Denver Law Review

Volume 71 | Issue 2 Article 6

January 1994

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> "They once came in the night, wearing white hooded robes and brandishing fiery crosses, proclaiming that God was pro-white and on their side. Now they come in the morning, wearing suits and carrying incendiary posters, proclaiming that God is pro-life and on their side."[1]

INTRODUCTION

Over the past decade, militant antiabortion groups, religious zealots, and radical conservative factions have dramatically increased their efforts to prevent women from exercising their constitutional right to an abortion.[2] The level of violence has escalated rapidly,[3] culminating in the March 1993 shooting death of Dr. David Gunn, who performed legal abortions at a health clinic in Florida.[4]

The violence continues unfettered. Clinics are besieged by angry mobs and each day doctors and patients face physical and verbal assault.[5] Firebombs, death threats, and shootings have replaced reasoned debate in the anti-abortion crusade.[6] State laws against trespass, harassment, and interference have proven insufficient and ineffective in fighting these terrorist attacks.[7]

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1. Constance A. Morella, *Clinics Under Siege*, WASH. POST, Mar. 23, 1993, at A21.

2. The right to abortion was established in Roe v. Wade, 410 U.S. 113 (1973). The *Roe* decision evolved from the Supreme Court's decisions in Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the "right of privacy . . . is a legitimate one") and Eisenstadt v. Baird, 405 U.S. 438, 453 (1972), (holding that "[i]f the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

3. From 1977 to 1990, there were 829 cases of abortion violence. This violence included bombings, arson, shootings, death threats, assault and battery, clinic invasions, burglaries, kidnappings, and vandalism. *See* Brief for the National Abortion Federation and Planned Parenthood Federation of America at 4-5, Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993) (No. 90-985); *see also* FAYE D. GINSBURG, CONTESTED LIVES 50 (1989); Mimi Hall, *Abortion Fight Takes Deadly Turn - Violent Tactics on the Increase*, USA TODAY, Mar. 11, 1993, at 3A.

4. *See* Sandra G. Boodman, *Abortion Foes Strike at Doctors' Home Lives–Illegal Intimidation or Protected Protest?*, WASH. POST, Apr. 8, 1993, at A1, A17.

Five months after the slaying of Dr. David Gunn, a doctor in Witchita, Kansas, was shot by a woman who had sent fan mail to Dr. Gunn's assassin. Seth Faison, *Abortion Doctor Wounded Outside Kansas Clinic*, N.Y. TIMES, Aug. 20, 1993, at A12; *see also* Tanya Melich, *The War on Abortion Clinics*, N.Y. TIMES, Sept. 9, 1993, at A25.

5. *See* Paul Solotaroff, *Surviving the Crusades*, ROLLING STONE, Oct. 14, 1993, at 57; Felicia R. Lee, *Abortion Battle Lines Drawn in New York—Debate Rages On Outside of Clinics*, N.Y. TIMES, May 17, 1993, at B1.

6. *See, e.g.*, Eloise Salholz, *The Death of Doctor Gunn*, NEWSWEEK, Mar. 22, 1993, at 34.

7. Due to the ineffectiveness of state laws and law enforcement, women and clinics have turned to federal laws, which allow clinics to obtain injunctions valid over entire counties, rather than the case-by-case relief obtainable under most state laws. *See* Linda Greenhouse, *Supreme Court Says Klan Law Can't Block Abortion Blockades*, N.Y. TIMES, Jan. 14, 1993, at

In an effort to stem the tide of violence, clinics have looked to the courts to enjoin groups such as Operation Rescue from continuing their lawless acts of force, intimidation, and harassment. Most recently, plaintiffs have attempted to invoke § 1985(3)[8] of the Reconstruction Era Ku Klux Klan Act[9] to establish a private, class-based conspiracy. Historically, § 1985(3) has had a limited application. The Supreme Court has consistently narrowed the intended scope of the statute by imposing a state action requirement,[10] by creating a class-based animus prerequisite,[11] and by restricting the classes of individuals that can rely on it as a federal remedy.[12] Recently, however, several circuit courts have found that congressional intent and statutory language dictate that § 1985(3) protection can and should be applied broadly and, in particular, to women seeking abortion services.[13]

Unfortunately, the United States Supreme Court does not agree. In January 1993, the Court held in *Bray v. Alexandria Women's Health Clinic*[14] that women seeking abortions are not a "class" to be protected by federal law.[15] *Bray* is the most recent step in the Court's attempt to limit the scope and application of § 1985(3). This decision will have a debilitating effect on the statute and its ability to remedy the modern-day conspiracies that mirror the violence and intimidation faced by blacks in 1871.[16]

A1; Ruth Walker, *A Long Shadow Across Roe v. Wade*, CHRISTIAN SCI. MONITOR, Jan. 20, 1993, at 18; *An Assault on Women's Rights*, BOSTON GLOBE, Jan. 19, 1993, at 14.

8. 42 U.S.C. § 1985(3) (1988) provides in part that:

> [i]f 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 . . . the equal protection of the laws; . . . 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.

9. 42 U.S.C. § 1985(3) was passed as H.R. 320 under the title of "Act to Enforce the Fourteenth Amendment" and is now known as the Ku Klux Klan Act. The Act was enacted in response to the racially and politically motivated violence and terror that infused the post-Civil War South. Section 1 (later codified at 42 U.S.C. § 1983) of the Ku Klux Klan Act of 1871 provided a federal remedy to those deprived of their constitutional rights by persons acting under the color of law. Section 2 (later codified at § 1985(3)) was designed to punish, criminally and civilly, conspiracies to deprive others of their constitutional rights. Randolph M. Scott-McLaughlin, Bray v. Alexandria Women's Health Clinic: *The Supreme Court's Next Opportunity to Unsettle Civil Rights Law*, 66 TUL. L. REV. 1357, 1371 n.49 (1992).

10. Collins v. Hardyman, 341 U.S. 651, 655 (1951), *overruled by*, Griffin v. Breckenridge, 403 U.S. 88 (1971).

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

12. United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 837-39 (1983).

13. *E.g.*, National Org. for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), *rev'd in part and vacated in part sub nom.* Bray v. Alexandria Women's Health Clinic, 113 U.S. 753 (1993); New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1359 (2d Cir. 1989) (conspiracies "directed against women are inherently invidious, and repugnant"), *cert. denied*, 495 U.S. 947 (1990); Stathos v. Bowden, 728 F.2d 15, 20 (1st Cir. 1984) (conspiracies based on sex come within the purview of § 1985(3)); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1243 (3d Cir. 1978) (gender is within the scope of § 1985(3)), *vacated on other grounds*, 442 U.S. 366 (1979).

14. 113 S. Ct. 753 (1993).

15. *Id.* at 759.

16. Although I attempt to draw a parallel between the acts of violence and harassment faced by blacks in the nineteenth century and those faced by women seeking abortions today,

This Comment critically analyzes the *Bray* decision and concludes that the plurality opinion, written by Justice Scalia, ignores the legislative intent, history, and plain meaning behind § 1985(3). The *Bray* decision curtails the natural evolution of the statute and denies women protection from the acts of violence and intimidation perpetrated against them.

I. BACKGROUND

A. *The Ku Klux Klan Act*

The text of 42 U.S.C. § 1985(3) is derived from the Ku Klux Klan Act of 1871.[17] This Act was originally drafted in response to the Ku Klux Klan's reign of terror in the post-Civil War South.[18] The Klan used violence and terror against blacks and Republicans in an effort to further their political objectives.[19] Murders, whippings, hangings, and arson were common tactics used by the Klan to keep blacks from voting and to keep others from supporting the Republican party and its political agenda.[20]

As violence in the South escalated, many members of Congress felt that state governments were either unable or unwilling to protect their citizens from the violence of the Ku Klux Klan.[21] Under existing law, the

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this comparison is in no way intended to convey the lawless acts women and doctors face today are on the same level as the atrocities and systematic persecution blacks faced in the Reconstruction Era South. I attempt to show that this persecution of women at the hands of radical political factions today reflects the situation in 1871 sufficiently to fall within the purview of the civil rights statute.

17. Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1985(3) (1988)). The Ku Klux Klan Act of 1871 is the forefather of much of our modern civil rights legislation. From this Act emerged: 42 U.S.C. § 1983 (1988) (civil liability for deprivation of federally protected rights under the color of state law); 42 U.S.C. § 1985(3) (1988) (civil liability for conspiracy to deprive of equal protection of the laws); 42 U.S.C. § 1988 (1988) (attorney's fees for proceedings in vindication of civil rights); 18 U.S.C. § 241 (1988) (criminal conspiracy provision). Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 540-41 n.31 (1985).

18. *See generally* Scott-McLaughlin, *supra* note 9, at 1362-72 (discussing why Congress felt a need to respond to the Ku Klux Klan).

19. The Klan was comprised mainly of disgruntled southerners after the Civil War who were opposed to freeing the slaves and who resented the federal government and Lincoln's Republican party. *See* Gormley, *supra* note 17, at 534-35.

20. *Id.*

21. Many members of the Klan were, in fact, local law enforcement officers. Scott-McLaughlin, *supra* note 9, at 1361.

Representative Jeremiah Wilson of the Forty-Second Congress felt that it was the purpose of the Klan to thwart and overthrow local officials. He testified that the Klan existed:

> for the express purpose of controlling government in the States . . . by preventing citizens from exercising their legitimate constitutional privileges. It is to overthrow by force and violence political opinion; it is to destroy by violence the freedom of the ballot box, and therefore it is the most dangerous form of domestic violence and rebellion against the laws.

CONG. GLOBE, 42d Cong., 1st Sess. 484 (1871) [hereinafter CONG. GLOBE].

Representative John Coburn also expressed the fear of lawlessness in the South. He explained that

> there is a preconcerted and effective plan by which thousands of men are deprived of the equal protection of the laws. The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes free, the persecuted citizen looks in vain for redress. This condition of affairs extends to counties and States; it is, in many places, the rule, and not the exception.

Id. at 459.

federal government had no specific power to intervene. To remedy this lack of power, the Reconstruction Congress produced a series of enactments intended to protect civil rights at the federal level.[22] From this congressional action emerged § 1985(3), which, as part of the Ku Klux Klan Act, was designed to guard against private deprivations of equal protection.[23] In defense of Congress' power to enact such a statute, supporters of the bill asserted that the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments constituted a fundamental shift in power from the states to the national government.[24] These supporters urged that protection of citizens' rights was no longer solely within the province of the states, but that Congress' power was now enlarged to address the deprivation of civil rights at the federal level.[25]

B. *Intended Scope of Section 1985(3)*

As originally introduced in the Forty-second Congress, the Ku Klux Klan Act was a broad criminal provision intended to cover any acts that violated the rights, privileges, or immunities of another person.[26] Fearful of the Act's unlimited scope, legislators pushed for its amendment.[27] The amended version retained the criminal provision and added a civil cause of action for persons injured by the conspiratorial actions of private parties.[28] Under this amendment, the bill was limited to private conspiracies

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22. The Reconstruction Congress passed five major pieces of civil rights legislation: Act of May 31, 1870, ch. 114, 16 Stat. 144 (codified at 42 U.S.C. §§ 1981-1982 (1988)) (protecting voting rights); Act of Mar. 1, 1875, ch. 114, 18 Stat. 337 (held unconstitutional in part in the Civil Rights Cases, 109 U.S. 3 (1883), codified in part at 42 U.S.C. § 1984 (1988)) (prohibiting racial discrimination in public accommodations); Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1985(3) (1988)) (the Ku Klux Klan Act); Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C.) (outlawing Black Codes in the former Confederate states); Act of Feb. 28, 1871, ch. 99, 16 Stat. 433, repealed by Act of Feb. 8, 1894, ch. 25, 28 Stat. 36 (protecting voting rights).

23. The conditions in the South demonstrated the rights secured by the Thirteenth, Fourteenth, and Fifteenth Amendments were in jeopardy. Congress' actions reflect a belief in its own power to punish both private and state actors who deprived others of the rights secured by those amendments. CONG. GLOBE, *supra* note 21, at 153; *see also supra* note 9.

24. *Id.* at app. 149-50.

25. *Id.*

26. Griffin v. Breckenridge, 403 U.S. 88, 100 (1971) (citing CONG. GLOBE, *supra* note 21, at app. 68); *see also supra* note 9 and accompanying text.

27. As originally introduced into the House of Representatives, section two of the Ku Klux Klan Act was a federal criminal statute with a list of actionable offenses. This section was so broad that virtually every backyard conspiracy between two individuals could be deemed a violation of federal law. The amendment removed the list of actionable crimes and proclaimed the act must be one that seeks to deprive a person of some protected right because of his or her membership in a particular class. United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 841-46 (1983) (Blackmun, J., dissenting).

28. Representative Shellabarger explained that:

> [t]he object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section.

CONG. GLOBE, *supra* note 21, at 478.

The amendment added the critical language, which was eventually incorporated into § 1985(3), that imposes liability on persons who "conspire together for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection

which are aimed at particular classes of citizens, and which seek to strip from those classes the equal protection of the laws.[29] The amendment was thus designed to allay the fears of the legislators that this statute would become a general federal tort remedy.[30]

It remained, however, the intent of Congress in 1871 to create a powerful tool to combat private conspiracies.[31] Congress sought to provide a remedy for any class of people who became the target of a conspiracy by an organization or group whose intent was to deprive that class of their privileges and immunities.[32] While sponsors of the Ku Klux Klan Act referred to the Thirteenth, Fourteenth, and Fifteenth Amendments as potential sources of Congress' power, no supporter indicated any intention to limit the application of the statute to conspiracies motivated only by racial animus.[33] Thus, any conspiracy directed at a group or class of people, with the intent and animus necessary to deprive that group or class of their constitutional rights, would fall within the reach of § 1985(3).

C. *The Supreme Court's Interpretation of Section 1985(3)*

From the time of its inception, § 1985(3) has not been allowed to serve its intended purpose.[34] The civil component of the statute lay dormant for nearly seventy years, due largely to the Supreme Court's decision in *United States v. Harris*.[35] In *Harris*, the Court declared the criminal counterpart to § 1985(3) unconstitutional, as it exceeded Congress' powers under the Thirteenth, Fourteenth, and Fifteenth Amendments.[36] The

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of the laws, or of equal privileges and immunities under the laws." *Carpenters*, 463 U.S. at 844 (Blackmun, J., dissenting) (quoting § 1985(3)).

29. CONG. GLOBE, *supra* note 21, at 478.

30. *See Carpenters*, 463 U.S. at 841-46 (Blackmun, J., dissenting).

31. In addressing the proposed amendment to the original bill, Representative Shanks proclaimed that "I do not want to see (this measure) so amended that there shall be taken out of it the frank assertion of power of the national Government to protect life, liberty, and property, irrespective of the act of the State." CONG. GLOBE, *supra* note 21, at app. 101.

32. *See* Scott-McLaughlin, *supra* note 9, at 1372.

33. The legislators agreed that the Ku Klux Klan Act was designed to remedy deprivations of rights of all classes of citizens whether by the Klan or some other organization. *See* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 800-01 (1993) (O'Connor, J., dissenting) (citing CONG. GLOBE, *supra* note 21, at app. 153-54 (statement of Rep. Garfield) (legislation protects "particular classes of citizens" and "certain classes of individuals"); *id.* at app. 267 (statement of Rep. Barry) ("white or black, native or adopted citizens"); *id.* at app. 376 (statement of Rep. Lowe) ("all classes in all States; to persons of every complexion and of whatever politics"); *id.* at app. 190 (statement of Rep. Buckley) ("yes, even women")).

Senator Edmunds of Vermont stated that if "it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it." CONG. GLOBE, *supra* note 21, at 567.

34. *See* Gormley, *supra* note 17, at 541 & n.32 (describing the period between 1873 and 1883 as the "Dreadful Decade" in which the Court was hostile to the civil rights statutes of the Reconstruction Era. The Justices during this time were concerned with protecting the power of the states, were impatient with civil rights issues, and "refused to grant Congress broad power to enforce the civil rights of individuals").

35. 106 U.S. 629 (1883).

36. *Id.* at 641. *Harris* involved twenty men who removed four prisoners from jail and beat them. They were charged under § 5519, the provision under which the criminal component of the Ku Klux Klan Act was codified. The civil provision was designated as § 1985(3) in the 1979 United States Code. The Court in *Harris* declared that § 5519 exceeded Congress'

modern-day Supreme Court, in addressing the civil component of § 1985(3), has added and removed certain restrictions to the application of § 1985(3), but the Court has consistently denied the broad interpretation and liberal application intended by the Forty-second Congress.

The Supreme Court first addressed the civil portion of § 1985(3) in 1951 in *Collins v. Hardyman*.[37] The plaintiffs in *Collins* were residents of California and members of a political club.[38] Defendants, who opposed the plaintiffs' political views, conspired to interfere with and prevent a club meeting.[39] The conspirators assaulted members of the club and used other violent means to break up the meeting.[40] The plaintiffs argued that the conspirator's actions violated their rights to peaceably assemble and petition the federal government for redress of grievances.[41]

In this initial interpretation, the Court held state officials must be involved in the conspiracy in order to invoke § 1985(3).[42] Although the plaintiffs did not allege a Fourteenth Amendment violation,[43] the Court considered the statute pursuant to Congress' power under that amendment. The majority opinion determined that since § 1985(3) derived its power from the Fourteenth Amendment, the statute protected only against state action.[44] The dissent, however, viewed § 1985(3) more broadly and asserted that Congress had the power, apart from the Fourteenth Amendment, to prevent private parties from infringing upon constitutional rights.[45] By ignoring legislative history and intent, and reading a state action requirement into the civil conspiracy section, the *Collins* Court, in effect, put private conspiracies to deprive people of their civil rights out of the reach of the statute.[46]

In 1971, twenty years after *Collins* and one hundred years after § 1985(3)'s inception, the Court in *Griffin v. Breckenridge*[47] gave § 1985(3) some teeth by eliminating the restrictive interpretation placed on the statute in *Collins*. *Griffin* involved several black motorists who were stopped on a highway in Mississippi by a group of white men who mistakenly believed

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power under the Thirteenth, Fourteenth, and Fifteenth Amendments and was therefore unconstitutional. *Id.* at 644.

37. 341 U.S. 651 (1951), *overruled by* Griffin v. Breckenridge, 403 U.S. 88 (1971).

38. *Id.* at 653.

39. *Id.* at 654.

40. *Id.*

41. *Id.* at 655.

42. *Id.*

43. *Id.*

44. *Id.* at 658. There was much debate among legislators in 1871 regarding the Fourteenth Amendment's relationship to § 1985(3). A review of these legislators' positions reveals that Congress intended to protect rights that flowed from the Thirteenth, Fourteenth, and Fifteenth Amendments, and not the Fourteenth Amendment alone. Many of the speakers asserted that § 1985(3) would address any violation of equal protection or denial of any privilege and immunity and, as such, the statute was not limited to deprivations of purely Fourteenth Amendment rights. *See* Scott-McLaughlin, *supra* note 9, at 1364.

45. *Collins*, 341 U.S. at 663-64 (Burton, Black & Douglas, JJ., dissenting).

46. *See* Helyn S. Goldstein, Note, *Private Conspiracies to Violate Civil Rights: The Scope of Section 1985(3) After* Great American Federal Savings & Loan Association v. Novotny, 61 B.U. L. REV. 1007, 1008 (1981).

47. 403 U.S. 88 (1971).

that one of the black men was a civil rights worker.[48] The plaintiffs were threatened, held at gunpoint, and beaten.[49] Griffin and the other black occupants of the car brought suit in federal court under § 1985(3). They alleged a conspiracy to deprive them of the equal protection of the laws of the United States and Mississippi, including the right to First Amendment freedoms, the right not to be enslaved, the right to life and liberty, and the right to travel public highways.[50]

The Court looked to the plain meaning of § 1985(3) and held that it did, and was intended to, provide protection from private conspiracies.[51] Justice Stewart, writing for the majority, declared that many of the constitutional problems perceived in *Collins* regarding congressional power and state action did not exist and that the statute should be given a sweep as broad as its language.[52] However, Stewart and the majority in *Griffin* then proceeded to fashion their own constraints on the application of § 1985(3).

Wary that the imprecise wording of the statute would allow it to become a general federal tort remedy,[53] the Court developed the requirement that a plaintiff prove a "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[54] In addition, the *Griffin* court required the source of Congress' power to remedy the particular deprivation be identified.[55] The plaintiff's claims in this case were justified under the Thirteenth Amendment and the right to travel.[56] The Court, however, was careful to explain that "[i]n identifying these two constitutional sources of congressional power, we do not imply the absence of any other."[57] Justice Stewart was inferring that the Fourteenth Amendment could be a viable source of Congress' power, but not in the case at hand.[58]

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48. *Id.* at 90.

49. *Id.* at 91.

50. *Id.* at 90-92.

51. *Id.* at 96.

52. The Court explained that other civil rights statutes from the Reconstruction Era had been given "a sweep as broad as their language" and that § 1985(3) should as well. *Id.* at 97.

53. *Id.* at 102. The Court noted that "[t]he constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose." *Id.*; *see also supra* note 30 and accompanying text.

54. *Griffin*, 403 U.S. at 102. The "invidiously discriminatory animus" requirement established that a prejudicial reason for the conspiracy must exist. This language was intended to give the statute the meaning intended by the authors of the original limiting amendment. *See supra* note 29 and accompanying text; *see also* Bruce Brown, *Injunctive Relief and Section 1985(3): Anti-Abortion Blockaders Meet the "Ku Klux Klan Act"*, 39 BUFF. L. REV. 855, 859 (1991).

55. *Griffin*, 403 U.S. at 104.

56. *Id.* at 105-06. The Court recognized the right to travel in Shapiro v. Thompson, 394 U.S. 618 (1968). "[T]he constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." *Id.* at 630 (quoting United States v. Guest, 383 U.S. 745, 757-58 (1966)).

57. *Griffin*, 403 U.S. at 107.

58. The "Enabling Clause" of the Fourteenth Amendment states "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. The Court implied that the Enabling Clause might give Congress the power to reach private conspiracies of all kinds and not just those aimed at racial groups.

Griffin left two important questions unanswered. First, lower courts, when interpreting § 1985(3), would need to determine whether an "otherwise class-based" animus included discriminatory intent other than racial bias.[59] Second, considerable doubt still existed as to the existence of the state action requirement. *Griffin* was a race discrimination case based on the Thirteenth Amendment and the right to travel. If the discrimination extended to groups such as women, homosexuals, or religious groups, the Fourteenth Amendment, with its explicit state action requirement, would be implicated. The *Griffin* Court inferred, but failed to state explicitly, that the Fourteenth Amendment could serve as a source of power for Congress to remedy private deprivations of constitutional rights.[60] This gave the lower courts great latitude in interpreting § 1985(3) and *Griffin*'s requirements.[61] Some federal courts, such as the Seventh Circuit, attempted to limit the reach of § 1985(3) by reviving a state action requirement;[62] yet others, such as the Eighth Circuit, found no difference between conspiracies grounded in the Thirteenth Amendment and those based on the Fourteenth, so long as both were fueled by invidious discrimination.[63]

As the lower federal courts struggled to sort out these complex issues involving racial and "otherwise class-based" discrimination, a state action requirement, and the source of congressional power, the Supreme Court had its next opportunity to address the scope and application of § 1985(3). In 1983, the Court, in *United Brotherhood of Carpenters, Local 610 v. Scott*,[64] examined the two important questions left unanswered in *Griffin*. The plaintiffs in *Carpenters*, nonunion construction workers, were victims of mob violence and harassment by local residents and union members.[65] These nonunion members alleged that a group had conspired against them because of their refusal to join a union and that they were denied their First Amendment associational rights.[66]

In addressing the question of which classes the statute should protect, the Court did not go so far as to specifically limit a § 1985(3) action only to racial groups. However, it did prohibit extension of the statute to reach conspiracies based on an economic animus. The Court recognized that legislative intent promised a broad reach to the statute, but quickly dis-

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> [T]he allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment. By the same token, since the allegations of the complaint bring this cause of action so close to the constitutionally authorized core of the statute, there has been no occasion here to trace out its constitutionally permissible periphery.

Griffin, 403 U.S. at 107.

59. *Griffin*, 403 U.S. at 102 n.9.

60. *See supra* notes 55-58 and accompanying text.

61. *See generally* Gormley, *supra* note 17, at 550-55.

62. *E.g.*, Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972).

63. *E.g.*, Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971).

64. 463 U.S. 825 (1983).

65. *Id.* at 827-28.

66. *Id.* at 829-30.

missed this factor, stating that the "predominant purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters."[67]

Addressing the second question, regarding the existence of a state action requirement, the Court held that First Amendment rights were protected through the Due Process Clause of the Fourteenth Amendment and thus required state action to invoke protection under § 1985(3).[68] In ruling that state action was necessary for a claim under the Fourteenth Amendment, the Court did not specifically overturn *Griffin*. The Court distinguished the two cases by saying that, in *Griffin*, a § 1985(3) action was properly maintained under a claim for deprivation of Thirteenth Amendment rights and the constitutional right to travel;[69] whereas in *Carpenters*, a claim based on the deprivation of Fourteenth Amendment rights must include state action.[70] Although the decision in *Griffin* provided the option of upholding federal claims under § 1985(3) via the Enabling Clause of the Fourteenth Amendment, the Court in *Carpenters* chose to reestablish the restrictive state action requirement.

The dissent in *Carpenters* criticized the plurality for ignoring the legislative history and intent of the statute. The dissent argued that it was apparent from the remarks of the Forty-second Congress that no state action requirement was intended[71] and pointed to the *Griffin* Court's explicit ruling that no state action requirement need exist.[72] The dissent also argued that the statute was meant to reach any class that was deprived of their constitutional rights. The language of the statute itself and the documented intentions of the Reconstruction Congress left no doubt in the minds of the dissenters that § 1985(3) extended protection beyond racial classes.[73]

While the plurality in *Carpenters* explicitly denied protection to conduct motivated by economic animus, it was silent as to what classes, other than racial groups, might be protected under the statute. This indecision again left a great amount of discretion to the lower courts to determine the scope of the statute. Several district and circuit courts have been willing to extend protection to groups that traditionally have faced class discrimination. Many lower courts have afforded protection under § 1985(3) to groups bound by race, sex, religious affiliation, or ethnic origin.[74] Other courts have tried to stretch the scope of the statute even farther,

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67. *Id.* at 836.
68. *Id.* at 830-31.
69. *Id.* at 832-33.
70. *See supra* note 68 and accompanying text.
71. *Carpenters*, 463 U.S. at 841-49 (Blackmun, Brennan, Marshall & O'Connor, JJ., dissenting).
72. *Id.* at 848-49.
73. *Id.* at 850-51.
74. *E.g.*, Ward v. Connor, 657 F.2d 45, 46-47 (4th Cir. 1981) (conspiracy to "deprogram" members of the Unification Church), *cert. denied*, 455 U.S. 907 (1982); Fisher v. Shamburg, 624 F.2d 156 (10th Cir. 1980) (conspiracy to assault a black man at a roadside diner); Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 500 (9th Cir. 1979) (conspiracy against female insurance policy holders); Weise v. Syracuse Univ., 522 F.2d 397, 406 (2d Cir. 1975) (implying that gender constitutes a cognizable class); Marlowe v. Fisher Body, 489 F.2d 1057, 1059 (6th Cir. 1973) (conspiracy against members of the Jewish faith); Bergman v. United States,

attempting to fashion more liberal and creative causes of action under § 1985(3).[75]

The Supreme Court, in its limited dealings with § 1985(3), has been far more hesitant to accord similar breadth to the statute. The Court has never explicitly extended the statute to reach any classes other than racial groups. The state action requirement under the Fourteenth Amendment has alternately been insisted upon and denied by the Court. The inconsistent precedent set by the opinions in *Griffin* and in *Carpenters* on the issues of state action and congressional power has left these issues open to interpretation. Since its enactment in 1871, the effectiveness of § 1985(3) has slowly but surely been eroded at the hands of the Supreme Court. The statute's decay culminated in the 1993 decision *Bray v. Alexandria Women's Health Clinic*[76]—the Court's most recent, and perhaps most devastating, interpretation of § 1985(3).

II. *BRAY V. ALEXANDRIA WOMEN'S HEALTH CLINIC*

A. *Facts*

Plaintiffs in *Bray* included nine clinics that provide abortions or abortion counseling, and five organizations that seek to establish and preserve women's right to obtain an abortion.[77] Defendant Operation Rescue is a group whose members oppose abortion and its legalization.[78] Operation Rescue's principal goal is to stop abortion by any means necessary. It typically achieves this goal by demonstrations called "rescues," which consist of intentionally trespassing on a clinic's premises for the purpose of blockading entrances and exits, effectively closing the facility.[79]

Members of Operation Rescue agree and combine with one another to organize, coordinate, and participate in "rescue" demonstrations at clinics across the country, including the Washington metropolitan area.[80] Their goals in disrupting and blockading clinics are to (1) prevent abortions, (2) dissuade women from seeking the services of abortion clinics, and (3) impress upon members of society the moral righteousness of their anti-abortion views.[81]

In light of the increased number of "rescue" demonstrations in the Washington metropolitan area,[82] and indications that defendants had no intention of abandoning their protests,[83] plaintiffs filed for a permanent

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551 F. Supp. 407, 415 (W.D. Mich. 1982) (conspiracy by members of the Ku Klux Klan and others to attack "Freedom Riders" during trip through Alabama).

75. *See generally* Gormley, *supra* note 17, at 550-51.

76. 113 S. Ct. 753 (1993).

77. Nat'l Org. for Women v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part and vacated in part sub nom.* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

78. *Id.*

79. *Id.*

80. *Id.* at 1488.

81. *Id.*

82. Almost weekly from 1984 to 1989, Commonwealth Women's Clinic was the target of "rescue" demonstrations by Operation Rescue. *Id.* at 1489.

83. *Id.* at 1490.

injunction to enjoin defendant Operation Rescue and its members from trespassing on or impeding or obstructing ingress to or egress from facilities providing abortion services and related counseling.[84] Plaintiffs asserted five causes of action; two were federal claims under 42 U.S.C. § 1985(3) and the remaining three were pendent state claims for trespass, public nuisance, and tortious interference with business.[85]

B. *Lower Courts*

The federal district court, in *National Organization for Women v. Operation Rescue*,[86] granted a permanent injunction enjoining the defendants from continuing their "rescue" activities.[87] The court determined that the defendants engaged in a conspiracy for the purpose of depriving women seeking abortions of the right to travel interstate.[88] The court found the rescue demonstrations interfered with the right to travel because substantial numbers of women seeking the services of clinics in the Washington metropolitan area travel interstate to obtain these services.[89] The court based its decision on the premise that gender-based discrimination satisfies the class-based discriminatory animus element of § 1985(3),[90] and that seeking to deprive women of their right to travel interstate is therefore actionable under the statute.[91]

Although the plaintiffs argued that the defendants had deprived them of their right to privacy under the Fourteenth Amendment in seeking abortion services, the court chose not to base its decision on that ground, relying instead on the deprivation of the plaintiff's right to interstate travel. The district court was reluctant to venture into the "thicket" of abortion, because the "law concerning a putative abortion right is in a state of flux,"[92] and also because another independent ground for relief existed under § 1985(3).[93] Thus, although the desired injunction was

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84. *Id.* at 1486.

85. *Id.* at 1492.

86. 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part and vacated in part sub nom.* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

87. *Id.* at 1497. The court noted that, under *Griffin*, the elements of a cause of action under § 1985(3) are:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Id. at 1492 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971)).

In other words, plaintiffs in a § 1985(3) claim must show first that they are a class; second, that they have been deprived of a constitutionally protected right that Congress has the power to redress; and third, that this deprivation was the result of an "invidiously discriminatory animus" as established in *Griffin*.

88. *Id.* at 1489.

89. *Id.*

90. *Id.* at 1492.

91. *Id.* at 1493.

92. *Id.* at 1494. The court cited *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989) in alluding to the increasing number of restrictions on abortion. *Nat'l Org. for Women*, 726 F. Supp. at 1494 n.13.

93. *National Org. for Women*, 726 F. Supp. at 1494.

granted, the district court expressed no view as to the plaintiff's claim based on a fundamental right to abortion.

The Fourth Circuit upheld the district court's opinion and the issuance of a permanent injunction.[94] The circuit court agreed with the district court that gender-based animus satisfies the "purpose" element of § 1985(3).[95] The circuit court also agreed that blocking access to abortion facilities that serve clients traveling from out of state is a violation of the right to interstate travel, but, like the district court, declined to address the issue of whether § 1985(3) encompasses a violation of the right to privacy.[96] Upon reviewing the relevant points of law, the circuit court concluded that the district court had not abused its discretion and affirmed the judgment of the district court in all respects.[97]

C. *Bray v. Alexandria Women's Health Clinic*

The Supreme Court granted certiorari on February 25, 1991, in *Bray v. Alexandria Women's Health Clinic.*[98] The *Bray* Court had several issues to determine en route to affirming or reversing the circuit court. First, the Court had to determine whether the conspirators' actions stemmed from "a class-based invidiously discriminatory animus." Essential to that determination was deciding whether women seeking abortions constitute a class. If so, the Court then would have to decide whether gender-based discrimination fits within the scope of § 1985(3). Finally, the Court had to determine if the respondents were asserting and being deprived of any constitutional rights enforceable by Congress. The rights implicated in this case included the fundamental right to abortion and the right to travel. Justice Scalia, writing for the plurality,[99] denied relief to respondents and gave the Reconstruction Era statute its most limiting interpretation and application since its inception over one hundred years ago.

1. Plurality Opinion

Justice Scalia began by explaining that precedent established two elements must be shown in order to prove a private conspiracy in violation of the first clause of § 1985(3).[100] First, according to *Griffin*, "some racial, or

94. Nat'l Org. for Women v. Operation Rescue, 914 F.2d 582, 584 (4th Cir. 1990), *rev'd in part and vacated in part sum nom.* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

95. *Id.* at 585. The court stated the Fourth Circuit had forecast this holding in Buschi v. Kirven, 775 F.2d 1240, 1257 (4th Cir. 1985) and that at least six circuits agreed. *See* New York Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1359 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); Volk v. Coler, 845 F.2d 1422, 1434 (7th Cir. 1988); Novotny v. Great Am. Fed. Savings & Loan Ass'n, 584 F.2d 1235, 1244 (3d Cir. 1988), *vacated on other grounds*, 442 U.S. 366 (1979); Stathos v. Bowden, 728 F.2d 1520 (1st Cir. 1984); Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979); Conroy v. Conroy, 575 F.2d 175, 177 (8th Cir. 1978).

96. *Nat'l Org. for Women*, 914 F.2d at 586.

97. *Id.*

98. 498 U.S. 1119 (1991).

99. Justice Scalia delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices White, Kennedy, and Thomas joined.

100. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 757-58 (1993). The Court differentiated between the first and second clauses of § 1985(3). The first clause of

perhaps otherwise class-based, invidiously discriminatory animus" must lie behind the conspirator's actions.[101] Second, *Carpenters* established that the conspiracy must be aimed at a right that is "protected against private, as well as official, encroachment."[102] According to the plurality, respondents failed on both counts.

Justice Scalia first refuted the respondents' assertions that "opposition to abortion" belongs alongside race discrimination as "an otherwise class-based, invidiously discriminatory animus."[103] According to Scalia, opposition to abortion does not constitute discrimination against the "class" of women seeking abortions. In fact, these women seeking abortions do not constitute a class, even in a speculative extension of *Griffin*'s "otherwise class-based" requirement.[104] Justice Scalia argued that by allowing "women seeking abortion" to be labeled a class under § 1985(3), the statute would become the "general federal tort law" that the statute's original sponsors feared.[105]

Despite respondents' assertion that this conspiracy affects the class of "women in general," Scalia found nothing in the record to demonstrate that petitioners' actions are directed at women in general.[106] He determined that a class-based animus can only be established by showing either that the opposition to abortion has a sex-based intent *or* that it has a sex-based effect.[107] Justice Scalia argued that the petitioners' opposition was grounded in matters other than animosity toward women, such as the preference of childbirth over abortion, and therefore there was no sign that the conspiracy was a product of the protesters' dislike of women as a class.[108] Thus, there existed no discriminatory, sex-based intent. As to whether petitioners' actions constituted class-based animus solely by effect, Justice Scalia cited past precedent to show that the "disfavoring of abortion" is not ipso facto sex discrimination without the requisite element of intentional, class-based, invidiously discriminatory animus.[109] The plural-

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§ 1985(3), referred to as the "deprivation clause," describes a conspiracy "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." The second clause, referred to as the "hindrance" or "prevention" clause, adds "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." 42 U.S.C. § 1985(3) (1988). The Court interpreted and applied these two clauses in *Bray*.

101. *Bray*, 113 S. Ct. at 758; *see supra* text accompanying notes 53-58 and note 54.

102. *Bray*, 113 S. Ct. at 758; *see supra* text accompanying notes 67-75.

103. *Bray*, 113 S. Ct. at 759.

104. *Id.*

105. "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.*; *see also supra* note 30 and accompanying text.

106. *Bray*, 113 S. Ct. at 759.

107. *Id.* at 760.

108. *Id.* Justice Scalia stated that "there are common and respectable reasons for opposing [abortion], other than hatred of or condescension toward . . . women as a class—as is evident from the fact that men and women are on both sides of the issue." *Id.*

109. *Id.* at 760-61. Justice Scalia cited several cases to illustrate his point that disfavoring of abortion is not ipso facto sex discrimination: Harris v. McRae, 448 U.S. 297 (1980) (holding that abortion restriction issues are not viewed under heightened-scrutiny standards as are other cases dealing with sex-based discrimination); Maher v. Roe, 432 U.S. 464 (1977) (also

ity concluded there was no invidiously discriminatory animus that affected women as a class, and therefore, the respondents failed to satisfy the requirements set forth in *Griffin*.[110]

Justice Scalia then addressed the issue of state action raised by the Court in *Carpenters*[111] and determined the petitioners had not interfered with any rights protected against private encroachment. He asserted that an incidental infringement of the right to interstate travel is not sufficient for a § 1985(3) claim.[112] The deprivation of that right must be the conscious objective of the group and not simply a circumstantial effect.[113] In addition, the right of interstate travel is not implicated at the federal level unless the restriction is applied discriminatorily against travelers from another state or actual barriers are erected to interstate movement.[114] Thus, according to Justice Scalia, the actions of petitioners in no way implicated the right of interstate travel.

Justice Scalia next addressed the respondents' claim of a deprivation of their right to obtain an abortion. He likewise dismissed this claim by asserting the deprivation of that federal right is not remediable under § 1985(3) when it is produced by the object of a purely private conspiracy.[115] Justice Scalia argued that since the Court held in *Carpenters* that the absence of state action barred a claim against the deprivation of First Amendment rights, it would not make sense for the Court to allow such a claim for abortion, a right which is less explicitly protected by the Constitution.[116] Thus, respondents failed to establish either a class-based invidiously discriminatory animus or the deprivation of a right protected against private encroachment. Accordingly, Justice Scalia found no violation of the first clause of § 1985(3), and held that respondents' "deprivation" claim must fail.

Justice Scalia then quickly dismissed the issue of the second "hindrance" clause of § 1985(3).[117] Based on evidence that small, local police

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holding that abortion restriction issues are not viewed under heightened-scrutiny standards); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (denying an Equal Protection claim against a Massachusetts law giving employment preference to veterans, over 98% of whom were male); Geduldig v. Aiello, 417 U.S. 484 (1974) (rejecting a Fourteenth Amendment claim against an insurance company for denying coverage for certain disabilities associated with pregnancy).

110. By rejecting the claim that petitioners' opposition to abortion reflects an animus against women in general, the Court avoided determining whether women, or any group other than racial minorities, are a qualifying class under § 1985(3).

111. The Court in *Carpenters* held that a § 1985(3) private conspiracy claim requires intent to deprive persons of a right guaranteed against private impairment. *Bray*, 113 S. Ct. at 762 (citing United Bhd. of Carpenters, Local 610 v. Scott, 463 U.S. 825, 833 (1983)); *see also supra* text accompanying notes 64-75.

112. *Bray*, 113 S. Ct. at 762-63.

113. "The right must be '*aimed at*,' . . . its impairment must be a conscious objective of the enterprise." *Id.* at 762 (citing *Carpenters*, 463 U.S. at 833).

114. *Id.* at 763.

115. *Id.* at 764. The right to abortion is not a right that is protected against both federal and private encroachment, as it is "one element of a more general right of privacy . . . or of Fourteenth Amendment liberty." *Id.*

116. *Id.*

117. *See supra* note 100.

forces are often hindered or overrun by the mass demonstrations organized by Operation Rescue, respondents sought to invoke this clause on reargument and in their supplemental brief.[118] Although several Justices argued that relief could and should be granted on the basis of the hinderance clause, Justice Scalia claimed this second clause was not under review.[119] He mentioned, however, that if the second clause were invoked, it would still "seem to require" the class-based discriminatory animus required under the first clause.[120] The Supreme Court then reversed the judgment of the court of appeals, and left to the lower court on remand the question of whether the pendent state claims alone justified the injunction.

2. Concurring Opinion

Justice Kennedy wrote a concurring opinion claiming the different interpretations of § 1985(3) offered by the dissenting Justices confirmed, in his mind, the correctness of the Court's opinion.[121] A misinterpretation of this statute, he claimed, could make numerous "ordinary" state crimes actionable under a federal statute enacted over one hundred years ago.[122] Although Justice Kennedy viewed the petitioners' conduct as "persistent, organized, premeditated lawlessness" that "menaces in a unique way the capacity of a State to maintain order and preserve the rights of its citizens,"[123] he concluded that there are other forms of federal assistance that groups such as respondents can invoke.[124]

3. Justice Souter Concurring in Part and Dissenting in Part

Justice Souter began his opinion by asserting the case required interpretation of both clauses of 42 U.S.C. § 1985(3).[125] Justice Souter agreed with the majority's interpretation and application of the first clause of the statute. He concurred finding the criteria, set forth in *Griffin* and

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118. "Respondents sought to include a 'hindrance' clause section in their Supplemental Brief of Reargument, but the Court declined to accept that section for filing." *Bray*, 113 S. Ct. at 765.

119. *Id.* at 764-65.

120. *Id.* at 765-66. "We said in *Griffin* that the source of the animus requirement is '[t]he language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities' . . . and such language appears in the 'hindrance' clause as well." *Id.* (alteration in original) (citation omitted).

Justice Scalia went on to say that "[w]ithout a race or class-based animus requirement, the 'hindrance' clause of this post-Civil War statute would have been an available weapon against the mass 'sit-ins' that were conducted for the purposes of promoting desegregation in the 1960's—a wildly improbable result." *Id.* at 766.

By addressing this clause "not on review," Justice Scalia, through dictum, foreclosed any possibility that future plaintiffs in a similar situation could successfully invoke the second clause.

121. *Id.* at 768 (Kennedy, J., concurring).

122. *Id.*

123. *Id.* at 769.

124. Justice Kennedy mentioned that, pursuant to 42 U.S.C. § 10501 (1988), the Attorney General of the United States is empowered to put the full force of federal law enforcement resources at the disposal of the State. *Bray*, 113 S. Ct. at 769 (Kennedy, J., concurring).

125. *Bray*, 113 S. Ct. at 769 (Souter, J., concurring in part and dissenting in part).

Carpenters, necessary to invoke protection under the "deprivation" clause.[126] Thus, the absence of a class-based discriminatory animus aimed at the deprivation of a constitutional right that is protected from private as well as state encroachment forced him to agree, in part, with the majority.

Dissenting in part, Justice Souter maintained that the issue of the "hindrance clause" was properly before the Court. He believed that the question was presented broadly under the § 1985(3) claims.[127] As the Court had not previously addressed the hindrance clause and was not officially addressing it in this decision, Justice Souter attempted to clarify what he considered to be the clause's proper interpretation and application.

Justice Souter looked to legislative intent to argue that the class-based discriminatory animus imposed on the first clause of the statute should not be applied to the second.[128] He believed a similar limiting construction would render the statute inoperable. For example, the restrictions placed on the deprivation clause by the Court in *Griffin* and *Carpenters* "almost certainly narrowed that clause from the scope Congress had intended."[129] Justice Souter seemed reluctant to let the Court impose a similarly unintended restriction on the hindrance clause. He concluded by saying the Court should vacate the decision and remand for a final determination of whether this conspiracy is actionable under the hindrance clause of 42 U.S.C. § 1985(3).[130]

4. Justice Stevens' Dissenting Opinion

Justice Stevens was one of three Justices to fully dissent in the *Bray* decision.[131] Justice Stevens argued that the Court ignored § 1985(3)'s history, intent, and plain language and relied on misplaced precedent in its opinion. He determined that the narrow interpretation given to the statute in *Griffin* and *Carpenters* was done to avoid what were perceived as constitutional problems with the statute itself. As these problems no longer existed,[132] the statute should be interpreted to "reach current concerns without exceeding the bounds of its intended purposes."[133]

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126. Although Justice Souter abided by the precedent set in *Griffin*, he believed that the restrictions to a § 1985(3) claim fashioned by this opinion run counter to the intentions of Congress in 1871. *Id.* at 772.

127. *Id.* at 770.

128. While the limitations on the deprivation clause set by the *Griffin* court were a safeguard to the statute becoming a general federal tort law, no such danger exists with the hindrance clause. The requirement of proving a conspiratorial purpose to "prevent or hinder the constituted authorities . . . from giving or securing . . . the equal protection of the laws" is a sufficiently limiting requirement. *Id.* at 775.

129. *Id.* at 774.

130. *Id.* at 779.

131. Justice Blackmun joined with both Justice Stevens and Justice O'Connor, who wrote separate dissenting opinions.

132. Questions concerning the constitutional power of Congress in providing relief under the statute are no longer an issue. *See* Griffin v. Breckenridge, 403 U.S. 88, 95-96 (1971). Also, providing a remedy to the violent interference with women exercising their right to travel interstate to obtain an abortion "presents no danger of turning the statute into a general tort law." *Bray*, 113 S. Ct. at 784-85 (Stevens & Blackmun, JJ., dissenting).

133. *Bray*, 113 S. Ct. at 783.

Justice Stevens found no basis in the text of § 1985(3) for excluding from its coverage any class of persons entitled to equal protection of the laws.[134] Gender-based classifications, like racially based classifications, have historically been subject to challenge on constitutional grounds. Since *Griffin* does not explicitly exclude women from coverage under the statute, the question remained whether the deprivation of a woman's right to obtain an abortion, or to travel interstate to do so, is "class based" and actionable under § 1985(3).

In addressing this question, Justice Stevens attacked the plurality's reasoning in evaluating the elements of intent and effect in its determination of what constitutes class-based animus.[135] He claimed that by opposing constitutionally protected conduct engaged in exclusively by one class of people, the conspirators' intent to discriminate against that class is readily apparent.[136] In addition, the effect of this opposition or discrimination is felt only by that one group or class of people. Justice Stevens concluded that it is undeniable "the conspirators' immediate purpose was to affect the conduct of women."[137] Petitioners targeted these women particularly because of their gender and their capacity to become pregnant and have abortions. Therefore, a class-based invidiously discriminatory animus against the respondents had certainly been demonstrated.

Justice Stevens also believed the respondents had clearly established a violation of their right to interstate travel.[138] He cited precedent in which the Court explicitly held the right to enter another State to seek abortion services protected by the Privileges and Immunities Clause.[139] Making a woman's destination inaccessible or unavailable after she has traveled long distances for a single purpose is unquestionably a restriction on her constitutional right to interstate travel. Although the plurality insisted the "intent" requirement of 18 U.S.C. § 241 applies to its civil counterpart, § 1985(3), Justice Stevens asserted that it would be incorrect to assume the requirement found in the criminal statute should be "glibly" incorporated into the civil statute.[140] In fact, the language of § 1985(3) is obviously less stringent, broadly describing a purpose to deprive another of a privilege "either directly or indirectly."[141]

Even though the majority chose not to address the issue of the hindrance clause, Justice Stevens felt the respondents had unquestionably established a claim under that provision.[142] By preventing law enforcement officials from offering protection to women seeking to exercise their constitutional rights, petitioners' actions clearly implicate the hindrance clause of § 1985(3). Justice Stevens, like Justice Souter, also argued that

134. *Id.* at 785 (Stevens & Blackmun, JJ., dissenting).
135. *Id.* at 785-92.
136. *Id.* at 786.
137. *Id.* at 787.
138. *Id.* at 792.
139. *E.g.*, Doe v. Bolton, 410 U.S. 179, 200 (1973).
140. *Bray*, 113 S. Ct. at 793 (Stevens & Blackmun, JJ., dissenting).
141. *Id.*
142. *Id.* at 795.

the restrictions imposed by *Griffin* should not apply to the hindrance clause.[143] Not only do the restrictions in *Griffin* specifically address the deprivation clause of the statute ("the portion of § 1985(3) before us"[144]), but the hindrance clause requires no further restrictions to achieve its goals and to keep it from being a general federal tort law.[145]

Justice Stevens concluded by accusing the Court of selectively employing its various approaches to statutory interpretation in order to give § 1985(3) its narrowest possible interpretation.[146] The fatal flaw in the plurality opinion, according to Justice Stevens, was the Court's mistaken assumption that this case was about the opposition to abortion and not about the violent deprivation of constitutional rights.[147]

5. Justice O'Connor's Dissenting Opinion

Justice O'Connor, joined by Justice Blackmun, wrote a brief but powerful dissent concluding that "petitioners' activities fall squarely within the ambit" of § 1985(3).[148] Justice O'Connor argued these activities satisfied both clauses of the statute. She claimed that petitioners' purpose was to directly deprive women of their ability to obtain abortion services and to indirectly infringe on their constitutional right to travel interstate in seeking those services.[149] It was also evident from the record, according to Justice O'Connor, that local law enforcement officials have been hindered in or prevented from maintaining open access to the clinics[150] and a safe environment for their clients.

Justice O'Connor, along with Justices Souter and Stevens, looked to the legislative history of the statute and determined the lawlessness and violence exhibited by petitioners is just the scenario the authors of § 1985(3) wished to prevent.[151] Although Justice O'Connor viewed *Griffin's* imposition of the class-based, invidiously discriminatory animus requirement as a rational attempt to keep the statute from becoming the federal tort law feared by the sponsors,[152] she asserted that the decision in *Carpenters* was misguided in denying protection to groups based on characteristics other than race.[153] Justice O'Connor believed the scope of § 1985(3) should be as broad as was intended by Congress in 1871. The Court's approach to Reconstruction Era civil rights statutes has historically been to "accord [them] a sweep as broad as [their] language."[154] Ac-

143. *Id.* at 797.
144. Griffin v. Breckenridge, 403 U.S. 88, 99 (1971).
145. *Bray*, 113 S. Ct. at 797 (Stevens & Blackmun, JJ., dissenting).
146. *Id.* at 798-99 n.37.
147. *Id.* at 798.
148. *Id.* at 799 (O'Connor & Blackmun, JJ., dissenting).
149. *Id.* at 799-800.
150. *Id.* at 800.
151. *Id.* at 801.
152. *Id.* at 800.
153. *Id.* at 801.
154. *Id.* at 799 (quoting United States v. Price, 383 U.S. 787, 801 (1966)) (alteration in original). In *Bray*, however, "the Court does just the opposite, precluding application of the statute to a situation that its language clearly covers." *Id.*

cordingly, Justice O'Connor determined that, at the very least, the classes protected by the statute must encompass those groups that merit heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[155] Gender, she argued, most certainly falls within those bounds.[156]

Justice O'Connor found the petitioners' activities exhibited a discriminatory animus, regardless of the motivation behind their actions.[157] She noted the sincerity of their opposition to abortion "cannot surmount the manner in which they have chosen to express it."[158] In addition, the Fourteenth Amendment should not bar § 1985(3) from providing protection to respondents. Unlike Justice Scalia and the majority, Justice O'Connor viewed the statute as a complement to the Fourteenth Amendment and not as its twin. Thus, she saw no reason to hold a § 1985(3) plaintiff to the same constitutional standard of invidious discrimination.[159]

Justice O'Connor concluded that § 1985(3) was "intended to provide a federal means of redress to the targets of private conspiracies seeking to accomplish their political and social goals through unlawful means."[160] Thus, protection under the statute exists when "private conspirators target their actions at members of a protected class, by virtue of their class characteristics, and deprive them of their equal enjoyment of the rights accorded them under law."[161]

III. ANALYSIS

The Supreme Court has limited the interpretation of § 1985(3) since the statute's inception in 1871. Over the past century, the meaning and scope given to this Civil War statute by the Court have been inconsistent and indecisive. The Court inserted and removed, and then inserted again, certain restrictions until the precise meaning of the broadly worded statute was up for grabs. It is certain, however, that the statute has not become what its creators intended.

Bray v. Alexandria Women's Health Clinic gave the Supreme Court the opportunity to once again interpret the language of the statute, along with its legislative history and intent, and correctly apply it to the situation at hand. Instead of allowing the statute to remedy the type of situation for which it was intended, the Court denied protection from a private conspiracy that is strikingly similar to the one faced by Black Americans in 1871. The Court's decision included a narrow interpretation of the legal issues,

155. *Id.* at 801.

156. Justice O'Connor cited several circuit courts that reached the conclusion that the class of "women" falls within the protection of § 1985(3). *Id.* at 801; *see also supra* note 13 and accompanying text.

157. *Bray*, 113 S. Ct. at 802-03 (O'Connor & Blackmun, JJ., dissenting).

158. *Id.* at 802.

159. *Id.* at 803.

160. *Id.* at 805.

161. *Id.* at 804.

a complete disregard for the history and intent of the statute, and a failure to consider the dangerous legal and social repercussions of the decision.

A. *Justice Scalia's Majority Opinion*

1. Class-Based Animus Requirement

The *Griffin* Court stressed that § 1985(3) may not be construed as "a general federal tort law,"[162] because the limiting language "requiring intent to deprive of *equal* protection, or *equal* privileges and immunities" necessitates a demonstration of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions."[163] This limiting language was a rational response to congressional concern over the enormous sweep of the original criminal provision in the Ku Klux Klan Act.[164]

In *Bray*, Justice Scalia denied that respondents had established a class-based, invidiously discriminatory animus. He determined the group of "women seeking abortions" does not constitute a class. In addition, "opposition to abortion" does not constitute discrimination against "women as a class." In his view, this discrimination can only be shown by a "sex-based intent" or discriminatory "effect." Finding neither present, Justice Scalia concluded the petitioners' actions could not constitute a class-based, invidiously discriminatory animus.

The Court misinterpreted both the identity of the class and the nature of the protesters' animus in this case. The Court viewed the respondents as "women seeking abortion" rather than simply "women in general;" choosing to define petitioners' actions as simply "opposition to abortion"—alluding to a peaceful display of political difference—rather than recognizing petitioner's violent intentions and the discriminatory effect of their actions.

Justice Scalia refused to acknowledge that, because only women can become pregnant and only women can have abortions, it is necessarily the class of "women in general" being affected. He narrowed the identity of the group by claiming they are "women seeking abortions," ignoring the fact that the constitutional right to abortion is available to *all* women, whether they choose to exercise it or not. Operation Rescue and similar organizations have the ultimate goal of denying each and every woman the right to an abortion, regardless of whether she appears at a clinic. By identifying these women as "a group of people who wish to engage in a particular activity," Justice Scalia ignored the larger implications of his actions—effectively denying all women the protection of their constitutional rights.

Justice Scalia attempted to bolster this narrow interpretation by proclaiming that "[t]he approach of equating opposition to an activity (abortion) that can be engaged in only by a certain class (women) with

162. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).
163. *Id.*
164. *See supra* note 27 and accompanying text.

opposition to that class leads to absurd conclusions. On that analysis, men and women who regard rape with revulsion harbor an invidious anti-male animus."[165] It is Justice Scalia's analogy, however, that proves nearer to the absurd. While it is true that most rapists are male and rape victims female, it is certainly possible for a woman to rape a man, or for a woman to rape another woman, or even for a man to rape another man.

Justice Scalia's analogy, moreover, avoided again the fact that petitioners' opposition to this activity, in effect, denies to an entire class a constitutionally protected right. To deny women the exercise of their constitutional right to abortion is to deny an entire class. It matters not the intent of Operation Rescue or their feelings toward women. The problem that exists, and the real issue to be examined, is the discriminatory effect of their actions.

By not identifying the group seeking relief as women in general, the plurality avoided answering one of the most important questions left open in *Griffin*. If the Court had found that women "as a class" were invoking protection under § 1985(3), the Court would have been forced to determine, for the first time, if gender properly comes within the purview of the statute. It would be logical to assume that § 1985(3) provides protection to those groups the Court has already determined merit heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[166] Ever wary of extending civil rights protection, however, the Rehnquist Court effectively narrowed the issues and curtailed its analysis enough to avoid having to do so.

The Rehnquist Court has never been a champion of civil rights. In its effort to deny the expansion of civil rights to groups such as women, homosexuals, and ethnic minorities, the Court has, in the past, employed the same tactics used by Justice Scalia in the *Bray* decision. The issues are narrowed until the Court apparently has no choice but to rule against expanding civil rights. For example, in 1986, the Court in *Bowers v. Hardwick*[167] denied the extension of the constitutional right of privacy to homosexuals. Justice White based his majority opinion on the fact the Constitution does not confer on homosexuals a fundamental right to engage in sodomy. But as the dissent in *Bowers* pointed out, "[t]his case is no more about a 'fundamental right to engage in homosexual sodomy' . . . than *Stanley v. Georgia* . . . was about a fundamental right to watch obscene movies."[168]

Similarly, *Bray* is not a case simply about the right to abortion or the desire to engage in the activity of abortion. It is about the violent deprivation of the constitutional rights of a cognizable class of persons. Moreover, *Bray* is not about the petitioners' opposition to abortion. It is about

165. *Bray*, 113 S. Ct. at 761 n.4.

166. *See supra* note 154-56 and accompanying text.

167. 478 U.S. 186 (1986).

168. *Id.* at 199 (citations omitted); *see also* Stanley v. Georgia, 394 U.S. 557 (1969) (holding that the First and Fourteenth Amendments protect the possession and reading of obscene materials in the home).

the manner in which they choose to express that opposition. By not addressing the real issues before the Court, the plurality denied once again the extension of civil rights, left unanswered the questions surrounding § 1985(3), and thwarted the intent of the Reconstruction Congress to provide protection against mob violence.

2. Rights Protected Against Private Encroachment

The respondents asserted they were deprived of two constitutional rights: the right to travel interstate and the right to abortion. Justice Scalia concluded that petitioners had not interfered with any rights protected against private as well as official encroachment.

The right to travel needs no state action requirement and can be the object of a purely private conspiracy. It was on this ground that the lower courts granted relief to respondents. The plurality in *Bray*, however, reversed the injunction on grounds that the deprivation of this right must be the conscious objective of the group and not simply a circumstantial effect.

In addition, the deprivation of the right to an abortion cannot, according to Justice Scalia, be the object of a private conspiracy. He explained the right to abortion is based on a more general right to privacy and on Fourteenth Amendment liberties. After only a cursory analysis, Justice Scalia concluded that Fourteenth Amendment liberties such as the one respondents asserted simply cannot be protected from purely private conspiracies.[169] Justice Scalia's analysis, however, failed to address both the legislative intent behind the statute and the Court's precedent regarding congressional power under the Fourteenth Amendment.

The records of the congressional debates in 1871 demonstrate that § 1985(3) was fashioned as a necessary corollary to the Fourteenth Amendment. Using language similar to that of the amendment, the drafters intended the statute to protect against private conspiracies that could deny equal protection as effectively as any state action.[170] Many legislators believed that Congress had the power to punish private individuals who deprived others of the rights secured by the Thirteenth, Fourteenth, and Fifteenth Amendments.[171] Much of the debate actually focused on whether Congress had this power under the Fourteenth Amendment. The prevailing view was that southern states, by failing to convict or punish Klan members for their crimes, were encouraging the violence or, at the

169. The lower courts granted relief under the right to interstate travel and therefore did not need to address the question of abortion and congressional power under the Fourteenth Amendment.

170. Gormley, *supra* note 17 at 550.

171. *See supra* note 44.

very least, acquiescing to it.[172] Congress was therefore empowered to act in place of the states when the states failed to protect their citizens.[173]

Modern precedent supports the principle that Section 5 of the Fourteenth Amendment authorizes Congress "to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy."[174] Although the text of the Due Process and Equal Protection clauses of the Fourteenth Amendment suggests that only governmental actions are restricted, the Court has, in the past, subscribed to a theory of congressional power that allows Congress to subject some private conduct to Fourteenth Amendment limitations.[175] These cases support the idea that even under the narrowest reading of Section 5 of the Fourteenth Amendment, proscription of private conduct is proper as an auxiliary remedy in order to ensure that individuals are able to exercise their right to equal treatment.[176]

Most recently, the Court in *Griffin* intimated that Section 5 of the Fourteenth Amendment could be a source of congressional power to regulate private conspiracies.[177] Unfortunately, in the subsequent decisions of *Carpenters* and *Bray* the Court declined to grant relief on this basis. It would be consistent, however, with both legislative history and precedent, for the Court to hold that states have an affirmative obligation to regulate certain forms of private conduct, and when they fail to do so, Congress can substitute its own regulation under the Fourteenth Amendment.[178] Just as Congress provided protection to blacks when the states failed to do so, Congress should also afford women, as the targets of unfettered private conspiracies, remedies at the federal level.[179]

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172. "A systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection . . . and justifies . . . the active interference of the only power that can give it. . . ." Scott-McLaughlin, *supra* note 9, at 1374 n.55 (citing CONG. GLOBE, *supra* note 21, at 459) (alteration in original).

173. "It may be safely said, then, that there is a denial of the equal protection of the law by many of these States. It is therefore the plain duty of Congress to enforce by appropriate legislation the rights secured by this clause of the fourteenth amendment of the Constitution." *Id.*

174. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-15 (2d ed. 1988) (citing United States v. Guest, 383 U.S. 745 (1966)); *see also supra* note 58.

175. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966) (holding that § 5 of the Fourteenth Amendment authorizes Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment); United States v. Guest, 383 U.S. 745 (1966) (declaring that Congress possesses the power under § 5 of the Fourteenth Amendment to enact laws punishing all conspiracies to interfere with Fourteenth Amendment rights regardless of state action); District of Columbia v. Carter, 409 U.S. 418, 423 (1973) (dictum) (noting that the Fourteenth Amendment itself "erects no shield against merely private conduct"); Brewer v. Hoxie Sch. Dist. No. 46, 238 F.2d 91 (8th Cir. 1956) (holding that federal courts have power to enjoin private action designed to prevent school boards from furnishing unsegregated education).

176. TRIBE, *supra* note 174, § 5-15.

177. *See supra* notes 57-58 and accompanying text.

178. *See supra* notes 173-76 and accompanying text.

179. *See supra* note 7 and accompanying text.

B. *Legislative History and Intent*

Never before in interpreting § 1985(3) had the Court been presented with a situation that so closely resembled the events in 1871. The problem faced by society in the post-Civil War South was both politically and socially based. A class of people were being violently deprived of their constitutional rights. As much of this problem was due to political differences as was due to bigotry and hatred. The issues surrounding abortion are also political in nature. Just as there were differences in opinion in 1871 regarding slavery and suffrage, similar debate exists today over the legal, social, and moral implications of abortion.

The violence against blacks and their supporters in 1871 had escalated to a point where Congress was pushed into action. The violence against women seeking to exercise their constitutional right to abortion and their supporters has also escalated.[180] The conservative majority of the Supreme Court, however, is unwilling to provide protection for these women under the same statute enacted to protect blacks against violence in the Reconstruction South. Justice O'Connor aptly concluded in her dissent that the Ku Klux Klan Act:

> was intended to provide a federal means of redress to the targets of private conspiracies seeking to accomplish their political and social goals through unlawful means. Today the Court takes yet another step in restricting the scope of the statute, to the point where it now cannot be applied to a modern-day paradigm of the situation the statute was meant to address.[181]

C. *Implications and Alternatives*

The ramifications of the Court's inaction will be severe. The Supreme Court has, in effect, given a stamp of approval to organizations such as Operation Rescue and their acts of violence and harassment. The *Bray* decision sends a dangerous and far-reaching message to those who insist upon denying the reproductive freedoms of women.

"Rescues" will certainly multiply and radical pro-life factions will continue their campaign of domestic terrorism with new fervor.[182] Doctors

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180. According to the National Abortion Federation, vandalism in the last year more than doubled, and hate mail and harassing phone calls to clinics tripled. A total of eight death threats were reported in 1992, and in the first three months of 1993 alone, there were forty-three. *See* Mary Jordan & Don Phillips, *Abortion Foe Arrested in Shooting*, WASH. POST, Aug. 21, 1993, at A1.

181. *Bray*, 113 S. Ct. at 805 (O'Connor & Blackmun, JJ., dissenting).

182. According to the National Abortion Federation, violence against women and clinics increased dramatically in the last year. The group recorded 93 acts of violence (including vandalism, arson, bombing, assault, and death threats) against providers in 1991. In 1992, the number rose to 186. Robin Abcarian, *Doctor's Death Is a Call to Action*, L.A. TIMES, Mar. 17, 1993, at E1; *see also* Amy Goldstein & Brooke A. Masters, *Ruling Seen as Reviving Blockades - Abortion Foes Hope to Gain Second Wind*, WASH. POST, Jan. 14, 1993, at A10.

In response to the *Bray* decision, Randall Terry, the leader and founder of Operation Rescue, declared that "the most potent weapon" pro-choice advocates "had against us was the illegal use of the federal judiciary. That weapon was . . . smashed to pieces. This is really going to help us in our recruiting. Look out, here we come." Dick Lehr, *Court Limits Protection from Abortion Protests*, BOSTON GLOBE, Jan. 14, 1993, at B1; *see also* Fred Bruning, *Whatever*

will stop performing abortions for fear of suffering a fate similar to that of Dr. David Gunn.[183] Women will have to travel far and wide to exercise their constitutional right free from intimidation and harassment.

It is readily apparent that women who are being deprived of their rights in a persistent and violent manner cannot look to the Supreme Court for relief. Although the language of and intent behind § 1985(3) seem sufficient to give women seeking abortions protection, the Supreme Court interpreted the statute otherwise. Thus, in response to the *Bray* decision and similarly constricting civil rights interpretations by the Court, the public has called for specific protection of their civil rights by the legislature. Congress and the new administration have been quick to act. The President, the Attorney General, and many members of Congress support measures that would make it a federal offense to impede women's access to reproductive health care by means of violence and harassment. Pending legislation includes the Freedom of Choice Act and, most recently, the Freedom of Access to Clinic Entrances Act.[184] These bills, if passed, will make federal remedies available to women whom the Supreme Court has failed to protect from interference with their constitutional right to abortion.

In *National Organization for Women, Inc. v. Scheidler*,[185] the Supreme Court, in allowing petitioner's claim to go forward, opened another potential avenue of protection—the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970.[186] Similar to *Bray*, the petitioner health care clinics brought an action against a coalition of anti-abortion groups, called the Pro-life Action Network (PLAN), and alleged, among other things, that the respondents "were members of a nationwide conspiracy to shut down abortion clinics though a pattern of racketeering activity."[187] The petitioners argued that the PLAN constituted a racketeering "enterprise" for purposes of § 1962(c). The district court dismissed the case on the pleadings, finding that § 1962(c) required an economic motive requirement to "the extent that

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Happened to Reasoned Debate?, MACLEANS, Apr. 12, 1993, at 11 (quoting Don Treshman, director of another major anti-abortion group, Rescue America, who warns that if government passes legislation limiting pro-life demonstrators "there no doubt will be an even more regrettable increase in the level of violence.").

183. *See* Stephen Nohlgren, *Abortion Doctors in Demand*, ST. PETERSBURG TIMES, Aug. 26, 1991, at 1A.

184. The Freedom of Choice Act, H.R. 25, 103d Cong., 1st Sess. (1993), would prevent states from restricting the right to terminate a pregnancy before fetal viability or at any time if a woman's life or health is in danger. *See* Abcarian, *supra* note 183.

Under the Freedom of Access to Clinic Entrances Act, H.R. 796, 103d Cong., 1st Sess. (1993), the federal courts would have jurisdiction to order injunctive relief and damages against persons who use intimidation, violence, and threats to settle disagreements, but First Amendment protections would be available to those who oppose abortion in a peaceful manner. *See* Melich, *supra* note 4; *see also* Morella, *supra* note 1.

185. No. 92-780, 1994 WL 13716 (U.S. Jan. 24, 1994).

186. 18 U.S.C. §§ 1961-1968 (1988 & Supp. IV 1992).

187. *Scheidler*, 1994 WL 13716, at *2.

some profit-generating purpose must be alleged in order to state a RICO claim."[188]

In a unanimous decision written by Chief Justice Rehnquist, the Court found "a requirement of economic motive [in § 162(c)] neither expressed nor . . . fairly implied in the operative section of the Act."[189] Finding the statutory language unambiguous, the Court held that Congress had not required that an "'enterprise' in § 1962(c) have an economic motive."[190] In finding no economic requirement, the Court held the petitioners could maintain the RICO action, but still must prove that "respondents conducted the enterprise through a pattern of racketeering activity."[191]

Although the Court's decision did not primarily involve the issue of abortion, it nevertheless provided abortion clinics a potentially powerful weapon to combat the harassment they currently endure. Whether petitioners and future abortion clinics will be able to prove that anti-abortion groups have conducted an enterprise through a pattern of racketeering and, in turn, whether such acts are fully protected First Amendment activity, is yet to be determined.[192] In the interim, the vehement condemnation of the Court's decision by anti-abortion groups indicates the potential strength of RICO to halt the ongoing harassment.[193]

CONCLUSION

The Ku Klux Klan Act was enacted in response to the lawless mob violence in the post-Civil War South that law enforcement officials in the states were either unable or unwilling to stop. Just as the issues of race, slavery, and suffrage were explosive in the nineteenth century South, today's issues of privacy, abortion, and reproductive rights are equally volatile. The violence that ensues from this battle has gone virtually unchecked. Women being deprived of their constitutional rights have looked to § 1985(3) of the Ku Klux Klan Act for help. In *Bray v. Alexandria Women's Health Clinic*, the Supreme Court denied them that help. Thus, the protections envisioned by the Forty-second Congress, which should be extended to groups such as women, gays, and ethnic minorities, are being held hostage by a conservative Court.

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188. National Org. for Women, Inc. v. Scheidler, 765 F. Supp. 937, 943 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992). In affirming the district court's decision, the Seventh Circuit held that "non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO." *Scheidler*, 968 F.2d at 629.

189. *Scheidler*, 1994 WL at *6.

190. *Id.* at **6-7.

191. *Id.* at *7.

192. *See Scheidler*, 1994 WL 13716, at *8 (Souter, J., concurring) (stressing the Court's decision "does not bar First Amendment challenges to RICO's application in particular cases."). The Supreme Court, however, soon will likely decide this issue. On January 21, 1994, the Court agreed to hear a free-speech challenge by anti-abortion demonstrators to a court ordered injunction that created a protest-free buffer zone at an abortion clinic in Florida. *See* Madsen v. Women's Health Center, No. 93-880, 1994 U.S. Lexis 1317 (Jan. 21, 1994).

193. *See* Linda Greenhouse, *Abortion Clinic's Upheld by Court On Racket Suits*, N.Y. TIMES, Jan. 25, 1994, at A1; Tamar Lewin, *Anti-Abortion Protests to Continue, Groups Say*, N.Y. TIMES, Jan. 25, 1994, at A10.

It is therefore necessary to look to the legislature in hope that it will be better able to reflect the voice and concerns of the people. Women and other disadvantaged classes will also look to the new Administration to mold the Supreme Court into a body that wishes to enforce and not deprive citizens of their civil and constitutional rights.

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