

***FARBER V. CITY OF PATERSON: THE THIRD  
CIRCUIT WEIGHS IN ON THE FUTURE OF  
PROTECTING POLITICAL CLASSES  
UNDER SECTION 1985(3)***

INTRODUCTION

In response to the violence and discrimination directed toward African Americans and their supporters in the post-Civil War South, Congress enacted several civil rights statutes to protect those being harmed and to punish those inflicting the harm.<sup>1</sup> Today, one such statute is codified at 42 U.S.C. section 1985(3).<sup>2</sup> Section 1985(3) “provides a civil cause of action against individuals who conspire to deprive ‘any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.’”<sup>3</sup> In *Griffin v. Breckenridge*,<sup>4</sup> the U.S. Supreme Court changed the course of section 1985(3) jurisprudence by holding that it reaches private, as well as public, conspiracies.<sup>5</sup> The *Griffin* Court also found that, for an action to violate section 1985(3), it must be motivated by “some racial, or perhaps otherwise class-based, invidiously discriminatory animus.”<sup>6</sup>

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1. See Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 534–40 (1985).

2. Section 1985(3) reads, in pertinent part, as follows:

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 . . . 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.

42 U.S.C. § 1985(3) (2000).

3. Devin S. Schindler, Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(3): A Limiting Strategy Gone Awry?*, 84 MICH. L. REV. 88, 88 (1985) (quoting 42 U.S.C. § 1985(3)).

4. 403 U.S. 88 (1971).

5. *Id.* at 101; see also *infra* notes 30–40 and accompanying text.

6. *Griffin*, 403 U.S. at 102 (emphasis added); see also *infra* note 41 and accompanying text.

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Over a decade later, in *United Brotherhood of Carpenters, Local 610 v. Scott*,<sup>7</sup> the Court marginally refined the meaning of “otherwise class-based” by listing classes not included.<sup>8</sup> Although the *Scott* Court discussed whether a conspiracy motivated by one’s political affiliation would be satisfactory under the *Griffin* standard, the Court unfortunately left the question unanswered.<sup>9</sup> Another ten years passed before the Court decided *Bray v. Alexandria Women’s Health Clinic*,<sup>10</sup> holding that opposition to abortion did not qualify as “class-based, invidiously discriminatory animus.”<sup>11</sup> *Bray* addressed the characteristics of an identifiable class and the invidious discrimination necessary to show a cognizable section 1985(3) claim—characteristics that courts could use to determine the section 1985(3) eligibility of victims of political discrimination.<sup>12</sup> Nonetheless, the Court has never squarely determined whether political affiliation is a class protected by section 1985(3).

The Court’s refusal to decide whether political affiliation is a cognizable class under section 1985(3) has led to a three-way split among the courts of appeals.<sup>13</sup> As of this writing, the most recent circuit to weigh in on the issue is the Third Circuit, deciding in *Farber v. City of Paterson* that a plaintiff could not maintain a section 1985(3) claim by alleging that she was discriminated against because of her affiliation with the Republican Party.<sup>14</sup> In determining that political affiliation is not a cognizable class under section 1985(3), *Farber* deepened the split among the circuits and highlighted the need for the Court to resolve this issue.

Part II of this Note explores section 1985(3)’s background, including a brief description of its legislative history, initial Court decisions suggesting little use for the statute, and the Court’s construction of section 1985(3) since it first revived the statute in the early 1970s.<sup>15</sup> Part III examines the Third Circuit’s analysis in *Farber*.<sup>16</sup> Part IV critiques *Farber*, explaining the jurisprudential problems and possible solutions to those problems that the Third Circuit might have

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7. 463 U.S. 825 (1983).

8. *Id.* at 837–39 (holding that economic and commercial classes are not protected under section 1985(3)).

9. *See id.* at 835–37.

10. 506 U.S. 263 (1993).

11. *Id.* at 263, 266–74.

12. *See infra* notes 61–70 and accompanying text.

13. *See infra* note 114.

14. 440 F.3d 131 (3d Cir. 2006).

15. *See infra* notes 20–74 and accompanying text.

16. *See infra* notes 75–136 and accompanying text.

considered.<sup>17</sup> Part V briefly comments on *Farber*'s potential impact upon future court decisions and hypothesizes that courts following *Farber*'s analysis would reject potential section 1985(3) claims arising out of a recent political controversy, the dismissal of several U.S. attorneys for alleged political reasons.<sup>18</sup> Part VI concludes that *Farber* correctly determined section 1985(3)'s scope in finding that political affiliation should not be a cognizable class.<sup>19</sup>

## II. BACKGROUND

Before embarking on any discussion of section 1985(3), one must first understand the statute's evolution since its genesis over a century ago. This Part initially discusses the legislative history leading up to section 1985(3)'s enactment and the subsequent period of time in which it was rendered largely ineffective by U.S. Supreme Court decisions.<sup>20</sup> Next, this Part focuses on *Griffin v. Breckenridge*, in which the Court held that section 1985(3) reaches both private and public conspiracies and requires a conspiracy motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus."<sup>21</sup> It then examines the Court's holding in *United Brotherhood of Carpenters, Local 610 v. Scott* that claims alleging conspiracies motivated by commercial or economic bias are not actionable under section 1985(3).<sup>22</sup> Part II concludes by discussing *Bray v. Alexandria*

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17. See *infra* notes 137–247 and accompanying text.

18. See *infra* notes 248–263 and accompanying text.

19. Other aspects of section 1985(3) are discussed in this Note as well, but only to the extent that they relate to the primary discussion on political affiliation as a cognizable class. One related question is the proper constitutional source of congressional power to enact section 1985(3). See Kenneth A.K. Martin, Note, *The Sixth Circuit Takes a Stand: Conklin v. Lovely and the Extension of Protection Under 42 U.S.C. § 1985(3) to Victims of Non-Racial, Politically Discriminatory Conspiracies*, 20 U. TOL. L. REV. 733, 735 (1989) (stating that Congress enacted the Ku Klux Klan Act pursuant to its authority under section 5 of the Fourteenth Amendment). *But cf. Griffin*, 403 U.S. at 107 (declining to consider the "scope of the power of Congress under § 5 of the Fourteenth Amendment"). Another related question is what rights plaintiffs may vindicate under section 1985(3). Compare *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993) (stating that only the rights to be free from involuntary servitude and to travel interstate are protected from private conspiracies), and *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 830 (1983) (holding that a private conspiracy to violate First Amendment rights is not a violation of section 1985(3)), with *Scott*, 463 U.S. at 849 (Blackmun, J., dissenting) (arguing that section 1985(3) prohibits interference with First Amendment rights by private conspiracy even without state involvement). It should also be noted that "political affiliation" is used in this Note only to characterize a class of persons under a section 1985(3) claim, not in the context of the First Amendment freedom to associate, or any other claims that might arise from the infringement of that freedom, unless otherwise specified.

20. See *infra* notes 24–30 and accompanying text.

21. 403 U.S. 88, 102 (1971) (emphasis added); see *infra* notes 31–44 and accompanying text.

22. See *infra* notes 45–54 and accompanying text.

*Women's Health Clinic*, in which the Court held that opposition to abortions did not qualify as the invidiously discriminatory animus needed to state a section 1985(3) claim and explained what constitutes an "identifiable" class for section 1985(3) purposes.<sup>23</sup>

#### A. Section 1985(3) Pre-Griffin

Although the Emancipation Proclamation, the end of the Civil War, and the ratification of the Thirteenth Amendment all served to abolish slavery, the Reconstruction-era Congress still faced the issue of continuing violence aimed at the newly freed African Americans, particularly in the South.<sup>24</sup> Members of the recently formed Ku Klux Klan intimidated and murdered African Americans and white sympathizers throughout the South "in an attempt to overthrow the Reconstruction policy of the Republican Congress."<sup>25</sup> Recognizing that the state and local courts were "unable, or unwilling," to quell the rampant violence,<sup>26</sup> Congress sought to use federal law to reach the Klan's activities and responded with the Civil Rights Act of 1871 (the "Ku Klux Klan Act").<sup>27</sup>

Section 2 of the Ku Klux Klan Act, the predecessor to 42 U.S.C. section 1985(3), caused intense debate in Congress, because the language of the original version was considered too broad.<sup>28</sup> The "equal protection" and "equal privileges and immunities" language found in section 1985(3) today was adopted as a compromise—"[t]his language limited the reach of the statute to a small subset of private conspiracies—namely those . . . that threatened the equal protection of certain classes of individuals, especially the newly freed [African Americans]."<sup>29</sup> However, in the years following the enactment of the Ku

23. See *infra* notes 55–74 and accompanying text.

24. Gormley, *supra* note 1, at 534. The Thirteenth Amendment pronounces that "[n]either 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." U.S. CONST. amend. XIII, § 1.

25. Gormley, *supra* note 1, at 534.

26. *Id.* at 535.

27. See Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871); Gormley, *supra* note 1, at 536. In addition to the Civil Rights Act of 1871, the Reconstruction Congress passed four other important pieces of civil rights legislation to combat the ongoing violence and racial discrimination in the South. Gormley, *supra* note 1, at 534 & n.6, 536 & n.14 (listing statutes passed to protect voting rights, prohibit racial discrimination in public accommodations, and outlaw Black Codes).

28. Gormley, *supra* note 1, at 537.

29. *Id.* at 539. As Justice Stewart explained in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the original version "was solely a criminal provision outlawing certain conspiratorial acts done with intent 'to do any act in violation of the rights, privileges, or immunities of another person,'" and "the present civil remedy was added" with the amendment. *Griffin*, 403 U.S. at 99–100 (quoting CONG. GLOBE, 42d Cong., 1st Sess., App. 68 (1871)). The criminal and civil portions of section 2

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Klux Klan Act, section 2 of the Act remained of little use to putative plaintiffs due to “hostile Supreme Court decisions.”<sup>30</sup> The state of section 1985(3) jurisprudence remained dependent upon these decisions until the Court changed course in 1971.

### B. Griffin v. Breckenridge

In *Griffin v. Breckenridge*,<sup>31</sup> a group of African Americans brought a section 1985(3) claim after they were threatened and severely beaten by two white defendants in Mississippi.<sup>32</sup> The plaintiffs alleged that the defendants were motivated by a conspiracy to intimidate and prevent the plaintiffs and other African Americans from “seeking the equal protection of the laws” and from “enjoying and exercising their rights, privileges and immunities as citizens.”<sup>33</sup> The Fifth Circuit affirmed the district court’s dismissal of the plaintiffs’ claim,<sup>34</sup> concluding that it was bound by the precedent set forth in *Collins v. Hardyman*,<sup>35</sup> which, in the Fifth Circuit’s opinion, held that section 1985(3) did not cover private conspiracies.<sup>36</sup>

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of the Ku Klux Klan Act were later divided up and codified in three different statutes. The civil portion became 42 U.S.C. section 1985(3). The criminal portion was further divided and placed in two different sections of the Revised Statutes. One portion survived to become 18 U.S.C. section 241, while the other portion, Rev. Stat. section 5519, was struck down in *United States v. Harris*, 106 U.S. 629 (1882). Gormley, *supra* note 1, at 540 n.30; *see also infra* note 30.

30. Schindler, *supra* note 3, at 89. In *Harris*, the Court found the criminal counterpart of section 1985(3) to be unconstitutional, reasoning that, because the act was not limited to state action, it was beyond the scope of the Fourteenth Amendment. *Id.* at 89 n.5 (citing *Harris*, 106 U.S. at 638–39); *see also* Baldwin v. Franks, 120 U.S. 678 (1887) (reaffirming *Harris*). In 1951, the Court limited the scope of section 1985(3) in *Collins v. Hardyman*, 341 U.S. 651 (1951), by “impos[ing] a state action requirement on § 1985(3) causes of action,” a requirement similar to that which the Court had found necessary to render the statute in *Harris* constitutional. Schindler, *supra* note 3, at 89 n.5.

31. 403 U.S. 88 (1971).

32. *Id.* at 89–90. The plaintiffs were passengers in an automobile driven by a person whom the defendants mistakenly believed to be a civil rights worker. *Id.* at 90. Under this mistaken belief, the defendants drove their truck in front of the automobile, forced the occupants to abandon the automobile, threatened the plaintiffs while the driver was clubbed, and finally clubbed and severely injured the plaintiffs. *Id.* at 90–91.

33. *Id.* at 90–91. The plaintiffs alleged that they were deprived of several rights, including the following:

[R]ights to freedom of speech, movement, association and assembly; the right to petition their government for redress of grievances; their right to be secure in their person; their right not to be enslaved nor deprived of life, liberty or property other than by due process of law, and their rights to travel the public highways without restraint in the same terms as white citizens in Kemper County, Mississippi . . . .

*Id.* at 91–92.

34. *Id.* at 92.

35. 341 U.S. 651.

36. *Griffin*, 403 U.S. at 92–93. The Court in *Collins* had, “in effect[,] construed the . . . language of § 1985(3) as reaching only conspiracies under color of state law.” *Id.* at 92; *cf. Collins*,

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The Supreme Court granted certiorari. In the Court's decision, Justice Stewart set out to determine the "scope and constitutionality" of section 1985(3) by examining (1) the language of the statute itself,<sup>37</sup> (2) the companion provisions of section 1985(3),<sup>38</sup> and (3) the legislative history of section 1985(3).<sup>39</sup> After this examination, the Court found it "evident that all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985(3)'s coverage of private conspiracies."<sup>40</sup> The Court was concerned, however, that this expansion would lead lower courts to interpret section 1985(3) as a

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341 U.S. at 663 (Burton, J., dissenting) ("The language of the statute refutes the suggestion that action under color of state law is a necessary ingredient of the cause of action which it recognizes."). The Fifth Circuit, in its opinion, "expressed 'serious doubts' as to the 'continued vitality' of *Collins v. Hardyman*, and stated that 'it would not [be surprised] if *Collins v. Hardyman* were disapproved and if § 1985(3) were held to embrace private conspiracies to interfere with rights of national citizenship.'" *Griffin*, 403 U.S. at 92 (citations omitted) (quoting *Griffin v. Breckenridge*, 410 F.2d 817, 823, 825–26 (5th Cir. 1969)).

37. *Griffin*, 403 U.S. at 96–98. The Court found that, "[o]n their face, the words of the statute fully encompass the conduct of private persons" and noted that section 1985(3) spoke "simply of 'two or more persons . . . ' who 'conspire or go in disguise . . . '" and reasoned that going in disguise, in this context, was not an activity associated with official action. *Id.* at 96. The Court went on to state that, while section 1985(3) has language similar to that found in the Fourteenth Amendment, there was nothing "inherent in the [language] that require[d] the action working the deprivation to come from the State," and that the "failure to mention any [public action] requisite [could] be viewed as an important indication of congressional intent to speak in § 1985(3) of all deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' whatever their source." *Id.* at 96–97 (emphasis in original). Compare 42 U.S.C. § 1985(3) ("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"), with U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws."). The Court noted that in previous constructions of criminal statutes similar to section 1985(3), the Court had held that the statutes reach private action. *Griffin*, 403 U.S. at 97–98 (citing *United States v. Williams*, 341 U.S. 70 (1951); *United States v. Harris*, 106 U.S. 629 (1883)).

38. *Griffin*, 403 U.S. at 98–99. The Court found that the "under color of state law" element of 42 U.S.C. section 1983, along with another clause in section 1985(3) that dealt specifically with interference with state officials, made it "impossible to believe" that the language in section 1985(3) was intended to "duplicate the coverage" of these separate provisions. *Id.* at 99.

39. *Id.* at 99–101. The Court explained that the section was originally introduced in the 42nd Congress solely as a "criminal provision outlawing certain conspiratorial acts done with intent to do any act in violation of the rights, privileges, or immunities of another person." *Id.* at 99–100 (internal quotation marks omitted). However, the expansive scope of this language led to calls for amendment that were answered by adding the present civil remedy. The Court explained that "[t]he explanations of the added language centered entirely on the animus or motivation that would be required, and there was no suggestion whatever that liability would not be imposed for purely private conspiracies." *Id.* at 100. The Court noted in conclusion that "[o]ther supporters of the bill were even more explicit in their insistence upon coverage of private action." *Id.* at 101 (quoting statements by House representatives before the amendment was introduced and a statement by a senator supporting the Senate bill).

40. *Id.* at 101.

“general federal tort law,” a use that Congress never intended, and found that the statute’s requirement of “intent to deprive of *equal protection*, or *equal* privileges and immunities” meant that conspirators’ actions must be motivated by “some racial, or *perhaps otherwise class-based*, invidiously discriminatory animus.”<sup>41</sup>

Next, the Court defined the four elements constituting a valid section 1985(3) claim: the defendant (1) conspired or went “in disguise on the highway or on the premises of another” (2) “for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws” by (3) “any act in furtherance of . . . the conspiracy,” (4) where a person was “injured in his person or property” or “deprived of having and exercising any right or privilege of a citizen of the United States.”<sup>42</sup> Applying these elements, the Court found that the plaintiffs had stated a cause of action under section 1985(3).<sup>43</sup> The Court concluded that there was a “source of congressional power to reach the private conspiracy alleged” and that it was not unconstitutional for section 1985(3) to encompass private conspiracies.<sup>44</sup>

### C. United Brotherhood of Carpenters, Local 610 v. Scott

Twelve years after *Griffin*, the Court was faced with another section 1985(3) quandary in *United Brotherhood of Carpenters, Local 610 v. Scott*.<sup>45</sup> In *Scott*, non-union construction workers, who were hired by a construction company that employed workers irrespective of union

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41. *Id.* at 101–02 (third emphasis added). The Court, in a footnote accompanying this requirement, specifically reserved the question of which classes “otherwise class-based” encompassed. *Id.* at 102 n.9.

42. *Id.* at 102–03 (quoting 42 U.S.C. § 1985(3)).

43. *Id.* at 103. The Court found that the complaint fully and particularly alleged a conspiracy to assault the plaintiffs. *Id.* The Court next found that the allegations that the defendants acted under the mistaken belief that the driver was a civil rights worker and that they engaged in a conspiracy to prevent and intimidate African Americans from seeking equal protection and enjoying equal privileges and immunities “clearly support[ed] the requisite animus to deprive the [plaintiffs] of the equal enjoyment of legal rights because of their race.” *Id.* The acts in furtherance of the conspiracy requirement were found to be “amply satisf[ied]” by the “claims of detention, threats, and battery.” *Id.* Finally, the Court found that the plaintiffs had alleged personal injury, satisfying the last requirement, and that it was irrelevant whether or not the driver was the conspiracy’s only target. *Id.*

44. *Griffin*, 403 U.S. at 103–06. The Court found no constitutional difficulties with the statute, considering that it had been settled that a similar criminal statute with far broader phrasing, 18 U.S.C. section 241, reached private conspiracies and was held to be constitutional. *Id.* at 104. Further, the Court found two sources of congressional power to reach the conspiracy at issue: section 2 of the Thirteenth Amendment and the constitutionally protected right of interstate travel. *Id.* at 105–06.

45. 463 U.S. 825 (1983).

membership, were beaten by union members.<sup>46</sup> The plaintiffs, two non-union workers who had been beaten, brought section 1985(3) claims against the local unions and various individuals.<sup>47</sup> An en banc Fifth Circuit affirmed the district court's judgment for the plaintiff, holding that "§ 1985(3) reached conspiracies motivated either by political or economic bias."<sup>48</sup>

Justice White, writing for a five-to-four majority, reversed the Fifth Circuit's decision and held that section 1985(3) did not reach "conspiracies motivated by economic or commercial animus."<sup>49</sup> However, in coming to this decision, the Court left open the question of what other, nonracial biases could motivate an actionable conspiracy under section 1985(3).<sup>50</sup> Unpersuaded by the Fifth Circuit's conclusion that section 1985(3) reached conspiracies motivated by economic and political biases,<sup>51</sup> the Court believed that such a proposition would lead

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46. *Id.* at 827–28.

47. *Id.* at 828.

48. *Id.* at 829–30. The district court had found the protected class to be that of "non-union laborers and employers." *Id.* at 829. The Fifth Circuit understood the plaintiffs to be claiming that the defendants' conspiracy was aimed at denying "their First Amendment right to associate with their fellow nonunion employees" and found that it was not "necessary to show some state involvement to demonstrate an infringement of First Amendment rights." *Id.* at 830. The Court disagreed, holding that state involvement is needed to make out a claim based on "a conspiracy to violate First Amendment rights." *Id.* at 832.

49. *Id.* at 838. The Court thought that "such a construction would extend § 1985(3) into the economic life of the country in a way that [the Court doubted] that the 1871 Congress would have intended when it passed the provision in 1871" and that economic or commercial conflicts were better dealt with by addressing statutes specifically to the problems and applying general tort law. *Id.* at 837–39.

50. *Id.* at 835–37. It is debatable whether this discussion suggests that the Court would find that a political class is or is not a protected class under section 1985(3) if it was squarely faced with that question. One commentator found that the *Scott* court "implied . . . that conspiracies devoid of racial considerations may not raise cognizable claims." Martin, *supra* note 19, at 743 n.49. The Third Circuit in *Farber v. City of Paterson* also agreed that *Scott* suggested that the Court would decide against protecting classes based on political affiliation. 440 F.3d 131, 139–40 (3d Cir. 2006). However, another commentator has viewed *Scott*'s discussion as "lend[ing] support to both sides of the issue of political party members as a protected class." Daniel E. Durden, Note, *Republicans as a Protected Class?: Harrison v. KVAT Food Management, Inc. and the Scope of Section 1985(3)*, 36 AM. U. L. REV. 193, 208 (1986). One thing is certain: "[w]hile in some ways [*Scott*] provided useful information, it failed to prevent the subsequent, inconsistent application of [section 1985(3)] between circuits. In fact, as the post-*Scott* circuit decisions have demonstrated, the Supreme Court may actually have compounded the problem." Martin, *supra* note 19, at 743.

51. *Scott*, 463 U.S. at 835–36. The Court characterized the lower court's logic as having three parts: (1) the court described the Ku Klux Klan during the period following the Civil War—Reconstruction—as "a political organization that sought to deprive a large segment of the Southern population of political power and participation in the governance of those States and of the Nation"; (2) the court reasoned that because Republicans were also objects of the Klan's violence and conspiratorial activities, "Republicans in particular and political groups in general were to be protected"; and (3) the court believed that because "animus against an economic

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to increased interference by federal courts with the activities of rival political groups, rival campaign tactics, and exercises of free speech at rival political meetings—interference the Court did not seem eager to support.<sup>52</sup> Although it noted that there was some support in section 1985(3)'s legislative history to reach beyond racial biases,<sup>53</sup> the Court followed the lead set over a decade earlier in *Griffin* and left the issue of political bias untouched.<sup>54</sup>

#### D. *Bray v. Alexandria Women's Health Clinic*

*Bray v. Alexandria Women's Health Clinic*, decided ten years after *Scott*, involved a battle between pro-choice and pro-life supporters.<sup>55</sup> Although the Court did not directly address whether political affiliation was protected under section 1985(3), it discussed what is required to define a class and what types of animus are considered “invidious.”<sup>56</sup> The plaintiffs<sup>57</sup> sued to enjoin the defendants, Operation Rescue<sup>58</sup> and six individuals, from demonstrating at abortion clinics in the Washington, D.C. area.<sup>59</sup> The Fourth Circuit affirmed the district court's determination that the defendants' actions were a conspiracy to deprive women seeking abortions of their right to travel interstate in violation of section 1985(3).<sup>60</sup>

In another five-to-four decision, the Court first rejected the district court's determination that “women seeking abortion” could constitute

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group . . . [was] ‘closely akin’ to the animus against political association,” the animus against the plaintiffs was sufficiently similar to political animus to fall under the statute. *Id.*

52. Justice White reasoned as follows:

[W]e find difficult the question whether § 1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group by use of otherwise unlawful means. . . . [Section] 1985(3) would arguably reach the claim that a political party has interfered with the freedom of speech of another political party by encouraging the heckling of its rival's speakers and the disruption of the rival's meetings.

*Id.* at 836; see also *infra* notes 115, 135 (reciting more of Justice White's reasoning supporting this proposition).

53. See *infra* note 115.

54. *Scott*, 463 U.S. at 837.

55. 506 U.S. 263 (1993).

56. *Id.* at 269–74.

57. The plaintiffs were abortion clinics, pro-choice organizations, and members who may wish to use the clinics. *Id.* at 266.

58. Operation Rescue organizes anti-abortion demonstrations that involve trespassing on, and obstructing access to, the premises of abortion clinics. *Id.*

59. *Id.*

60. *Id.* at 266–67. See also *NOW v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd per curiam*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part, vacated in part sub nom.* *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

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an identifiable class for the purposes of section 1985(3).<sup>61</sup> The Court reasoned that a class could not be defined by “a group of individuals who share a desire to engage in conduct that the section 1985(3) defendant disfavors,” for this would convert the provision into the “general federal tort law” meant to be avoided.<sup>62</sup> The Court found that the “animus” requirement necessitates a purpose that focuses upon the class by reason of their class, for instance, discriminating against women because they are women.<sup>63</sup> This requirement was not met, because the defendants defined their “rescues” with reference to abortionists and the practice of abortion, not with reference to women.<sup>64</sup>

Given that the discrimination was founded on opposition to abortion, and not to women, the Court thought that class-based animus could only be found if either the defendants’ “opposition to abortion [could] reasonably be presumed to reflect a sex-based intent” or the defendants’ actual intent was irrelevant and animus could “be determined solely by effect.”<sup>65</sup> The Court resolved the first issue by noting that, while “[s]ome activities [are] such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed,” opposition to abortion was not such an activity.<sup>66</sup> The Court next responded to the second proposition in the negative by looking to four equal protection cases—two of which supported a finding that, for effect to imply intent, a decision must be made “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group,”<sup>67</sup> and two

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61. *Bray*, 506 U.S. at 269.

62. *Id.*; *accord* United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 850 (1983) (Blackmun, J., dissenting) (“[T]he class must exist independently of the defendants’ actions; that is, it cannot be defined simply as the group of victims of the tortious action.”).

63. *Bray*, 506 U.S. at 270. Justice Scalia, writing for the majority, provided the example of a “purpose of ‘saving’ women *because they are women* from a combative, aggressive profession such as the practice of law.” *Id.* (emphasis in original).

64. *Id.*

65. *Id.* This second proposition was described as such: “that since voluntary abortion is actively engaged in only by women, to disfavor it is *ipso facto* to discriminate invidiously against women as a class.” *Id.* at 271.

66. *Id.* at 270. As an example, the Court stated that “[a] tax on wearing yarmulkes is a tax on Jews,” and a clear case in which disfavoring an activity would allow a presumption of intent to disfavor a particular class. *Id.* The Court found that there were “common and respectable reasons for opposing [abortion], other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class.” *Id.* This was supported by the fact that there were men and women involved on both sides of the demonstrations. *Id.*

67. *Id.* at 271–72 (citing *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). In addition to *Feeney*, which sustained an equal protection challenge to a law giving employment preferences to military veterans (over 98% of this class in Massachusetts were male), the Court also relied on *Geduldig v. Aiello*, 417 U.S. 484 (1974), in which the Court rejected another sex-based equal

other cases that “establish[ed] conclusively that [disfavoring abortion] is not *ipso facto* sex discrimination.”<sup>68</sup>

The Court then looked to the use of “invidious” in *Griffin*’s section 1985(3) requirements and concluded that the goal of preventing abortion did not qualify as “invidious” discrimination. Relying on *Maher v. Roe* and *Harris v. McRae*,<sup>69</sup> the Court found that the goal of preventing abortion “[did] not remotely qualify for such harsh description [as invidious], and for such derogatory association with racism.”<sup>70</sup> The Court proceeded to address and reject the plaintiffs’ arguments that the defendants had interfered with their right to travel<sup>71</sup> and right to abortion,<sup>72</sup> as well as the dissent’s argument that the plaintiffs had established a violation under the “hindrance” clause of

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protection challenge against a “state disability insurance system that denied coverage to certain disabilities resulting from pregnancy.” *Bray*, 506 U.S. at 271. The same principle espoused by these cases applied to the “class-based invidiously discriminatory animus” requirement of section 1985(3)—“not because [the Court believed] that Equal Protection Clause jurisprudence is automatically incorporated into § 1985(3), but rather because it is inherent in the requirement of a class-based animus, *i.e.*, an *animus based on class*.” *Id.* at 272 & n.4 (emphasis in original).

68. *Bray*, 506 U.S. at 273. The Court relied on *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), which held that for cases involving “government abortion-funding restrictions,” the Court would engage in ordinary rationality review, not the heightened-scrutiny that sex-based discrimination commanded. *Bray*, 506 U.S. at 273.

69. *Bray*, 506 U.S. at 274. The Court explained that, in *Maher*, it had reasoned that “‘a value judgment favoring childbirth over abortion’ is proper and reasonable enough to be implemented by the allocation of public funds.” *Id.* (quoting *Maher*, 432 U.S. at 474). In *Harris*, the Court upheld Congress’s decision to discriminate against abortion in a financial support and medical procedures provision. *Id.* (citing *Harris*, 448 U.S. at 325).

70. *Id.*

71. *Id.* at 274–77. The Court found that the defendants’ actions were meant to oppose abortion and that any impairment on the “right to travel” was an incidental consequence, not a “conscious objective” as required for a conspiracy to be “for the purpose” of denying equal protection. *Id.* at 275–76.

72. *Id.* at 277–78. The Court rejected this argument, because section 1985(3) “applies only to [private] conspiracies that are ‘aimed at interfering with rights . . . protected against private, as well as official, encroachment.’” *Id.* at 278 (quoting *Scott*, 463 U.S. at 833). The Court had previously only recognized the “right to be free from involuntary servitude” and the “right of interstate travel” as such rights. *Id.* In concluding that the right to abortion was not in the same category as these rights, the Court emphasized that (1) the right of abortion was one element of a broader right of privacy or liberty and the other rights that had also been found within these broader constitutional rights had not been afforded protection against private infringement; and (2) because the *Scott* Court had refused to categorize the right to free speech—a right explicitly protected in the Constitution—as protected against private interference, “it would be most peculiar to accord [the right to abortion] that preferred position, since it is much less explicitly protected by the Constitution.” *Id.* at 278; *see also Scott*, 463 U.S. 830–33.

section 1985(3),<sup>73</sup> ultimately finding that the plaintiffs had not established a section 1985(3) claim.<sup>74</sup>

### III. SUBJECT OPINION: *FARBER V. CITY OF PATERSON*

This Part first sets forth *Farber's* relevant factual and procedural history.<sup>75</sup> It then discusses *Farber's* examination of the plaintiff's section 1985(3) claim,<sup>76</sup> analyzing the court's conclusion that the plaintiff had failed to allege an identifiable class under section 1985(3)<sup>77</sup> and discussing the Third Circuit's conclusion that a political discriminatory animus is not invidious for of section 1985(3) purposes.<sup>78</sup>

#### A. *Factual and Procedural History*

In *Farber v. City of Paterson*,<sup>79</sup> Democratic candidate, Jose Torres, defeated the incumbent Republican Mayor, Martin G. Barnes, in the May 2002 mayoral election in Paterson, New Jersey.<sup>80</sup> After his victory, Torres voiced his intent to terminate city employees who had supported the former mayor.<sup>81</sup> The plaintiff, Roberta Farber, a city employee<sup>82</sup> and admitted supporter of the former mayor, was subsequently terminated in late June 2002.<sup>83</sup>

In response to her termination, Farber asked the American Federation of State, County & Municipal Employees, AFL-CIO, Local 3474 (the "Union") to file a grievance on her behalf for alleged breach of the collective bargaining agreement governing her employment.<sup>84</sup> Union and city representatives met, but Farber's claim was rejected on the basis that she was a provisional employee who could be fired at

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73. *Bray*, 506 U.S. at 279–85. The "hindrance" clause of section 1985(3), as the Court in *Bray* referred to it, "covers conspiracies 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." *Id.* at 279 (quoting 42 U.S.C. § 1985(3)).

74. *Id.* at 285.

75. See *infra* notes 79–91 and accompanying text.

76. See *infra* notes 92–136 and accompanying text.

77. See *infra* notes 96–109 and accompanying text.

78. See *infra* notes 110–136 and accompanying text.

79. 440 F.3d 131 (3d Cir. 2006). The facts recited in this Note are the facts found in the Third Circuit's opinion. For a more detailed discussion of the facts of this case, see the district court's opinion in *Farber v. City of Paterson*, 327 F. Supp. 2d 401, 403–06 (D.N.J. 2004).

80. *Farber*, 440 F.3d at 132–33.

81. *Id.* at 133.

82. Farber was hired in or about 1991, became the Assistant Director for Economic and Industrial Development in or about 1994, and held this position until her termination. *Farber*, 327 F. Supp. 2d at 403. The Third Circuit referred to this position as an "administrative, non-policy-making position." *Farber*, 440 F.3d at 133.

83. *Farber*, 440 F.3d at 133.

84. *Id.*

will.<sup>85</sup> Farber alleged that, after the meeting, the Union president, who also happened to be a political ally of Torres, was then appointed as the city's Director of Public Works.<sup>86</sup>

Farber's subsequent suit against the city and the Union, among others, alleged that the defendants had engaged in a conspiracy to deprive her of her First Amendment rights because of her political affiliation in violation of section 1985(3).<sup>87</sup> Farber's suit also included a claim that the Union breached the duty of fair representation it owed her under the state constitution and the New Jersey Employer-Employee Relations Act.<sup>88</sup> The Union moved to dismiss, arguing that discrimination based on political affiliation could not support a section 1985(3) claim.<sup>89</sup>

The district court denied the motion to dismiss, determining that political affiliation was a cognizable class under section 1985(3) and that "Farber [pled] sufficient class-based animus when she alleged that Defendants conspired against her because she is a Republican."<sup>90</sup> The Union moved for an interlocutory appeal of the denial of the motion to dismiss, and the district court granted the motion, certifying the question of whether "people who share a political affiliation [are] a cognizable class for § 1985(3) purposes."<sup>91</sup>

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85. *Id.* The Third Circuit explained in a footnote that the New Jersey Civil Service Act governed public employment in Paterson and distinguished between permanent employees and those who are provisionally employed. *Id.* at 133 n.1. Despite the requirement that a provisional appointment could not last longer than twelve months, Farber remained a provisional employee for her entire employment—eleven years—because the city allegedly failed to complete the process that would have changed her status to permanent. *Id.*

86. *Id.* at 133.

87. *Id.*

88. *Id.* The Third Circuit's discussion of the duty of fair representation claim is outside the scope of this Note, and this claim will not be addressed further. Therefore, it is sufficient to mention that the Third Circuit affirmed the district court's conclusion that the claim fell under a six-year statute of limitations, and thus the Union's motion to dismiss the claim was properly denied. *Id.* at 145.

89. *Farber*, 440 F.3d at 133.

90. *Id.* (alteration in original) (quoting *Farber v. City of Paterson*, 327 F. Supp. 2d 401, 424–25 (D.N.J. 2004)). The district court had relied on a previous district court case, *Perez v. Cucci*, 725 F. Supp. 209 (D.N.J. 1989), *aff'd*, 898 F.2d 142 (3d Cir. 1990), in reaching its conclusion. *Farber*, 440 F.3d at 133. In *Perez*, a former police officer alleged that his civil rights were violated when he was demoted, because he supported the candidacy of a mayoral incumbent who lost his reelection bid. 725 F. Supp. at 212. After a detailed discussion regarding section 1985(3), *see id.* at 248–53, the court found that "§ 1985(3) sanctions politically motivated conspiracies, and consequently allows those injured by conduct of the conspirators to obtain relief for injuries they caused." *Id.* at 253.

91. *Farber*, 440 F.3d at 134.

B. *The Third Circuit's Discussion of Section 1985(3)*

The Third Circuit began its review of the issue by setting out the four requirements for a section 1985(3) claim established first by *Griffin* and later refined by *Scott*.<sup>92</sup> The court went on to briefly describe section 1985(3)'s background, from its initial inclusion in the Ku Klux Klan Act of 1871 to *Griffin*, in which the U.S. Supreme Court held that a section 1985(3) claim can reach private, as well as public, conspiracies.<sup>93</sup> The court also noted *Griffin*'s requirement that a claimant allege "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action" in order to state a claim.<sup>94</sup> The Third Circuit then defined the test that would instruct the case before it: a plaintiff must allege (1) "that the conspiracy was motivated by discriminatory animus against an identifiable class"; and (2) "that the discrimination against the identifiable class was invidious."<sup>95</sup>

1. *Farber Failed to Satisfy the Identifiable Class Requirement*

In analyzing the first prong of its two-part test, the *Farber* court, relying on language found in *Bray*, first found that "§ 1985(3) defendants must have allegedly conspired against a group that has an identifiable existence independent of the fact that its members are victims of the defendants' tortious conduct."<sup>96</sup> The court explained that this independent existence preserved the distinction between the requirements that, in a section 1985(3) claim, the "conspirators be motivated

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92. *Id.*

93. *Id.* at 134–35.

94. *Id.* at 135 (emphasis in original) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

95. *Id.* The court relied on *Aulson v. Blanchard*, 83 F.3d 1, 4–5 (1st Cir. 1996), for formulating this test. At the time *Farber* was decided, *Aulson* was the most recent circuit case involving section 1985(3) and political affiliation. In *Aulson*, the plaintiff alleged that municipal officeholders in his town subjected him to illegal searches, giving rise to a section 1985(3) claim, because the plaintiff was a "member[ ] of a political group which supports candidates who oppose the politics of the [officeholders]." *Id.* at 2 (first alteration in original). The First Circuit did not decide whether political classes were covered by section 1985(3), instead ruling against the plaintiff, because the class the plaintiff proposed did not constitute a cognizable class. *Id.* at 4. The *Aulson* court found the plaintiff's proposed class not cognizable, because it could not be characterized "as an identifiable segment of the community by reference to any objective criteria" and because it was defined "with reference to what it opposes . . . rather than with reference to what it espouses." *Id.* at 6.

96. *Farber*, 440 F.3d at 136. The language relied upon from *Bray* stated the following:

"[C]lass" unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors. Otherwise, innumerable tort plaintiffs would be able to assert causes of action under § 1985(3) by simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered with.

*Id.* at 135–36 (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993)).

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by class-based invidiously discriminatory animus and that the plaintiff be the victim of an injury he . . . seeks to remedy by means of § 1985(3).”<sup>97</sup> To satisfy the “independent identifiable existence” requirement, the court set out an objective test: “a reasonable person must be able to ‘readily determine by means of an objective . . . set of criteria who is a member of the group and who is not.’”<sup>98</sup>

After briefly illustrating the decisions in *Bray* and *Aulson*, in which the U.S. Supreme Court and the First Circuit, respectively, found that the alleged classes at issue in those cases were not identifiable,<sup>99</sup> the Third Circuit turned to its own jurisprudence and recognized that it had previously deemed women<sup>100</sup> and persons with mental retardation<sup>101</sup> to be objectively identifiable classes.<sup>102</sup> The court further observed that, when groups are deemed distinguishable based on immutable characteristics—such as race, sex, and mental disability—they are considered so objectively identifiable that no extended analysis is needed.<sup>103</sup> However, when mutable characteristics, such as opinion or conduct, are used to define a class, the court found that determining an objectively identifiable class is not so simple.<sup>104</sup>

The court then applied the standards previously mentioned to Farber’s claims and concluded that the district court “erred when it concluded that ‘Farber [pled] sufficient class-based animus when she alleged that Defendants conspired against her *because she is a Republican.*’”<sup>105</sup> The court explained that Farber did not satisfy the pleading requirement, because Farber neither alleged that she was a Republican nor alleged that the supposed conspiracy was motivated by a desire to discriminate against Republicans.<sup>106</sup> Farber had only alleged that her termination was caused by her support for and affiliation with the former mayor, who was later identified as a Republican.<sup>107</sup> Nor did she allege that her support or injury was founded upon the

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97. *Id.* The court went on to explain that if merely alleging injury sought to be remedied by section 1985(3) could satisfy the class-based animus, “the requirement of class-based animus would be drained of all meaningful content,” *id.* (quoting *Aulson*, 83 F.3d at 5), and this “would transform § 1985(3) into the ‘general federal tort law’ Congress did not intend to enact.” *Id.* (quoting *Bray*, 506 U.S. at 269).

98. *Id.* (quoting *Aulson*, 83 F.3d at 5–6).

99. See *supra* notes 61–62, 95 and accompanying text.

100. See *Novotny v. Great Am. Fed. Sav. & Loan Ass’n*, 584 F.2d 1235 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979).

101. See *Lake v. Arnold*, 112 F.3d 682 (3d Cir. 1997).

102. *Farber*, 440 F.3d at 137.

103. *Id.*

104. *Id.*

105. *Id.* (alteration and emphasis in original).

106. *Id.*

107. *Id.* at 137–38.

mayor's political affiliation.<sup>108</sup> In concluding that Farber's attempt to define a class was "so subjectively defined and 'wholly indeterminate'" that it could not meet the "independent identifiable existence" requirement, the Third Circuit explained that there were "differences between being discriminated against because of membership in a political party and being discriminated against because of support for the policies of a politician who also happens to be a member of the party," though it declined to define those differences.<sup>109</sup>

## 2. *Political Discriminatory Animus is Not "Invidious"*

Instead of resolving the case solely on Farber's failure to allege an identifiable class, the court also discussed whether Farber's claim of discrimination based on her political affiliation was so invidious as to qualify for section 1985(3) protection.<sup>110</sup> The court's analysis began by stating the two guideposts set out by the U.S. Supreme Court for considering section 1985(3) claims: (1) a conspiracy motivated by racial discrimination is actionable under section 1985(3);<sup>111</sup> and (2) a conspiracy motivated by economic or commercial animus is not actionable under section 1985(3).<sup>112</sup> The court went on to acknowledge the mixed signals that the Third Circuit itself had sent to its district courts concerning the issue of discriminatory animus directed at a political class<sup>113</sup> and also recognized the split among the courts of ap-

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108. *Farber*, 440 F.3d at 138.

109. *Id.* Thus, the *Farber* court did not hold that a class based on political affiliation could never pass the "independent identifiable existence" requirement, but perhaps indicated that registration with a certain party would be necessary. See also *infra* notes 161-164 and accompanying text.

110. *Farber*, 440 F.3d at 138. In moving past Farber's failure to allege an identifiable class and onto the issue of whether political discrimination is invidious, the Third Circuit ultimately decided an issue that it technically did not have to resolve, and one that its circuit had not yet conclusively decided. This deserves commendation, considering that, in at least four prior opportunities, the Third Circuit declined to address the question of political discrimination under section 1985(3). See, e.g., *Stephens v. Kerrigan*, 122 F.3d 171 (3d Cir. 1997); *Robison v. Canterbury Vill., Inc.*, 848 F.2d 424 (3d Cir. 1988); *C & K Coal Co. v. UMWA*, 704 F.2d 690 (3d Cir. 1983); *Rogin v. Bensalem Twp.*, 616 F.2d 680 (3d Cir. 1980).

111. *Farber*, 440 F.3d at 138 (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

112. *Id.* (citing *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 838 (1983)).

113. *Id.* at 138-39. The court compared its affirmation of *Perez v. Cucci*, 725 F. Supp. 209 (D.N.J. 1989), *aff'd*, 898 F.2d 142 (3d Cir. 1990), which held that political affiliation was a cognizable class under section 1985(3), with several other affirmations of district court opinions in which the district court held that political affiliation did not qualify as a class pursuant to section 1985(3). See, e.g., *D'Aurizio v. Palisades Park*, 963 F. Supp. 378 (D.N.J. 1997), *aff'd*, 151 F.3d 1024 (3d Cir. 1998); *Stephens v. Kerrigan*, No. CIV.-A.-95-615, 1996 WL 256581 (E.D. Pa. May 15, 1996), *aff'd on other grounds*, 122 F.3d 171 (3d Cir. 1997); *Deblasio v. Zoning Bd. of Adjustment*, 820 F. Supp. 876 (D.N.J. 1993), *aff'd in part, rev'd in part*, 53 F.3d 592 (3d Cir. 1995).

peals.<sup>114</sup> The court determined that political discriminatory animus was not invidious on two grounds: (1) although Congress had acknowledged in 1871 that Republicans were victims of racially motivated violence, this did not mean that section 1985(3) was meant to reach victims of political discrimination; and (2) the nature of political discrimination was not sufficiently “irrational and odious” to be considered invidious.<sup>115</sup>

The *Farber* court found that, by relying upon *Perez v. Cucci*, the lower court had thereby actually relied upon the Second Circuit’s pre-*Scott* decision of *Keating v. Carey*,<sup>116</sup> which had held that section

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114. *Farber*, 440 F.3d at 139. The court identified three appellate court approaches: (1) four courts held that discrimination based on political affiliation was actionable under section 1985(3), see *Conklin v. Lovely*, 834 F.2d 543 (6th Cir. 1987); *Galloway v. Louisiana*, 817 F.2d 1154 (5th Cir. 1987); *Keating v. Carey*, 706 F.2d 377 (2d Cir. 1983); and *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975); (2) two courts held that discrimination based on political affiliation was not actionable under section 1985(3), see *Grimes v. Smith*, 776 F.2d 1359 (7th Cir. 1985); and *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155 (4th Cir. 1985); and (3) three courts did not address the issue, see *Aulson v. Blanchard*, 83 F.3d 1 (1st Cir. 1996); *Schultz v. Sundberg*, 759 F.2d 714 (9th Cir. 1985); and *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984).

115. *Farber*, 440 F.3d at 140–43 (quoting *Novotny v. Great Am. Fed. Sav. & Loan Ass’n*, 584 F.2d 1235, 1243 (3d Cir. 1978)). In prefacing its discussion of whether political discrimination was invidious, the *Farber* court stated that dicta in *Scott* suggested how the Supreme Court “would rule if squarely faced with the issue.” *Id.* at 139. In determining that the Court would rule against political affiliation being a cognizable class, the court noted that the *Scott* Court was “unpersuaded” by the Fifth Circuit’s reasoning that political groups were to be protected based on the legislative history of section 1985(3). *Id.* (citing *Scott*, 463 U.S. at 835–38). The court went on to quote the *Scott* Court’s explanation:

[I]t is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against [African Americans] and those who championed their cause, most notably Republicans. The central theme of the bill’s proponents was that the Klan and others were forcibly resisting efforts to emancipate [African Americans] and give them equal access to political power. The predominant purpose of § 1985(3) was to combat the prevalent animus against [African Americans] and their supporters. The latter included Republicans generally, as well as others, such as Northerners who came South with sympathetic views towards [African Americans].

*Id.* (quoting *Scott*, 463 U.S. at 836). The court also noted that the *Scott* Court acknowledged a statement made by Senator Edmunds during the debate over the Ku Klux Klan Act that a person discriminated against “because he was a Democrat . . . or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter” would have a cause of action under section 1985(3). *Id.* at 139 n.8 (quoting *Scott*, 463 U.S. at 836–37). However, the *Scott* Court quickly discounted this statement, because it was made by a senator and the bill and its amendments originated in the House of Representatives, not the Senate. *Id.*

116. 706 F.2d 377 (2d Cir. 1983). In *Keating*, the plaintiff alleged that he was fired from his state civil service position because, *inter alia*, he was a Republican. *Id.* at 380. The district court had initially dismissed the plaintiff’s federal claims, because he had “failed to allege that the defendants acted from a class-based discriminatory motive.” *Id.* at 381. Interestingly, *Keating* was decided just three months before *Scott*. Although the *Farber* court partially disagreed with *Keating*’s reasoning, because it was pre-*Scott* and therefore decided without the benefit of *Scott*’s suggestive dicta, the court noted that despite *Scott*’s dicta, the Second Circuit had re-affirmed *Keating* post-*Scott* in *N.Y. State NOW v. Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989). *Farber*, 440 F.3d at 140 n.9. However, *Terry*’s post-*Scott* approval of *Keating* might be more accurately at-

1985(3) was meant to “provide all victims of political animus with a cause of action” and emphasized “the repeated statements of the 42d Congress that Ku Klux Klan hostility towards ‘Republicans’ must end.”<sup>117</sup> The *Keating* court reasoned that the Klan was a political organization in 1871 and sought to inflict violence not only upon African Americans, but also upon “Republicans.”<sup>118</sup> The *Keating* court buttressed its reasoning with other circuits’ findings that political discrimination was prohibited by section 1985(3).<sup>119</sup> Ultimately, the *Keating* court concluded that Congress sought to “prohibit political discrimination in general.”<sup>120</sup>

The *Farber* court disagreed with that conclusion.<sup>121</sup> The Third Circuit reasoned that the fact that many victims of the Klan’s racially motivated violence were Republicans did not “mean that the discriminatory animus was *because* they were Republicans.”<sup>122</sup> The court

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tributed to *Scott*’s refusal to explicitly address political affiliation, a refusal that has forced courts to rely on pre-*Scott* decisions, contributing to the circuit split on this issue. Compare *Conklin*, 834 F.2d at 549 (recognizing that it was “not writing on a clean slate” as other circuits might have been in “restrict[ing] section 1985(3) to conspiracies directed towards racial classes” in post-*Scott* decisions because of a pre-*Scott* decision, *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973), which held that section 1985(3) reached classes such as “supporters of a political candidate”), with *Harrison*, 766 F.2d 155 (engaging in an independent section 1985(3) analysis, because it was not bound by precedent and ultimately holding that Republicans are not a protected class); see also *infra* notes 202–207 and accompanying text.

117. *Farber*, 440 F.3d at 140 (citing *Keating*, 706 F.2d at 387). The *Keating* court cited seven statements made by members of Congress during debate over the Ku Klux Klan Act that specifically linked Klan violence to Republicans. *Keating*, 706 F.2d at 387–88. An example of a statement quoted by the *Keating* court is “[E]very victim of Ku Klux outrage has been a Republican.” *Id.* at 387 (alteration in original).

118. *Farber*, 440 F.3d at 140 (citing *Keating*, 706 F.2d at 387). The *Keating* court explained that the “current perception of the Klan as a racist organization” would distort the view of the Ku Klux Klan Act, because, in 1871, the Klan was viewed not only as a racist organization, but also as a “political organization intent on establishing Democratic hegemony in the South.” *Keating*, 706 F.2d at 387.

119. *Keating*, 706 F.2d at 388; see, e.g., *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975); *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973).

120. *Farber*, 440 F.3d at 140 (quoting *Keating*, 706 F.2d at 387). Accordingly, the *Keating* court held that the plaintiff’s allegations satisfied the requirement of class-based discriminatory animus. *Keating*, 706 F.2d at 387–88. Additionally, the court saw the invidious discrimination requirement as separate from the class-based requirement and did not address whether the defendant’s conduct was “the sort of invidious deprivation of equal protection or equal privileges and immunities sanctioned by [section 1985(3)].” *Id.* at 388 n.18. Judge Meskill dissented from the majority opinion as to its conclusion regarding the section 1985(3) claim, finding the majority’s interpretation of section 1985(3) too expansive and characterizing the termination at issue as merely an example of political patronage that the 1871 Congress never intended to address with the Ku Klux Klan Act. *Id.* at 388 (Meskill, J., concurring and dissenting). See also *infra* note 135.

121. *Farber*, 440 F.3d at 140.

122. *Id.* at 141 (emphasis in original).

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found *Bray* instructive. In *Bray*, the Court concluded that, although the only victims of the conspiracy motivated by opposition to abortion were women, this did not mean that the discriminatory animus experienced was motivated by the person's sex.<sup>123</sup> Thus, the *Farber* court found that the repeated statements in the legislative history indicating Congressional intent to protect Republicans did not mean that "Republicans victimized by animus directed against Republicans can ride the coattails of Republicans victimized by animus directed against African-Americans."<sup>124</sup> The Court instead supported the view that a section 1985(3) plaintiff "need not be a member of the class against which a conspiracy directs its invidiously discriminatory animus."<sup>125</sup> The *Farber* court went further, noting that the Third Circuit's decision in *Novotny v. Great American Federal Savings & Loan Ass'n* explained that section 1985(3) did not require that the person injured "have any relationship to the 'person or class of persons' which the conspiracy seeks to deprive of equal protection, privileges or immunities."<sup>126</sup>

After determining that the legislative history of section 1985(3) did not support protecting political classes, the *Farber* court delved into an independent determination of whether discrimination based on political affiliation is "invidious in the same way that discrimination directed at African Americans is invidious."<sup>127</sup> The court first looked to the meaning of the word "invidious" and the context in which the *Griffin* Court used the word.<sup>128</sup> Looking to *Bray*, the *Farber* court then rationalized that, if the goal of preventing abortion did not qualify as invidious discrimination, then "neither [did] the goal of replac-

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123. *Id.* (citing *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269–70 (1993)).

124. *Id.*

125. *Id.* To show the circuit's agreement with this view, the *Farber* court cited to *Richardson v. Miller*, 446 F.2d 1247, 1249 (3d Cir. 1971), which found that a nonminority victim of racially discriminatory animus could state a section 1985(3) claim. *Farber*, 440 F.3d at 141. The court also noted that *Richardson* was cited approvingly in a post-*Scott* decision, *Robison v. Canterbury Village, Inc.*, 848 F.2d 424, 431 n.7 (3d Cir. 1988). *Farber*, 440 F.3d at 141 n.11.

126. *Farber*, 440 F.3d at 141 (citing *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1244 (3d Cir. 1978)). In *Novotny*, the Third Circuit "held that a *male* victim of sexually discriminatory animus directed at *women* could state a § 1985(3) claim." *Id.* (emphasis in original).

127. *Id.*

128. *Id.* at 142. The court looked at the Supreme Court's explanation in *Bray* of "[t]he nature of the 'individuously discriminatory animus' *Griffin* had in mind." *Id.* (alteration in original) (quoting *Bray*, 506 U.S. at 274). The *Bray* Court defined "invidious" as "tending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating," *Bray*, 506 U.S. at 274 (citing WEBSTER'S INTERNATIONAL DICTIONARY 1306 (2d ed. 1954)). The *Bray* Court also took into account the *Griffin* Court's use of the phrase "some racial, or perhaps otherwise class-based" before its use of "invidiously." *Bray*, 506 U.S. at 274.

ing, with one's own, members of an opposing political party in an exercise of classic political patronage."<sup>129</sup>

The court then analyzed the distinction between discrimination motivated by immutable characteristics and that motivated by mutable characteristics.<sup>130</sup> Past circuit decisions had "emphasized the 'irrational and odious' nature of discrimination motivated by a class's immutable characteristics because such characteristics are 'determined by the accident of birth' and 'bear[ ] no relation to ability to perform or contribute to society.'"<sup>131</sup> The court again noted the circuit's prior decisions finding invidious discrimination where the discrimination was based on immutable characteristics<sup>132</sup> and concluded that, assuming that discrimination "motivated by a mutable characteristic" could be invidious, political affiliation was not one of those characteristics.<sup>133</sup>

In concluding its analysis regarding Farber's section 1985(3) claim, the court briefly discussed the possible implications should politically motivated conspiracies be vulnerable under section 1985(3).<sup>134</sup> It concluded that this "would involve the federal courts in policing the political arena in ways that the drafters of § 1985(3) could not have intended."<sup>135</sup> The court then held that "§ 1985(3) does not provide a cause of action for individuals allegedly injured by conspiracies moti-

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129. *Farber*, 440 F.3d at 142. The *Bray* Court had concluded that "the goal of preventing abortion . . . in itself . . . does not remotely qualify for such harsh description, and for such derogatory association with racism." *Bray*, 506 U.S. at 274.

130. *Id.*

131. *Id.* (alteration in original) (quoting *Novotny*, 584 F.2d at 1243).

132. See *Lake v. Arnold*, 112 F.3d 682 (3d Cir. 1997) (discrimination directed toward mentally handicapped); *Novotny*, 584 F.2d 1235 (discrimination directed toward women).

133. *Farber*, 440 F.3d at 142. The *Farber* court noted that political patronage sometimes has a rational basis, whereas racial discrimination will never have a rational basis. *Id.* at 142 n.12.

134. *Id.* at 142.

135. *Id.* The court relied on observations by Judge Pollak in *Nilan v. De Meo*, 575 F. Supp. 1225 (E.D. Pa. 1983), Judge Meskill in *Keating v. Carey*, 706 F.2d 377 (2d Cir. 1983) (Meskill, J., concurring and dissenting), and Justice White in *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825 (1983). Judge Pollak explained that "political patronage 'plays a major role in all politics,' and . . . 'it can be reasonably assumed that private political actors will continue to press government officials to exercise such partisan leeway as the hiring and firing processes still permit, conformably with the [Supreme] Court's decisions.'" *Farber*, 440 F.3d at 142 (quoting *Nilan*, 575 F. Supp. at 1227). Judge Meskill observed that "[p]ermitting § 1985(3) to reach politically motivated conspiracies would effectively outlaw all terminations based on political affiliation" and that "[i]t is unlikely that Congress 'contemplated that the Civil Rights Act would strike the death knell to a way of political life that flourished then and remains an accepted incident of elective office.'" *Id.* (quoting *Keating*, 706 F.2d at 394 (Meskill, J., concurring and dissenting)). Justice White stated that the extension of section 1985(3) to conspiracies motivated by political affiliation would "go far toward making the federal courts . . . the monitors of campaign tactics in both state and federal elections, a role that the courts should not be quick to assume." *Id.* at 142-43 (quoting *Scott*, 463 U.S. at 836).

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vated by discriminatory animus directed toward their political affiliation.”<sup>136</sup>

#### IV. ANALYSIS

This Part analyzes *Farber* and explains the present state of section 1985(3) jurisprudence with respect to political affiliation. It first explores the minimal precedent binding on the *Farber* court and critiques the reasoning behind the court’s conclusion.<sup>137</sup> This Part then concludes by examining whether the Third Circuit correctly decided *Farber*—a question answered in the affirmative—by considering some impediments courts face when deciding section 1985(3) cases, including a lack of both U.S. Supreme Court guidance and uniform interpretation of section 1985(3)’s legislative history, as well as various analyses that have been proposed as solutions to the section 1985(3) puzzle.<sup>138</sup>

##### A. Critique of *Farber*

One cannot fully comprehend *Farber* without understanding the backdrop against which the Third Circuit decided the fate of political affiliation under section 1985(3). Thus, before it examines the *Farber* opinion, this Section discusses Supreme Court and circuit court precedent regarding political affiliation and cognizable classes under section 1985(3).

##### 1. Prior Cases

As previously stated, and as noted in opinions by the different circuits, Supreme Court precedent regarding whether political affiliation is a cognizable class has been scant and noncommittal.<sup>139</sup> In *Scott*, the lone Supreme Court decision to discuss whether section 1985(3) pro-

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136. *Farber*, 440 F.3d at 143.

137. See *infra* notes 139–193 and accompanying text.

138. See *infra* notes 194–247 and accompanying text.

139. Since its watershed decision in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), in which the Court revitalized the use of section 1985(3) by holding that the statute applies to public and private conspiracies alike and required a conspiracy motivated by a class-based, invidiously discriminatory animus, the Court has delivered few decisions substantively determining section 1985(3)’s scope. See, e.g., *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993) (holding that “women seeking abortion” is not a protected class and discussing what constitutes an identifiable class); *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825 (1983) (holding that economic or commercial classes are not protected); *Great Am. Fed. Sav. & Loan Ass’n v. Novotny*, 442 U.S. 366 (1979) (holding that deprivation of a right created by Title VII cannot be the basis for a cause of action under section 1985(3)). See also *supra* note 114 (listing appellate court decisions coming to different conclusions regarding the protection of political affiliation under section 1985(3)).

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vides refuge for political affiliation, the majority opinion explicitly withheld judgment on that issue.<sup>140</sup> Although it is debatable what the majority's discussion regarding section 1985(3) and political affiliation suggests,<sup>141</sup> the discussion, nevertheless, consists of dicta that are not binding on lower courts.<sup>142</sup>

In addition to the absence of a definitive statement by the Court regarding political affiliation and section 1985(3), the *Farber* panel was faced with inconsistent circuit precedent.<sup>143</sup> On the one hand, the Third Circuit had affirmed a post-*Scott* district court decision,<sup>144</sup> holding that "political affiliation qualifies as a § 1985(3) class."<sup>145</sup> On the other hand, the Third Circuit had also affirmed post-*Scott* district court decisions refusing to recognize a section 1985(3) claim based on political affiliation.<sup>146</sup> Moreover, in two post-*Scott* decisions, the Third Circuit had explicitly declined to address discrimination based upon political affiliation.<sup>147</sup> Therefore, the *Farber* court was faced

140. *Scott*, 463 U.S. at 835–37. The Court "[did] not affirm" the circuit court's decision that section 1985(3) "reache[d] conspiracies other than those motivated by racial basis." *Id.* at 835.

141. *Compare* Durden, *supra* note 50, at 208 ("Paradoxically, the Court's analysis in *Scott* lends support to both sides of the issue of political party members as a protected class."), with Conklin v. Lovely, 834 F.2d 543, 549 (6th Cir. 1987) ("Admittedly, [*Scott*] raises doubts about the legitimacy of plaintiff's claims [based on political support for a Democrat] . . ."), Grimes v. Smith, 776 F.2d 1359, 1366 (7th Cir. 1985) ("[*Scott*] is a powerful indication that, when squarely confronted with the question, the Court would not include [purely political] conspiracies within the scope of [section 1985(3)]."), and Harrison v. KVAT Food Mgmt., Inc., 766 F.2d 155, 161 (4th Cir. 1985) ("In analyzing the *Scott* decision, we find little support for the contention that § 1985(3) includes in its scope of protection the victims of purely political conspiracies."). See also *supra* note 50.

142. See, e.g., Maryland v. Wilson, 519 U.S. 408, 412–13 (1997) (noting that statements in dicta do not constitute binding precedent).

143. *Farber* v. City of Paterson, 440 F.3d 131, 138–39 (3d Cir. 2006). The court admitted to sending "mixed signals as to whether discriminatory animus directed at a class based on political affiliation can also so qualify." *Id.* at 138.

144. *Perez* v. Cucci, 725 F. Supp. 209 (D.N.J. 1989), *aff'd*, 898 F.2d 142 (3d Cir. 1990).

145. *Farber*, 440 F.3d at 138 (citing *Perez*, 725 F. Supp. at 253). The district court judge, in deciding *Perez*, agreed with the Second Circuit's analysis in *Keating v. Carey*, 706 F.2d 377 (2d Cir. 1983), and apparently looked to *Keating*, because the Third Circuit had cited approvingly to *Keating* in a post-*Scott* decision, *Robison v. Canterbury Village, Inc.*, 848 F.2d 424 (3d Cir. 1988). See *Perez*, 725 F. Supp. at 250, 252.

146. *Farber*, 440 F.3d at 137–38; see *supra* note 113.

147. See *Stephens v. Kerrigan*, 122 F.3d 171, 184 (3d Cir. 1997) (denying a section 1985(3) claim for failure to show a conspiracy and forgoing the decision of whether private conspiracies to discriminate on nonracial factors are prohibited by section 1985(3)); *Robison*, 848 F.2d at 430 n.7. This decision to "reserve comment" was also made in two pre-*Scott* decisions. See *C & K Coal Co. v. UMWA*, 704 F.2d 690, 700 (3d Cir. 1983) ("[W]e need not attempt to resolve the interesting issues which divided the . . . Fifth Circuit [in *Scott*] and has now attracted the attention of the Supreme Court."); *Rogin v. Bensalem Twp.*, 616 F.2d 680, 697 (3d Cir. 1980) ("We need not decide today whether § 1985(3) embraces private conspiracies to discriminate on the basis of factors other than race."). Although these cases address private conspiracies, the private-public conspiracy distinction has no bearing on whether political affiliation is a protected

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with circuit precedent indicating that a decision directly addressing the issue of whether political affiliation was under the reach of section 1985(3) was long overdue.

## 2. *The Farber Court's Reasoning*

Because of the Third Circuit's muddled precedent regarding section 1985(3) and political affiliation, the *Farber* court sought guidance from the most recent appellate court decision, *Aulson v. Blanchard*;<sup>148</sup> the most recent Supreme Court decision addressing what constitutes a "class" under section 1985(3), *Bray v. Alexandria Women's Health Clinic*;<sup>149</sup> as well as the Supreme Court's decision in *United Brotherhood of Carpenters, Local 610 v. Scott*.<sup>150</sup> The *Farber* court embarked on a two-part analysis, derived from *Aulson*, in which it first determined (1) whether the discriminatory animus was against an identifiable class, before it moved on to determine (2) whether the discrimination was invidious.<sup>151</sup> This is a sensible approach, because, before *Griffin's* requirement of "class-based, invidiously discriminatory animus"<sup>152</sup> can be satisfied, a distinctive class must first exist.<sup>153</sup>

### a. Attacking the "Identifiable Class" Question

The *Farber* court turned to *Bray* and *Aulson* to structure its analysis under the first prong,<sup>154</sup> because it conceded that circuit precedent had often addressed the second prong without addressing "the predicate question of whether an objectively identifiable class existed in the first place."<sup>155</sup> With its framework in place, the *Farber* court found

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class. Cf. *Aulson v. Blanchard*, 83 F.3d 1, 4 (1st Cir. 1996) ("[A]n unforced reading of § 1985(3) affords no principled basis for distinguishing between public and private conspiracies.").

148. 83 F.3d 1 (1st Cir. 1996).

149. 506 U.S. 263 (1993).

150. 463 U.S. 825 (1983).

151. *Farber v. City of Paterson*, 440 F.3d 131, 135 (3d Cir. 2006); see also *Aulson*, 83 F.3d at 4–5.

152. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

153. See *Farber*, 440 F.3d at 135 ("[T]he allegation of a 'class-based animus' naturally presumes that there is a specific, identifiable class against whom the defendants can have discriminated.").

154. See *supra* notes 96–98 and accompanying text.

155. *Farber*, 440 F.3d at 137. The court recognized that it had previously extended section 1985(3) to women in *Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978), and the mentally retarded in *Lake v. Arnold*, 112 F.3d 682 (3d Cir. 1997). In applying section 1985(3) to the mentally retarded, the court "assum[ed], albeit implicitly, that the mentally retarded constitute an objectively identifiable class in the first place." *Farber*, 440 F.3d at 137. However, one could argue that the circuit's characterization of the "mentally retarded" as an "objectively identifiable class" ignores the reality that a "mentally retarded" class would consist of people having a wide range of intellectual capabilities. In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Court held that mental retardation was not

the plaintiff's complaint insufficient, because, among other things, the plaintiff did not allege that her support for the former mayor, or her termination, was due to the former mayor's status as a Republican.<sup>156</sup> However, one could argue that, in a political patronage situation—which the court admitted this was<sup>157</sup>—a newly elected politician's dismissal of the incumbent's employees is always based, at least in some part, on the former officeholder's political affiliation, because, in most elections, candidates running against each other are of different political affiliations.<sup>158</sup> While it is true that the plaintiff's support of the former mayor cannot automatically be attributed to his Republican status,<sup>159</sup> it seems a bit of a stretch for the Third Circuit not to reasonably infer an allegation of termination based on the former mayor's Republican status.<sup>160</sup>

Nevertheless, the court found that there were “differences between being discriminated against because of membership in a political party and being discriminated against because of support for the policies of a politician who also happens to be a member of the party.”<sup>161</sup> It concluded that the plaintiff's putative class was not objectively determinative.<sup>162</sup> Unfortunately, the court declined to discuss these differences and why they would be relevant to defining a proper class,

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a quasi-suspect classification deserving of heightened scrutiny under the Equal Protection Clause. In so concluding, the Court noted that the mentally retarded “range from those whose disability is not immediately evident to those who must be constantly cared for,” falling “into four distinct categories.” *Cleburne*, 473 U.S. at 442 & n.9. The Court also referred to the mentally retarded as a “large and amorphous class” and stated that “[t]hey are thus different, immutably so, in relevant respects.” *Id.* at 442, 445. Although *Cleburne* was an equal protection case, it is probative as to what the Supreme Court would consider an “objectively identifiable class” for purposes of section 1985(3). As the *Lake* court admitted, in referring to its previous holding in *Novotny*, “[o]ur holding which declined to ‘truncat[e] [the] sweep’ of section 1985(3) is buttressed by the fact that ‘comparable Reconstruction civil rights legislation such as the equal protection clause of the fourteenth amendment has no such boundaries.’” *Lake*, 112 F.3d at 686–87 (alterations in original) (quoting *Trautz v. Weisman*, 819 F. Supp. 282, 294 (S.D.N.Y. 1993)).

156. *Farber*, 440 F.3d at 138. See also *supra* notes 105–108 and accompanying text.

157. *Farber*, 440 F.3d at 132 (“We have before us a classic example of political patronage.”).

158. See *Elrod v. Burns*, 427 U.S. 347, 353 (1976) (“[The] practice of dismissing employees on a partisan basis is but one form of the general practice of political patronage.”). Of course, in primary elections, a member of one party may run against an incumbent of the same party; however, this was not the situation in *Farber*.

159. Indeed, the plaintiff's complaint alleged that the “[p]laintiff was a public supporter and advocate of the policies of [the mayor]” and that “[s]he believed [the mayor's] policies were good for the city of Paterson and openly expressed herself to that effect.” *Farber*, 440 F.3d at 137 n.5.

160. The court accepted “facts alleged in the complaint and the reasonable inferences that can be drawn from those facts” as true “for purposes of . . . review.” *Id.* at 134.

161. *Id.* at 138.

162. *Id.*

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which leaves one to speculate as to the distinction that makes the former capable of being defined as a class and the latter incapable of the same. A possible explanation for the distinction is that membership in a party, so long as one is registered, is easily determined. Although registered members of a political party may agree with different policies, the registration process makes the class easily identifiable; one is either a registered Republican or not a registered Republican. This satisfies the requirement espoused in *Farber* that objective criteria are needed to define a class.<sup>163</sup> Defining a class based upon support of another's policies, on the other hand, requires defining a class by the conduct in which those persons are engaged, a result contrary to the teaching of *Bray v. Alexandria Women's Health Clinic*.<sup>164</sup>

b. Is Political Discrimination Invidious?

*Farber* stands out among section 1985(3) jurisprudence, because the Third Circuit determined whether discrimination motivated by political affiliation was invidious, despite the plaintiff's failure to establish a class.<sup>165</sup> In doing so, the *Farber* panel resisted the urge to dispose of a case on the simplest grounds and stood firm against the "this question we leave for another day" logic.<sup>166</sup>

In discussing the issue of invidious discrimination, the *Farber* court expressly disagreed with the Second Circuit's reading of the legislative history of the Ku Klux Klan Act in *Keating v. Carey*,<sup>167</sup> instead relying upon the dicta in *United Brotherhood of Carpenters, Local 610 v. Scott*<sup>168</sup> and its own interpretation of the legislative history, which was partially based upon Judge Meskill's concurrence and dissent in *Keating*.<sup>169</sup> In interpreting the legislative history, the court persuasively analogized post-Civil War violence against Republicans to the opposition to abortion at issue in *Bray*.<sup>170</sup> Just as the fact that the "victims of a conspiracy motivated by opposition to abortion were all women did not mean that the discriminatory animus they faced was [based on sex],"<sup>171</sup> the fact that the majority of people attacked by the Klan

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163. *Id.* at 136. As previously noted, the *Farber* court did not hold that a class based on political affiliation could never be an identifiable class. See *supra* note 109 and accompanying text.

164. 506 U.S. 263, 269 (1993).

165. *Farber*, 440 F.3d at 138–43.

166. See *supra* note 147 and accompanying text.

167. 706 F.2d 377 (2d Cir. 1983).

168. 463 U.S. 825 (1983).

169. *Farber*, 440 F.3d at 140–43.

170. *Id.* at 141.

171. *Id.* (citing *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269–70 (1993)).

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were Republicans did not evidence a political animus, but rather a racial odium, because Republicans were involved in gaining civil rights for African Americans. The court continued this reasoning in noting “that a § 1985(3) plaintiff need not be a member of the class against which a conspiracy directs its invidiously discriminatory animus.”<sup>172</sup> The court found that the legislative history underscored this view<sup>173</sup>—that the Republicans would be protected by the Act because of their support for African Americans, and not because of their political affiliation—as a logical application of this principle. In further interpreting the legislative history, the *Farber* court stated that reading section 1985(3) to protect Republicans because of their political affiliation would be to remove it from its historical context.<sup>174</sup>

Turning to whether discrimination based on political affiliation was invidious, the *Farber* court first looked to *Bray* and reasoned that, because opposition to abortion is not invidious, an “exercise of classic political patronage” is “surely” not invidious.<sup>175</sup> However, this statement is problematic. First, the court gave no reason for this analogy. It reasoned that political patronage sometimes has a rational basis in that “[a] new administration is justified in replacing policymaking employees with members of its own party in order to ensure ‘that representative government not be undercut by tactics obstructing the implementation of policies of the new administration.’”<sup>176</sup> However, the decision that the court cited for this proposition, *Elrod v. Burns*, largely emphasized how political patronage pales in comparison to one’s First Amendment rights and, in fact, established limits on political patronage.<sup>177</sup> One could also contend that the right to political expression or affiliation is a stronger constitutional right than the right to an abortion. The right to political expression is explicitly contained in the First Amendment, whereas the right to an abortion is “less explicitly protected by the Constitution,” because it is “one element of a

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172. *Id.* (citing *Richardson v. Miller*, 446 F.2d 1247, 1249 (3d Cir. 1971)).

173. *Id.*

174. *Id.* at 140 n.10 (citing *Keating v. Carey*, 706 F.2d 377, 393–94 (2d Cir. 1983) (Meskill, J., concurring and dissenting)).

175. *Farber*, 440 F.3d at 142.

176. *Id.* at 142 n.12 (quoting *Elrod v. Burns*, 427 U.S. 347, 367 (1976)).

177. The *Elrod* plurality opinion held that the political patronage dismissal of a “nonpolicymaking, nonconfidential government employee” was unconstitutional. *Elrod*, 427 U.S. at 375. The plurality believed in the limited utility of political patronage compared to First Amendment rights: “[T]he gain to representative government provided by the practice of patronage, if any, would be insufficient to justify its sacrifice of First Amendment rights.” *Id.* at 370; see also *id.* at 356 (“Our concern with the impact of patronage on political belief and association does not occur in the abstract, for political belief and association constitute the core of those activities protected by the First Amendment.”).

more general right of privacy or of Fourteenth Amendment liberty.”<sup>178</sup> Therefore, infringing upon a stronger constitutional right could possibly be more invidious than infringing upon a right less explicitly grounded in the Constitution. It should also be noted that, although the *Farber* court used the occasional rationality of political patronage—in the case of the dismissal of a policy-making employee—to negate the invidious nature of political patronage generally, the plaintiff before it was a nonpolicy-making employee,<sup>179</sup> suggesting that the mitigating justification for political patronage used by the court was not present in the case at hand.

The *Farber* court also followed the immutable characteristics test used by the Third Circuit,<sup>180</sup> emphasizing previous circuit decisions that found discrimination irrational and odious, because the discrimination at issue was motivated by immutable characteristics.<sup>181</sup> The circuit’s basis for finding invidious discrimination based upon immutable characteristics was that “such characteristics are ‘determined by the accident of birth’ and ‘bear[ ] no relation to ability to perform or contribute to society.’”<sup>182</sup> Therefore, because political affiliation depends on a mutable characteristic, such as opinion or conduct, discrimination on the basis of political affiliation did not bear the signs of invidiousness.<sup>183</sup>

178. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 278 (1993) (citation omitted).

179. *Farber*, 440 F.3d at 133.

180. *See* Schindler, *supra* note 3, at 95–98; *see also* Matthew C. Hans, Note, *Lake v. Arnold: The Disabled and the Confused Jurisprudence of 42 U.S.C. § 1985(3)*, 15 J. CONTEMP. HEALTH L. & POL’Y 673, 699 & n.189 (1999). Schindler explains that the “immutable characteristics” test to determine which groups were subject to section 1985(3) protection originated in *Novotny v. Great American Federal Savings & Loan Ass’n*, 584 F.2d 1235 (3d Cir. 1978). The Third Circuit took the “immutable characteristics” requirement from *Frontiero v. Richardson*, 411 U.S. 677 (1973), in which the Supreme Court found that gender classifications were subject to “elevated fourteenth amendment equal protection scrutiny.” Schindler, *supra* note 3, at 95; *see also infra* notes 181–182 and accompanying text. It should also be noted that the *Farber* court used “immutable characteristic” language in its determination of whether an identifiable class was shown. *Farber*, 440 F.3d at 137; *see supra* notes 100–104 and accompanying text. The reader should be aware of this dual use of “immutable characteristics” in the *Farber* court’s determination of both an identifiable class and an invidious discrimination to prevent any blurring between the two separate analyses.

181. The court used *Novotny* (sex discrimination) and *Lake v. Arnold*, 112 F.3d 682 (3d Cir. 1997) (discrimination against the mentally retarded), as examples. *Farber*, 440 F.3d at 137, 142.

182. *Farber*, 440 F.3d at 142 (alteration in original) (quoting *Novotny*, 584 F.2d at 1243). The Third Circuit’s application of this principle in *Lake* could be questioned, because it can be argued that mental retardation does have an effect on “ability to perform.” *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) (“[I]t is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world.”).

183. *See Farber*, 440 F.3d at 142. The court clarified that it did not “hold that discrimination motivated by a mutable characteristic can never be invidious.”

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However, the immutable characteristics approach has been criticized. One commentator has argued that *Novotny* did not cite to any legislative history supporting the creation of categories based on immutable characteristics<sup>184</sup> and that the district courts in the Third Circuit “have applied the *Novotny* principles far beyond their intended scope.”<sup>185</sup> The dissent in *Scott* also implicitly rejected the immutable characteristics approach by suggesting that other traits “should be considered in delineating § 1985(3).”<sup>186</sup>

In the final stage of its discussion, the *Farber* court explained how “[p]ermitting § 1985(3) to reach politically motivated conspiracies would effectively outlaw all terminations based on political affiliation.”<sup>187</sup> However, this statement is not entirely accurate. It is true that encompassing political classes under section 1985(3) could greatly change the future of terminations from a government position based on political affiliation, as was the case in *Farber*. In this instance, assuming a conspiracy was present, courts would no longer have to determine whether “party affiliation is an appropriate requirement for the effective performance of the public office involved,” as required by *Branti v. Finkel*.<sup>188</sup> The situation changes, however, in the case of a private conspiracy or a termination from a nongovernment position. While section 1985(3) applies to public and private conspiracies alike,

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184. Schindler, *supra* note 3, at 96. Schindler argued that section 1985(3) was designed to protect African Americans, as well as their political “sympathizers.” *Id.* According to Schindler, the “latter group would be excluded under the Third Circuit’s approach.” *Id.*

185. *Id.* at 97 & n.58. Schindler contends that the Third Circuit in *Novotny* “explicitly limited its discussion of section 1985(3) to the coverage of women,” and therefore, the “immutable characteristic” guidelines should not have been used outside of this context. Examples of trial courts’ misuse of this test include denying section 1985(3) protection to other groups, including Germans, tenant organizers, and individuals issued writs of protection. *Id.* at 97 & nn.59–61.

186. Schindler found that the following language represented an approach contrary to the Third Circuit’s approach:

Congress intended to provide a remedy to any class of persons, whose beliefs or associations placed them in danger of not receiving equal protection of the laws from local authorities. While certain class traits, such as race, religion, sex, and national origin *per se* meet this requirement, other traits also may implicate the functional concerns in other situations.

*Id.* at 98 n.65 (quoting *Scott*, 463 U.S. at 853 (Blackmun, J., dissenting)). Because the dissent supported finding economic and political classes under the scope of section 1985(3), see *Scott*, 463 U.S. at 849–54 (Blackmun, J., dissenting), the inclusion of these classes based on mutable characteristics contradict the Third Circuit’s approach.

187. *Farber v. City of Paterson*, 440 F.3d 131, 142 (3d Cir. 2006) (citing *Keating v. Carey*, 706 F.2d 377, 394 (2d Cir. 1983) (Meskill, J., concurring and dissenting)).

188. 445 U.S. 507, 518 (1980). The Court abandoned the policy-making/confidential inquiry enunciated in *Elrod v. Burns*, 427 U.S. 347 (1976), explaining that there are circumstances in which a nonconfidential, nonpolicy-making position can be considered political, and also circumstances in which political affiliation is not relevant to a confidential, policymaking position. *Branti*, 445 U.S. at 518.

the rights vindicated under section 1985(3) differ depending upon the conspiracy. Because the U.S. Supreme Court has viewed section 1985(3) as a purely remedial statute,<sup>189</sup> it has held that, for a private conspiracy to be actionable under section 1985(3), the rights interfered with have to be “constitutionally protected against private, as well as official, encroachment.”<sup>190</sup>

To date, the Court has only recognized the “right to be free from involuntary servitude” and the “right of interstate travel” as such rights<sup>191</sup> and has explicitly excluded First Amendment rights from the same category.<sup>192</sup> Because a termination based upon political affiliation implicates the rights of political expression and association<sup>193</sup>—First Amendment rights—and it would be a rare instance where a putative plaintiff could allege that his termination infringed upon his right to travel or to be free from slavery—expanding section 1985(3) to cover political classes would not significantly affect terminations carried out in the private sector. Thus, while it is likely that the majority of terminations based upon political affiliation are public terminations—situations in which political affiliation is expected to make more of an impact upon termination decisions—and would possibly be outlawed by including political classes under section 1985(3), the fallout from extending section 1985(3)’s scope is not as severe as the *Farber* court contended. Private terminations would largely be unaffected due to the nature of the rights that must be infringed upon to state a cause of action.

### B. *Did the Third Circuit Get Farber Right?*

In deciding *Farber*, the Third Circuit decided a question that it had declined to answer for almost a quarter of a century. It has now joined a number of courts holding that a class based on political affiliation is not cognizable under section 1985(3), further deepening the circuit split on this issue.<sup>194</sup> But was this decision correct? Did the

189. See *Hans*, *supra* note 180, at 705. This view was first recognized in *Great American Federal Savings & Loan Ass’n v. Novotny*, 442 U.S. 366 (1979), and reaffirmed in *Scott*. *Hans*, *supra* note 180, at 705 & nn.221–22; see also *Novotny*, 442 U.S. at 372 (“Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates.”).

190. *Scott*, 463 U.S. at 833 (majority opinion).

191. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 278 (1993).

192. *Scott*, 463 U.S. at 830 (majority opinion) (“[A]n alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved that the State is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the State.”); *id.* at 833 (“[The First] Amendment restrains only official conduct . . .”). See also *Hans*, *supra* note 180, at 705–08 (discussing the rights vindicated under section 1985(3)).

193. See *Elrod*, 427 U.S. 347.

194. See *supra* note 114.

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Third Circuit use the correct approach? Would it have been more prudent for the Third Circuit to reserve the question until the U.S. Supreme Court has definitively addressed the issue? This Note argues that *Farber* was correctly decided.

Anyone studying section 1985(3) jurisprudence, particularly the question of inclusion or exclusion of political classes from the statute’s protection, will notice two major impediments to a clear resolution of the issue: the lack of Supreme Court guidance<sup>195</sup> and the varying interpretations of the true meaning of the congressional debate leading up to the enactment of the Ku Klux Klan Act, the statutory predecessor to section 1985(3).<sup>196</sup> The result has been a range of suggested solutions to the section 1985(3) puzzle by various commentators,<sup>197</sup> and a three-way split among the courts of appeals.<sup>198</sup> This Section initially addresses the first major impediment: the lack of Supreme Court guidance.<sup>199</sup> It then discusses the second major impediment: the inability of courts to agree upon the proper reading of section 1985(3)’s legislative history.<sup>200</sup> Finally, this Section examines several approaches to section 1985(3) analysis.<sup>201</sup>

1. *Lack of U.S. Supreme Court Guidance*

A common thread running through this Note has been the lack of U.S. Supreme Court guidance on the issue of political affiliation as a class under section 1985(3). Although *Scott*<sup>202</sup> implied in dicta that section 1985(3) does not cover political classes, it did not decide the issue conclusively.<sup>203</sup> The resulting quandary is that, although the Court has suggested what it deems to be the proper scope of section 1985(3) as applied to political classes, certain circuits are bound by pre-*Scott* decisions and analyses.<sup>204</sup> These circuits’ jurisprudence, with

195. See *supra* note 139 and accompanying text.

196. See *infra* note 211.

197. See, e.g., *infra* notes 223–229, 236–242 and accompanying text.

198. See *supra* note 114.

199. See *infra* notes 202–210 and accompanying text.

200. See *infra* notes 211–222 and accompanying text.

201. See *infra* notes 223–247 and accompanying text.

202. 463 U.S. 825 (1983).

203. See *supra* notes 52–54, 115, 135 and accompanying text.

204. The Second Circuit approvingly cited *Keating v. Carey*, 706 F.2d 377 (2d Cir. 1983), regarding political classes and section 1985(3) in *N.Y. State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989). The Fifth Circuit decision in *Galloway v. Louisiana*, 817 F.2d 1154 (5th Cir. 1987), was bound by *Kimble v. D.J. McDuffy, Inc.*, 623 F.2d 1060 (5th Cir. 1980), *vacated on other grounds*, 648 F.2d 340 (5th Cir. 1981) (en banc). The Sixth Circuit in *Conklin v. Lovely*, 834 F.2d 543 (6th Cir. 1987), explicitly stated that it was bound by *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973), despite sister circuits’ decisions following *Scott*’s suggestion. *Conklin*, 834 F.2d at 549. These three circuits include classes based on political affiliation under the scope of section 1985(3). It

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respect to coverage of political classes, is therefore frozen because of the familiar rule that one panel in a circuit cannot overrule the decision of an earlier panel, absent an en banc decision or a U.S. Supreme Court decision requiring the overruling of the earlier decision.<sup>205</sup> Conversely, other circuits, with the “benefit” of no circuit precedent, are able to consider the *Scott* dicta in their quest to fulfill the “obligation of the subordinate jurisdictions to divine the direction of the Court.”<sup>206</sup> In fact, no circuit facing this issue as a matter of first impression post-*Scott* has held that political affiliation is a cognizable class, either declining to answer the question or reading *Scott* to instruct it to that end.<sup>207</sup>

By reading an exclusion of classes based upon political affiliation from the *Scott* dicta, the *Farber* court correctly followed the trend of circuits deciding the issue on a clean slate. While the majority opinion in *Scott* has been criticized by some for implying that political classes are not covered under section 1985(3),<sup>208</sup> it is the sole Supreme Court opinion directly discussing the issue in which a majority of the Court agreed. The Third Circuit, while not bound by the decision, had an obligation to hypothesize what the Court would decide based upon that decision. It seems clear that the *Scott* majority, if “squarely faced”<sup>209</sup> with the question, would have decided against recognizing classes based on political affiliation.<sup>210</sup> Thus, the *Farber* court correctly followed this existing, although scant, guidance.

## 2. What Did the 42nd Congress Mean?

Lack of U.S. Supreme Court guidance has also led to confusion over the proper construction of section 1985(3)’s legislative history. As one commentator has noted, attempts to discern the scope of section 1985(3) intended by the 42nd Congress have led to a multitude of

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should be noted that the Eleventh Circuit is also bound by *Kimble*, because it was decided before the Fifth Circuit was divided into the new Fifth and Eleventh Circuits. *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072 (11th Cir. 2000) (“pre-split” decisions binding on circuit); see also *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* R. 10.8.2, at 96 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005) (noting that the Fifth Circuit split on October 1, 1981).

205. See, e.g., *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999); *Jones v. Coughlin*, 45 F.3d 677, 679 (2d Cir. 1995); *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993); *Salmi v. Sec’y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

206. *Grimes v. Smith*, 776 F.2d 1359, 1366 (7th Cir. 1985).

207. See *supra* note 114.

208. See, e.g., 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 (1987); 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 (1986). See also *supra* notes 52, 115, & 135 (noting relevant *Scott* dicta).

209. *Farber v. City of Paterson*, 440 F.3d 131, 139 (3d Cir. 2006).

210. See *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 835–37 (1983).

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interpretations.<sup>211</sup> This confusing array of section 1985(3) readings has been compounded by the fact that, in the *only* case in which the U.S. Supreme Court addressed the political affiliation question, the majority and dissent did not even agree on what the legislative history proposed.<sup>212</sup> The majority's reading suggested that Republicans were intended to be protected, only because they were supporting African Americans, not because of their political views.<sup>213</sup> When faced with Senator Edmunds's statement,<sup>214</sup> the "clearest expression" of the view that section 1985(3) reaches political classes, the majority found the importance of the statement reduced, because the *Griffin* court had not extended section 1985(3) to political classes, despite its knowledge of the senator's statement.<sup>215</sup> The dissent, on the other hand, found that "the 42d Congress viewed the Ku Klux Klan as pre-eminently a political organization, whose violence was thought to be premised most often on the political viewpoints of its victims."<sup>216</sup> More generally, the dissent found that Congress intended a "functional" scope of

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211. McDonald, *supra* note 208, at 476. McDonald identified at least seven different arguments made for the intended purpose of the Ku Klux Klan Act:

- (1) [T]o exclusively protect black citizens and their supporters against Klan violence;
- (2) to protect victims of racial animus in general;
- (3) to protect political, economic and social groups oppressed in the South;
- (4) to protect those groups entitled to heightened scrutiny under fourteenth-amendment, equal-protection analysis;
- (5) to protect against all private and public conspiracies;
- (6) to protect solely against public conspiracies; and
- (7) to protect any oppressed groups who were the victims of any conspiracies to deny them equal protection or equal privileges and immunities under the law.

*Id.* As McDonald also observed, one reason for this slew of interpretations is that a court or commentator can support an interpretation by using only certain statements from the legislative history and ignoring (or perhaps being unaware of) statements militating against that interpretation. *See id.*

212. *Compare Scott*, 463 U.S. at 836–38 (finding the bill's central concern to be the protection of African Americans and supporters), *with Scott*, 463 U.S. at 849–53 (Blackmun, J., dissenting) (finding that Congress believed violence was racially, politically, and economically motivated).

213. *Scott*, 463 U.S. at 836 (majority opinion) ("The predominate purpose of § 1985(3) was to combat the prevalent animus against [African Americans] and their supporters. The latter included Republicans *generally, as well as others, such as Northerners who came South with sympathetic views towards [African Americans].*") (emphasis added).

214. *See supra* note 115.

215. *Scott*, 463 U.S. at 836–37 (majority opinion) ("Lacking other evidence of congressional intention, we follow the same course here."). The Fourth Circuit found this statement significant. *Harrison v. K VAT Food Mgmt., Inc.*, 766 F.2d 155, 162 (4th Cir. 1985) ("The significance of the Court's determination in *Scott* that the evidence of congressional intent did not warrant a widening of the scope of protection under § 1985(3), beyond that previously afforded in *Griffin*, should not be ignored."). The *Scott* majority also discounted the statement, because it was made in the Senate, where only technical changes were made. 463 U.S. at 837.

216. *Scott*, 463 U.S. at 850 (Blackmun, J., dissenting); *see also id.* at 853 (stating that the 42nd Congress perceived the people injured by the Ku Klux Klan to be people who could not demand law enforcement protection because of their political affiliation).

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section 1985(3), capable of protecting any class of persons, depending on the circumstances.<sup>217</sup>

In light of the *Scott* majority's reading of the legislative history, it cannot be said that the Third Circuit incorrectly concluded that the 42nd Congress did not intend to "[g]ive [v]ictims of [p]olitical [d]iscrimination a [c]ause of [a]ction."<sup>218</sup> This reading follows the majority view of the only U.S. Supreme Court opinion addressing the issue and parallels the post-*Scott* interpretations adopted by two other circuits not bound by circuit precedent.<sup>219</sup> Although the Third Circuit is not bound by the decisions of these other circuits, circuit courts give sister circuit decisions "most respectful consideration" and weight in an attempt to maintain uniformity in the federal law.<sup>220</sup> Additionally, previous Third Circuit decisions that interpreted the legislative history of section 1985(3) did not address whether the Reconstruction-era Congress intended to protect political classes.<sup>221</sup> While the debate over the appropriate interpretation of the legislative history of section 1985(3) will continue—fueled primarily by commentators—courts should follow the *Farber* court and rely upon the teachings of the *Scott* majority and the analyses of other circuits.<sup>222</sup>

### 3. *Suggested Approaches to Solving the Section 1985(3) Puzzle*

In attempts to clarify the confusion that has engulfed section 1985(3) jurisprudence, commentators have proposed different courses of action to map out the territory covered by a section 1985(3) claim. While not all of these approaches tackle the political affiliation question directly, their analyses can be fitted to address that question. One obvious approach is for a court to avoid the issue and decide a case on alternative grounds where possible.<sup>223</sup> However much sense

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217. *Id.* at 851 (stating that Congress intended to protect conspiracies involving invidious animus and the "possibility of ineffective state enforcement"). See also *supra* note 186.

218. *Farber v. City of Paterson*, 440 F.3d 131, 140 (3d Cir. 2006).

219. See *Grimes v. Smith*, 776 F.2d 1359 (7th Cir. 1985); *Harrison*, 766 F.2d 155.

220. *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987); *accord Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979).

221. *Lake v. Arnold*, 112 F.3d 682, 686–88 (3d Cir. 1997) (addressing whether section 1985(3) reaches handicapped classes); *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1238–43 (3d Cir. 1978) (addressing whether section 1985(3) reaches sex-discrimination).

222. A thorough analysis of section 1985(3)'s legislative history is outside the scope of this Note; it is only discussed to show one of the difficulties in construing section 1985(3). For an in-depth discussion of section 1985(3) and its legislative history, see Neil H. Cogan, *Section 1985(3)'s Restructuring of Equality: An Essay on Texts, History, Progress, and Cynicism*, 39 RUTGERS L. REV. 515 (1987).

223. Cf. *Durden*, *supra* note 50, at 211–12, 214 (criticizing the Fourth Circuit in *Harrison* for making a blanket ruling on political classes where it could have decided the case on narrower grounds).

this proposal may have made in *Scott*'s immediate aftermath and with the optimism that the Court would definitively determine protected classes in the near future, that optimism has since been eradicated by the passing of more than twenty years without an elucidating decision. Deciding cases in this fashion gives no guidance to the district courts and only delays answering an inevitable question. The *Farber* court realized the negative consequences of deciding the case before it on the narrowest grounds—that a class was not alleged—and understood the importance of providing guidance to the lower courts.<sup>224</sup>

Another approach involves shifting the focus of section 1985(3) analysis: examining the requirement of invidious discrimination before addressing whether there is an identifiable class.<sup>225</sup> To aid in determining the threshold question of invidious discrimination, this approach looks to the “discriminatory purpose” standard of equal protection jurisprudence and whether the discrimination is so invidious as to almost rise to the level of racism.<sup>226</sup> Once the court finds an invidious discrimination, it applies the “class-based” requirement in “an extremely broad manner,” protecting any class that is “readily and easily definable.”<sup>227</sup> Limiting section 1985(3) claims would thus be achieved by strictly applying the first requirement of invidious discrimination to the facts of each individual case.<sup>228</sup>

Another related argument focuses solely upon the invidiousness of the discrimination and eliminates the class requirement.<sup>229</sup> Under this approach, the plaintiff in *Farber* may have been able to clear the first hurdle.<sup>230</sup> The Third Circuit viewed political patronage as occasionally having a rational basis—as in the case of replacing policy-making

224. Cf. *supra* note 113 and accompanying text.

225. See Hans, *supra* note 180, at 700–04.

226. *Id.* at 701. Both guidelines are taken from statements made in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). The “discriminatory purpose” standard implies that the conspiracy was carried out “because of” class membership, and not “in spite of” class membership. See Hans, *supra* note 180, at 701 (quoting *Bray*, 506 U.S. at 271–72).

227. Hans, *supra* note 180, at 702. The class requirement proposed would have to satisfy the requirements set forth in *Bray* and in *Scott*'s dissent. *Id.* at 702 n.208; see also *supra* notes 62, 96 and accompanying text.

228. Hans, *supra* note 180, at 704 (suggesting that the section 1985(3) claim involved in *Lake v. Arnold* would be dismissed, because defendants' sterilization of their mentally handicapped daughter “may have stemmed from a concern for her health and welfare”).

229. See, e.g., McDonald, *supra* note 208. McDonald found that the “analysis of the animus involved focuses on the kind of invidious discriminatory motivation behind the conspirator's act, not on the victim's class status.” *Id.* at 494–95. McDonald also contended that *Griffin*'s “imposition of a showing of class-based animus is ill-founded and is at the root of the confusion and inconsistency surrounding section 1985(3) and the Court's failure to extend the statute to cover the types of injury it was intended to redress.” *Id.* at 474.

230. Depending on the variation of the approach used, the plaintiff's failure to allege an identifiable class would have had different results.

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employees—to support its finding that political discrimination is never invidious.<sup>231</sup> However, if the *Farber* court would have looked at the political discrimination in this particular case, as opposed to discrimination generally, this rational basis factor would not have been present, because the plaintiff was a nonpolicy-making employee. Thus, in this particular case, the political discrimination might have been more invidious than one would consider it in the abstract. Additionally, it could be argued that firing someone from his job, one's means of supporting himself and others, is more invidious than other actions against the person.<sup>232</sup>

Despite these possible arguments, and the contention that section 1985(3)'s legislative history does not support a class-based requirement,<sup>233</sup> *Griffin* established a class-based requirement. Courts must address this issue. The sequence of determining invidious discrimination and an identifiable class has also been established by *Bray*, in which the Court held that “women seeking an abortion” was not a qualifying class *before* addressing the discrimination at hand.<sup>234</sup> The *Farber* court, therefore, faithfully followed suit in its resolution of the issue.

Given the belief that section 1985(3) was enacted pursuant to the Fourteenth Amendment,<sup>235</sup> some courts and commentators have advocated an equal protection approach to determine the scope of section 1985(3).<sup>236</sup> One commentator has suggested an approach

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231. *Farber v. City of Paterson*, 440 F.3d 131, 142 & n.12 (3d Cir. 2006).

232. While most of the cases concerning political discrimination discussed in this Note involve terminations, other acts of discrimination have been alleged in this context. *See, e.g.*, *Aulson v. Blanchard*, 83 F.3d 1 (1st Cir. 1996) (illegal searches); *Grimes v. Smith*, 776 F.2d 1359 (7th Cir. 1985) (putting a same-name candidate in another race to defraud a defeated candidate). This Note is not commenting on whether these acts are more invidious than termination.

233. *McDonald*, *supra* note 208, at 489 (“Nowhere in the legislative history is there an explicit reference to a requirement of ‘class-based animus.’”).

234. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269–70 (1993).

235. The title of the Act that became section 1985(3) was “An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes.” *Martin*, *supra* note 19, at 735. There is some debate as to whether section 1985(3) was enacted pursuant to section five of the Fourteenth Amendment. *See supra* note 19; *see also* U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

236. *McDonald*, *supra* note 208, at 495 & n.93. The reader should not interpret these equal protection “approaches” as applying traditional equal protection “analysis.” The following approaches do not actually apply the equal protection tiers of scrutiny to the classes, for example, subjecting discrimination motivated by a person's race to strict scrutiny and asking whether the discrimination was necessary to accomplish a compelling interest. *Cf. Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984) (describing the strict scrutiny test). The use of “equal protection analysis” will refer to that analysis used in equal protection cases, and the use of “equal protection approach” will refer to the proposed methods of analysis to determine what classes are protected by section 1985(3).

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incorporating rebuttable and irrebuttable presumptions based on the scrutiny a court would employ if carrying out an equal protection analysis for a particular class.<sup>237</sup> When a “suspect” class or a “fundamental right” is implicated and strict scrutiny would normally be applied, there would be an irrebuttable presumption that the section 1985(3) claim may stand.<sup>238</sup> In cases where a court would normally apply rationality review to an equal protection claim, such as for an economic or commercial class, a plaintiff would be doomed by the irrebuttable presumption that a section 1985(3) claim cannot stand.<sup>239</sup> “Quasi-suspect” classes or other classes that would undergo “intermediate scrutiny” under an equal protection analysis, would be given a rebuttable presumption either for or against having a section 1985(3) claim, with that presumption eliminated if examination of the particular facts of the case determined that the presumption was incorrect.<sup>240</sup>

A related approach protects classes that would receive “heightened” scrutiny under equal protection analysis—strict or immediate scrutiny—with the exception of classes that receive strict scrutiny because of their exercise of a “fundamental right.”<sup>241</sup> However, applying these equal protection approaches to section 1985(3) claims has been criticized, because it ignores the fact that classes undergoing rationality review are still protected by the equal protection clause and its analysis, although that protection is very slim.<sup>242</sup> Thus, the equal protection approach does not give protection to classes that would have some, albeit minute, protection under true equal protection analysis.

Had the *Farber* court undertaken an equal protection approach to decide whether section 1985(3) prohibited political discrimination, it is

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237. Martin, *supra* note 19, at 759–62; *see also* McDonald, *supra* note 208, at 495 n.92 (describing the three tiers of equal protection analysis and to which classes they apply).

238. Martin, *supra* note 19, at 760–62.

239. *Id.* at 759–61.

240. *Id.* at 761–62.

241. Schindler, *supra* note 3, at 99–107. The absence of protection for classes exercising “fundamental rights” is justified for the following reasons: (1) the Court has not extended protection to economic or political groups, “even when these groups were exercising fundamental rights (participation in the political process and freedom of association). . . . Thus, class members must share more than the common exercise of fundamental rights to fall within the ambit of the statute”; (2) “even though fundamental rights are employed in equal protection jurisprudence, they are not direct progeny of the fourteenth amendment as the suspect classifications are”; and (3) “adopting the fundamental rights approach would allow a plaintiff to fall within the ambit of § 1985(3) merely by making out a substantive violation, regardless of whether that violation was motivated by a class-based animus.” *Id.* at 103 n.104.

242. McDonald, *supra* note 208, at 496–97 & n.100 (giving the example of *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), as an instance in which a classification was struck down under rationality review).

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possible that the Third Circuit would have decided in favor of protecting political classes. Although equal protection analysis does not afford heightened scrutiny to political groups,<sup>243</sup> one could argue that a conspiracy to interfere with somebody’s rights because of his political affiliation impedes his fundamental right to vote and participate in the political process.<sup>244</sup> A person might be unwilling to register with his desired political party and cast his vote for a candidate he supports if he knows that he might be more susceptible to termination or some other conspiracy against him.

Despite the availability of these possible approaches to the section 1985(3) issue, the *Farber* court followed the immutable characteristics approach used in Third Circuit jurisprudence.<sup>245</sup> Although this approach has been found “troublesome,”<sup>246</sup> the *Farber* court correctly applied it, because no U.S. Supreme Court case has rejected this approach or instructed circuits to follow a different approach.<sup>247</sup> Until the Supreme Court definitively informs the circuit courts as to the appropriate method of analysis, each circuit will follow its own approach, and the goal of a uniform federal law will not be accomplished.

#### V. IMPACT

While *Farber* most directly impacts the district courts in the Third Circuit, other circuits that have not yet decided whether to recognize political affiliation as a section 1985(3) class may choose to use *Farber* as a guidepost for their analyses, because it is the most recent decision on the subject in a section 1985(3) landscape barren of recent guidance. Those circuits that have not yet decided the issue—the First, Ninth, and the District of Columbia<sup>248</sup>—will thus be the courts that determine whether the split in the courts of appeals is deepened or the recent trend of not recognizing political affiliation as a cognizable class is continued.<sup>249</sup> Because the U.S. Supreme Court has not squarely addressed the issue, other circuits that have answered the question in the affirmative are bound by pre-*Scott* decisions and will be unlikely to regard *Farber* as a reason to reverse their prior panels’ rulings with an en banc decision. Whatever the merits of each argu-

243. Martin, *supra* note 19, at 763.

244. *See id.*; Schindler, *supra* note 3, at 103 n.104; *see also* Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

245. *See supra* notes 130–133, 180–186 and accompanying text.

246. Schindler, *supra* note 3, at 96. *See also supra* notes 184–186 and accompanying text.

247. Schindler, *supra* note 3, at 97.

248. *See supra* note 114.

249. *See supra* note 207 and accompanying text.

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ment for or against extending section 1985(3) to political classes, it is clear that, at its next given opportunity, the Court should conclusively decide the issue.

The divisions and hostilities based on political differences, even among members of the same political party, are growing deeper every day, with harsh consequences. This is exemplified by the controversy surrounding the forcing out or dismissal of several U.S. attorneys in late 2006.<sup>250</sup> The dismissals, which have been characterized as “unprecedented,”<sup>251</sup> were largely influenced by politics,<sup>252</sup> although the dismissed attorneys were appointed by President George W. Bush<sup>253</sup> and were, for the most part, Republicans.<sup>254</sup> In testimony arising out of Congress’s investigation of the matter, a former top Justice Department aide also admitted that she improperly considered political beliefs in reviewing applicants for nonpartisan legal jobs, such as assistant U.S. attorney and other prestigious positions.<sup>255</sup> Irrespective of any other legal remedies to which the dismissed U.S. attorneys or the passed-over applicants may resort,<sup>256</sup> one might inquire whether section 1985(3) would provide relief in light of *Farber*.

It is interesting to note that jurisdictions where the dismissed U.S. attorneys could possibly bring suit include circuits that have not determined whether section 1985(3) protects political classes.<sup>257</sup> However,

250. Dan Eggen & Paul Kane, *Gonzales: ‘Mistakes Were Made’*, WASH. POST, Mar. 14, 2007, at A1.

251. Julie Scelfo, *‘Quite Unprecedented’: Former U.S. Attorney Mary Jo White Explains Why the Firing of Eight Federal Prosecutors Could Threaten the Historic Independence of Federal Law-Enforcement Officials*, NEWSWEEK, Aug. 21, 2007, <http://www.newsweek.com/id/36208/output/print>. See also Eggen & Kane, *supra* note 250.

252. Eggen & Kane, *supra* note 250 (“The Justice e-mails and internal documents . . . show that political loyalty and positions on signature GOP policy issues loomed large in weighing whether a prosecutor should be dismissed.”).

253. See Dan Eggen, *Prosecutor Firings Not Political, Gonzales Says*, WASH. POST, Jan. 19, 2007, at A2.

254. Paul Kane & Dan Eggen, *Second Lawmaker Contacted Prosecutor*, WASH. POST, Mar. 6, 2007 (six of the eight U.S. attorneys were of the same political party as the current presidential administration).

255. David Johnston & Eric Lipton, *Ex-Justice Aide Admits Politics Affected Hiring*, N.Y. TIMES, May 24, 2007, at A1.

256. See *supra* notes 177, 188 and accompanying text. This is also ignoring any possible legal differences there may be between political discrimination in the termination context and the hiring context.

257. See *supra* note 114. One possible jurisdiction would be the D.C. Circuit, where the Department of Justice is located. See U.S. Dep’t of Justice, *Contact Us*, <http://www.usdoj.gov/contact-us.html> (last visited Feb. 4, 2008); U.S. Courts, <http://www.uscourts.gov/courtlinks> (last visited Feb. 4, 2008) (map showing the geographical apportionment of the appellate circuits). Other possible jurisdictions would include the location of the dismissed United States attorneys’ offices. In fact, six of the dismissed attorneys’ offices were in states that are found in the Ninth Circuit, which has also declined to decide the section 1985(3) political affiliation issue. See *supra*

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as previously discussed, courts since *Scott* have been reluctant to recognize political classes as protected under section 1985(3).<sup>258</sup> In addition, any circuit relying on *Farber's* analysis could potentially throw out a section 1985(3) claim brought by a dismissed U.S. attorney or passed-over applicant, because the prospective plaintiff would not be able to allege an identifiable class.<sup>259</sup> This is true for two reasons: (1) most of the dismissed attorneys were members of the same political party as the presidential administration,<sup>260</sup> thus not bringing into play *Farber's* implication that "membership in a political party" would constitute an "independently identifiable class";<sup>261</sup> and (2) the dismissed attorneys allegedly lost their positions, and the passed-over applicants were not hired for nonpartisan legal jobs, at least in part because of actions<sup>262</sup> in which they engaged that would result in a definition of the deprived class based on the plaintiff's conduct, violating the Court's instruction in *Bray v. Alexandria Women's Health Clinic*.<sup>263</sup>

Victims of wrongdoing based upon political differences, as may be the situation with the dismissed U.S. attorneys, need to know what remedies are available to them. To the extent that these potential victims do know because they happen to live in a circuit that has not decided the issue, the ability or inability to resort to a federal civil rights statute for redress should be uniform throughout the country. Perhaps in time the *Farber* decision, and other court decisions relying on *Farber*, will make the Court aware that political discrimination is still alive almost twenty-five years after *United Brotherhood of Carpenters, Local 610 v. Scott* and that the disunity in section 1985(3) jurisprudence throughout the country needs to be remedied.

note 114; Kane & Eggen, *supra* note 254 (listing office locations where fired U.S. attorneys worked); U.S. Courts, *supra*.

258. See *supra* note 207 and accompanying text.

259. See *supra* notes 95–109 and accompanying text.

260. See *supra* note 254 and accompanying text.

261. *Farber v. City of Paterson*, 440 F.3d 131, 138 (3d Cir. 2006). See also *supra* notes 109, 161–163 and accompanying text.

262. David Bowermaster, *Charges May Result from Firings, Say Two Former U.S. Attorneys*, SEATTLE TIMES, May 9, 2007 (stating that the dismissed attorneys' handling of "ongoing public-corruption or voter-fraud investigations" may have motivated the dismissal); Dan Eggen & Amy Goldstein, *Voter-Fraud Complaints by GOP Drove Dismissals*, WASH. POST, May 14, 2007, at A4 (stating that "[n]early half the U.S. attorneys slated for removal . . . were targets of Republican complaints that they were lax on voter fraud"). See Johnston & Lipton, *supra* note 255 (stating that a former Justice Department aide admitted that she researched whether job candidates contributed money to Republican or Democratic candidates to determine the candidates' political background).

263. 506 U.S. 263, 269 (1993) ("[A class] unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors."). See also *supra* notes 62, 164 and accompanying text.

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## VI. CONCLUSION

In deciding *Farber*, the Third Circuit answered the call from its district courts for guidance on section 1985(3). It realized that the practice of deciding a case on the narrowest grounds possible would not be beneficial in an area of jurisprudence wanting for case law. Additionally, the court correctly looked for any circuit and Supreme Court precedent. In an effort to predict how the Supreme Court would decide this issue, the Third Circuit appropriately relied upon the *Scott* dicta—the Court’s only substantive statement on the relationship between section 1985(3) and political affiliation—which implied that expanding section 1985(3) was imprudent. The *Farber* court was further correct to look to the circuit’s immutable characteristics approach, which, although flawed, has not been repudiated by the Supreme Court and should not be ignored absent an en banc or Court decision overruling the precedent. It would be difficult to maintain that one’s political affiliation is an immutable characteristic.

This is not to say that there are not legitimate arguments for extending section 1985(3) to political classes. One could arguably read section 1985(3)’s legislative history to protect those deprived of rights because of their political affiliation. One could also contend that the right to vote and participate in the political process is implicated. Further, growing divisions between those on different sides of the political spectrum may necessitate more protection from politically motivated actions, especially in the employment context. However, these considerations were properly subordinated to the Supreme Court’s interpretation of the legislative history and binding precedent. Now that the *Farber* court has settled the question in its circuit, one can only speculate as to how long the relationship between the scope of section 1985(3) and political affiliation will remain unsettled in other circuits and ultimately in the U.S. Supreme Court.

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