a role in limiting the scope of the statute, including the Third Circuit, where the court held that § 1985(3) "should apply only to classes defined by immutable characteristics . . . [but did not explain] why the section should

130. *Id.* at 472–73.

131. *Id.* at 474.

132. Michael Weingartner, *Remedying Voter Disinformation Through § 1985(3)'s Support-or-Advocacy Clauses*, 110 GEO. L.J. ONLINE 83, 83 (2021).

133. *Id.*

134. *See id.*

135. *Id.*

136. Steven F. Shatz, *The Second Death of 42 U.S.C. Section 1985(3): The Use and Misuse of History in Statutory Interpretation*, 27 B.C. L. REV. 911, 911 (1986).

137. *Id.*

apply to all classes defined by 'immutable characteristics' or should exclude all other classes."[138]

These arguments made by scholars about the proper interpretation of the statute will remain relevant when again considering the scope of the statute in relation to disability discrimination.

IV. DISABILITY DISCRIMINATION SHOULD FALL WITHIN THE SCOPE OF 42 U.S.C. § 1985(3)

The scope of the statute has expanded over time to include more classes than the primary purpose of the legislation. Courts' decisions on whether particular classes are properly included within the scope of § 1985(3) seem to follow tiers of scrutiny used by the Supreme Court of the United States when deciding other cases involving discrimination and when deciding cases under the Equal Protection Clause.[139] Courts use strict scrutiny when considering racial discrimination; because race is an immutable trait that is visibly apparent and cannot be changed, there is a history of discrimination throughout the entire history of the United States regarding race, and there is a lack of contemporary political power as a result of the history of discrimination.[140] If a law is looked at with a higher tier of scrutiny, then there is a greater chance that the discrimination would be held to be unconstitutional by the court, which in this case would be analogous to a court holding that 42 U.S.C. § 1985(3) applies to disability discrimination. Being disabled is similarly an immutable trait for many people for whom it is a trait that cannot be changed. In that manner, a correct application of the statute should follow a similar analysis to cases that are brought involving racial discrimination where courts conclude that § 1985(3) applies.

The courts should consider the broad language used when the statute was written, as the statute refers to "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."[141] This is written in a manner that seems intended to apply to a large range of classes of people being discriminated against as a result of a conspiracy by a public or private entity. The law specifically states that it is intended to apply to "any persons or class of persons,"[142] and it does not expressly limit the type of class that the statute should cover. It also does not state that the statute

138. *Id.* at 919.

139. New York *ex rel.* Abrams v. 11 Cornwell Co., 695 F.2d 34, 42 (2d Cir. 1982), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983).

140. *See* discussion *supra* note 139.

141. 42 U.S.C. § 1985(3).

142. *Id.*

should not protect against disability discrimination. Although the Ku Klux Klan Act was originally adopted in response to racial discrimination by the Ku Klux Klan following the Civil War during the Reconstruction era, the statute was written to include broad language that would apply to more classes of people than merely racial discrimination.

Statements made by lawmakers also show that § 1985(3) should apply to cases of disability discrimination. For example, Representative Shellabarger emphasized the word "any" as she explained that the object of an amendment that she wrote to the statute was to confine authority of the law to "any" violation of the deprivation of the rights of American citizens.[143] Senator Edmunds similarly expanded on this idea when he explained that this section would reach a conspiracy formed against a man "because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist or because he was a Vermonter."[144] In listing these examples, Senator Edmunds intended to show that there was a broad range of classes that a plaintiff could bring a claim under through the use of § 1985(3).[145] Indeed, the most obvious interpretation is that he intended to demonstrate that there was no limit to the type of class a plaintiff could use to bring a claim of discrimination under the statute. He did not intend the list of potential classes that he illustrated to be exhaustive. If Senator Edmunds were asked whether § 1985(3) would apply to disability discrimination, he would most likely state that it would because it is comparable to the other classes that he said would fall under the statute, including political party, religion, or state of origin.

Because of the language of the statute, the gradual expansion of the application of the statute over time since its adoption, and the views of lawmakers at the time of the adoption of the Ku Klux Klan Act, the proper interpretation of § 1985(3) is that it applies to disability discrimination. Due to this, the Sixth Circuit erred in its decision in *Post v. Trinity Health-Michigan*. In August 2022, it held that § 1985(3) does not apply to disability discrimination.[146] Should the Supreme Court consider a similar case, it should hold similar to the Second and Third Circuits, which have both previously held that § 1985(3) can reach disability discrimination in cases brought before them.[147]

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143. Mark Fockele, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402, 418 n.67 (1979).

144. Folkers, *supra* note 114, at 627.

145. Lee Pinzow, *Is It Really All About Race?: Section 1985(3) Political Conspiracies in the Second Circuit and Beyond*, 83 FORDHAM L. REV. 1031, 1045 n.113 (2014).

146. *See* Post v. Trinity Health-Michigan, 44 F.4th 572 (6th Cir. 2022).

147. *See* New York *ex rel.* Abrams v. 11 Cornwell Co., 695 F.2d 34, 42 (2d Cir. 1982), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983); *see also* Lake v. Arnold, 112 F.3d 682, 684 (3d Cir. 1997), *as amended* (May 15, 1997).

CONCLUSION

42 U.S.C. § 1985(3) serves an important purpose for individuals who have suffered due to discrimination from conspiracy to interfere with civil rights in a public or private setting, as the statute provides a law under which plaintiffs can bring a claim. Throughout the time since the adoption of the statute, soon after the Civil War, courts have decided which classes of people are protected by the statute and under which types of discrimination. In August 2022, the Sixth Circuit Court of Appeals held in *Post v. Trinity Health-Michigan* that the statute could not reach disability discrimination.[148] In doing so, the Sixth Circuit agreed with past decisions made by the Seventh and Tenth Circuits and disagreed with previous decisions made by the Second and Third Circuits that concluded that § 1985(3) could reach disability discrimination.[149]

Although the circuits are currently split on the issue of whether § 1985(3) could reach disability discrimination, the correct decision is that it can because of the broad language used in writing the statute, as evidenced by quotes by congresspeople, the plain language itself, and also evidenced by the gradual expansion of the scope of the application of the statute over time—since its adoption—to apply to more classes of people than perhaps the statute was originally specifically intended.

Because a correct interpretation of 42 U.S.C. § 1985(3) is that it does apply to disability discrimination, the Sixth Circuit Court of Appeals in *Post v. Trinity Health-Michigan* incorrectly held that it does not, and in the future, that court and other courts should come to a different conclusion.

148. *See Post*, 44 F.4th at 574.
149. *Id.*