THE REJECTION OF EQUAL PROTECTION: A CASE FOR INADVERTENT DISCRIMINATION

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I. INTRODUCTION

Our Nation's standing as a "developed country" seems like a distant notion for those living and working in Flint, Michigan, where grim conditions represent a rather dystopian society. The Flint Water Crisis crept out of a failed effort to make water supply more cost-efficient for the city, prompting Flint officials to switch its water source to the Flint River in 2014.[1] The switch had immediate repercussions.[2] Because the Flint River naturally contains high amounts of chloride, the iron pipes in the water distribution system began to corrode.[3] The corrosion caused

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1. *See* Carthan v. Snyder (*In re* Flint Water Cases), 329 F. Supp. 3d 369, 383 (E.D. Mich. 2018), *vacated*, No. 16-cv-10444, 2018 U.S. Dist. LEXIS 192371 (E.D. Mich. Nov. 9, 2018) [hereinafter *Flint Water Cases*] (noting that Michigan Department of Environmental Quality (MDEQ) officials acknowledged that deciding whether to switch Flint's water source was based on cost, as opposed to scientific suitability). It should be noted that despite the emphasis on cost, an independent engineering firm—contracted to assess the cost effectiveness of switching the water source to the Flint River—concluded that remaining with the Detroit Water and Sewer Department (DWSD) would be "more cost-effective both in the short and long term." *Id.*

2. *Id.* at 385.

3. *Id.*; Terese Olson, *The Science Behind the Flint Water Crisis: Corrosion of Pipes, Erosion of Trust*, THE CONVERSATION (Jan. 28, 2016, 5:46 AM), https://theconversation.com/the-science-behind-the-flint-water-crisis-corrosion-of-pipes-

lead to leach out of the pipes and into the water.[4] The release of lead and iron also reacted negatively with the added chlorine, thereby preventing proper disinfection and increasing the presence of bacteria.[5] The ill-treated water supply was consequently distributed, consumed, and used by Flint residents for at least two years, causing a host of major public health concerns, including death.[6] Four years later, the lack of a clean water supply is still the reality for residents.[7]

For example, Dwayne Nelson was employed as a salesman with ABC Warehouse in Flint.[8] Nelson was battling cancer when he was admitted to the McLaren Hospital of Flint for complications from Legionnaires' disease.[9] Nelson contracted Legionnaires' after drinking

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erosion-of-trust-53776 [http://web.archive.org/web/20190905051522/https://theconversation.com/the-science-behind-the-flint-water-crisis-corrosion-of-pipes-erosion-of-trust-53776]; *see also* Ben Panko, *Scientists Now Know Exactly How Lead Got Into Flint's Water*, SMITHSONIAN.COM (Feb. 3, 2017), https://www.smithsonianmag.com/science-nature/chemical-study-ground-zero-house-flint-water-crisis-180962030/ [http://web.archive.org/web/20190907155329/https://www.smithsonianmag.com/science-nature/chemical-study-ground-zero-house-flint-water-crisis-180962030/].

4. Panko, *supra* note 3.

5. *Id.*

6. *See infra* Part II.A.

7. *See* Leonard N. Fleming, *Flint: Water Line Replacement Won't Be Done Till 2019*, THE DETROIT NEWS (Dec. 4, 2018, 8:39 PM), https://www.detroitnews.com/story/news/michigan/flint-water-crisis/2018/12/04/state-shrugs-flint-pipe-replacement-work-ahead/2204132002/ [http://web.archive.org/web/20190708172302/https://www.detroitnews.com/story/news/michigan/flint-water-crisis/2018/12/04/state-shrugs-flint-pipe-replacement-work-ahead/2204132002/]. Because Flint's service lines contributed to the water supply's lead contamination, the excavation and replacement of those lines has been underway with projected completion in late 2019. *Id.*

8. Elisha Anderson, *Here Are the Victims of The Legionnaires' Disease Outbreak in Flint*, DETROIT FREE PRESS (June 14, 2017, 10:28 AM), https://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/04/09/biographies-legionnaires-disease-flint-area/82478182/ [http://web.archive.org/web/20190728075351/https://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/04/09/biographies-legionnaires-disease-flint-area/82478182/].

9. *Id.* Legionnaires' disease is a type of pneumonia caused by bacteria growth (legionella pneumophila) in water. *See* Rebecca Hersher, *Lethal Pneumonia Outbreak Caused by Low Chlorine in Flint Water*, NPR (Feb. 5, 2018, 3:00 PM), https://www.npr.org/sections/health-shots/2018/02/05/582482024/lethal-pneumonia-outbreak-caused-by-low-chlorine-in-flint-water [http://web.archive.org/web/20191014211451/https://www.npr.org/sections/health-shots/2018/02/05/582482024/lethal-pneumonia-outbreak-caused-by-low-chlorine-in-flint-water]. Exposure to the bacteria can be fatal for those without a robust immune system. *Id.* Within weeks of the transition to the Flint River, the number of cases of Legionnaires' disease significantly increased, triggering an outbreak. *Id.* According to

Flint's water.[10] It was the Legionnaires' that caused his death—just days after his hospital admission.[11]

Porcha Clemons, the owner of a Flint dance studio, teaches free dance classes for children twice a week.[12] Though she has access to donated bottled water, she often uses tap water to bathe because it is easier; this despite the fact that her hair "falls out and feels funny."[13]

Nakiya Wakes moved to Flint with her children shortly before becoming pregnant with twins.[14] She suffered miscarriages in the first and second trimester, as both babies died in her womb at separate times.[15] Upon returning from the hospital, Wakes read a letter from the city of Flint advising pregnant women and residents over 55 years old not to drink the water—the same water that she had been consuming throughout her pregnancy.[16]

Crystle Davidson, mother to an eight-year old son, Julian, suffers from bouts of rashes caused by bathing in Flint's tap water.[17] Her main concern, however, is the effect of the increased levels of lead found in her son's blood.[18] Julian already struggles with learning disabilities due to attention deficit hyperactivity disorder.[19]

Is race relevant to the suffering caused by the use of Flint's contaminated water?[20] Nelson appears to have been a white male.[21]

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scientific studies, Flint's poor water quality and insufficient amount of chlorine enabled legionella growth during the time of the transition to the Flint River. *See* Sammy Zahran et al., *Assessment of the Legionnaires' Disease Outbreak in Flint, Michigan*, PROC. OF THE NAT'L ACAD. OF SCI. (Feb. 20, 2018), https://www.pnas.org/content/115/8/E1730 [http://web.archive.org/web/20190731015523/https://www.pnas.org/content/115/8/E1730].

10. Anderson, *supra* note 8.

11. *Id.*

12. Anna Davies, *Voices of the Forgotten: Flint Speaks Out*, THE DAILY DOSE (Mar. 8, 2018), https://www.ozy.com/true-story/voices-of-the-forgotten-flint-speaks-out/85049/ [http://web.archive.org/web/20181008135657/https://www.ozy.com/true-story/voices-of-the-forgotten-flint-speaks-out/85049/].

13. *Id.*

14. Mallory Simon & Sara Sidner, *Flint Water Crisis: Families Bear Scars from 'Manmade Disaster'*, CNN (Mar. 5, 2016, 8:33 AM), https://www.cnn.com/2016/03/03/health/water-crisis-flint-michigan/ [http://web.archive.org/web/20190529213659/https://www.cnn.com/2016/03/03/health/water-crisis-flint-michigan/].

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. The news articles do not describe the victims in racial terms. *See* Anderson, *supra* note 8; Davies, *supra* note 12; Simon & Sidner, *supra* note 14. Through memorial and editorial stories, this Note intentionally observed the victims' races. This Note highlights

Davidson appears to be a white woman.[22] Clemons and Wakes appear to be black women.[23] In recounting each person's suffering and misfortune, it would be remiss to objectify their race in relation to their suffering. Although the race of the victim has no bearing on the degree of sympathy owed to the individuals who are suffering, the wrong inflicted on the people of Flint would not have happened but for the race of a majority of its citizens.[24] In light of this, can white residents of Flint—a majority African American city—be part of a claim that alleges injury caused by deprivation of equal protection of the law on the basis of race?

According to the plaintiffs in *Flint Water Cases*, racially discriminatory animus towards African American residents motivated the decision to switch Flint's water supply.[25] There, the district court dismissed the plaintiffs' Equal Protection claim because all—as opposed to only African American—residents included the claim in their pleadings.[26] Insisting on a reductive and unfair conception on the role of race, the court found that only the protected class alleged to have been conspired against can plead these allegations.[27] This had the ironic effect of dismissing, rather than addressing, a monumental wrong—a racially discriminatory conspiracy that caused cross-racial injury.[28]

Courts evaluating Equal Protection claims must factor in potential race discrimination;[29] the question is to what degree.[30] The *Flint Water*

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the victim's race in an effort to provoke the view that race should be irrelevant in evaluating injury.

21. Anderson, *supra* note 8.

22. Simon & Sidner, *supra* note 14. Note that this assertion is based on a photograph retrieved from the article.

23. Davies, *supra* note 12; Simon & Sidner, *supra* note 14.

24. *See infra* Part II.A (discussing Flint residents' claim that government officials and others in authority switched their water supply to the Flint River because the city has a majority black population).

25. Flint Water Cases, 329 F. Supp. 3d 369, 418 (E.D. Mich. 2018).

26. *Id.* at 426. The plaintiffs' Equal Protection Claim—and the principal claim that this Note examines—was brought under 42 U.S.C. § 1985. A protected class is generally a subset of people who are vulnerable to discrimination due to, but not limited to, their race, gender, sexual orientation, or religious beliefs. *See* Frontiero v. Richardson, 411 U.S. 677, 682 (1973); Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2005). Because African Americans have been recognized as a protected class, they are afforded special protection by law from racially discriminatory actions, laws, or policies. *See* Vaughn v. Watkins Motor Lines, Inc., 291 F.3d 900, 906 (6th Cir. 2002); Browder v. Tipton, 630 F.2d 1149, 1150 (6th Cir. 1980).

27. *Flint Water Cases*, 329 F. Supp. 3d at 414–17.

28. *See id.*

29. *See* Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 265–66 (1977).

Cases court took a more narrow approach by finding that the claimants *harmed* by racial discrimination must be part of the class of *intended* victims.[31] For example, "University A," in a concealed effort to limit the admission of black students, rejects all applications that come from "Public School B," which has a majority black demographic. However, due to the rejection of all applications coming from Public School B, the minority of white students who also attend that school inadvertently lost the opportunity to join University A. Thus, the group directly affected by the university policy includes both black and white students of Public School B, even though the policy's intent lies in racial discrimination against the black students in particular. In such instances, courts may find that white people who suffer from a racially discriminatory conspiracy directed at black people would not be permitted to bring forth an Equal Protection claim to recover damages caused by that conspiracy.[32]

According to the United States Census Bureau, African Americans comprise a majority of the population of Flint.[33] Because the black population makes up 53.9% of the community, in comparison to 39.9% white residents,[34] any injury suffered by Flint residents as a whole disproportionally affects black people.

Many American communities are becoming more racially integrated, albeit imperfectly.[35] The significance of racial integration means that discrimination against black people, a protected class, may also

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30. *See id.* ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." (quoting Washington v. Davis, 426 U.S. 229, 242 (1976) (internal quotation marks omitted))).

31. *See Flint Water Cases*, 329 F. Supp. 3d at 416.

32. *See id.*

33. U.S. CENSUS BUREAU, FLINT, MI, POPULATION ESTIMATES (2017), https://www.census.gov/quickfacts/fact/table/flintcitymichigan/PST045217 [http://web.archive.org/web/20191011112611/http://www.census.gov/quickfacts/fact/table/flintcitymichigan/RHI225218].

34. *Id.*

35. *See* Ronald F. Ferguson, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas*, *in* 1 AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES 391, 401–03 (Neil J. Smelser et al. eds., 2001) (noting that certain cities, such as Los Angeles and Boston, have experienced a "sustained decline" in black-white segregation). While neighborhood segregation has decreased, racism and discrimination have not been eradicated by any means—implicit discrimination is rampant throughout the U.S. today. *See* David H. Chae et al., *The Role of Racial Identity and Implicit Racial Bias in Self-Reported Racial Discrimination: Implications of Depression Among African American Men*, 438 J. OF BLACK PSYCHOL. 789, 795 (2017) (discussing past studies which found that 70% of people in the U.S. who take an implicit bias association test display an anti-black bias).

inadvertently affect white people, a non-protected class.[36] The pervasiveness of institutional racism has contributed to the far-reaching hand of implicit racial animus.[37] Thus, systemically racist policies and practices have placed *all* Flint's residents at a disadvantage.[38] Similarly, advocates for environmental justice reference the Flint Water Crisis to substantiate research findings that racial minorities are more likely to live in polluted environments, are disproportionately exposed to lead, and are more likely to suffer from racial discrimination in the enforcement of environmental laws and regulations.[39]

The Flint Water Crisis has become a household phrase over the past few years.[40] It is the scarlet letter on America's legal landscape,

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36. Inadvertent discrimination is a different concept than claims of reverse discrimination. Reverse discrimination claims are made by non-minority, white plaintiffs who allege that they have been disparately treated on the basis of their *own* race. *See* Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985) (finding that reverse discrimination complainants bear the burden of demonstrating intentional discrimination despite majority status). For an in-depth analysis of reverse discrimination claims, see Shirley W. Bi, Note, *Race-Based Reverse Employment Discrimination Claims: A Combination of Factors to the Prima Facie Case for Caucasian Plaintiffs*, 40 CARDOZO L. REV. DE NOVO 41 (2016).

37. *See* Flint Water Cases, 329 F. Supp. 3d 369 (E.D. Mich. 2018).

38. *Id.*

39. *See* Laura Pulido, *Flint, Environmental Racism, and Racial Capitalism*, 27 CAPITALISM NATURE SOCIALISM 1, 1–2, 6–8 (2016), https://www.tandfonline.com/doi/pdf/10.1080/10455752.2016.1213013 [http://web.archive.org/web/20191028213105/https://www.tandfonline.com/doi/pdf/10.1080/10455752.2016.1213013] (arguing that the Flint Water Crisis is a powerful example of environmental racism, where the lives of the people in that community are devalued on the basis of their "blackness" and "surplus status"); John Eligon, *A Question of Environmental Racism in Flint*, N.Y. TIMES (Jan. 21, 2016), https://www.nytimes.com/2016/01/22/us/a-question-of-environmental-racism-in-flint.html [http://web.archive.org/web/20190828231223/https://www.nytimes.com/2016/01/22/us/a-question-of-environmental-racism-in-flint.html].

40. The Flint Water Crisis has outraged the nation. It is not just an issue for lawyers and legislators to assess, but social justice experts, advocates, celebrities, filmmakers, and medical professionals have taken up the Crisis as a cause. *See* John Crawford, *Storytelling for Social Justice in Flint and Beyond*, BABSON (Feb. 20, 2019), http://entrepreneurship.babson.edu/storytelling-for-social-justice-in-flint-and-beyond/ [http://web.archive.org/web/20190809120417/https://entrepreneurship.babson.edu/storytelling-for-social-justice-in-flint-and-beyond/]; Phil Helsel, *Celebrities, Companies Step Up To Help Flint Amid Water Crisis*, NBC NEWS (Jan. 26, 2016, 7:13 PM), https://www.nbcnews.com/storyline/flint-water-crisis/celebrities-companies-step-help-flint-amid-water-crisis-n504776 [http://web.archive.org/web/20181231224011/https://www.nbcnews.com/storyline/flint-water-crisis/celebrities-companies-step-help-flint-amid-water-crisis-n504776]; Tom Henry, *Flint Crisis, Firsthand: Dr. Mona Hanna-Attisha Tells Stories of the City*, THE BLADE (July 29, 2018, 12:02 AM), https://www.toledoblade.com/local/2018/07/28/Flint-

representing a plague of institutional racism and socioeconomic injustice.[41] Race played a role in the inadequacy of and indifference to equal protection of the Flint population, compelling the inquiry concerning who should have access to clean water in the United States.[42] The plethora of litigation that has ensued involves questions regarding *which* injured Flint residents have standing to assert constitutional claims.[43] *Flint Water Cases* outlines the main litigation dealing with this issue.[44] There, the court failed to fully appreciate the relevance of race in evaluating the plaintiffs' Equal Protection claims.[45]

This Note argues that the purpose of § 1985(3), a federal equal protection provision, is to provide relief for injuries resulting from discriminatory conspiracies, irrespective of whether the conspiracy was directed at the claimant.[46] In light of this purpose, the *Flint Water Cases* plaintiffs properly alleged a § 1985(3) claim for injuries caused by a racially motivated conspiracy. Further, Equal Protection claims based on injury caused by institutional and inadvertent racism (as opposed to explicit, individualized racism) do not stray from the legislative purpose of § 1985(3).[47] Non-protected persons should be able to assert Equal Protection claims when injured by discrimination directed toward a protected class.[48]

This Note proceeds in four parts. Part II provides a brief overview of the Flint Water Crisis, an examination of the legislative history behind

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crisis-firsthand-Dr-Mona-Hanna-Attisha-tells-stories-of-the-city/stories/20180724143 [http://web.archive.org/web/20180731062340/https://www.toledoblade.com/local/2018/07/28/Flint-crisis-firsthand-Dr-Mona-Hanna-Attisha-tells-stories-of-the-city/stories/20180724143].

41. *See* Pulido, *supra* note 39, at 1–2.

42. *See, e.g.*, Lauren Berg, *Clean Water and the Environmental Justice Movement*, SHARED JUSTICE (June 12, 2019), http://www.sharedjustice.org/domestic-justice/2019/6/12/clean-water-and-the-environmental-justice-movement [http://web.archive.org/web/20191028222052/http://www.sharedjustice.org/domestic-justice/2019/6/12/clean-water-and-the-environmental-justice-movement].

43. *Compare* Flint Water Cases, 329 F. Supp. 3d 369 (E.D. Mich. 2018) (dismissing an equal protection claim brought by Flint residents as a class on the ground that "at least 34% are not members of the protected class"), *with* Guertin v. Michigan, No. 16-cv-124122017, 2017 WL 2418007, at *11 (E.D. Mich. June 5, 2017) (denying as "frivolous" defendants' motion to dismiss for lack of standing, where plaintiffs properly alleged injury due to consumption of Flint water allegedly contaminated by the defendants).

44. *Flint Water Cases*, 329 F. Supp. 3d at 415.

45. *Id.*

46. *See infra* Part III.A.

47. *See infra* Part II.A (discussing the legislative history of §1985(3)).

48. In other words, plaintiffs must suffer injury caused by a conspiracy against a protected class, but do not have to be a *member* of the protected class.

§ 1985(3), and an analysis of the *Flint Water Cases*.[49] Examination of the legislative history and the plain text of § 1985(3) indicates that the statute's scope covers all persons injured by a conspiracy motivated by racial animus—not just the intended targets of that conspiracy.[50] Part III analyzes the seminal Supreme Court case on § 1985(3), *Griffin v. Breckenridge*, and also discusses the Third Circuit's succinct application of *Griffin* in *Great American Savings & Loan Ass'n v. Novotny*.[51] The Court in *Griffin* outlined the robust context of § 1985(3) legislation and provided precedent that directly applies to the facts of the Flint case.[52] This Note examines the ruling in *Flint Water Cases* in light of both the *Griffin* and *Novotny* decisions as well as the legislative history of § 1985(3). Additional arguments outline why the district court made a conclusory leap in finding that § 1985(3) claimants needed to be part of the protected class in which the conspired was aimed. Part IV concludes with a brief overview of the Note and discusses possible limitations.

II. BACKGROUND

A. Flint Water Crisis

The Detroit Water and Sewer Department (DWSD) supplied the municipal water in Flint for approximately 50 years and continued to do so until 2014.[53] The city decided to switch its water source from DWSD to the Flint River, despite warnings against the transition.[54] Michigan Department of Environmental Quality (MDEQ) District Supervisor Stephen Busch warned government officials that sourcing water from the Flint River may result in a high probability of certain health risks that "would come with additional regulatory requirements" costing over sixty-million dollars.[55] Former Utility Administrator of Flint, Michael Glasgow, expressed concerns to state officials and personnel at the MDEQ regarding the city's lack of adherence to safety requirements,

49. Although this Note focuses on the decision in *Flint Water Cases*, the Flint Water Crisis lead to a spate of litigation. *See, e.g.*, Boler v. Earley, 865 F.3d 391 (6th Cir. 2017); Davenport v. Lockwood, Andrews & Newnam, Inc., 854 F.3d 905 (6th Cir. 2017); Mays v. Snyder, 916 N.W.2d 227 (Mich. Ct. App. 2018), *leave to appeal granted*, 503 Mich. 1030 (2019).

50. *See infra* Part II.B (discussing the legislative history of §1985(3)).

51. *See infra* Part III.A.; Griffin v. Breckenridge, 403 U.S. 88, 102–03 (1971); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1244 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979).

52. *Griffin*, 403 U.S. at 88.

53. Flint Water Cases, 329 F. Supp. 3d 369, 380, 382 (E.D. Mich. 2018).

54. *Id.* at 383, 385–86.

55. *Id.* at 383.

inadequate monitoring, and training during the transition period.[56] Glasgow said that "management had its own agenda" and that he felt pressured to approve the switch.[57]

Although Glasgow advised authorities of the needed adjustments and improvements, "[w]hen the transition occurred, Flint's water treatment system was not prepared to safely deliver Flint River water to users."[58] The acute effects quickly manifested, as the newly sourced water caused pipes to leak out toxins.[59] Weeks after the switch, residents complained of brown water with an abnormal smell and taste and of rashes linked to water use.[60] Tests soon revealed that lead and bacteria contaminated the water in amounts exceeding legal limits.[61] Meanwhile, confronted with the reality of the previously warned of risks, Flint and the State of Michigan decided to deal with the crisis behind closed doors.[62] Users' exposure to bacteria and neurotoxins continued for almost two years without any acknowledgment of the harms, while officials falsely assured residents that the water was safe.[63]

Ultimately, Flint residents brought a class action lawsuit against the State of Michigan, the city of Flint, government contractors, and other public officials.[64] The plaintiffs asserted a claim under 42 U.S.C. § 1985(3), alleging that defendants' conspiracy "to deprive the 'water users in the predominately African American community of Flint' of their civil rights" injured them.[65] The plaintiffs claimed that defendants knew the water from the Flint River was "grossly inferior" to the DWSD water source.[66] The complaint stated further:

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56. *Id.* at 385.

57. *Id.* (internal quotation marks omitted).

58. *Id.*

59. *Id.*

60. *Id.* at 380, 385.

61. *Id.* at 386.

62. *Id.* at 389 ("By late 2014 or early 2015, Lyon also knew about the increase in children with elevated blood lead levels and Legionnaires' disease cases, but did not report these findings to the public or other government officials, or take any steps to otherwise intervene."); ("Throughout September 2015, Wurfel and the MDEQ continued to issue false statements claiming the water in Flint was safe, and that the people sounding alarms about Flint's water quality were mistaken or 'rogue.'").

63. *Id.* at 388–89.

64. *See id.* at 414–15.

65. *Id.* (quoting Consolidated Amended Class Complaint for Injunctive and Declaratory Relief, Money Damages, and Jury Demand, *In re* Flint Water Cases, No. 5:16-cv-10444-JEL-MKM (E.D. Mich. Nov. 29, 2017), ECF No. 214 at PID 8621 [hereinafter Complaint]).

66. Complaint, ECF 214 at PID 8612.

> Recognizing these facts, Defendants conspired to devise an Interim Plan that allowed the predominately white water users of Genesee County to receive the safe superior water from DWSD and the predominately black water users of Flint would have to accept during the interim period grossly inferior, previously rejected and potentially unsafe Flint River water.[67]

The plaintiffs also alleged an absence of any rational economic or fiscal justification for defendants' decision to switch Flint's water source.[68] In light of this, and of the racial composition of Flint's population, the plaintiffs alleged that defendants engaged in a conspiracy produced by "invidious racial animus in violation of the Thirteenth Amendment."[69] Plaintiffs asserted that the distribution of dangerous water is "a badge, vestige, and symbol of slavery abolished and prohibited by the Thirteenth Amendment," thereby depriving Flint residents of equal protection of the law.[70]

However, the court dismissed the § 1985(3) claim, finding that although the plaintiffs properly alleged a conspiracy motivated by racial animus, they failed to demonstrate that they were "a suspect class subject to heightened protection under the Equal Protection clause."[71] The court reasoned that a "traditional class" of plaintiffs in a § 1985(3) action would have only included the African American residents of Flint, because they were the direct targets of the alleged racial animus.[72]

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67. *Id.* at PID 8620–21.

68. *Id.* at PID 8625.

69. *Id.* at PID 8621. The Thirteenth Amendment to the United States Constitution provides in relevant part, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

70. Complaint, ECF 214 at PID 8621.

71. Flint Water Cases, 329 F. Supp. 3d 369, 415–17 (E.D. Mich. 2018).

72. *See id.* at 415. At the time of this Note, the case is unable to move forward because plaintiffs have asked to amend the complaint on issues upon which judgment was rendered, which resulted in the judgment being vacated. *See* Waid v. Snyder, Nos. 18-1960; 18-1967; 18-1970; 18-1983; 18-1999; 18-2386; 18-2395; 18-2416; 18-2426, 2019 WL 4121023, at *1–2 (6th Cir. Feb. 19, 2019). It is unclear at this point what aspect of their complaint the plaintiffs seek to amend. *See id.* at *2.

B. Legislative History of 42 U.S.C. § 1985(3)

42 U.S.C. § 1985(3) has its roots in the Civil Rights Act of 1871, otherwise known as the Ku Klux Klan Act.[73] The Act provided for civil and criminal penalties and protections against the types of conspiratorial violence instigated by the Klan.[74] The legislature acted in response to the violent resistance to Reconstruction in the South.[75] Post-Civil War America was recovering from slavery, and racism continued to pervade in the form of other discriminatory measures.[76]

Those opposed to Reconstruction—mostly white Southerners—fought against emancipation by violating the rights of freed African Americans and their supporters.[77] The members of the Ku Klux Klan were not mere oppositionists; they operated through disguises and secrecy, perpetrating organized violence, oppression, and terror against the African American population.[78] President Ulysses S. Grant responded to the Southern turmoil, urging Congress to enact legislation to remedy the dangerous conditions.[79]

Congressional debates addressed the need to repress the Klan, who were engaged in a "pre-concerted and effective plan by which thousands of men are deprived of the equal protection of the laws."[80] Acknowledging that the Klan was conspiring to prevent "certain classes of citizens of the United States from enjoying these new rights conferred upon them by the Constitution and laws," legislators sought to strengthen legal protections against racism.[81]

Congressional debates reveal Congress's intent to provide "a civil action to *Anybody* who may be injured" in furtherance of a conspiracy.[82] Not only did legislators acknowledge the widespread violence and death

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73. *See* Civil Rights (Ku Klux Klan) Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. §§ 1983, 1985(3)); 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).

74. Shatz, *supra* note 73, at 911.

75. *Id.*

76. Lee Pinzow, *Is It Really All About Race?: Section 1985(3) Political Conspiracies in the Second Circuit and Beyond*, 83 FORDHAM L. REV. 1032, 1038–39 (2014).

77. *Id.* at 1039.

78. *Id.* at 1041–42.

79. *Id.* at 1039.

80. Stephanie M. Wildman, *42 U.S.C § 1985(3) – A Private Action to Vindicate Fourteenth Amendment Rights: A Paradox Resolved*, 17 SAN DIEGO L. REV. 317, 322 (1979) (quoting a statement made by Representative Coburn).

81. *Id.*

82. Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1244 (3d Cir. 1978) (emphasis added) (quoting Statement of Senator Edmunds, CONG. GLOBE, 42nd Cong., 1st Sess. 568 (1871)).

of African Americans, but they also highlighted the perilous fate of those who sought to promote African American rights.[83] Representative Buckley told the story of a white man hanged by the Ku Klux Klan for seeking to educate African Americans and establish equality.[84] Similar stories of non-black persons victimized by the Klan for seeking to uplift African Americans were also discussed in these debates.[85]

Representative Shellabarger reported a story of a man who was "shot at and banished" for teaching black children to read.[86] He also spoke of a Reverend sent from Philadelphia to preach to black people, who as a result was "scourged near unto death."[87] In briefing Congress on the Klan's activities, Representative Perry announced, "Their operations are, therefore, directed chiefly against blacks *and against white people who by any means attract attention as earnest friends of the blacks.*"[88] Such declarations made during the Congressional debates strongly suggest that the proposed legislation sought to outlaw discriminatory acts which deprived *anyone* of equal protection of the laws.[89]

The Ku Klux Klan Act was later codified and signed into law as 42 U.S.C. § 1985(3).[90] Section 1985(3) provides a civil cause of action for injuries caused by acts committed in furtherance of a conspiracy designed to deprive persons of the equal protection of the laws or equal privileges and immunities under the laws of the United States.[91] Thus, the statute gives victims injured by such conspiracies the opportunity to recover damages against conspirators.[92] Section 1985(3) states in relevant part:

> If two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, . . . the party so injured or deprived may have an action for the recovery of

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83. *See* Statement of Representative Buckley, CONG. GLOBE, 42nd Cong., 1st Sess. app. at 191–93 (1871).

84. *Id.* at 193.

85. *Id.* at 191–93.

86. Statement of Representative Shellabarger, CONG. GLOBE, 42nd Cong., 1st Sess. 517 (1871).

87. *Id.*

88. Statement of Representative Perry, CONG. GLOBE, 42nd Cong., 1st Sess. app. at 78 (1871) (emphasis added).

89. Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1244 (3d Cir. 1978) ("In light of this history, we do not believe that Congress intended to immunize Klansmen when their victims happened to be white.").

90. *See* 42 U.S.C. § 1985(3) (2018); Shatz, *supra* note 73.

91. 42 U.S.C. § 1985(3).

92. *Id.*

> damages occasioned by such injury or deprivation, against any one or more of the conspirators.[93]

As such, to make out a § 1985(3) claim, plaintiffs must show: (1) a conspiracy; (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws"; (3) an act in furtherance of the conspiracy; and (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.[94] In addition to these elements, the Supreme Court in *Griffin v. Breckenridge* (the seminal case on § 1985(3)) found that there must also be a "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[95]

C. In Re Flint Water Cases: Equal Protection Access Denied

The district court in *Flint Water Cases* noted that the class conspired against "must be a suspect class subject to heightened protection under the Equal Protection Clause."[96] The plaintiffs claimed that the purported suspect class was "all water users of Flint."[97] The court found this problematic, noting that African American residents would be the "traditional class" of plaintiffs because of their status as a protected class.[98] According to the court, if only the black residents had pleaded the § 1985(3) claim and had been successful, the white residents would be added to any remedy achieved for the community without having been a party to the claim.[99]

The court asked plaintiffs to identify cases where an "Equal Protection class subject to heightened scrutiny" included both "members of a suspect class" *and* members outside that class.[100] The plaintiffs cited *Adickes v. S.H. Kress & Co.*,[101] a case in which a restaurant denied service to a teacher because she was a white woman in the company of

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93. *Id.*

94. Griffin v. Breckenridge, 403 U.S. 88, 102–03 (1971).

95. *Id.* at 102. In *Griffin*, the Court also held that § 1985(3) could be used against private citizens who conspired to deprive others of their civil rights. *Id.* at 104.

96. Flint Water Cases, 329 F. Supp. 3d 369, 415 (E.D. Mich. 2018) (citing Browder v. Tipton, 630 F.2d 1149, 1150 (6th Cir. 1980)).

97. *Id.*

98. *Id.*

99. *See infra* Part IV (discussing the limitation that an equal protection claim plead only by African Americans would render the same result if it also was litigated with white neighbors).

100. *Flint Water Cases*, 329 F. Supp. 3d at 415.

101. *Id.*

her African American students.[102] Upon leaving the restaurant, an officer arrested the teacher on the charge of vagrancy.[103] The teacher sued, claiming that the restaurant and police conspired to violate her equal protection rights.[104]

The *Flint Water Cases* court distinguished *Adickes* from the Flint residents' case on the grounds that in *Adickes*, only the teacher who alleged that she was "discriminated against on the basis of her race" brought suit.[105] But in the instant case, Flint residents are alleging that "regardless of race, they were equally punished based on animus *toward the African American members* of the class."[106]

The district court's characterization is inconsistent with what the Supreme Court said in *Adickes*, viz., that a "[s]tate must not discriminate against a person because of his race *or* the race of his companions," and that the teacher was denied service "because she was a white person in the company of Negroes."[107]

Despite this, the court was not persuaded that *Adickes* applied to the matter before it, because the plaintiffs' Equal Protection claim was based on animus against only the African American members of the class.[108] As the court noted, white residents did not claim "they were discriminated against on the basis of their race."[109] Rather, they claimed "they were discriminated against because they were members of a group" comprised of majority African Americans who were the direct targets of a conspiracy.[110] The district court ultimately dismissed the § 1985(3) claim, noting that the proposed class was based on "association" as opposed to race, and therefore it did not constitute a suspect class "subject to heightened scrutiny."[111]

The district court strayed from the legislative purpose of § 1985(3), which the Supreme Court undertook to resolve in *Adickes*.[112] The court effectively rearranged the scope of the requirements set forth in the statute, thereby reducing the effectiveness of equal protection laws in protecting against and providing remedies for injuries caused by racial discrimination.

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102. Adickes v. S.H. Kress & Co., 398 U.S. 144, 149 (1970).
103. *Id.*
104. *Id.*
105. *Flint Water Cases*, 329 F. Supp. 3d at 416.
106. *Id.* (emphasis added).
107. *Adickes*, 398 U.S. at 151–52 (emphasis added).
108. *Flint Water Cases*, 329 F. Supp. 3d at 416.
109. *Id.*
110. *Id.*
111. *Id.* at 416–17.
112. *See generally Adickes*, 398 U.S. 144.

III. ANALYSIS

A. The Seminal Case on § 1985(3)

In *Griffin v. Breckenridge*, the Supreme Court "gave new life to the civil conspiracy provisions of the Klu Klux Klan Act."[113] In *Griffin*, three black plaintiffs were passengers in a car owned and driven by R.G. Grady.[114] The black passengers and Grady were brutally attacked by white men who mistakenly thought that Grady, the driver, was a civil rights activist for African Americans.[115] The plaintiffs sued the assailants, asserting a § 1985(3) violation.[116] They alleged that defendants acted pursuant to a conspiracy, through intimidation and force, to prevent them and other African Americans from seeking equal protection of the law.[117] The basis for the conspiracy was the defendants' mistaken belief that Grady was a civil rights activist.[118] However, Grady was not a party to the suit.[119]

Upon examining the historical background, plain statutory language, and legislative history, the Supreme Court concluded that the language in § 1985(3) requiring intent to deprive another individual of "equal protection" or "equal privileges and immunities" requires that the conspiracy be motivated by "racial, or perhaps otherwise class-based, invidiously discriminatory animus."[120]

The Court found that plaintiffs satisfied the element of racial animus by alleging that defendants acted "under a mistaken belief that R.G. Grady was a worker for Civil Rights for [African Americans]."[121] It stated that such allegations "clearly support the requisite animus to

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113. Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1240 (3d Cir. 1978).

114. Griffin v. Breckenridge, 403 U.S. 88, 90 (1971).

115. *Id.* The complaint alleged that the defendants,

> drove their truck into the path of Grady's automobile and blocked its passage over the public road. Both defendants then forced Grady and said plaintiffs to get out of Grady's automobile and prevented said plaintiffs from escaping while defendant James Calvin Breckenridge clubbed Grady with a blackjack, pipe or other kind of club by pointing firearms at said plaintiffs and uttering threats to kill and injure them if defendants' orders were not obeyed.

Id. at 90–91.

116. *Id.* at 103.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 102.

121. *Id.* at 103. Note that the plaintiffs were not necessarily attacked because they were black, but because defendants falsely assumed that plaintiffs' companion, Grady, was a civil rights activist.

deprive the [plaintiffs] of the equal enjoyment of legal rights because of their race."[122] Further, the Court concluded that plaintiffs properly alleged injury under the statute and noted "whether or not the nonparty Grady was the main or only target of the conspiracy," the plaintiffs' allegations include "personal injury resulting from those acts."[123]

The same would be true if there was no one but Grady in the car, or if Grady himself had been white—though the Court does not mention his race.[124] Further, had the defendants not falsely presumed Grady was a civil rights activist, the conspiracy that harmed the plaintiffs might not have transpired.[125]

Under these circumstances, the Court found that the plaintiffs properly alleged that the conspiracy caused injury and disregarded as immaterial the fact that the plaintiffs were not the intended target of the conspiracy.[126] Had the car passengers been white, they would still be victims of a violent act caused by racial animus against a person believed to be a civil rights activist for African Americans.[127]

Novotny v. Great American Savings & Loan Ass'n supports these points.[128] The Third Circuit analyzed *Griffin's* reasoning and stated, "There is no intimation that, had one of the plaintiffs in Griffin been a white civil rights worker, he would have been denied the cause of action which his black compatriots were granted."[129]

The Third Circuit closely analyzed the statutory terms and legislative history of § 1985(3) as laid out by the Supreme Court and held that the provision does not require that a claimant "have any relationship to 'the person or class of persons' which the conspiracy seeks to deprive of

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122. *Id.*

123. *Id.*

124. *See Griffin*, 403 U.S. 88. There seems to be conflicting views regarding R.G. Grady's race. *Compare* Timothy Verhoff, *Class Struggles: A Century After the Ku Klux Klan Act and Still Seeking Protection for the Disabled*, 1999 WIS. L. REV. 153, 158 (1999) (stating that Grady was a "white man"), *with* CHRISTOPHER M. RICHARDSON & RALPH E. LUKER, HISTORICAL DICTIONARY OF THE CIVIL RIGHTS MOVEMENT 206 (2nd ed. 2014) (stating that Griffin and Grady were "[t]wo African Americans"), *and* John Valery White, *Vindicating Rights in a Federal System: Rediscovering 42 U.S.C. § 1985(3)'s Equality Right*, 69 TEMP. L. REV. 145, 220 (1996) (stating that Griffin and Grady were "black citizens of Mississippi and Tennessee").

125. *See Griffin*, 403 U.S. 88.

126. *Id.* at 103 ("Finally, the petitioners—*whether or not the nonparty Grady was the main or only target of the conspiracy*—allege personal injury resulting from those acts.") (emphasis added).

127. *See id.* at 90.

128. Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1245 (3d Cir. 1978).

129. *Id.* at 1245.

equal protection," nor does it "presuppose[] membership in the class against which the conspiracy is directed."[130]

In *Novotny*, a male employee sued his former employer, Great American Federal Savings and Loan Association (GAF), asserting a § 1985(3) sex discrimination claim for terminating him due to his known support of equal employment opportunities for women.[131] When a female co-worker alleged sex discrimination at the company, Novotny, then a member of the board of directors, took up her cause by expressing his view that GAF was not in compliance with the relevant employment law.[132] GAF terminated Novotny shortly thereafter.[133]

Defendants argued against the Equal Protection claim, asserting that Novotny—a male—lacked standing to raise a § 1985(3) sex discrimination claim since "the animus toward females was not directed at him."[134] However, the Third Circuit upheld his claim, concluding that a § 1985(3) action does not require "a conspiracy involving invidious animus directed against the plaintiff *personally*."[135]

The court articulated that § 1985(3) was enacted to provide a cause of action for violations analogous to those in the instant case, citing two pertinent instances at the time of legislation, in which non-black persons were murdered by the Klan for their support and service to African Americans.[136] The court reasoned:

> In light of this history, we do not believe that Congress intended to immunize Klansmen when their victims happened to be white. By analogy, members of a conspiracy to deprive women of equal rights are liable under § 1985(3) *to persons who are injured in furtherance of the object of the conspiracy*, whether male or female.[137]

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130. *Id.* at 1244.
131. *Id.* at 1237–38.
132. *Id.* at 1238.
133. *Id.*
134. *Id.* at 1244.
135. *Id.* at 1245 (emphasis added).
136. *Id.* at 1244.
137. *Id.* (emphasis added). The Supreme Court later vacated *Novotny* because the plaintiff had alleged a conspiracy under Title VII of the Civil Rights Act of 1964. *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 378 (1979). The Court held that Title VII could not be a basis for a § 1985(3) claim because it would circumvent the procedural requirements that Congress included in Title VII. *Id.* It is important to note, however, that the Supreme Court did not disapprove of—or even address—the Third Circuit's reasoning on the issue of Novotny's standing to bring forth a § 1985(3) sex discrimination claim. *See id.* at 366–78.

B. Significant Case Law on § 1985(3)

The court in *Flint Water Cases* emphasized that plaintiffs failed to identify any case in which an Equal Protection claim was alleged by a class of both protected and non-protected persons.[138] The court's emphasis, however, misconstrues the reasoning that resolves a § 1985(3) claim. The question whether plaintiffs properly alleged the "protected class" requirement should be viewed in the context of whether the conspiracy was *aimed* at a protected class. The issue of standing, therefore, is resolved in determining whether injury was caused by an alleged conspiracy against a protected class, not whether the claimant is *part* of a protected class.[139]

The district court cited *Browder v. Tipton* in confining § 1985(3) to a cause of action exclusively for "protected classes" to allege.[140] The court misperceived the question concerning whether claimants have been injured by a discriminatory conspiracy.[141] It is not a question of who is in the protected class, but whether the conduct prohibited by the statute injured the plaintiffs. The standard requires a conspiratorial racial animus, not that the victims themselves be members of any particular group.[142] Using *Browder*,[143] this Note argues that the *Flint Water Cases* court made an unwarranted and conclusory leap.

In *Browder*, the Sixth Circuit held that the class of individuals protected by § 1985(3) consists of "minorities that receive special protection" for their "inherent personal characteristics."[144] The plaintiffs' § 1985(3) claim failed because they could not allege membership in a protected class.[145] The proposed class was comprised of persons who crossed a picket line during a strike and were "falsely arrested."[146] The plaintiffs alleged that the arrest was based on discriminatory animus against the class for partaking in the strike.[147] The Sixth Circuit

138. Flint Water Cases, 329 F. Supp. 3d 369, 415 (E.D. Mich. 2018).

139. *See Novotny*, 584 F.2d at 1245.

140. *Flint Water Cases*, 329 F. Supp. 3d at 415; *see also* Browder v. Tipton, 630 F.2d 1149, 1150 (6th Cir. 1980) ("[T]he class of individuals protected by the 'equal protection of the laws' language of the statute are those so-called 'discrete and insular' minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics.").

141. *See id.*

142. *See* 42 U.S.C. § 1985(3) (2018); *see also supra* Part II.B (analyzing the statutory text).

143. *Browder*, 630 F.2d at 1149.

144. *Id.* at 1150.

145. *Id.* at 1154.

146. *Id.* at 1150.

147. *Id.* at 1151.

examined the statute's legislative history and found that a violation of § 1985(3) "turns on the need for a class-based motivation for the wrong."[148]

The court discussed Senator Edmunds's speech during the Congressional debates, where he said the Ku Klux Klan Act was not meant to protect neighborhood feuds resulting in the burning of another man's barn.[149] The Sixth Circuit elaborated on the Senator's example, noting that on one hand, the Klan burning someone's barn for "racial, religious, political, or sectional animus" would be a violation of the statute.[150] However, on the other hand, the court noted, burning the barn out of personal enmity between the barn owner and a Klan member would not qualify as a violation.[151] It reasoned that the case before it merely involved a local labor dispute and not an attempt to deprive anyone of their constitutional rights.[152]

In augmenting the hypothetical Senator Edmunds posed, the court did not mention *who* was the barn owner.[153] Are readers supposed to presume that the barn owner was a member of a racial minority because the barn was burned down out of racial animus? Though this may be the most natural conclusion, this Note argues against that presumption.

The fact that a racial attack was perpetrated against someone, intentionally or otherwise, does not lead inevitably to the conclusion that the *victim* was a member of a racial minority. Senator Edmunds does not highlight the barn owner's status as a non-protected person—indeed, neither his race, gender, nor religious orientation are mentioned at all.[154] Rather, it was the fact that the barn was burned down "out of *personal enmity*" that foreclosed any claim of a class-based harm.[155]

As such, the district court in *Flint Water Cases* did not properly apply *Browder* when it cited the case to suggest that all claimants must be a part of the conspired against protected class.[156] However, under *Browder*, the class of individuals protected by § 1985(3) are those who belong to a "discrete and insular" minority group who receive special

148. *Id.* at 1152. Note that the Flint plaintiffs did allege a class-based motivation for the harm. *See* Flint Water Cases, 329 F. Supp. 3d 369, 415 (E.D. Mich. 2018).

149. *Browder*, 630 F.2d at 1151.

150. *Id.* at 1152.

151. *Id.*

152. *Id.* at 1154 ("[T]he discriminatory animus of the barn owner's neighbors is sparked by personal animosity, not the barn owner's peculiar exercise of a constitutional right.").

153. *See id.*

154. *See id.* at 1151.

155. *Id.* at 1152.

156. Flint Water Cases, 329 F. Supp. 3d 369, 415 (E.D. Mich. 2018).

protection due to inherent personal characteristics.[157] The *Browder* court held that persons who crossed a picket line did not meet that criteria.[158] However, it is clear that African Americans are protected persons, and the *Flint Water Case* plaintiffs claimed a *racial* conspiracy—not merely a conspiracy on the basis of their residence in Flint, MI, or some other mutable quality.[159] The plaintiffs' claim demonstrated an interest in protecting the African American majority while vindicating the rights and harms of all injured residents.

Further, in light of the Supreme Court precedent in *Griffin*, it seems straightforward that if a barn is burned down because the perpetrator mistakenly thought it belonged to a black person, then it would be covered by §1985(3).[160] If the barn was being rented by a white person from a black owner, then both would presumably be covered by the statute.[161] An overview of the legislative history of § 1985(3) further substantiates these points because Congress sought to protect against the consequences of racial discrimination against all societal members, black or white.[162] The incidents cited by legislators are significant because non-minority persons were injured on the basis of the Klan's invidious discriminatory animus against black people—not against the white victims.[163]

The district court in *Flint Water Cases* reasoned improperly in holding that only an essential claim of discrimination brought by an actual black person can be alleged under the statute.[164] Though white people are not a protected class and therefore do not receive special protection under the law, the white residents were nonetheless injured by alleged discrimination against a protected class: the black residents.[165] This was not a case of plaintiffs asserting they were also discriminated against because of *their* race, nor a case of plaintiffs merely defending the rights of the discriminated group.[166]

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157. *Browder*, 630 F.2d at 1150 (internal quotation marks omitted).

158. *Id.*

159. *See Flint Water Cases*, 329 F. Supp. 3d at 416.

160. *See* Griffin v. Breckenridge, 403 U.S. 88, 103 (1971); *Browder*, 630 F.2d at 1151–52.

161. *See Griffin*, 403 U.S. at 103; *Browder*, 630 F.2d at 1151–52.

162. *See* Pinzow, *supra* note 76, at 1038. For a summary of the Congressional debates, see Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1247–48 (3d Cir. 1978).

163. *Novotny*, 584 F.2d at 1247–48. Representatives discussed an onslaught of incidents involving Klan members who perpetrated violent and fatal crimes against *anyone* who vindicated or simply acknowledged the civil rights of African Americans. *Id.*

164. *See Flint Water Cases*, 329 F. Supp. 3d at 416–17.

165. *Id.* at 415.

166. *Id.* at 416.

C. Accepting Claims for Inadvertent and Institutional Racism Under § 1985(3)

Standing under § 1985(3) should be recognized if plaintiffs can prove that defendants conspired to discriminate against a protected class and that they suffered an injury because of that conspiracy.[167] Under the reasoning and ruling of *Novotny*, the Flint plaintiffs sufficiently alleged a valid § 1985(3) claim.[168] In *Novotny*, the defendants' conspiracy was motivated by a discriminatory animus toward women that ultimately injured the male plaintiff.[169] Similarly, the Flint plaintiffs alleged a conspiracy to deprive African American residents of their civil rights, which ultimately injured all water users in Flint.[170] Under the *Novotny* holding, the inclusion of white residents in the Equal Protection claim should not render that claim invalid.[171] Rather, the inclusion of the white Flint residents in the claim was proper, because—consistent with the legislative intent and history of the Act—they were injured as a result of a racially discriminatory conspiracy motivated by animus toward their black neighbors.[172]

Indeed, the *Flint Water Cases* court itself noted that the plaintiffs alleged a conspiracy to deprive the African American residents of their civil rights.[173] The court's analysis, however, should not have incorporated the mistaken question of whether all plaintiffs were targets of the conspiracy.[174] Rather, the court should have assessed whether all

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167. *See id.* at 415. Despite its later holding that plaintiffs lacked standing as a protected class, the *Flint Water Cases* court recited this very standard. *Id.* (citing Johnson v. Hills & Dales Gen. Hosp., 40 F.3d 837, 839 (6th Cir. 1994) The *Johnson* court held that in order for plaintiffs to make out a claim under § 1985(3), they must show:

> (1) a conspiracy involving two or more persons (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws and (3) an act in furtherance of the conspiracy (4) which causes injury to *a person or property*, or a deprivation of any right or privilege of a citizen of the United States.

Johnson, 40 F.3d at 839 (emphasis added).

168. *See Novotny*, 584 F.2d 1235.

169. *Id.* at 1237–38.

170. *Flint Water Cases*, 329 F. Supp. 3d at 380–81, 415.

171. *Novotny*, 584 F.2d at 1244. (disagreeing with the defendants' argument that plaintiff's claim failed because discriminatory animus was not aimed at him, noting that such an argument is "at odds" with the § 1985(3) statutory language).

172. *See id.* Congressional representatives consistently discussed victims of Klan attacks who were not African American, which strongly indicates that § 1985(3) was meant to protect *all* victims of racial conspiracies. *See, e.g.*, Statement of Representative Buckley, CONG. GLOBE, 42nd Cong., 1st Sess. app. at 191–93 (1871).

173. *Flint Water Cases*, 329 F. Supp. 3d at 415.

174. *See id.*

the claimants suffered an injury *as a result of* the racially motivated conspiracy.[175]

The Supreme Court's reasoning in *Griffin* further supports this point.[176] There, the plaintiffs were in the car with the target of the conspiracy.[177] Although they were not the targeted victims, they were in close proximity to—and injured by—the actions directed at the target.[178] Similarly, in the Flint case, the plaintiffs alleged a conspiracy based on racially discriminatory animus.[179] The defendant-conspirators knew or should have known that their discriminatory conspiracy would not solely affect the African American residents of Flint, but also their white neighbors.[180]

The plain language of § 1985(3) suggests that *injury* by conspiracy—and *not* the protected status of the claimant—is the driving force of legal action.[181] There is no limitation regarding who can assert the claim—only that the conspiracy be based upon discrimination against a protected class, for which *any* injured party may recover damages.[182] Thus, it should be highlighted again that the Flint plaintiffs did not bring an action on *behalf* of African American residents, which undoubtedly would raise standing issues.[183] Rather, the white residents were included for their *own* specific injuries caused by the conspiracy.[184]

The world we live today is not nearly as segregated as the one in which the equal protection laws were developed.[185] It would be impossible for racially discriminatory actions and conspiracies to *solely* affect one class of people because today societies, communities, and families are intertwined. The purpose of equal protection laws was to eradicate segregation and discrimination to give African Americans the right to work and live among everyone else.[186] Therefore, it does not

175. *Novotny*, 584 F.2d at 1245.

176. Griffin v. Breckenridge, 403 U.S. 88 (1971).

177. *Id.* at 91.

178. *See id.*

179. *Flint Water Cases*, 329 F. Supp. 3d at 415.

180. *See id.*

181. 42 U.S.C. § 1985(3) (2018) ("[T]he party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation . . . .").

182. *See* Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1244 (3d Cir. 1978) ("Section 1985(3) provides for a cause of action in any instance where 'in furtherance of the object of' a proscribed conspiracy an act is done 'whereby another is injured in his person or property.' By its terms, the statute gives no hint of any requirement that the 'other' must have any relationship to the 'person or class of persons' which the conspiracy seeks to deprive of equal protection, privileges or immunities.").

183. *Flint Water Cases*, 329 F. Supp. 3d at 380–81.

184. *Id.*

185. *See* Ferguson, *supra* note 35.

186. *Novotny*, 584 F.2d at 1238–40.

make sense to limit the reach of equal protection laws—especially where the legislative history of § 1985(3) indicates that it is not meant to stand as a limitation to those who were not direct targets of illegal actions.[187] Section 1985(3) expands protections to all people from injuries caused by discriminatory animus.[188] It is inevitable that racially discriminatory acts will affect non-targeted persons given our pluralistic society, thereby causing another form of discrimination—inadvertent discrimination.

IV. CONCLUSION

The essential point of this Note is that injury derived from a racially discriminatory conspiracy should constitute a sufficient cause of action under § 1985(3) when all other requisite elements are met. This would not lead courts astray; rather, it would bring them in alignment with the statute's legislative purpose. Courts have allowed Equal Protection claims to be alleged by non-protected persons when such persons were injured by a discriminatory conspiracy.[189] Although these cases may not include plaintiffs who represent both classes, the fact that the Flint plaintiffs pleaded together should not prove fatal. In *Flint Water Cases*, the court noted that plaintiffs properly alleged a conspiracy based in racial animus.[190] Since the Flint residents claimed injuries caused by that racial conspiracy,[191] their § 1985(3) claim should not have been dismissed.

The *Flint Water Cases* court pointed out that exclusion of non-protected residents in assertion of the equal protection claim would not change the outcome, as any remedy resolved by the protected class of plaintiffs would thereby benefit the entire Flint community.[192] Practically speaking, this is true. Moreover, some may argue that the remedy is the most important stage of litigation. If all the residents, regardless of race,

187. *Id.*

188. For a critique of the more rigid approach to evaluating protected class status in discrimination claims, see Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101 (2017). Clarke coins the phrase "protected class gatekeeping" to argue that "dubious constructions of antidiscrimination statutes . . . prevent[] equality law from achieving its central aim: dismantling [discrimination]." *Id.* at 101. Clarke argues that, "whether a plaintiff falls into the protected class is not a productive line of inquiry for disparate treatment law, and courts are better off focusing on the question of *whether a discriminator was motivated by forbidden grounds*." *Id.* at 178 (emphasis added). Similarly, this Note argues that the focus for a § 1985(3) class should be whether the conspirator's actions were motivated by invidious discriminatory animus.

189. *See, e.g.*, *Novotny*, 584 F.2d at 1245.

190. Flint Water Cases, 329 F. Supp. 3d 369, 415 (E.D. Mich. 2018).

191. *Id.*

192. *Id.*

are remedied by the claim, then why does it matter *who* can claim it? However, it is equally important that the mechanics of the law function properly and that the law serves its purpose as well as its citizens.

Injury based on a discriminatory animus confers standing upon § 1985(3) claimants.[193] Courts need not revise their mode of evaluation for § 1985(3) claims—the statutory text and Supreme Court analysis resolve what a prima facie case looks like. As the statute expresses, "if two or more persons conspire for the purpose of" depriving a class of persons of equal protection, then the "*injured or deprived party may have an action.*"[194] There is no suggestion in the language of the statute that claimants need to be a member of the protected class.[195] The Supreme Court in *Griffin* tells us that the conspirators' actions must be rooted in a racial or other "class-based invidiously discriminatory animus."[196] It does not say that the *claimants* must be a part of a protected class.[197]

193. *Novotny*, 584 F.2d at 1243.
194. 42 U.S.C. § 1985(3) (2018) (emphasis added).
195. *Id.*
196. Griffin v. Breckenridge, 403 U.S. 88, 102–03 (1971).
197. *Id.*