CIVIL RIGHTS—ABORTION PROTESTS—42 U.S.C. § 1985(3) DOES NOT PROVIDE A FEDERAL CAUSE OF ACTION AGAINST PROTESTERS WHO OBSTRUCT ACCESS TO ABORTION CLINICS—*Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993).

On March 10, 1993, Dr. David Gunn was shot to death outside a Florida abortion clinic.[1] In Wichita, Kansas on August 19, 1993, a

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[1] Larry Rohter, *Doctor Is Slain During Protest Over Abortions*, N.Y. TIMES, Mar. 11, 1993, at A1 [hereinafter Rohter, *Doctor Slain*]. Dr. Gunn was one of only a few physicians who performed abortions in the Pensacola area. *Id.* at B10. Until Dr. Gunn opened the Pensacola Women's Medical Services clinic in early 1993, there was only one other clinic that offered abortions in the city. *Id.* at A1, B10. The doctor also traveled to Georgia and Alabama to provide the service. *Id.* at B10. The police arrested Michael F. Griffin, age 31, immediately after the shooting. *Id.* at A1. Griffin was later charged with murder. *Id.* The police said that Griffin was apparently not active in any anti-abortion group. *Id.* at B10. Griffin was, however, acquainted with the protest's organizer, John Burt. *Id.* at A1, B10.

Most anti-abortion groups stated they did not approve of the use of violence against abortion clinics. *Id.* at B10. However, Don Treshman, the national director of Rescue America, said: "'While Gunn's death is unfortunate, it's also true that quite a number of babies' lives will be saved.'" *Id.* A member of the American Family Association asserted that "'the man that was killed—and it was unfortunate—he should be glad he was not killed the same way that he has killed other people, which is limb by limb.'" Felicity Barringer, *Abortion Clinics Preparing for More Violence*, N.Y. TIMES, Mar. 12, 1993, at A1, A17. Additionally, some anti-abortion organizations claimed that harassing doctors who perform abortions is one of the most effective means of protest. Rohter, *Doctor Slain*, *supra*, at B10. Randall Terry, the founder of Operation Rescue, said: "'We've found the weak link is the doctor. . . . We're going to expose them. We're going to humiliate them.'" *Id.*

A nurse at The Ladies Center in Pensacola predicted that Dr. Gunn's death would have little effect on the abortion debate. Larry Rohter, *Death of Doctor Refuels a Debate—Each Side on Abortion Says Shooting at Florida Clinic Will Not Halt Struggle*, N.Y. TIMES, Mar. 13, 1993, at A6 [hereinafter Rohter, *Death of Doctor*]. She said: "'We're not going to let those people take away women's rights, and they aren't going to back off.'" *Id.* The leader of the Florida chapter of the National Organization for Women stated that security would be increased at clinics across the state. *Id.* The regional director of Rescue America, John Burt, declared that protests would resume outside The Ladies Center as soon as a replacement for Dr. Gunn was found. *Id.* Anti-abortion protesters have been demonstrating regularly outside the Pensacola clinic since the early 1980s. *Id.*

Griffin was convicted of first-degree murder on March 5, 1994. Larry Rohter, *Man Guilty of Murder in Death of Abortion Doctor*, N.Y. TIMES, Mar. 7, 1994, at A15 [hereinafter Rohter, *Man Guilty*]. The jury deliberated for less than three hours. *Id.* The jury disagreed with the defense's argument that Griffin had a nervous breakdown after being exposed to anti-abortion literature and videotapes and thereafter accepted blame for the murder to shield anti-abortion leaders. *Id.* Judge John Parnham immediately sentenced Griffin to life in prison, Florida's mandatory sentence for first-degree murder in cases in which the prosecution does not seek the death penalty. *Id.* Griffin will not be eligible for parole for 25 years. *Id.* David Gunn, Jr., Dr. Gunn's son, approved of the verdict but also expressed his belief that Griffin was not the lone murderer. *Id.*

homemaker active in the pro-life movement fired multiple rounds from a handgun at Dr. George Tiller, wounding him in both arms.[2] In the same month, Reverend David Trosch, a Roman Catholic priest, attempted to run a newspaper advertisement that espoused killing physicians who perform abortions.[3] A Bakersfield, Califor-

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[2] Seth Faison, *Abortion Doctor Wounded Outside Kansas Clinic*, N.Y. TIMES, Aug. 20, 1993, at A12. Tiller was shot outside Women's Health Care Services, one of only a few clinics in the country that performs third trimester abortions. *Id.* As a result, the clinic was targeted extensively by abortion protests in the summer of 1991. *Id.* In response to the shooting, Andrew Burnett, co-founder of Operation Rescue, stated that: "'The chickens have come home to roost at Tiller's house. . . . It would seem that he has been put out of commission, at least temporarily. I hope he will take this opportunity to reevaluate what he is doing.'" *Id.* Reverend Keith Tucci, executive director of Operation Rescue, on the other hand, distanced his organization from the shooting, asserting: "'Operation Rescue does not support vigilante acts of violence. . . . We remain committed to a peaceful, nonviolent intervention at clinics to save lives.'" *Id.*

The assailant, although chased by Dr. Tiller's coworkers, escaped by car. *Id.* Rachelle Renae Shannon, age 37, was arrested at an Oklahoma airport shortly after the shooting. *Suspect in Doctor's Shooting Praised Killing*, N.Y. TIMES, Aug. 22, 1993, at A29 [hereinafter *Suspect in Shooting*]. Shannon was charged with attempted murder. *Id.* Dr. Tiller returned to work at the clinic the morning after the shooting. *Id.* The doctor explained: "'I'm a health-care provider. . . . We had patients to take care of.'" *Id.*

After the murder of Dr. Gunn, a friend of Shannon's quoted her as saying: "'Is it really so bad?'" Dirk Johnson, *Abortions, Bibles and Bullets, And the Making of a Militant*, N.Y. TIMES, Aug. 28, 1993, at A1. "'People cheered when Hitler was killed,'" Shannon was quoted as saying, "'[a]nd this abortionist was a mass murderer.'" *Id.* Shannon had written letters of admiration and praise to Michael Griffin while he was in jail awaiting trial for the murder of Dr. Gunn. *Id.* at A8; *Suspect in Shooting*, *supra*, at A29. She wrote in one letter, "'I know you did the right thing. It was not murder. You shot a murderer. It was more like anti-murder.'" Johnson, *supra*, at A1. Shannon also contributed to Griffin's defense fund. *Suspect in Shooting*, *supra*, at A29.

Most major anti-abortion groups have condemned the violence. Johnson, *supra*, at A1. The National Right to Life Committee, for example, denounced efforts to link violence to the anti-abortion movement as a whole. *Id.* at A8. Some radical factions, however, have shown support for protesters who use violence to convey their message. *Id.* at A1. Andrew Burnett said that he supported Shannon, calling her act "'courageous.'" *Id.* at A1-A8. Burnett warned that more shooting could be anticipated because nothing else has proved effective. *Id.* at A8.

Shannon was convicted of attempted murder in the first degree on March 25, 1994. *11-Year Term in Shooting Outside Clinic*, N.Y. TIMES, Apr. 27, 1994, at A10. Judge Gregory Waller sentenced Shannon to almost 11 years in prison. *Id.* During the sentencing hearing, Shannon told the judge that she had done nothing wrong. *Id.* When the judge contradicted her and declared "'You did [do] wrong,'" Shannon responded, "'They said that about Jesus.'" *Id.* Additionally, Shannon acknowledged that rehabilitation would not work in her case because she "'hope[s] that I'll always be obedient to God no matter what it costs.'" *Id.*

[3] *Priest Scolded on Abortion Ad*, N.Y. TIMES, Aug. 18, 1993, at A20. The advertisement depicted a man holding a gun to a doctor wielding a knife over a pregnant woman. *Id.* The picture was accompanied by the words: "'Justifiable homicide.'" *Id.* Trosch told *The Mobile Register* that "[i]f 100 doctors need to die to save over one million babies a year, I see it as a fair trade." *Id.* Roman Catholic officials criticized

nia abortion clinic that had been the target of repeated protests was decimated by fire on September 20, 1993.[4] The incidence of violence against abortion providers has risen substantially within the last three years.[5] In an effort to combat this violence and the resulting diminution of women's ability to exercise their constitutionally protected right to abortion,[6] the federal courts have em-

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Trosch and gave him the alternative of recanting or resigning from his public position in the church. *Id.* Trosch later stated that he was pleased with the publicity he has received because of the ad. *Priest Likes Results From Doctor-Killing Ads*, NEWS TRIBUNE (N.J.), Aug. 23, 1993, at B3. Trosch said: "'Instead of paying $1,200 [for an ad], I got a half billion dollars of free publicity.'" *Id.* (alteration in original).

4 *California City's Abortion Clinic Burns, and Police Suspect Arson*, N.Y. TIMES, Sept. 21, 1993, at A19. Although their investigation was not yet complete, fire officials said that the speed with which the fire spread and its intensity indicated arson. *Id.* The fire resulted in approximately $1.4 million in damages to the clinic and two contiguous buildings. *Id.* Henry Pacheco, the assistant fire chief, noted that the clinic had been targeted by anti-abortion protesters in the past and that customers in neighboring businesses had complained about harassment. *Id.* Judith DeSarno, president of the National Family Planning and Reproductive Health Association, attributed anti-abortion violence to the movement's loss of momentum on the political front. *Id.* She hypothesized: "'Extremists on the anti-abortion side really are in a panic. . . . They are in fact losing and are trying to raise the stakes as high as they can.'" *Id.*

5 *See* Rohter, *Doctor Slain*, *supra* note 1, at B10. Specifically, the National Abortion Federation observed that reported acts of vandalism increased more than twofold between 1991 and 1992. *Id.* Additionally, the federation pointed out, arson incidents escalated from four in 1990 to twelve in 1992. *Id.* Between the years of 1977 and 1990, clinics that perform abortions reported 129 violent incidents to the National Abortion Federation. Mary F. Leheny, Note, *A Question of Class: Does 42 U.S.C. Section 1985(3) Protect Women Who Are Barred From Abortion Clinics*, 60 FORDHAM L. REV. 715, 715 (1992) (citation omitted). Among these 129 incidents, 52 clinics were set on fire, 34 were bombed, and 43 were the sites of attempted bombings or arson. *Id.* Additionally, 269 clinics were vandalized, 266 were invaded, 77 received death threats, 64 clinics' patients or staff were assaulted and battered, 22 clinics were burglarized, and there were two kidnappings. *Id.*

This escalation of violence results from the proposition that "'if you think that abortion is murder, then act like it's murder.'" David A. Gardey, *Federal Power to the Rescue: The Use of § 1985(3) Against Anti-Abortion Protestors*, 67 NOTRE DAME L. REV. 707, 707 (1992) (quotation omitted). The anti-abortion campaign has led to more than 50,000 arrests of protesters. *Id.*

Abortion providers view the escalating violence as a "call to arms" and claim that it is time to defend themselves. Barringer, *supra* note 1, at A1. In response to the increase in violence, abortion rights activists are installing bullet-proof windows and instituting 24-hour patrols of clinics. *Id.* Other physicians, however, say there is little more they can do to defend themselves. *Id.* at A17. Dr. Warren Hern, the medical director of a Boulder, Colorado, abortion clinic, stated: "'I am sitting here behind my desk, looking out a bullet-proof window. I work in four layers of bullet-proof windows. Death threats are so common they are not remarkable. I went to a pro-choice meeting in Denver recently, and as I walked through the picket line, someone said, '[y]ou should die.'" *Id.*

6 The right to abortion was announced in *Roe v. Wade* and was reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Roe v. Wade, 410 U.S. 113, 163 (1973); Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2833

(1992). For a detailed discussion of *Casey*, see Mary Edwards & Brian D. Lee, Note, 23 SETON HALL L. REV. 255 (1992).

The plaintiffs in *Roe* were Jane Roe, an unmarried pregnant woman; James Hubert Hallford, a physician who had been arrested in the past for performing abortions; and John and Mary Doe, a married couple who wanted to avoid pregnancy because Mrs. Doe was suffering from a "neural-chemical" disorder. *Roe*, 410 U.S. at 120-21. All three plaintiffs attacked the constitutionality of Texas's criminal abortion statutes. *Id.* at 121-22. The statutes rendered criminal all abortions except those performed to save the life of the mother. *Id.* at 117-18 (quotation omitted).

Justice Blackmun, writing for the Court, first determined that Jane Roe had standing and that her abortion in 1970 did not render her case moot. *Id.* at 125. The Court concluded, however, that Dr. Hallford was not entitled to relief because he did not allege that any federally protected right was in substantial and immediate danger. *Id.* at 126. The Justice also averred that the Does' claim was too speculative and their injury too indirect to state a cause of action. *Id.* at 128-29.

The Court next engaged in a lengthy analysis of the history of abortion jurisprudence. *See id.* at 129-47. Justice Blackmun noted that criminal abortion statutes "are of relatively recent vintage." *Id.* at 129. At common law, the Justice articulated, abortions performed before quickening (the first movement of the fetus) were not subject to criminal penalties. *Id.* at 132 (footnotes omitted). The Court concluded that abortion is viewed more harshly under current American abortion statutes than it was at common law, at the adoption of the Constitution, and throughout the greater part of the 19th century. *Id.* at 140.

Justice Blackmun identified three justifications for criminal abortion statutes. *Id.* at 147. First, the Justice enunciated, some have claimed that the laws were the result of a Victorian interest in deterring promiscuity. *Id.* at 148. The second reason given in support of criminal abortion laws, the Court recounted, is a concern for women's health and safety in a medical procedure. *Id.* at 148-50. Finally, Justice Blackmun contended, the third justification is the State's interest in safeguarding the life of the fetus. *Id.* at 150.

Acknowledging that there is no explicit reference to the right of privacy in the Constitution, Justice Blackmun explained, however, that the Court has identified a right of privacy in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments and in the penumbras of the Bill of Rights. *Id.* at 152 (citations omitted). The Court concluded that, wherever the right of privacy is founded, it is broad enough to cover a woman's decision to end her pregnancy. *Id.* at 153. Justice Blackmun qualified this right by holding that it must be balanced against the state interest in regulation. *Id.* at 154. The Justice elaborated that when "fundamental rights" are at stake, regulation is warranted only when the state can demonstrate a "compelling" interest and when the legislation is narrowly tailored to that interest. *Id.* at 155 (citations omitted).

The Court did not determine the point at which life begins. *See id.* at 159. Justice Blackmun observed, however, that the law has never bestowed the unborn with all the rights enjoyed by persons. *Id.* at 162. As a result, the Justice refused to allow Texas to embrace one theory of life, thereby transcending pregnant women's rights. *Id.*

Reasoning that mortality rates during the first trimester are lower than mortality rates of normal childbirth, Justice Blackmun set the end of the first trimester of pregnancy as the point at which the State's interest in maternal health becomes "compelling." *Id.* at 163. After the first trimester, the Justice elaborated, the State may regulate abortion as long as "the regulation reasonably relates to the preservation and protection of maternal health." *Id.* Conversely, Justice Blackmun explicated, during the first trimester, physicians and patients are free to decide, without State interference, whether to terminate a pregnancy. *Id.* The Justice declared that the State's "compelling" interest begins at viability. *Id.* At this point, the Court explained, the fetus is capable of "meaningful life outside the mother's womb." *Id.* Therefore, Jus-

ployed 42 U.S.C. § 1985(3)[7] to provide a federal remedy for clinics and patients harmed by abortion protesters.[8]

Despite the federal courts' rather widespread utilization of § 1985(3) to enjoin abortion protests, in *Bray v. Alexandria Women's*

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tice Blackmun clarified, the State may prohibit abortion after viability, except in those instances when the mother's life or health is at stake. *Id.* at 163-64. Because Texas's statute failed to differentiate between abortions performed before and after the first trimester, the Court held that it could not withstand constitutional attack. *Id.* at 164.

[7] Section 1985(3), which is the surviving version of § 2 of the Civil Rights Act of 1871 and is entitled "Depriving persons of rights or privileges," provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1988); Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 757-58 (1993).

The first clause of § 1985(3), also called the deprivation clause, enjoins conspiracies that deprive "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." 42 U.S.C. § 1985(3). The second clause of the statute, commonly called either the prevention or the hindrance clause, applies to conspiracies "for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws." *Id.* This Note focuses on the prevention/hindrance clause of § 1985(3).

[8] *See, e.g.*, National Org. for Women, Inc. v. Operation Rescue, 914 F.2d 582, 585 (4th Cir. 1990) (affirming an injunction under § 1985(3) forbidding Operation Rescue from obstructing access to Washington, D.C. metropolitan area clinics), *rev'd in part and vacated in part sub nom.* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993); New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1359 (2d Cir. 1989) (holding that conspiracies aimed at women are within the ambit of § 1985(3)), *cert. denied*, 495 U.S. 947 (1990); Portland Feminist Women's Health Ctr. v. Advocates for Life Inc., 859 F.2d 681, 687 (9th Cir. 1988) (validating an injunction under § 1985(3) enjoining protesters from interfering with abortion services); Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church, 765 F. Supp. 617, 625 (N.D. Cal. 1991) (allowing a cause of action against anti-abortion protesters under § 1985(3)).

Health Clinic,[9] the United States Supreme Court refused to interpret the statute as affording protection to women as a class.[10] The majority announced that § 1985(3) provides no federal cause of action against protesters who obstruct access to abortion clinics.[11] Rather than provide a federal remedy, the Court suggested that clinics bring state court actions for trespass or for intentional obstruction of access to private premises.[12]

Operation Rescue[13] and its individual members are extremely dedicated to preventing abortion and reversing its current legality.[14] To attain these objectives, Operation Rescue arranges, coordinates, and takes part in "rescues"[15] at abortion clinics around the

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9 113 S. Ct. 753 (1993). *See generally* Lissa S. Campbell, Comment, *A Critical Analysis of* Bray v. Alexandria Women's Health Clinic *and the Use of 42 U.S.C. § 1985(3) to Protect a Woman's Right to an Abortion*, 41 KAN. L. REV. 569, 588 (1993) (disagreeing with the *Bray* Court's analysis because women are a class under § 1985(3) and the protesters acted with a class-based animus); Karen Chopra, *Putting The Judicial Squeeze On The Civil Rights Act Of 1871*, 1993 DET. C.L. REV. 1315, 1354-55 (concluding that *Bray* narrowed the scope of § 1985(3) to such an extent that congressional legislation in the only available means of remedying the injustices created by the decision); 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, 1403-04 (1992) (advocating that the Supreme Court should enjoin abortion protesters who create "a factual situation . . . similar to that of the South in 1871"); *The Supreme Court, 1992 Term—Leading Cases*, 107 HARV. L. REV. 144, 341 (1993) (asserting that despite the *Bray* Court's restrictive reading of § 1985(3) "challenges to remedy the discriminatory actions of private conspiracies remain viable under the statute").

10 *Bray*, 113 S. Ct. at 759-60. The Court held that neither "women seeking abortion" nor "women in general" qualify as a class under § 1985(3). *Id.* at 759.

11 *Id.* at 757-58, 758.

12 *Id.* at 768. On the state level, Justice Scalia noted, these offenses may be prosecuted criminally and may also give rise to civil damages. *Id.* The majority asserted that the mere fact that the petitioners committed these offenses to stop abortions does not transform them into federal causes of action. *Id.*

13 Operation Rescue has been defined as "an unincorporated association whose members oppose abortion and its legalization." National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1487 (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). Operation Rescue folded on January 31, 1990. John E. Foster, Note, *Women as a Class Under Section 1985(3): A Realistic Approach*, 8 J.L. & POL. 781, 789 (1992). Founder Randall Terry cited financial difficulties relating to a National Organization for Women (NOW) lawsuit as the reason for the organization's demise. *Id.* (citation omitted). "Operation Rescue National" has taken the place of the original Operation Rescue. *Id.* (citation omitted).

14 *Operation Rescue*, 726 F. Supp. at 1488. Because the Supreme Court failed to include the factual background in its *Bray v. Alexandria Women's Health Clinic* opinion, all the facts in this Note are taken from the district court's opinion.

15 The district court defined a "rescue" as a "demonstration at the site of a clinic where abortions are performed." *Id.* at 1487. The demonstrators, called "rescuers," deliberately trespass on the clinic's property and obstruct access to the clinic thus ceasing operations for the period of the rescue. *Id.* "Rescuers" perceive their demon-

country, including clinics in the Washington, D.C. metropolitan area.[16] The goal of the "rescue" is to interrupt operations at the targeted clinic, thereby effectively closing the clinic during the demonstration.[17] Operation Rescue's tactics include trespassing upon clinic property and physically obstructing access to clinics, which prevent patients and staff from giving or receiving medical services or psychological counselling.[18] Thus, "rescues" create a significant risk that the targeted clinic's patients may sustain physical or mental injury.[19]

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strations as "rescues" of the fetuses that would have otherwise been aborted that day. *Id.*

16 *Id.* at 1487-88. These "rescues" have been organized under such names as The D.C. Project, Project Rescue, and The Veterans Campaign for Life. *Id.*

17 *Id.* at 1488. Randall Terry, Founder and National Director of Operation Rescue, explained the purpose of a rescue in an affidavit: "'[W]hile the child-killing facility is blockaded, no one is permitted to enter past the rescuers . . . Doctors, nurses, patients, staff, abortion-bound women, families of abortion-bound women—all are prevented from entering the abortuary while the rescue is in progress.'" *Id.* Operation Rescue's literature construes rescues as "'*physically* blockading abortion mills with [human] bodies, to intervene between abortionists and the innocent victims.'" *Id.* (alteration in original) (quotation omitted). Operation Rescue has sabotaged locks so that clinic personnel cannot gain entry to the facility. Leheny, *supra* note 5, at 716. Protesters also walk very slowly when being cleared from the area by police and refuse to reveal their names when being questioned by law enforcement officials. *Id.* By engaging in these rescues, Operation Rescue intends to (1) stop abortions; (2) discourage women from having abortions; and (3) demonstrate to society the strength and virtue of their anti-abortion position. *Operation Rescue*, 726 F. Supp. at 1488.

On July 15, 1991, Operation Rescue began a six week "rescue" in Wichita, Kansas, known as the "Summer of Mercy." Georgia M. Sullivan, Note, *Protection Of Constitutional Guarantees Under 42 U.S.C. Section 1985(3): Operation Rescue's "Summer Of Mercy,"* 49 WASH. & LEE L. REV. 237, 238 (1992). Wichita was targeted because it was the site of one of the only clinics in the country that still performed third trimester abortions. Elizabeth A. Roberge, Note, *Operation Rescue's Anti-Abortion Rescue Blockades and 42 U.S.C. § 1985(3) (a/k/a the Ku Klux Klan Act)*, 26 IND. L. REV. 333, 334 (1993). During the summer-long mission, 2700 arrests were made and $800,000 in city and county funds were expended to control the demonstrations. *Id.*

18 *Operation Rescue*, 726 F. Supp. at 1489.

19 *Id.* Uncontradicted testimony at trial disclosed that obstructing clinic entrances and exits and thwarting patient access could engender stress, anxiety, and psychological harm to (1) women scheduled to undergo abortions that day; (2) women with abortion procedures already underway; and (3) women in need of counselling about the abortion decision. *Id.* For example, physicians prescribe and insert a device to effect cervical dilation for some women who choose to have an abortion. *Id.* Prompt removal of the device is required to prevent infection, bleeding, and other complications. *Id.* If a clinic is closed by a "rescue," patients must either delay completion of the procedure or look elsewhere for medical attention. *Id.* Uncontradicted testimony at trial demonstrated that there are both economic and psychological obstacles to attaining the services at an alternative location. *Id.* (footnote omitted).

The blockades pose a grave threat to a woman's physical health when abortions are delayed from the first to the second trimester of pregnancy. Foster, *supra* note 13, at 787. The rate of complications is three to four times greater in second trimester

Operation Rescue planned a sequence of gatherings, rallies, and "rescues" in the Washington, D.C. metropolitan area for November 10-12 and 18-20, 1989.[20] These proposed events spurred area clinics and women's organizations to action.[21] On November 8, 1989, plaintiffs, nine clinics and five organizations,[22] made a motion for a temporary restraining order forbidding defendants, Operation Rescue and six individuals,[23] from obstructing access to abortion clinics.[24]

The District Court for the Eastern District of Virginia granted the plaintiffs' temporary restraining order.[25] After a trial on the

abortions than it is in first trimester abortions. *Id.*; *see also* Leheny, *supra* note 5, at 715-16 ("Physical and mental assault characterizes a patient's visit to a blockaded clinic.").

20 *Operation Rescue*, 726 F. Supp. at 1490. Operation Rescue had targeted the Commonwealth Women's Clinic in the Washington, D.C. metropolitan area almost weekly for the five years preceding the institution of *NOW v. Operation Rescue* in 1989. *Id.* at 1489. On October 29, 1988, for example, a "rescue" closed the clinic for over six hours despite the efforts of local police. *Id.* The Falls Church police were outnumbered by "rescuers." *Id.* at 1489 n.4. Two hundred and forty "rescuers" were arrested, but even this number of arrests could not prevent the clinic from being closed from 7:00 am to 1:30 pm. *Id.* at 1489 & n.4. The "rescuers" did not limit their protest to trespassing and obstructing access to the clinic. *Id.* at 1489. They also vandalized clinic signs and fences, parked a car with deflated tires in the middle of the clinic's parking lot to obstruct access to the lot, and scattered nails on the parking lot and surrounding public streets. *Id.* at 1489-90. In April, 1989, the Metropolitan Family Planning Institute in the District of Columbia was closed for approximately four hours by a similar "rescue." *Id.* at 1490.

21 *Id.*

22 The "clinic plaintiffs" perform abortions and offer related medical and psychological services in the Washington, D.C. metropolitan area. *Id.* at 1487 (footnote omitted). The "clinic plaintiffs" included the following: Capitol Women's Clinic, Inc., Hillcrest Women's Surgi-Center, Metropolitan Family Planning Institute, Alexandria Women's Health Center, Commonwealth Women's Clinic, Gynecare Associates, Metro Medical Center, Inc., NOVA Women's Medical Center, Planned Parenthood of Metropolitan Washington, D.C., Inc. (Falls Church), Planned Parenthood of Metropolitan Washington, D.C., Inc. (Fairfax), and Prince William Women's Clinic. *Id.*

The goal of the "organizational plaintiffs" is to establish and safeguard women's right to abortion. *Id.* The organizational plaintiffs included: National Organization for Women (NOW), 51st State NOW, Maryland NOW, Virginia NOW, and Planned Parenthood of Metropolitan Washington, D.C., Inc. *Id.* The "organizational plaintiffs" initiated this cause of action on behalf of both themselves and their individual members. *Id.* The organizations' membership includes women who may want to obtain an abortion or related services in the Washington, D.C. metropolitan area. *Id.*

23 The six individual defendants, organizers for Operation Rescue in the Washington, D.C. metropolitan area, included Michael and Jayne Bray and Randall Terry. *Id.* at 1488.

24 *Id.* at 1486. The plaintiffs requested the temporary restraining order to enjoin Operation Rescue from "physically impeding access to, and egress from, premises that offer and provide legal abortion services and related medical and psychological counselling." *Id.*

25 *Id.* After issuing the temporary restraining order, the court expedited the trial

merits, the court concluded that the defendants had breached § 1985(3) by colluding to divest women of their constitutional right to interstate travel[26] because a significant portion of the women seeking abortion services in the Washington, D.C. metropolitan area clinics travel interstate to obtain these services.[27] Moreover, the district court found that the defendants had trespassed upon the plaintiffs' property[28] and had constituted a public nuisance.[29] In fashioning a remedy for the plaintiffs, the court forbade the defendants from trespassing upon or obstructing access to abortion clinics in the Washington, D.C. metropolitan area.[30]

Affirming the decision of the district court, the Court of Appeals for the Fourth Circuit accorded great weight to the lower court's finding that the defendants' actions traversed the line from persuasion to coercion, thereby depriving women of their constitutional right to travel.[31] The appellate court noted that the district

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on the merits and consolidated it with the hearing for a preliminary injunction. *Id.* At trial, the plaintiffs called nine witnesses and provided documentary evidence. *Id.* The defendants, on the other hand, chose to present no evidence. *Id.*

26 *Id.* at 1493. The court asserted that the right to unencumbered interstate travel to obtain abortion services was contained within the right to travel. *Id.* (citations omitted). The court did not agree with the argument that clinic closings impress only upon intra-state travel. *Id.* The court posited that if such a conclusion were accepted, frustration of the right to travel could take place only at state borders. *Id.* The district court further found that because the right to interstate travel is protected against private as well as official encroachment, the plaintiffs were not required to demonstrate state action as part of their § 1985(3) claim. *Id.* (citing Griffin v. Breckenridge, 403 U.S. 88, 105-06 (1971) (citations omitted); New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1360 (2d Cir. 1989) (citations omitted), *cert. denied*, 495 U.S. 947 (1990)).

27 *Id.* at 1489. For example, roughly 20 to 30% of the patients treated at the Commonwealth Women's Clinic in Falls Church, Virginia traveled from out of state to reach the clinic. *Id.* These patients resided in Florida, Maryland, New Jersey, New York, Pennsylvania, Texas, Washington, D.C., and West Virginia. *Id.* Additionally, the majority of the patients served at the Hillview Women's Center in Forestville, Maryland travel interstate to procure abortion services. *Id.*

28 *Id.* at 1495. In Virginia, it is unlawful

> (i) to enter or remain on the property of another after having been forbidden to do so, (ii) to instigate or encourage others to enter or remain on the property of another knowing that such persons have been forbidden to do so, and (iii) to enter the property of another for the purpose of damaging such property or interfering with the rights of the owner, user or occupant of such property.

Id. at 1494 (citation omitted).

29 *Id.* at 1495. The court defined a public nuisance as "an act or condition that unlawfully operates to injure an indefinite number of persons." *Id.* (citations omitted).

30 *Id.* at 1497. The court held that the plaintiffs' request for nationwide injunctive relief was overbroad. *Id.* The district court did, however, direct the defendants to pay the plaintiffs' attorney's fees. *Id.* at 1498 (citation omitted).

31 National Org. for Women, Inc. v. Operation Rescue, 914 F.2d 582, 585 (4th Cir.

court's holding was consistent with the holdings of other circuits—that animus based on gender falls within the purview of § 1985(3).[32] The Fourth Circuit further held that the district court did not abuse its discretion in granting the injunction.[33] Affirming the scope given the injunction by the lower court, the Fourth Circuit agreed that broadening the injunction's ambit would conceivably enjoin activities protected by the First Amendment.[34]

Subsequently, the Supreme Court granted certiorari.[35] Justice Scalia, writing for the majority, rejected the lower courts' reasoning and reversed the judgment of the court of appeals.[36] To demonstrate a violation of § 1985(3), the Court declared that a plaintiff must establish: (1) that the conspirators were motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus;"[37] and (2) that the rights targeted by the conspiracy were "protected against private, as well as official, encroachment."[38] Because the defendant clinics and organizations failed to make either of the requisite showings, Justice Scalia concluded, the injunctive relief granted by the courts below was inappropriate.[39]

Section 1985(3) was widely ignored for almost one hundred years after its enactment.[40] In 1951, the United States Supreme

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1990), *rev'd in part and vacated in part sub nom.* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

32 *Id.* (citation omitted). Specifically, the court referenced decisions of the First, Second, Third, Seventh, Eighth, and Ninth Circuits. *Id.* (citations omitted).

33 *Id.* at 585-86.

34 *Id.* at 586. Specifically, the district court refused to enlarge the injunction to encompass conduct that "tend[s] to 'intimidate, harass or disturb patients or potential patients.'" *Id.* The Fourth Circuit deemed Operation Rescue's practice of attempting to verbally persuade women not to undergo abortions "expressive activity," in which the court should not interfere. *Id.*

Additionally, the Fourth Circuit affirmed the district court's refusal to dismiss the state law claims raised by the plaintiffs. *Id.* The court further noted that the district court did not reach the issue whether § 1985(3) provided a remedy for violations of the right to privacy, and therefore did not address the question either. *Id.*

35 111 S. Ct. 1070 (1991).

36 Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 768 (1993). The Court remanded the case for consideration of whether the state-law claims were sufficient to support the injunction. *Id.*

37 *Id.* at 758 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (footnote omitted)).

38 *Id.* (quoting United Brotherhood of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott, 463 U.S. 825, 833 (1983)).

39 *Id.*

40 *See* Collins v. Hardyman, 341 U.S. 651, 656 (1951) (asserting that "[t]his statutory provision has long been dormant"); *see also* Campbell, *supra* note 9, at 573 (stating that § 1985(3) "lay virtually dormant until 1951 when the Supreme Court heard *Collins v. Hardyman*"); Mark Fockele, Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402, 405 (1979) (observing that the statute "lay

Court rendered the statute largely impotent in *Collins v. Hardyman*.[41] In *Collins*, members of a political club alleged that the defendants had assaulted and intimidated them because the defendants disagreed with the club's views.[42] Justice Jackson, writing for the Court, rejected the plaintiffs' § 1985(3)[43] claim because their complaint did not allege that state officials were part of the conspiracy or that the conspirators even purported to be acting under color of state law.[44] The *Collins* Court interpreted the statute so as to avoid perceived constitutional infirmities.[45] The majority concluded that although the plaintiffs' rights were abridged, such private discrimination was not actionable under the statute.[46]

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nearly dormant for a hundred years after its enactment"); Devin S. Schindler, Note, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(3): A Limiting Strategy Gone Awry?*, 83 MICH. L. REV. 88, 89 (1985) (contending that the statute "languished in relative obscurity until 1971").

41 341 U.S. 651 (1951). For a discussion of the *Collins* decision, see Fockele, *supra* note 40, at 421-23; Scott-McLaughlin, *supra* note 9, at 1383-85. The *Griffin* Court later noted that the "clause could almost never be applicable under the artificially restrictive construction of *Collins*." *Griffin*, 403 U.S. at 96.

42 *Collins*, 341 U.S. at 653-55. The complaint further alleged that because the plaintiffs' meeting was terminated, their rights to petition the government for redress of grievances was fettered. *Id.* at 654-55.

43 Act of April 20, 1871, ch. 22, 17 Stat. 13 (codified as 8 U.S.C. § 47(3)) (current version at 42 U.S.C. § 1985(3) (1988)).

44 *Collins*, 341 U.S. at 655. The *Collins* Court reiterated: "'[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.'" *Id.* at 658 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (footnote omitted)).

45 *Id.* at 659. Among the constitutional problems envisioned by the Court were "issues as to congressional power under and apart from the Fourteenth Amendment, the reserved power of the States, the content of rights derived from national as distinguished from state citizenship, and the question of separability of the Act in its application to those two classes of rights." *Id.*

46 *Id.* at 661. Justice Jackson declared that the plaintiffs' "rights *under the laws* and to *protection of the laws* remain untouched and equal to the rights of every other Californian, and may be vindicated in the same way and with the same effect as those of any other citizen who suffers violence at the hands of a mob." *Id.* at 661-62. The Court stressed that it was deciding no constitutional issue but was only interpreting a statutory provision. *Id.* at 662.

Justice Burton, joined by Justices Black and Douglas, dissented from the majority opinion, asserting that the language of the statute rebutted the conclusion that state action is a requisite element of the statutory claim. *Id.* at 663 (Burton, J., dissenting). The dissent observed that when the Congress of this era intended to include a state action requirement in analogous civil rights legislation, it said so explicitly. *Id.* at 664 (Burton, J., dissenting). Justice Burton maintained that Congress is empowered to provide a federal cause of action for victims of private conspiracies. *Id.* Furthermore, the dissent argued that the Court's Equal Protection jurisprudence does not prevent Congress from enacting statutes to protect rights independent of the Fourteenth Amendment. *Id.*

In *Griffin v. Breckenridge*,[47] the Court sounded the death knell for *Collins* and revived § 1985(3) when it announced that the statute encompassed purely private conspiracies.[48] In holding that the defendants' conspiracy could be reached under § 1985(3), the Court dismissed *Collins* by maintaining that the constitutional infirmities envisioned in that case did not pertain.[49] Guided by the traditional judicial tendency to interpret Reconstruction civil rights statutes as broadly as their language allowed,[50] the *Griffin* Court removed the state action requirement imposed by *Collins*.[51]

Writing for the Court, Justice Stewart examined the statute's

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47 403 U.S. 88 (1971). For an analysis of the *Griffin* decision, see Fockele, *supra* note 40, at 405-07; Roberge, *supra* note 17, at 338-39; Scott-McLaughlin, *supra* note 9, at 1385-89; Sullivan, *supra* note 17, at 243-44. In *Griffin*, two white men blocked the passage of a car of black men traveling on a Mississippi highway. *Griffin*, 403 U.S. at 90. The defendants, mistakenly believing the driver of the car to be a civil rights worker, assaulted the plaintiffs with deadly weapons and prevented their escape. *Id.* at 90-91. More specifically, the defendants forced the plaintiffs out of their car, clubbed them, and threatened to kill them if they did not obey the defendants' commands. *Id.* at 91. The plaintiffs brought a cause of action under § 1985(3), claiming that the defendants had prevented them from exercising their rights as citizens of the United States and of Mississippi. *Id.* at 91-92. Included among the rights the plaintiffs asserted were infringed upon by the defendants' conspiracy were "their rights to freedom of speech, movement, association and assembly; the right to petition their government for redress of grievances; their right to be secure in their person; their right not to be enslaved nor deprived of life, liberty or property other than by due process of law, and their rights to travel the public highways without restraint in the same terms as white citizens . . . ." *Id.* The district court relied on *Collins* and dismissed the complaint for failure to state a cause of action. *Id.* at 92. The Court of Appeals for the Fifth Circuit affirmed the district court's decision. *Id.* (citation omitted).

48 *Griffin*, 403 U.S. at 96; *see* Roberge, *supra* note 17, at 338 (maintaining that the statute "was given new life with the Supreme Court's decision in *Griffin v. Breckenridge*"). Specifically, the *Griffin* Court criticized the *Collins* state action requirement as "artificially restrictive" and virtually inapplicable to the conspiracies the statute was enacted to address. *Griffin*, 403 U.S. at 96.

49 *Griffin*, 403 U.S. at 95-96. The Court observed that *Collins* was decided 20 years earlier and decisional law had evolved since that date. *Id.* at 93, 95-96.

50 *Id.* at 97 (citing United States v. Price, 383 U.S. 787, 801 (1966); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968) (quotation omitted)). *Id.* Justice Stewart also noted that statutes similar to § 1985(3) have been interpreted incongruously with the reading given the statute in *Collins*. *Id.*

51 *Id.* at 96, 101. The Court found confirmation for this meaning in the judicial interpretation of commensurate statutes, the structure of § 1985(3) itself, and the statute's legislative history. *Id.* at 96. The majority opined that "there is nothing inherent in the phrase [deprivation of equal protection of the laws] that requires the action working the deprivation to come from the State." *Id.* at 97 (citation omitted). The Court also noted Congress's failure to include a state action requirement explicitly: "Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of *all* deprivations of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' whatever their source." *Id.*

legislative history and found no evidence that liability was not intended to attach to purely private conspiracies.[52] Rather than requiring state action as an element of a § 1985(3) claim, the Court announced that henceforth plaintiffs would have to demonstrate that defendants were motivated by an "invidiously discriminatory animus" as part of the statutory cause of action.[53] Justice Stewart contended that this requirement would circumvent the constitutional problems of construing § 1985(3) as a general federal tort law.[54]

Furthermore, the majority asserted that enactment of the statute was unquestionably within Congress's authority.[55] The *Griffin* Court pronounced that Congress was within its Thirteenth Amendment[56] powers when it created a cause of action for African-American citizens who had been deprived of their right to equal protection by private conspirators motivated by a racially discriminatory animus.[57] Additionally, the majority determined that the plaintiffs' § 1985(3) claim could be supported by the right to inter-

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52 *Id.* at 99-100. The Court asserted that discussion of an amendment to the statute focused on the animus or motivation that would be required. *Id.* at 100. The Court relied upon the comments of Representative Willard, who declared that the revision "'provid[ed] that the essence of the crime should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities under the laws; in other words, that the Constitution secured, and was only intended to secure, equality of rights and immunities, and that we could only punish by United States laws a denial of that equality.'" *Id.* (quoting CONG. GLOBE, 42nd Cong., 1st Sess. App. 188 (1871) (statement of Rep. Willard)).

53 *Id.* at 102. The majority interpreted the statute's equal protection language as requiring a "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* (footnote omitted).

54 *Id.* The Court articulated:

> The 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—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.

Id.

55 *Id.* at 96.

56 The Thirteenth Amendment provides: "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.

57 *Griffin*, 403 U.S. at 105. In enacting the Thirteenth Amendment, the Court explained, the people of the United States committed themselves to ensuring the freedom of the newly emancipated slaves. *Id.* The majority declared that to honor this commitment, "'Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.'" *Id.* (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968)).

state travel.[58] Reading the statute without the state action requirement but with the discriminatory animus requirement, the Court concluded that the complaint stated a cause of action under § 1985(3).[59]

The Court had the opportunity to expand the scope given to § 1985(3) by the *Griffin* Court in *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*,[60] but instead chose to narrow the statute's purview.[61] The plaintiffs in *Carpenters* included two nonunion workers attacked by a large group of union members.[62] Justice White, writing for the majority, declared that conspiracies driven by an economic or commercial animus were outside the ambit of § 1985(3).[63] The *Carpenters* Court considered

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58 *Id.* at 105-06. The majority observed that the right to interstate travel is safeguarded by the Constitution, is not dependent upon the Fourteenth Amendment, and can be asserted against private as well as governmental encroachment. *Id.* (citations omitted). The Court thus explained that under these facts the plaintiffs could prove that:

> [T]hey had been engaging in interstate travel or intended to do so, that their federal right to travel interstate was one of the rights meant to be discriminatorily impaired by the conspiracy, that the conspirators intended to drive out-of-state civil rights workers from the State, or that they meant to deter the petitioners from associating with such persons.

Id. at 106.

59 *Id.* at 103. In fact, Justice Stewart articulated that "the conduct here alleged lies so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not." *Id.* Because the allegations in the complaint reached so close to the essence of the statute, the *Griffin* Court was not compelled to find § 1985(3) constitutional in all possible applications. *Id.* at 107.

60 463 U.S. 825 (1983). For a thorough analysis of the *Carpenters* decision, see Foster, *supra* note 13, at 796-97; Jane Kelly, Recent Decision, 64 TEMP. L. REV. 1175, 1180 (1991); Leheny, *supra* note 5, at 731-32; Roberge, *supra* note 17, at 339-41; Scott-McLaughlin, *supra* note 9, at 1389-95.

61 *See* Elizabeth L. Crane, Comment, *Abortion Clinics And Their Antagonists: Protection From Protestors Under 42 U.S.C. § 1985(3)*, 64 U. COLO. L. REV. 181, 189 (1993) (enunciating that shortly after *Griffin*, "the Court delineated, and limited, the kinds of abridgement of rights towards which the statute should be aimed"); *see also Carpenters*, 463 U.S. at 854 (Blackmun, J., dissenting) (perceiving "no basis for the Court's crabbed and uninformed reading of the words of § 1985(3)").

62 *Carpenters*, 463 U.S. at 828. On January 17, 1975, several truckloads of union members drove to the construction site where the plaintiffs were working. *Id.* The union members assaulted employees of A.A. Cross Construction Co., Inc., which hired workers regardless of union affiliation. *Id.* at 827-28. The district court held that the statute's prohibition of class-based discrimination applied to the class of nonunion workers. *Id.* at 829. The Court of Appeals for the Fifth Circuit affirmed the judgment of the lower court. *Id.* at 829-30 (citing Scott v. Moore, 680 F.2d 979, 1004 (5th Cir. 1982)).

63 *Id.* at 838. The Court also declared that state action is a prerequisite for finding liability for a conspiracy to abridge First Amendment rights under § 1985(3). *Id.* at 830.

it a "close question" whether Congress intended § 1985(3) to apply to any class-based discrimination other than that motivated by race.[64] Allowing a remedy under § 1985(3) whenever one political group tried to harm another, the majority predicted, would transform the federal courts into watchdogs over state and federal elections.[65]

In the wake of *Griffin* and *Carpenters*, the federal courts were left with little guidance in determining what constitutes a class for purposes of § 1985(3).[66] A majority of federal circuit courts of appeal have found that women constitute a protected class under the

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64 *Id.* at 836. Justice White articulated that the primary purpose of the statute was to negate the discrimination endured by African-Americans and their advocates. *Id. But see* Foster, *supra* note 13, at 793 ("Examining the legislative debate in light of the political, racial and economic hatred motivating the Klan, the general conclusion that Congress did not intend to restrict the protection of § 1985(3) to blacks and white Republicans is inescapable."). The *Carpenters* Court concluded that the legislative history did not support the proposition that discrimination based on economic status was meant to be covered by § 1985(3). *Carpenters*, 463 U.S. at 837.

65 *Carpenters*, 463 U.S. at 836. Justice White stressed that the courts should be wary of assuming such a role. *Id.* Justice Blackmun, joined by Justices Brennan, Marshall, and O'Connor, dissented, asserting that in its enactment of § 1985(3) Congress contemplated a federal remedy for all *classes* that attempt to pursue their rights in a threatening environment, not just the victims of Ku Klux Klan terrorism. *Id.* at 839, 851 (Blackmun, J., dissenting). The dissent contended that rather than creating an exclusive list of the classes of persons to be protected under the statute, Congress envisioned a "functional definition." *Id.* As support for the proposition that Congress intended to offer protection to groups other than those defined by race, Justice Blackmun insinuated that Congress meant to protect another group endangered by Klan violence—economic migrants. *Id.* at 852 (Blackmun, J., dissenting). The Justice explained that Congress wanted this group protected because of its "tenuous position in the South." *Id.*

The dissent reiterated that Congress envisioned a federal remedy for any class of persons whose equal protection of the law was in jeopardy. *Id.* at 853 (Blackmun, J., dissenting). Justice Blackmun concluded that the plaintiffs in the case at hand were entitled to a federal remedy under § 1985(3). *Id.* The dissent averred that the individuality or identity of the victims was inconsequential to the conspirators. *Id.* at 854 (Blackmun, J., dissenting). Rather, Justice Blackmun argued, the plaintiffs were assaulted because of their nonunion status. *Id.* Furthermore, the Justice opined that the defendants intended to encumber the exercise of a particular class's legal rights because of their inclusion within the class. *Id.*

For an analysis that concludes that *Carpenters* was wrongly decided, see Foster, *supra* note 13, at 797 (arguing that Justice White's reading of § 1985(3) was "clearly at odds" with the intent of the statute's drafters).

66 *See* Campbell, *supra* note 9, at 570 & n.7 (averring that the Supreme Court has decided only a few § 1985(3) cases since the statute's enactment and that "[m]any questions remain unanswered about the scope" of the statute). The Supreme Court had merely held that invidious discrimination motivated by race falls within the purview of § 1985(3), but invidious discrimination based on an economic or commercial class does not. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971); *Carpenters*, 463 U.S. at 838.

statute.[67] For example, before *Carpenters* was decided, the Third Circuit concluded that women are protected under § 1985(3) in *Novotny v. Great American Federal Savings & Loan Association.*[68] The court, persuaded by the tenet that people should not be subjected to discrimination based on traits over which they have no control, determined that animus against women fit within *Griffin*'s class-based animus requirement.[69]

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67 *See, e.g.*, National Org. for Women v. Operation Rescue, 914 F.2d 582, 585 (4th Cir. 1990) (upholding the district court's finding that animus based on gender is sufficient under § 1985(3)), *rev'd in part and vacated in part sub nom.* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993); New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1359 (2d Cir. 1989) (concluding that conspiracies aimed at women are "inherently invidious" and redressable under the statute), *cert. denied*, 495 U.S. 947 (1990); Volk v. Coler, 845 F.2d 1422, 1434 (7th Cir. 1988) (declaring that § 1985(3) affords protection to classes based on race, gender, religion, ethnicity, and political affiliation) (citations omitted); Stathos v. Bowden, 728 F.2d 15, 20, 22 (1st Cir. 1984) (holding public officials subject to liability under § 1985(3) for discriminating against female employees); Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979) (announcing that women who purchase disability insurance are a protected class under § 1985(3)); Conroy v. Conroy, 575 F.2d 175, 177 (8th Cir. 1978) (holding that a claim alleging a conspiracy based on race and gender was properly stated under § 1985(3)) (citations omitted); Novotny v. Great Am. Fed. Savs. & Loan Ass'n, 584 F.2d 1235, 1242 (3d Cir. 1978) (concluding that women are a protected class under the statute), *vacated on other grounds*, 442 U.S. 366 (1979); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 712 F. Supp. 165, 169 (D. Or.), *aff'd as modified*, 859 F.2d 681 (9th Cir. 1988) (holding that women are a protected class under § 1985(3)); *see also* Roberge, *supra* note 17, at 341-42 (stating that in the majority of cases in which plaintiffs sought to enjoin anti-abortion protesters under § 1985(3), the lower federal courts provided the requested relief).

68 584 F.2d 1235, 1242 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979). After examining the legislative history of the statute, the Third Circuit articulated that "the language of § 1985(3) should not be unnaturally cropped to exclude women from its protection." *Id.*

The plaintiff, John Novotny, was the Secretary and a member of the board of directors of Great American Federal Savings & Loan Association (GAF). *Id.* at 1237. Novotny alleged that officers and board members of the bank deprived female employees of the opportunity to advance within the company. *Id.* (footnote omitted). Novotny further alleged that he was fired after he supported a female employee who claimed that she had been discriminated against on the basis of her sex. *Id.* at 1238. Thereafter, Novotny brought an action against his former employer under § 1985(3) and Title VII of the Civil Rights Act of 1964. *Id.* The district court, holding that the employees of GAF were unable to conspire in violation of § 1985(3), dismissed both of Novotny's claims. *Id.*

69 *Id.* at 1243-44. The Third Circuit expounded:

> [The] fact that a person bears no responsibility for gender, combined with the pervasive discrimination practiced against women, and the emerging rejection of sexual stereotyping as incompatible with our ideals of equality convince us that whatever the outer boundaries of the concept, an animus directed against women includes the elements of 'class-based invidiously discriminatory' motivation.

Id. at 1243 (footnotes omitted).

On appeal, the Supreme Court of the United States framed the issue as whether

Similarly, in *New York State National Organization for Women v. Terry*,[70] the Second Circuit held that the expansive text of § 1985(3) does not bar women from its coverage.[71] The court noted that differential treatment based on immutable traits such as sex has been deemed invidiously discriminatory since 1973.[72] Be-

a person harmed by a conspiracy to violate Title VII is denied equal protection of the law under § 1985(3). Great Am. Fed. Savs. & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979). The Court held that § 1985(3) may not be employed to remedy Title VII violations. *Id.* at 378. The majority reasoned:

> If a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of these detailed and specific provisions of the law. . . . The short and precise time limitations of Title VII would be grossly altered. Perhaps most importantly, the complainant could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII.

Id. at 375-76 (footnote omitted).

The Court declared that § 1985(3) establishes no rights. *Id.* at 376. Rather, the majority declared, the statute was "purely remedial." *Id.* The Court held, therefore, that a Title VII violation was insufficient to support a claim under § 1985(3). *Id.* at 378. As a result, the Court vacated the judgment of the Third Circuit and remanded. *Id.*

70 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990).

71 *Id.* at 1358. Although the court conceded that Congress's main concern in enacting the statute was the protection of African-Americans, the majority found the statute's broad language and legislative history more persuasive than the initial catalyst for § 1985(3). *Id.* at 1358-59.

72 *Id.* at 1359 (citing Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973)). At issue in *Frontiero* was the right of a female member of the military to receive benefits for her spouse in the same manner as a male member. *Frontiero*, 411 U.S. at 678 (footnote omitted). Under the statutes, a serviceman could claim his spouse as a "dependent" without proving that she was in fact dependent on him for maintenance. *Id.* (citation omitted). By contrast, a servicewoman was required to prove that her spouse was dependent upon her for more than half his support. *Id.* at 678-79 (citation omitted). Sharon Frontiero, a United States Air Force lieutenant, brought suit, claiming that the statutes violated the Due Process Clause of the Fifth Amendment by discriminating on the basis of gender. *Id.* at 680 (footnote omitted).

Justice Brennan, writing for the *Frontiero* Court, asserted that sex discrimination has had a long and unfortunate history in the United States. *Id.* at 684 (footnote omitted). Historically, the Justice contended, "such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Id.* The Court remarked that women's status has improved considerably in the past few decades. *Id.* at 685. Justice Brennan asserted, however, that "it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena." *Id.* at 686 (footnote omitted). Additionally, the Court posited, because sex is an "immutable characteristic determined solely by the accident of birth," placing impediments on the members of one gender violates the tenet that legal infirmities should relate to individual culpability. *Id.* (citation omitted). Justice Brennan stated that gender is not often indicative of capability. *Id.* (footnote omitted). Therefore, the Court declared that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior

cause conspiracies that target women are inherently invidious and contrary to the concept of equality for all citizens, the majority concluded that such conspiracies must be included within the statute's ambit.[73] The Second Circuit contended that both its own and other circuits have found that § 1985(3) extends protection to classes based on gender,[74] political affiliations,[75] and ethnicity,[76] none of which were specifically envisioned by Congress when enacting the statute.[77] The majority remarked that a restrictive reading of § 1985(3), which affords protection only to classes based on race, was unsound.[78] The court reasoned that Congress would not provide a federal remedy against private conspiracies to deprive citizens of the equal protection of the law and then preclude women from receiving such protection.[79] Therefore, the court proclaimed

legal status without regard to the actual capabilities of its individual members." *Id.* at 686-87.

The Court concluded that sex-based classifications, like those based on race, national origin, or alienage, are intrinsically suspect and can only be upheld under strict scrutiny. *Id.* at 688. Under this standard, Justice Brennan pronounced, the military benefits statutes are unconstitutional. *Id.* The Justice observed that the government's only justification for the distinction was "administrative convenience." *Id.* The Court held that such a rationale was insufficient to withstand strict scrutiny. *Id.* at 690. Therefore, Justice Brennan concluded, the statutes violated the Due Process Clause of the Fifth Amendment. *Id.* at 691.

[73] *Terry*, 886 F.2d at 1359. The court argued that "[b]y its very language § 1985(3) is necessarily tied to evolving notions of equality and citizenship." *Id.*

[74] *See, e.g.*, Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979) (concluding that § 1985(3)'s protection extends to women consumers of disability insurance); *Novotny*, 584 F.2d at 1242 (determining that women are protected by the statute); Conroy v. Conroy, 575 F.2d 175, 177 (8th Cir. 1978) (concluding that an allegation of conspiracy directed at race and sex supported a cause of action under § 1985(3)) (citation omitted).

[75] *See, e.g.*, Conklin v. Lovely, 834 F.2d 543, 549 (6th Cir. 1987) (reiterating that § 1985(3) affords protection to groups classified by political views); McLean v. International Harvester Co., 817 F.2d 1214, 1219 (5th Cir. 1987) (stating that "political beliefs or associations" are protected by § 1985(3)) (citations omitted); Hobson v. Wilson, 737 F.2d 1, 21 (D.C. Cir. 1984) (holding that political affiliation with civil rights organizations was protected by § 1985(3)), *cert. denied*, 470 U.S. 1084 (1985); Keating v. Carey, 706 F.2d 377, 386-87 (2d Cir. 1983) (holding that political association with the Republican party was protected under § 1985(3)).

[76] *See, e.g.*, Volk v. Coler, 845 F.2d 1422, 1434 (7th Cir. 1988) (finding that § 1985(3) affords protection to classes defined by gender, religious beliefs, ethnicity, and political affiliation) (citations omitted).

[77] *Terry*, 886 F.2d at 1359 (citations omitted). *See supra* notes 74-76 (listing the cases cited by the *Terry* court).

[78] *Terry*, 886 F.2d at 1359. The court articulated that "'[a] narrow interpretation of the statute as protecting only blacks and other analogously oppressed minorities is untenable in light of the history of the Act.'" *Id.* (quoting *Keating*, 706 F.2d at 387) (alteration in original).

[79] *Id.*

that women are a class for purposes of § 1985(3).[80]

After determining that the plaintiffs constituted a protected class, the *Terry* court found that the defendants in *Terry* conspired to deprive women from gaining access to medical facilities.[81] The court rejected the argument that because the defendants bore no malice toward women as a class, the statute's class-based animus requirement was not met.[82] Instead, the court asserted that because the defendants' conspiracy targeted women seeking abortions, their conduct unveiled an animus motivated by gender.[83] The majority remarked that in most instances of invidious discrimination, constitutional rights are abridged only when members of a class act in some way that offends the conspirators.[84]

The District Court of Oregon, in *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*,[85] also concluded that women who elect to exercise their constitutional right to privacy by undergoing an abortion are protected under § 1985(3).[86] The court determined that to be protected under the statute, a class must be capable of definition apart from the characteristics of the conspirators.[87] The court looked to the Ninth Circuit's decision in *Life In-*

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80 *Id.*

81 *Id.* The court referenced Operation Rescue literature that promoted the blockading of abortion clinics. *Id.* The majority deemed this type of behavior a conspiracy to participate in illegal activity. *Id.*

82 *Id.* Rather, the majority construed animus as an individual's fundamental attitude or purpose. *Id.*

83 *Id.* The court also rejected the defendants' argument that their conspiracy focused on an activity or a "subgroup" of women. *Id.* This contention, the majority averred, was insufficient to evade the ambit of § 1985(3). *Id.*

84 *Id.* The court noted that the plaintiffs in *Griffin* were assaulted because the defendants believed them to be civil rights workers. *Id.* at 1359-60 (citing Griffin v. Breckenridge, 403 U.S. 88, 90, 91 (1971)). The Second Circuit accused the defendants of deception in using the argument that their conspiracy targeted only those members of the class who pursue their rights. *Id.* at 1360. The court relegated the argument that the defendants' actions would benefit women to the "'we are doing this for your own good'" category, reasoning that such an argument typically serves only to disguise true motive. *Id.*

85 712 F. Supp. 165 (D. Or.), *aff'd as modified*, 859 F.2d 681 (9th Cir. 1988).

86 *Id.* at 169. Plaintiffs, a women's health center and certain of its employees and patients, alleged that defendants, Advocates for Life, Inc., Christians in Action, and 12 individuals, conspired to interrupt, torment, and damage the health center's business and property, to inflict emotional distress on the individual plaintiffs, and to preclude the individual plaintiffs from exercising their right to abortion. *Id.* at 166. The court framed the issue as whether "'women who exercise their right to choose abortion'" constitute a protected class under § 1985(3). *Id.* at 167.

87 *Id.* at 169. The court quoted *Carpenters* to illustrate this proposition:

> "[T]he intended victims must be victims not because of any personal malice the conspirators have toward them, but because of their membership in or affiliation with a particular class. Moreover, the class must

surance Company of North America v. Reichardt,[88] which held that women buying disability insurance constitute a class under § 1985(3), as authority for the proposition that the courts need not limit the statute's scope to classifications based on race.[89] The majority could find no analytical difference between women who purchase disability insurance and women who exercise their right to choose abortion.[90] Therefore, the court concluded that plaintiffs constituted a protected class under § 1985(3).[91]

Not all circuits have agreed that women seeking abortions are protected under § 1985(3).[92] The Fifth Circuit, for example, has consistently refused to employ the statute in the abortion protest context.[93] In *Roe v. Abortion Abolition Society*,[94] patients, doctors who provide abortions, a clinic, members of the clinic's staff, and an organization furnishing escorts for clinic patients, brought a class action suit against the Abortion Abolition Society, individual members of the society, and the cities of Dallas and Mesquite, Texas under § 1985(3).[95] The court emphasized that the members of the protected class must have some trait in common apart from being victims of the conspiracy; this shared characteristic must differentiate the class from the population at large.[96] The majority further described a protected class as one defined by traits of the targets of the conspiracy, not by the views of the conspirators.[97] The plain-

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> exist independently of the defendants' actions; that is, it cannot be defined simply as the group of victims of the tortious action."

Id. (quoting United Brotherhood of Carpenters & Joiners of Am., Local 610, AFL-CIO, 463 U.S. 825, 850 (1983)) (citations omitted).

[88] 591 F.2d 499 (9th Cir. 1979).

[89] *Portland Feminist*, 712 F. Supp. at 169 (quoting *Reichardt*, 591 F.2d at 505). The district court observed that other circuits have also relied on *Reichardt* in holding that women are included within the statute's scope of protection. *Id.* (citations omitted).

[90] *Id.*

[91] *Id.* On appeal, the only contested issue was the constitutionality of the injunction issued by the trial court. Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 859 F.2d 681, 682 (9th Cir. 1988). The Ninth Circuit upheld the injunction for three reasons: (i) it was not impermissibly vague; (ii) it was not a content-based restraint on expression; and (iii) the government had a significant interest in enjoining the protesters' disruptive conduct. *Id.* at 685-86. Thus, the court upheld a modified version of the injunction without mention of § 1985(3). *See id.* at 687.

[92] *See* Gardey, *supra* note 5, at 719; Crane, *supra* note 61, at 204.

[93] *See* Roe v. Abortion Abolition Soc'y, 811 F.2d 931, 937 (5th Cir. 1987); Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788, 795 (5th Cir. 1989).

[94] 811 F.2d 931 (5th Cir. 1987).

[95] *Id.* at 932. The district court granted the defendants' motion to dismiss for failure to state a claim on the grounds that § 1985(3) does not include a class that is defined as not sharing the defendants' religious views about abortion. *Id.* at 932-33.

[96] *Id.* at 934 (citations omitted).

[97] *Id.* at 935. The court commented that in the case at hand, the plaintiffs defined

tiffs, a group of persons who did not join in the defendants' opposition to abortion, the court concluded, did not constitute a class within the meaning of § 1985(3).[98]

Similarly, in *Mississippi Women's Medical Clinic v. McMillan*,[99] the Fifth Circuit refused to extend § 1985(3) protection to women of childbearing age who wished to obtain medical services from the Mississippi Women's Medical Clinic (MWMC).[100] Initially, the court contended that because the protesters did not physically prevent patients from entering the clinic, no one was deprived of their constitutional right to obtain an abortion.[101] Because the plaintiffs failed to show that the defendants' actions were motivated by an "invidiously discriminatory animus" against the group, the majority determined that women of childbearing age going to the MWMC for medical services were not a class.[102] The court averred that Congress did not intend that class-based discrimination be judged by impact, but by animus or motivation.[103] Therefore, the majority proclaimed that the MWMC had defined its class in too under-inclusive a manner to warrant the protection of § 1985(3).[104]

By the time the Supreme Court addressed the issue of the applicability of § 1985(3) to abortion protests, the federal courts of appeal had grappled with and, for the most part, come to terms

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themselves as persons who disagreed with the defendants' opposition to abortion. *Id.* This belief, the court submitted, was "no more a common trait or characteristic than would be a belief in using seat belts or in an ever-expanding universe." *Id.*

[98] *Id.* at 935, 937. The court elaborated that "[n]o common unity of either religious denomination or faith characterizes those who seek, provide, or advocate a woman's freedom to choose an abortion." *Id.* at 936.

[99] 866 F.2d 788 (5th Cir. 1989).

[100] *Id.* at 791, 795. The Mississippi Women's Medical Clinic (MWMC) brought an action to obtain a preliminary injunction to prohibit abortion protesters from picketing the clinic. *Id.* at 790. The clinic sought to forbid the demonstrators from protesting within 500 feet of its premises and to censor the language used during the protests. *Id.* The district court refused to grant the preliminary injunction. *Id.*

[101] *Id.* at 791 (footnote omitted). Although the protesters may have created a psychologically intimidating atmosphere, the court noted that some women did indeed obtain abortions at the clinic, proving that the choice to undergo an abortion was available. *Id.* The majority maintained that because pregnant women were still able to obtain abortions at the MWMC, their constitutional rights remained intact. *Id.* at 794. The court inferred that what the plaintiffs were really "complaining" about was that patients were being forced to hear speech that they did not wish to hear. *Id.* The court refused to protect such an "unusual" right, especially in a public forum. *Id.*

[102] *Id.* at 794, 795. The record demonstrated, the court stated, that the protesters targeted their pro-life views at all groups, not just women who sought medical treatment at the MWMC. *Id.* at 794. The majority maintained that the defendants wanted to discourage *anyone* who supported or provided abortions. *Id.*

[103] *Id.* (citation omitted).

[104] *Id.* The court asserted that this under-inclusiveness was so severe that it mischaracterized the controversy. *Id.*

with the statute's relevance in the abortion protest context.[105] In *Bray v. Alexandria Women's Health Clinic*,[106] the Court defined the issue as whether § 1985(3) creates a federal cause of action against protesters who blockade ingress to and egress from abortion clinics.[107] The majority found that because the petitioners were unable to demonstrate the requisite showings of a § 1985(3) cause of action, they could not avail themselves of a federal remedy.[108]

Justice Scalia, writing for the Court, began the analysis by addressing *Griffin*, which held that § 1985(3) is applicable to solely private conspiracies.[109] The Justice, however, was quick to point to language in that decision warning against using § 1985(3) as "a general federal tort law."[110] The majority recounted the *Griffin* Court's declaration that a § 1985(3) defendant must intend to "deprive [the plaintiff] of *equal* protection."[111] The Court underscored *Griffin*'s requirement that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[112]

Basing its reasoning on common sense and precedent, the majority quickly disposed of the respondents' assertion that opposition to abortion satisfies the class-based animus requirement of § 1985(3).[113] First, Justice Scalia chastised the district court for declaring that "women seeking abortion" represent a class.[114] While acknowledging that a precise meaning of class may be unattainable, the Justice asserted that the term means more than an aggregate of persons with a common wish to participate in an activity of

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105 *See supra* notes 67-84, 92-104, and accompanying text (discussing the decisions of the federal courts of appeal).

106 113 S. Ct. 753 (1993).

107 *Id.* at 757-58.

108 *Id.* at 758.

109 *Id.* at 758-59 (citing Griffin v. Breckenridge, 403 U.S. 88, 101-02 (1971)). *See supra* notes 47-59 and accompanying text (discussing *Griffin*).

110 *Bray*, 113 S. Ct. at 758-59 (quoting *Griffin*, 403 U.S. at 102). In this way, the Court observed, the "'constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law'" would be avoided. *Id.* (quoting *Griffin*, 403 U.S. at 102).

111 *Id.* at 759 (quoting *Griffin*, 403 U.S. at 102).

112 *Id.* (quoting *Griffin*, 403 U.S. at 102). Justice Scalia noted that the Court had not, until *Bray*, had an opportunity to attach meaning to the "perhaps" in the oft-quoted dicta of the *Griffin* opinion. *Id.*

113 *Id.* Justice Scalia ridiculed the notion that a law enacted in 1871 would cover opposition to abortion. *Id.*

114 *Id.* One commentator argues that women seeking abortion are not a protected class under § 1985(3) because anti-abortion protesters target the activity rather than the women who engage in the activity. Gardey, *supra* note 5, at 742.

which the defendant disapproves.[115] Otherwise, the Court predicted, § 1985(3) would become exactly what the *Griffin* Court sought to avoid—a general federal tort law.[116] Therefore, the Court concluded that "women seeking abortion" do not constitute a class for purposes of § 1985(3).[117]

Next, Justice Scalia rejected the respondents' claim that opposition to abortion represents an animus against women as a whole.[118] Justice Scalia instructed that the statute mandates a focus on women "*by reason of their sex*."[119] In rejecting the argument that opposition to abortion represents discrimination against women in general, the Court cited the district court's finding that the petitioners' demonstrations were not motivated by any intent, malevolent or benign, toward women.[120]

Moreover, Justice Scalia proffered that a class-based animus could be established only if: (1) hostility toward abortion can be assumed to indicate a gender-based purpose; or (2) intent is immaterial and a class-based animus can be ascertained by effect only.[121] The Court rejected both propositions.[122] First, the Justice contended that opposition to abortion is not irrational and cannot be translated into antagonism toward women.[123] Justice Scalia alleged that whatever one's views on abortion, there are prevalent and honorable reasons for disagreeing with it other than malevolence toward women.[124] Indeed, the Justice maintained, one need not

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

116 *Id.* The majority contended that a class cannot be construed as the aggregate of persons harmed by tortious conduct. *Id.* (quoting United Brotherhood of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott, 463 U.S. 825, 850 (1983) (Blackmun, J., dissenting)).

117 *Id.*

118 *Id.* Accordingly, Justice Scalia found it unnecessary to decide whether women in general constitute a class under § 1985(3). *Id.*

119 *Id.* The Justice conceded that the animus requirement does not demand that the discrimination be maliciously motivated. *Id.*

120 *Id.* at 759-60. Rather, Justice Scalia observed, the district court found that the petitioners' goal was to separate doctors performing abortions from fetuses. *Id.* at 759. The Court referred to the district court's assertion that the petitioners' sole mission was to prevent abortion and convince the government and the American people that the practice should be outlawed. *Id.* at 759-60 (quoting National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1488 (E.D. Va. 1989)).

121 *Id.* at 760.

122 *Id.*

123 *Id.*

124 *Id.* Justice Scalia acknowledged that some activities are such an irrational target of opposition that if the activity is targeted and is one in which only a particular class engages, a purpose to antagonize that class may be presumed. *Id.* For example, to tax a person because he is wearing a yarmulke, the Court explicated, is to tax him for being Jewish. *Id.*

hold any opinion at all about women as a class to oppose abortion.[125]

Having rejected the argument that opposition to abortion can be assumed to bespeak gender-based intent, Justice Scalia observed that the respondents' case was left to rest entirely on the proposition that intent is non-germane.[126] Such a theory, the Court explained, presupposes that because only women have abortions, expressing hostility toward abortion is tantamount to expressing hostility toward women.[127] Justice Scalia found no case law to support this reasoning.[128] In *Geduldig v. Aiello*,[129] Justice Scalia noted, the Court proclaimed that even though only women have the ability to become pregnant, every legislative classification regarding pregnancy is not necessarily a gender-based classification.[130] The Court also cited *Personnel Administrator of Massachusetts v. Feeney*,[131] in which the Court refused to invalidate a Massachusetts law that gave employment preference to veterans, even though the class was more than ninety-eight percent male.[132] Justice Scalia added to the

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125 *Id.* As evidence for this proposition, the Court observed that both sexes are represented on the two sides of the abortion debate. *Id.*

126 *Id.*

127 *Id.* (footnote omitted).

128 *Id.*

129 417 U.S. 484 (1974).

130 *Bray*, 113 S. Ct. at 760 (quoting *Geduldig*, 417 U.S. at 496 n.20). In *Geduldig*, women who were eligible to receive benefits under California's Disability Fund brought an action challenging the constitutionality of a provision that excluded disabilities resulting from pregnancy from coverage. *Geduldig*, 417 U.S. at 486, 489. Justice Stewart, writing for the Court, held that the exclusion of such disabilities did not violate the Equal Protection Clause. *Id.* at 494. The Court asserted that California did not differentiate among persons or groups eligible for insurance under the program. *Id.* Further, Justice Stewart articulated, the State's decision not to insure all risks was permissible. *Id.* at 494-95.

The Justice identified three legitimate State interests served by excluding disabilities resulting from normal pregnancy. *See id.* at 496. First, the Court averred, California has an interest in keeping its disability insurance program self-supporting. *Id.* Second, Justice Stewart claimed that the State has a legitimate interest in maintaining adequate payments for the disabilities that the program covers. *Id.* Finally, the Justice asserted that California has a legitimate interest in preventing the employee contribution rate from becoming inordinately onerous. *Id.* The Court determined that these three interests warranted the State's decision to exclude disabilities caused by normal pregnancy from its coverage. *Id.* For the aforementioned reasons, Justice Stewart proclaimed that California's disability insurance program did not violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 497.

131 442 U.S. 256 (1979).

132 *Bray*, 113 S. Ct. at 760 (citing *Feeney*, 442 U.S. at 270, 281). In *Feeney*, Justice Scalia recounted, the Court articulated: "'Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.'"

class-based animus requirement of § 1985(3) *Feeney*'s holding that an action must be taken "because of" its negative effect on a particular group.[133] The Court then declared that the disapproval of abortion, standing alone, is not gender discrimination.[134]

Id. (quoting *Feeney*, 442 U.S. at 279 (citation and footnotes omitted))(footnote omitted).

The issue in *Feeney* was whether a State veterans' preference statute violated the Equal Protection Clause of the Fourteenth Amendment. *Feeney*, 442 U.S. at 259. Under the Massachusetts statute, all veterans qualifying for civil service jobs "must be considered for appointment ahead of any qualifying nonveterans." *Id.* In practice, this preference overwhelmingly benefitted males. *Id.* The plaintiff, Helen Feeney, a non-veteran, claimed that the statute deprived women of equal protection. *Id.* (footnote omitted).

Justice Stewart, writing for the majority, noted that women who have served in the military have always been able to take advantage of the preference. *Id.* at 268. The Justice also observed that the Equal Protection Clause does not prohibit the States from classifying. *Id.* at 271 (citation omitted). The Court enunciated that if a classification is rationally based, varying effects on different groups normally create no constitutional violation. *Id.* at 271-72 (citations omitted). Justice Stewart, however, compared classifications based on gender to those based on race and proclaimed that gender based classifications "have traditionally been the touchstone for pervasive and often subtle discrimination." *Id.* at 273 (citation omitted). The Court articulated that such classifications "must bear a close and substantial relationship to important governmental objectives" and are often unconstitutional. *Id.* (citing Craig v. Boren, 429 U.S. 190, 197 (1976)) (other citations omitted).

The majority concluded that the veterans' preference statute could be interpreted as other than a gender-based classification. *Id.* at 275. The Court asserted that too many men were disadvantaged by the statute "to permit the inference that the statute is but a pretext for preferring men over women." *Id.* Further, Justice Stewart expounded, the distinction made by the statute was nothing more than it claimed to be—a distinction between veterans and non-veterans. *Id.* The Justice concluded that "the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women." *Id.* at 280. The Court found that Feeney failed to show that the veterans' preference statute evinced a discriminatory purpose. *Id.* at 281.

[133] *Bray*, 113 S. Ct. at 760-61 (quoting *Feeney*, 442 U.S. at 279)(footnote omitted).

[134] *Id.* at 761. As support for this proposition, Justice Scalia recounted the Court's earlier refusals to apply heightened scrutiny to government abortion-funding limitations. *Id.* (citing Maher v. Roe, 432 U.S. 464, 478 (1977); Harris v. McRae, 448 U.S. 297,-322-24 (1980)). Instead, the Justice underscored, in both cases the Court employed the lesser rationality standard. *Id.*

The issue in *Maher* was whether a state that participated in the federal Medicaid program and that provided funding for childbirth was required to fund non-therapeutic abortions. *Maher*, 432 U.S. at 465-66. A Connecticut Welfare Department regulation required Medicaid beneficiaries to obtain a certificate of medical necessity from their attending physicians before the State would finance the abortion. *Id.* at 466. Justice Powell, writing for the Court, declared that the plaintiffs, two indigent pregnant women who were unable to acquire certificates of medical necessity, were not a suspect class. *Id.* at 467, 470 (footnote omitted).

The Court explained that *Roe v. Wade* did not announce an unlimited right to abortion. *Id.* at 473. Rather, Justice Powell explicated, a woman has a right to be free from "unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Id.* at 473-74. The Justice declared that *Roe* did not restrict the

Attempting to give content to the phrase "invidiously discriminatory animus," the Court referenced the exact terminology used by the *Griffin* Court and the language surrounding the phrase.[135] The majority averred that opposition to abortion does not deserve to be associated with racism.[136] Justice Scalia submitted that the Court has, in fact, upheld governmental programs that prefer childbirth over abortion.[137]

The Court identified a second, wholly independent reason for the failure of the respondents' federal claim: the protesters did not intend to deprive of a right insured against private infringement.[138] Justice Scalia noted that both the respondents and the lower courts relied upon the right to interstate travel to support their § 1985(3) claim.[139] The Justice admitted that this right has been held to be protected against private encroachment.[140] Justice Scalia concluded, however, that the district court's finding that many women travel interstate to obtain abortions in the Washington, D.C. metropolitan area was insufficient to support a § 1985(3) claim.[141]

State's ability to "make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Id.* at 474. The Court maintained that Connecticut's regulation did not preclude a pregnant woman from obtaining an abortion. *Id.* Rather, Justice Powell propounded, an indigent woman is not disadvantaged by the regulation; she must continue to rely on private services to obtain an abortion. *Id.* Therefore, the Court held that the State regulation did not interfere with the fundamental right announced in *Roe. Id.* (footnote omitted).

Justice Powell further determined that the Connecticut regulation satisfied the rationality test. *Id.* at 478. The Court averred that the State indisputably had a legitimate interest in promoting childbirth. *Id.* (quotation and footnote omitted). Further, the Justice articulated, the Connecticut regulation unquestionably advanced that interest. *Id.* Justice Powell stressed that the Court's decision did not prohibit states from subsidizing non-therapeutic abortions. *Id.* at 480. Rather, the Justice emphasized, the Court decided only that states are not under a constitutional obligation to fund such abortions. *Id.*

[135] *Bray*, 113 S. Ct. at 761-62 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)). The Court also provided a definition of invidious: "'[t]ending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating.'" *Id.* (citation omitted).

[136] *Id.* at 762.

[137] *Id.* (citing *Maher*, 432 U.S. at 474; *Harris*, 448 U.S. at 325). Justice Scalia observed that Congress has, with the Supreme Court's endorsement, disfavored abortion in the allocation of federal funding for medical procedures. *Id.* (citing *Maher*, 432 U.S. at 474; *Harris*, 448 U.S. at 325).

[138] *Id.* (citing United Brotherhood of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott, 463 U.S. 825, 833 (1983)). *See supra* notes 60-65 and accompanying text (discussing *Carpenters*).

[139] *Bray*, 113 S. Ct. at 762.

[140] *Id.* (citing *Griffin*, 403 U.S. at 105-06) (citations omitted).

[141] *Id.* The majority asserted that the only connection between the petitioners' actions and the right to interstate travel was the district court's finding that

The Court maintained that it is not enough for a right to be concomitantly affected.[142] To the contrary, Justice Scalia contended, the right must be *aimed at* by the conspirators.[143] The Justice asserted that the respondents would have had to show that the protesters knowingly and deliberately hindered their right to interstate travel.[144] There was nothing in the record, the Justice observed, to demonstrate that it was the protesters' conscious objective to deprive the respondents of their right to interstate travel.[145]

Justice Scalia identified a third reason why the respondents did not demonstrate a conspiracy to infringe upon the right to interstate travel: the petitioners' "rescues" would not impress upon that right.[146] The Court stressed that the right to interstate travel does not change state-law torts into federal crimes merely because they are committed against interstate travelers.[147] In this case, the Court noted, the only tangible restraints to movement that would have been created by the proposed "rescues" would have occurred at the abortion clinics themselves.[148] Justice Scalia argued that such a barrier restricted movement only from one section of Virginia to another.[149] The Justice averred that this purely intrastate

"'[s]ubstantial numbers of women seeking the services of [abortion] clinics in the Washington Metropolitan area travel interstate to reach the clinics.'" *Id.* (quoting National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1489 (1989)).

The Court looked to the criminal counterpart of § 1985(3) for guidance. *Id.* (citing 18 U.S.C. § 241). The majority quoted:

> [A] conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then . . . the conspiracy becomes a proper object of the federal law . . . .

Id. (quoting United States v. Guest, 383 U.S. 745, 760 (1966))(footnote omitted).

142 *Id.*

143 *Id.* (quoting *Carpenters*, 463 U.S. at 833).

144 *Id.* The Court stressed that this intent to deprive of a right requires more than awareness or acceptance of the deprivation. *Id.* at 763. Rather, Justice Scalia insisted, the defendant must act in order to effectuate the deprivation. *Id.* (footnote omitted).

145 *Id.* The Court contended that interstate travel is irrelevant to the petitioners' opposition to abortion. *Id.*

146 *Id.*

147 *Id.* The majority enumerated two protections offered by the guarantee of interstate travel. *Id.* First, Justice Scalia observed that interstate travelers are shielded from "'the erection of actual barriers to interstate movement.'" *Id.* (quoting Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982)). Second, the Court narrated, the guarantee of interstate travel safeguards interstate travelers' right not to be "'treated differently' from intrastate travelers." *Id.* (quoting *Zobel*, 457 U.S. at 60 n.6)(other citations omitted).

148 *Id.*

149 *Id.*

restriction would implicate the guarantee of interstate travel only if it was employed *discriminatorily* against the interstate travelers.[150]

Shifting from the right to interstate travel to the right to abortion, the Court announced that this latter right was also insufficient to support a § 1985(3) claim.[151] Conceding that the right to abortion was most certainly "aimed at" by the petitioners, Justice Scalia pronounced that the divestiture of this right could not be the goal of a private conspiracy.[152] The Justice explained that the statute can only be invoked against conspiracies that target rights safeguarded from not only official but also private infringement.[153] Justice Scalia observed that there are very few rights that are protected against such private encroachment.[154] The right to abortion, the Justice continued, is not included in this selective group.[155] Rather, the majority submitted, the right to abortion is part of the broader, more general rights of privacy or liberty, which are not defended against private encroachment.[156] Therefore, the respondents' deprivation claim under the statute failed, the Justice posited, because it did not identify a right that was both protected against private interference and targeted by the conspiracy.[157]

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150 *Id.* The Court's conclusion that the restriction was not applied discriminatorily against interstate travelers was buttressed by the fact that the respondents conceded as much at oral argument. *Id.* (footnote omitted).

151 *Id.* at 764.

152 *Id.*

153 *Id.* (quoting United Brotherhood of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott, 463 U.S. 825, 833 (1983)).

154 *Id.* The Court noted that "only the Thirteenth Amendment right to be free from involuntary servitude" and the guarantee of interstate travel within the context of the Thirteenth Amendment are protected against private infringement. *Id.* (citing United States v. Kozminski, 487 U.S. 931, 942 (1988); United States v. Guest, 383 U.S. 745, 759 (1966)(citations omitted)).

155 *Id.* The Court speculated that it would be strange to endow the right to abortion with such extensive protection considering that the right is not explicitly provided for in the Constitution. *Id.*

156 *Id.* (citing Roe v. Wade, 410 U.S. 113, 152-53 (1973); Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2804-05 (1992)).

157 *Id.* After outlining its reasons for refusing to apply § 1985(3) to the petitioners' "rescues," the majority challenged the reasoning and conclusions of the dissents. *See id.* at 764-67. First, Justice Scalia chided the two Justices for reaching the hindrance clause of § 1985(3). *Id.* at 764-65. The majority summarized the "extraordinary" steps the dissenting Justices were forced to take to reach the hindrance clause issue, i.e., the Justices saw claims that were not in the complaint, decided an issue neither presented to nor ruled on by the courts below, ignored the questions presented in the Petition for Certiorari, and, finally, punished both parties for not speaking to an issue on which the Court refused additional briefing. *Id.* at 765 (citations and footnote omitted).

The Court would have expressed some degree of understanding with the dissenters' unorthodox consideration of the hindrance clause, Justice Scalia alluded, had the

The Court declined to answer the question whether the pendent state-law claims were sufficient to warrant the injunction; the issue was left for consideration on remand.[158] In conclusion, Justice Scalia mentioned that trespassing and intentionally obstructing access to private property are unlawful in most, if not all, states.[159] The Justice emphasized that the fact that these actions are crimes does not transform them into federal offenses merely because their purpose is to thwart abortions.[160] The Court reversed in part and vacated in part the judgment of the Court of Appeals and remanded the case for further consideration.[161]

Justice Kennedy concurred with the judgment of the Court, but wrote separately to highlight another federal statute available to victims of organized lawless behavior.[162] The Justice reported the merits of 42 U.S.C. § 10501, under which state officials may request assistance from federal law enforcement officers when federally guaranteed rights are in danger.[163] Thus, the Justice underscored, notwithstanding the decision in the case at hand, the respondents were not without federal remedy, should local authorities request such assistance.[164]

Justice Souter, who concurred in the judgment in part and dissented in part, maintained that the interpretation of the deprivation and prevention clauses of § 1985(3) was central to the resolution of the case *sub judice.*[165] The Justice concluded that the limiting conditions placed on the former clause by the majority were inapplicable to the latter clause.[166] Furthermore, Justice Sou-

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clause clearly been violated. *Id.* The majority opined that the violation was anything but clear. *Id.* The Court interpreted the hindrance clause in the same manner as the deprivation clause and concluded that both clauses required a "class-based, invidiously discriminatory animus." *Id.* The majority repeated its earlier finding of a lack of any such class-based intent. *Id.* Reiterating the requirement that the conspiracy must target rights protected against private as well as official infringement, Justice Scalia reasoned that the hindrance clause claim must fail for this reason as well. *Id.* at 766. Finally, the Court vehemently disagreed with the dissenters' conclusion that it was the *purpose* of the "rescuers" to hinder law enforcement. *Id.* at 767.

158 *Id.* at 768.

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* at 768, 769 (Kennedy, J., concurring).

163 *Id.* at 769 (Kennedy, J., concurring) (citing 42 U.S.C. § 10501). If this statute were invoked, Justice Kennedy remarked, the decision to call in federal resources would be one for the Executive rather than the Judicial Branch. *Id.*

164 *Id.*

165 *Id.* at 769 (Souter, J., concurring in part and dissenting in part). *See supra* note 7 (providing the text of these two clauses).

166 *Bray*, 113 S. Ct. at 775 (Souter, J., concurring in part and dissenting in part).

ter claimed that the facts supported a finding that the protesters violated the hindrance clause, thereby creating a cause of action under § 1985(3).[167]

In contrast to the majority, Justice Souter submitted that the phrase common to both the deprivation and hindrance clauses—"equal protection of the laws"—should be given an independent reading.[168] The reasons for applying these conditions to the deprivation clause, Justice Souter contended, are inapplicable to the hindrance clause.[169] The Justice argued that if the limitations were used to circumscribe the reach of the hindrance clause, the clause would be rendered ineffective against conspiracies it was clearly intended to cover.[170] Justice Souter argued that the conspiracy in the present case was within Congress's intended scope of the statute.[171] Justice Souter maintained that the condition that actionable conspiracies be prompted by an intent to deny equal protection of the laws was the chief restraint placed on the scope of § 1985(3).[172]

Moreover, Justice Souter found fault with the Court's decision in *Griffin*.[173] In all likelihood, the Justice maintained, Congress in-

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167 *Id.* at 779 (Souter, J., concurring in part and dissenting in part). Justice Souter criticized the majority's finding that the hindrance clause was not properly before the Court. *Id.* at 770 (Souter, J., concurring in part and dissenting in part). Because the respondents' complaint merely alleged that the petitioners colluded with each other to deprive women seeking abortions of their right to privacy, the Justice contended that their cause of action was not confined to the deprivation clause. *Id.* (citation and footnote omitted).

168 *Id.* at 771 (Souter, J., concurring in part and dissenting in part).

169 *Id.*

170 *Id.*

171 *Id.* The Justice observed that the petitioners planned to overpower law enforcement officers and preclude them from safeguarding a class of victims who were merely trying to exercise a constitutional liberty. *Id.*

172 *Id.* at 772 (Souter, J., concurring in part and dissenting in part). Justice Souter quoted the sponsor of the amendment to demonstrate that the purpose of the statute was to preserve equality. *Id.* (quoting CONG. GLOBE, 42 Cong., 1st Sess. 478 (1871) (statement of Rep. Shellabarger)). Representative Shellabarger stated:

> The 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, 42 Cong., 1st Sess. 478 (1871) (statement of Rep. Shellabarger).

173 *Bray*, 113 S. Ct. at 772 (Souter, J., concurring in part and dissenting in part) (citing Griffin v. Breckenridge, 403 U.S. 88 (1971)). In attempting to respect the circumscriptive intent of the 42nd Congress, the Justice alleged, the *Griffin* Court's narrowing of the deprivation clause verged on "overkill." *Id.* Furthermore, Justice Souter criticized the *Griffin* Court for adding this class-based animus restriction to the statute without any clear showing that this was what Congress intended. *Id.* (citations omitted).

tended the statute's equal protection phrase to be given the same meaning as the Fourteenth Amendment's equal protection language.[174] Justice Souter explained that under the Equal Protection Clause, all classifications, whether premised on a racial or otherwise class-based "invidiously discriminatory animus" or not, are susceptible to examination.[175] The Justice concluded that any impermissible classification under the Equal Protection Clause should give rise to a cause of action under § 1985(3).[176] Finally, Justice Souter commented, there is evidence in the legislative history to suggest that the absence of any allusion to race in § 1985(3) was the result of a conscious decision, not of inadvertence.[177] The Justice further concluded that the *Griffin* and *Carpenters* decisions stripped away much of the deprivation clause and left it more diminished than Congress intended.[178]

The Justice next addressed the question of whether the rationale supporting a narrow reading of the deprivation clause pertains to the hindrance clause.[179] Justice Souter submitted that these justifications were not applicable.[180] Because of the already narrow

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174 *Id.* The statute, Justice Souter recounted, was passed just three years after the amendment was ratified. *Id.* The Justice could fathom no reason why the equal protection provision in the statute should be interpreted any more narrowly than its counterpart in the amendment. *Id.*

175 *Id.* at 773 (Souter, J., concurring in part and dissenting in part) (citation omitted). Nowhere, the Justice remarked, does the Equal Protection Clause refer to race. *Id.* The Justice pointed out that customary legislative classifications are subject only to rational basis scrutiny. *Id.* (citations omitted).

176 *Id.*

177 *Id.* In support of this conclusion, the Justice quoted Senator Edmunds, who remarked that "if there were a conspiracy against a person '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.'" *Id.* (quoting CONG. GLOBE, 42nd Cong., 1st Sess. 567 (1871) (statement of Sen. Edmunds)) (footnote omitted). These examples, Justice Souter commented, were not based on classes analogous to race. *Id.* (footnote omitted).

178 *Id.* at 775 (Souter, J., concurring in part and dissenting in part). In *Carpenters*, Justice Souter alleged, the Court moved beyond *Griffin* by holding that a plaintiff must allege that the defendant's ultimate goal was to infringe upon a constitutional right guaranteed against private interference. *Id.* at 774 (Souter, J., concurring in part and dissenting in part) (citing United Brotherhood of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott, 463 U.S. 825, 833 (1983)). The Justice maintained that this was an important step, one in which the Court created a more narrow ambit for the clause than Congress intended. *Id.* The Justice voiced skepticism that Congress had intended only to preserve the rights already protected by the Thirteenth Amendment. *Id.* Had that been the contemplated meaning of the statute, Justice Souter argued, the drafters would have said so explicitly. *Id.* The Justice interjected that Congress did just that in the third and fourth clauses of § 1985(3), which concerned voting rights already protected by the Fifteenth Amendment. *Id.*

179 *Id.* at 775 (Souter, J., concurring in part and dissenting in part).

180 *Id.* While Justice Souter could find no basis for the *Griffin* Court's choice of a

scope of conspiracies qualifying under the hindrance clause, the Justice concluded, its "equal protection of the laws" language should be read in no more restrictive a manner than the Fourteenth Amendment.[181]

Turning to *Carpenters'* requirement that the federal right targeted must be protected against both private and official interference, Justice Souter opined that this requirement was also inapplicable to the hindrance clause.[182] The Justice claimed that this condition should not be imported onto the hindrance clause because the very act of overwhelming government officials represents state action.[183] The Justice announced that the hindrance clause should apply to a conspiracy to thwart the government's ability to provide "equal protection of the laws," even absent a race or otherwise class-based animus and an object of breaching a constitutional right protected only from state action.[184]

In applying the hindrance clause to the case at hand, Justice Souter concluded that a conspiracy that attempts to prevent law enforcement officials from safeguarding women's right to abortion falls within the purview of the clause.[185] The Justice reached this conclusion based on the judgment that the classification could not pass the rationality test, i.e., the classification does not bear any

racial or analogous class-based animus requirement to limit the scope of § 1985(3), the Justice acknowledged the need to restrict the number of actionable conspiracies under the deprivation clause. *Id.* Textually, the Justice opined, no restriction was placed on the scope of the deprivation clause other than the requirement that the conspiracy threaten equal protection of the law. *Id.* Absent some form of court imposed restriction on the deprivation clause, Justice Souter agreed, the statute would become exactly what the *Griffin* Court feared—"'a general federal tort law.'" *Id.* (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)).

The Justice, however, differentiated the hindrance clause from the deprivation clause. *Id.* Justice Souter emphasized an element unique to the hindrance clause which materially diminishes its scope. *Id.* The Justice maintained that a private plot to cause harm is insufficient under the hindrance clause and, in addition, the conspiracy must be forceful enough to subvert the ability of authorities to enforce the law. *Id.* The Justice asserted that an expansive conspiratorial goal would be required in today's world. *Id.* at 775-76 (Souter, J., concurring in part and dissenting in part).

181 *Id.* at 776 (Souter, J., concurring in part and dissenting in part).

182 *Id.* (citing *Carpenters*, 463 U.S. at 833).

183 *Id.* The Justice stated that the "relevant point here is that the whole basis of the *Griffin* Court's analysis was that 'interference with or influence on state authorities' was state action." *Id.* (quoting *Griffin*, 403 U.S. at 98). Justice Souter maintained that the *Griffin* Court intended the state interference requirement to apply to the hindrance clause alone. *Id.* The Justice remarked that a separate state action requirement would be duplicative because "interference with or influence upon state authorities" constituted state action in itself. *Id.*

184 *Id.* at 776-77 (Souter, J., concurring in part and dissenting in part).

185 *Id.* at 777 (Souter, J., concurring in part and dissenting in part) (citations omitted).

relationship to a legitimate governmental objective.[186]

In dissent,[187] Justice Stevens found that the judgments of the lower courts were buttressed by the text of § 1985(3), the statute's legislative history, and the Court's precedent.[188] The Justice asserted that the protesters' conspiracy was designed to, and in fact did, encumber the respondents' right to interstate travel.[189] Additionally, the Justice contended that the plain language of § 1985(3) was expansive enough to embrace the petitioners' "rescues"[190] be-

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186 *Id.* (citation omitted). The Justice outlined the district court's findings that the petitioners conspired to close the clinics, trespassed, obstructed ingress to and egress from the clinics, and overwhelmed the police force, creating a period in which police protection was inadequate to protect the respondents' persons and property. *Id.* at 778-79 (Souter, J., concurring in part and dissenting in part). Justice Souter claimed that these findings of fact were indicative of the petitioners' intent to "prevent" or "hinder" law enforcement officials from providing "equal protection of the laws." *Id.* at 779 (Souter, J., concurring in part and dissenting in part). Nonetheless, Justice Souter concluded, these findings were not express, and therefore "the decision of the Court of Appeals should be vacated and the case be remanded for consideration of purpose." *Id.*

187 *Id.* (Stevens, J., dissenting). Justice Stevens was joined by Justice Blackmun. *Id.*

188 *Id.* The Justice condemned the Court for disregarding the manifest intent of § 1985(3) to prevent organized mobs from appropriating individuals' constitutional rights. *Id.* at 780 (Stevens, J., dissenting).

189 *Id.* at 781 (Stevens, J., dissenting). The dissent cited with approval the district court's finding that the protesters "'engaged in this conspiracy for the purpose, either directly or indirectly, of depriving women seeking abortions and related medical and counselling services, of the right to travel.'" *Id.* at 782 (Stevens, J., dissenting) (quoting National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1493 (E.D. Va. 1989).

The Justice distinguished the petitioners' conduct from ordinary trespass or anything approximating pacifistic picketing. *Id.* Rather, Justice Stevens charged, the "rescues" exhibited a modern instance of the type of fanatical, politically driven, unlawful behavior that inspired Congress to pass the Ku Klux Klan Act in 1871. *Id.*

190 *Id.* The Justice observed that the "rescues" occurred both on the public "'highway'" and the private "'premises of another.'" *Id.* (quoting 42 U.S.C. § 1985(3) (1988)). Justice Stevens noted that the women at whom the blockades were aimed were most certainly within "'any person or class of persons.'" *Id.* (quoting 42 U.S.C. § 1985(3)). Finally, the Justice opined, by frustrating government authorities' ability to protect women seeking access to the clinics, the petitioners, either "'directly or indirectly,'" divested the women of equal protection and their guarantee of interstate travel. *Id.* at 782-83 (Stevens, J., dissenting) (quoting 42 U.S.C. § 1985(3)).

Had the Court confined its analysis to the text of the statute, Justice Stevens hypothesized, it would have affirmed the decision of the Court of Appeals. *Id.* at 783 (Stevens, J., dissenting). The Justice denounced the majority for ignoring the history, purpose, and plain language of the statute, and instead relying on inapplicable judicial precedent. *Id.* In *Collins*, *Griffin*, and *Carpenters*, the Justice averred, the Court gave § 1985(3) a narrow construction in order to eschew perceived constitutional maladies inherent in the statute. *Id.* (citations omitted). Justice Stevens maintained, however, that granting a remedy to women attempting to exercise their right to travel interstate to obtain an abortion creates no peril of mutating § 1985(3) into a general federal tort law. *Id.* at 784-85 (Stevens, J., dissenting).

cause nothing in the text of the statute precludes any cognizable class of individuals from receiving the benefit of "equal protection of the laws."[191] Furthermore, the Justice attested, the reading given § 1985(3) by the *Griffin* Court did not exclude discrimination based on gender from the statute's purview.[192]

Justice Stevens debated the majority's declaration that a class-based animus could be found only if: (1) opposition to abortion can be reasonably presumed to signify gender-based intent; or (2) intent is immaterial.[193] Even accepting the Court's two-pronged characterization of class-based animus, however, the dissent concluded that both types of animus were present in the case at hand.[194] The dissent opined that a determination of a class-based animus does not necessitate the conclusion that simple opposition to abortion demonstrates prejudice against women as a class.[195] Justice Stevens expounded that because women are "unquestionably" a class worthy of protection, the class-based animus requisite is fulfilled if the conspiracy targets an activity in which only members of the class have the capability to engage.[196] The Justice explained that the effect on the protected class does not have to be the exclusive object of the conspiracy.[197] Rather, Justice Stevens maintained, it is sufficient that the conspiracy be induced at least partially by the unfavorable result it will have on the class.[198]

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[191] *Id.* at 785 (Stevens, J., dissenting). While conceding that the statute was enacted in 1871 in large measure to protect the nation's newly emancipated citizens, Justice Stevens reported that the Act's protection was to extend to all the nation's citizens. *Id.* (quoting CONG. GLOBE, 42nd Cong., 1st Sess. 484 (1871)).

[192] *Id.*

[193] *Id.* at 785-86 (Stevens, J., dissenting) (citing *id.* at 760). Justice Stevens interpreted the first proposition to indicate animosity or hostility. *Id.* at 786 (Stevens, J., dissenting). Using *Griffin* to refute the Court's premise, Justice Stevens proclaimed that it was immaterial that the defendants, in addition to preventing African-Americans from pursuing their rights, also objected to desegregation and African-American suffrage. *Id.* Similarly, the Justice posited, the *Griffin* Court did not demand that the plaintiffs prove that the assaults made upon them were inspired by hostility towards African-Americans. *Id.* In response to the Court's second proposition, that a discriminatory animus can be proven only if intent is irrelevant, Justice Stevens reminded the majority that Congress can offer more protection in a statute than is provided in the Constitution. *Id.*

[194] *Id.* at 787 (Stevens, J., dissenting).

[195] *Id.* In fact, the Justice continued, the conspirators need not be driven by animosity toward individual women to meet the class-based animus requirement of the statute. *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.* (citations omitted). In the case at hand, the Justice proffered, the petitioners intended their conduct to prevent the performance of abortions. *Id.* Justice Stevens emphasized that the petitioners' initial objective was to influence the behavior of

Turning to a discussion of discriminatory effects, Justice Stevens differentiated between statutory and constitutional claims.[199] The Justice acknowledged that the Fourteenth Amendment requires discriminatory intent, but refused to place a similar condition on a claim under § 1985(3).[200] Justice Stevens asserted that the difference between individuals who oppose abortion and individuals who use violence to force abortion clinics to close is more than semantic.[201] That the petitioners' conduct leads to discriminatory effects, Justice Stevens submitted, is unquestionable.[202]

The dissent stressed that the respondents' claim arose in a statutory rather than a constitutional context.[203] The Justice ex-

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women, regardless of the fact that their ultimate mission may have been to prevent abortion and reverse its legalization. *Id.* (footnote omitted). Thus, the dissent argued, women are the objects of the petitioners' "rescues" "*because of* their sex, specifically, because of their capacity to become pregnant and to have an abortion." *Id.* (footnote omitted).

The dissent hypothesized that the petitioners' unlawful behavior was also motivated by their belief that women are incapable of deciding whether to carry a fetus to term. *Id.* at 788 (Stevens, J., dissenting). The petitioners' activities, the Justice stressed, were implemented to deprive all women of a right that belongs to women alone. *Id.* Justice Stevens averred that this conspiracy, with its blatant disregard of the law and its vehement interference with women's constitutional rights, was illustrative of exactly the type of conduct that the drafters of the statute attempted to prevent. *Id.* (footnote omitted).

Shifting to the Court's equal protection analysis, Justice Stevens criticized the majority for creating an exception for rational class-based discrimination. *Id.* The Court, Justice Stevens admonished, confused lawful opposition to abortion with the violent usurpation of constitutionally protected rights. *Id.* at 788-89 (Stevens, J., dissenting). The Justice articulated that when Congress passed § 1985(3), it was asking the Court to recognize that these so called "rational" reasons are nothing more than excuses used to disguise and perpetuate discrimination. *Id.* at 789 (Stevens, J., dissenting).

199 *Id.*

200 *Id.* Justice Stevens clarified the holding in *Geduldig*. *See id.* (citing Geduldig v. Aiello, 417 U.S. 484 (1974)). *See supra* note 130 (discussing the *Geduldig* decision). That case, the Justice warned, did not hold that "a classification based on pregnancy is gender-neutral." *Bray*, 113 S. Ct. at 789 (Stevens, J., dissenting). The dissent opined that all that *Geduldig* established was that not every classification based on pregnancy was comparable to the classifications invalidated in *Frontiero* and *Reed*. *Id.* (citing Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971)). Justice Stevens noted that a central tenet of the *Geduldig* holding was the Court's belief that the disability insurance policy bestowed benefits equally on males and females. *Id.* (footnote omitted).

201 *Bray*, 113 S. Ct. at 790 (Stevens, J., dissenting) (quoting Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977)) (footnote omitted). The Justice accused the petitioners of forming a "mob that seeks to impose a burden on women by forcibly preventing the exercise of a right that only women possess." *Id.*

202 *Id.*

203 *Id.* The Justice explained that in constitutional cases, the Court applies an intent standard in deciding whether the Constitution has been breached. *Id.* at 790-91 (Stevens, J., dissenting). In contrast, Justice Stevens stated, the "class-based animus

plained that the roles of the intent standard and the class-based animus test vary depending upon whether the violation is constitutional or statutory.[204] The Justice then proffered that there is no reason to impute the rigorous criteria applied to a claim arising under the Constitution to one arising under § 1985(3).[205]

Justice Stevens next offered his belief that laws that encumber pregnant women discriminate on the basis of sex.[206] The Justice submitted that this is true because the capability of becoming pregnant is the inherited and immutable trait that fundamentally distinguishes females from males.[207] Justice Stevens argued that this conclusion should guide the courts' interpretation and application of civil rights legislation.[208]

Next, Justice Stevens asserted that the right to interstate travel cannot be severed from the rights the respondents sought to exercise.[209] The Justice agreed with the district court's finding that the petitioners intended to hinder the federal guarantee of interstate travel.[210] The dissent elaborated that by rendering abortion clinics inaccessible, the protesters encumbered interstate travel that was engaged in for the single purpose of obtaining an abortion.[211] Justice Stevens alleged that the obstruction of interstate travel was the foreseeable and natural outcome of the "rescues."[212]

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test" is employed in § 1985(3) cases to ascertain whether the already established violation can be remedied. *Id.* at 791 (Stevens, J., dissenting).

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.* (quotation omitted).

208 *Id.* The Justice found affirmation for this view in the Pregnancy Discrimination Act. *Id.* (citing 42 U.S.C. § 2000e(k) (1988)). Justice Stevens argued that the Act unequivocally communicates Congress's judgment that "'discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex.'" *Id.* (quoting Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Comm'n, 462 U.S. 669, 684 (1983)). The dissent next quoted *Automobile Workers v. Johnson Controls*, in which the Court held that a policy that precluded "all women capable of bearing children" from jobs which would expose them to lead was discriminatory on its face. *Id.* at 791-92 (Stevens, J., dissenting) (citing Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187 (1991)).

209 *Id.* at 792 (Stevens, J., dissenting).

210 *Id.* In fact, Justice Stevens opined, because the petitioners' ultimate objective is the abolition of all abortion facilities in the country, it is imperative that they obstruct women's access to abortion in other States. *Id.*

211 *Id.*

212 *Id.* Justice Stevens criticized the majority's reading of *United States v. Guest*. *Id.* at 792-93 (Stevens, J., dissenting) (citing United States v. Guest, 383 U.S. 745 (1966)). The dissent argued that nowhere in the *Guest* opinion did the Court imply that the right to interstate travel bars only restrictions that discriminate against out-of-state residents. *Id.* at 793 (Stevens, J., dissenting). The dissent also reproved the Court for failing to differentiate between a criminal and a civil statute. *Id.* (citing *id.* at 762; 18

Addressing the second clause of § 1985(3), the hindrance provision, the Justice concluded that the respondents were undeniably entitled to relief under this provision.[213] Justice Stevens conceded that the right to choose whether to terminate a pregnancy is a right protected only against state interference.[214] By preventing government authorities from protecting the pursuit of that right, however, Justice Stevens pronounced that the petitioners rendered their conspiracy redressable under § 1985(3).[215] The Justice enunciated that a conspiracy to hinder the government's ability to secure constitutionally protected rights involves the State to a significant degree and therefore creates a claim under the statute.[216]

The Justice turned next to application of the class-based animus requirement to the hindrance clause.[217] Justice Stevens noted that the *Griffin* Court restricted its holding to the statute's deprivation clause and thus concluded that *Griffin*'s reasoning was inapplicable to the hindrance clause.[218] Accordingly, Justice Stevens opined that it is wholly irrational to give the second clause a diver-

U.S.C. § 241 (1988)). The Justice commented that it was improper to incorporate the strict scienter requirement of the criminal statute in *Guest* into the civil statute in *Bray*. *Id.* (footnote omitted). The dissent found further fault with the Court's determination that an impediment to interstate travel is legitimate as long as intrastate travelers are equally hindered. *Id.* at 795 (Stevens, J., dissenting). Furthermore, Justice Stevens professed that discrimination is a component of the class-based animus requirement, not of the obstruction of a woman's guarantee of interstate travel. *Id.*

213 *Id.* at 795, 798 (Stevens, J., dissenting). Justice Stevens claimed that the record was replete with evidence of the petitioners' successful attempts to overwhelm local law enforcement. *Id.* at 796 (Stevens, J., dissenting). The Justice maintained that the authorities were rendered impotent during the "rescues" and that, as a result, mob violence triumphed. *Id.* (citing National Org. for Women, Inc. v. Operation Rescue, 726 F. Supp. 1483, 1489-90 & n.4 (E.D. Va. 1989)). Justice Stevens submitted that it was exactly this type of conspiracy that the hindrance clause of § 1985(3) was intended to contravene. *Id.*

214 *Id.*

215 *Id.* (citing United Brotherhood of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott, 463 U.S. 825, 830 (1983); Great Am. Fed. Savs. & Loan Ass'n v. Novotny, 442 U.S. 366, 384 (1979) (Stevens, J., concurring)).

216 *Id.*

217 *See id.* Justice Stevens acknowledged that the Court had never been presented with this precise issue, but contended that there had been occasion to consider the applicability of the requirement to another portion of the Ku Klux Klan Act, § 1985(2). *Id.* The Justice recounted that the Court did not impose the *Griffin* requirement on § 1985(2). *Id.* (quoting Kush v. Rutledge, 460 U.S. 719, 723 (1983)). Justice Stevens inferred from *Kush* that *Griffin*'s class-based animus requirement, drafted for the deprivation clause of § 1985(3), should not narrow the dissimilar second clause of the statute. *Id.* at 796-97 (Stevens, J., dissenting) (citing *Kush*, 460 U.S. at 726).

218 *Id.* at 797 (Stevens, J., dissenting) (quoting Griffin v. Breckenridge, 403 U.S. 88, 99 (1971)).

gent and more contrived reading.[219] The Justice reiterated that there is simply no danger of the hindrance clause becoming a general federal tort law, even absent the class-based animus requirement.[220]

Therefore, Justice Stevens reasoned that large-scale conspiracies preventing government officials from protecting one class's constitutionally protected rights should be covered by the hindrance clause.[221] In conclusion, the Justice maintained that *Bray* was not about opposition to abortion at all, but about the exercise of federal power to curb nationwide conspiracies to engage in unlawful conduct.[222]

Justice O'Connor, joined by Justice Blackmun, also dissented, averring that § 1985(3) extends to the respondents' injuries and the petitioners' conduct.[223] The dissent criticized the majority for relying upon an "element" of § 1985(3) that cannot be found within the text of the statute.[224] Justice O'Connor agreed with the majority that the narrowing interpretation given § 1985(3) by the *Griffin* Court was a sound attempt to preserve the text of the statute without allowing it to become a general federal tort law.[225] The

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219 *Id.*

220 *Id.* Justice Stevens next contended that it would be reasonable to hold that the clause prohibits conspiracies to hinder the government from protecting activities unique to a protected class. *Id.* This would be true, the Justice maintained, even where the conspirators' animus was directed not at the class but at the activity. *Id.*

221 *Id.* Such conduct, the Justice maintained, reaches as close to the core of the statute's scope as possible. *Id.*

222 *Id.* at 798 (Stevens, J., dissenting). The Justice admonished the Court for assuming that the case was about opposition to abortion. *Id.* Justice Stevens submitted that this erroneous conclusion contaminated the Court's reasoning throughout the entire opinion. *Id.*

223 *Id.* at 799 (O'Connor, J., dissenting). The Justice conceded that the initial purpose of the statute was to deter prejudice against African-Americans, but argued that the text of the Act is more inclusive than the historical situation that stimulated it. *Id.* (citations omitted). The Justice stressed that § 1985(3) was written in general language. *Id.* Historically, Justice O'Connor noted, the Court has interpreted Reconstruction Era civil rights legislation as broadly as the language will allow. *Id.* (citing United States v. Price, 383 U.S. 787, 801 (1966); Griffin v. Breckenridge, 403 U.S. 88, 97 (1971); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968)). The Justice denounced the Court for contradicting this precedent and refusing to apply a statute to a situation it was designed to cover. *Id.*

224 *Id.* at 800 (O'Connor, J., dissenting). *See supra* notes 109-12 and accompanying text (discussing the majority's analysis of *Griffin*). Justice O'Connor submitted that the Court clung vehemently to the language in *Griffin* that requires a class-based animus as part of a § 1985(3) cause of action. *Bray*, 113 S. Ct. at 800 (O'Connor, J., dissenting). The Justice, on the other hand, would have considered not only *Griffin*'s limiting phrase but also the reasons the Court added the phrase as an element of a § 1985(3) cause of action. *Id.*

225 *Id.*

Justice, however, viewed the class-based animus requirement as a shorthand description of the kind of conduct Congress was trying to prohibit, not an all-inclusive list of protected classes.[226]

The Justice could find no distinguishing factor between the Ku Klux Klan activities originally targeted by § 1985(3) and the protesters' activities in the present case.[227] Justice O'Connor disagreed with the majority's conclusion that women seeking abortions are no more than the aggregate of victims of the tortious activity.[228] Rather, the Justice asserted that the targets of the protesters' conspiracy were a clearly identifiable class before any tortious action took place.[229] Justice O'Connor agreed with Justice Stevens that the language of § 1985(3) offers no support for precluding any identifiable class of persons from receiving equal protection of the law.[230] The Justice opined that, at a minimum, the classes that warrant heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment must be defended by § 1985(3).[231] Justice O'Connor noted that gender-based classifications trigger such heightened scrutiny.[232]

Because women are a protected class under the statute, Justice O'Connor argued, § 1985(3) must cover conspiracies motivated by characteristics possessed exclusively by that class.[233] The Justice maintained that the victims of the protesters' tortious activities

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226 *Id.* at 801 (O'Connor, J., dissenting) (quoting United Brotherhood of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott, 463 U.S. 825, 851 (1983) (Blackmun, J., dissenting)).

227 *Id.* Justice O'Connor alleged that in both cases, the actors "'intended to hinder a particular group in the exercise of their legal rights because of their membership in a specific class.'" *Id.* (quoting *Carpenters*, 463 U.S. at 854 (Blackmun, J., dissenting)).

228 *Id.* (quoting *Carpenters*, 463 U.S. at 850 (citations omitted)). *See supra* notes 115-17 and accompanying text (discussing the majority's conclusion that women seeking abortions are not an identifiable class absent the tortious activity).

229 *Bray*, 113 S. Ct. at 801 (O'Connor, J., dissenting). The Justice contended that the targets were identifiable because of their "affiliation and activities." *Id.*

230 *Id.* (quoting *id.* at 785 (Stevens, J., dissenting)). *See supra* note 191 and accompanying text (discussing Justice Stevens's assertion that § 1985(3) offers protection to all cognizable classes).

231 *Bray*, 113 S. Ct. at 801 (O'Connor, J., dissenting).

232 *Id.* (citations omitted). As evidence of the special attention gender-based classifications deserve, the Justice asserted that all seven circuit courts addressing the issue have found that women are a protected class under the statute. *Id.* (citations omitted). *See supra* note 67 (citing the various decisions of the federal circuit courts of appeals). Justice O'Connor also quoted with approval Justice White, who remarked in *Novotny* that "'[i]t is clear that sex discrimination may be sufficiently invidious to come within the prohibition of § 1985(3).'" *Bray*, 113 S. Ct. at 801-02 (O'Connor, J., dissenting) (quoting Great Am. Fed. Savs. & Loan Ass'n. v. Novotny, 442 U.S. 366, 389 n.6 (1979) (White, J., dissenting)).

233 *Bray*, 113 S. Ct. at 802 (O'Connor, J., dissenting).

were united by their biological capability of becoming pregnant and their ability to abort their pregnancies.[234] Justice O'Connor opined that because the petitioners' "rescues" were intimately related to these unique characteristics, the "rescues" were motivated by the class-based animus required under *Griffin*.[235] Justice O'Connor asserted that the petitioners intended to aim at a protected class because of their class characteristics and to hinder their enjoyment of their lawful personal and property rights.[236] The Justice submitted that *Griffin*'s class-based animus requirement should demand no more.[237]

Justice O'Connor stressed that the majority's overly detailed examination of the words chosen by the *Griffin* Court should not supersede Congress's purpose for enacting § 1985(3).[238] Admonishing the Court for relying on cases interpreting the Equal Protection Clause, Justice O'Connor pointed out that the Equal Protection Clause applies to state actors, while the statute specifically addresses conspiracies engaged in by private actors.[239] The Justice averred that because of this difference, the majority's reliance on Equal Protection cases was misplaced and erroneous.[240] Justice O'Connor rejected the proposition that a § 1985(3) plaintiff must be held to the same invidious discrimination standard applied in Fourteenth Amendment cases.[241] Given the difference in focus between the Fourteenth Amendment and § 1985(3), the Justice would apply a lower threshold in establishing a violation of the statute than in establishing a violation of the Fourteenth Amendment.[242]

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234 *Id.*

235 *Id.*

236 *Id.*

237 *Id.* Justice O'Connor disagreed with the Court's assessment that using unlawful methods to attain a goal is irrelevant in determining animus. *Id.* (quoting *id.* at 760).

238 *Id.* at 802-03 (O'Connor, J., dissenting) (citation omitted).

239 *Id.* at 803 (O'Connor, J., dissenting) (citing Geduldig v. Aiello, 417 U.S. 484 (1974)).

240 *Id.* Justice O'Connor observed that Congress has determined that a classification based on pregnancy is a classification based on gender. *Id.* (citing Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1988)) (other citation omitted). Moreover, the Justice narrated, Congress has recently indicated that a showing of discriminatory purpose is not always essential to prove statutory discrimination. *Id.* (citation omitted).

241 *Id.*

242 *Id.* at 803-04 (O'Connor, J., dissenting). Like Justice Stevens, Justice O'Connor concluded that abortion was not the issue in this case. *Compare id.* at 804 (O'Connor, J., dissenting) *with id.* at 798 (Stevens, J., dissenting). *See supra* note 222 and accompanying text (discussing Justice Stevens's assertion that the case was not about abortion). The issue, the Justice opined, was whether a federal cause of action arises when

In addressing the hindrance clause of § 1985(3), Justice O'Connor declared that this clause entitled the respondents to seek the aid of a federal court.[243] The Justice maintained that the hindrance clause does not require that the conspiracy target rights protected against private as well as official infringement.[244] Instead, the Justice averred, the clause prohibits conspiracies intended to impede law enforcement.[245] Justice O'Connor concluded that the findings of the district court supported a holding that the petitioners' conspiracy was both class-based and designed to obstruct law enforcement officials' ability to preserve equal protection.[246]

Because of the escalating violence that often accompanies abortion protests and the inadequacy of state-law remedies to combat the problem, the Court should have followed the lead of the courts of appeals and provided a federal remedy under § 1985(3).[247] The Court unnecessarily restricted the scope of the statute, and did so without any clear mandate of legislative intent.[248] Rather, as was often pointed out by the dissenters in *Bray* and the circuits that recognized a cause of action under § 1985(3) in the abortion protest context, Congress chose only to limit the statute to deprivations of "*equal* protection of the laws."[249]

Therefore, the Court should have recognized that women are

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a private conspiracy to deprive a protected class of its legal rights is created. *Bray*, 113 S. Ct. at 804 (O'Connor, J., dissenting). The dissent asserted that a federal cause of action does arise in such a situation. *Id.*

243 *Bray*, 113 S. Ct. at 804 (O'Connor, J., dissenting).

244 *Id.*

245 *Id.*

246 *Id.* at 805 (O'Connor, J., dissenting).

247 *See* Foster, *supra* note 13, at 782 (asserting that state law remedies are less effective than federal remedies in enjoining Operation Rescue). *But see* Horizon Health Center v. Felicissimo, No. A-63, 1994 WL 117098 (N.J. Apr. 6, 1994); Murray v. Lawson, Nos. A-42, A-65, 1994 WL 117097 (N.J. Apr. 6, 1994); Operation Rescue v. Women's Health Center, 626 So. 2d 664 (Fla. 1993), *infra* note 273 (enforcing state law injunctions against anti-abortion protesters); Gardey, *supra* note 5, at 743 (arguing that because anti-abortion protesters violate state law, state courts rather than federal courts should mete out punishment).

248 Indeed, the statements of Senator Edmunds support the inclusion of *all* classes within the statute's purview. *See* CONG. GLOBE, 42nd Cong., 1st Sess. 567 (1871) (statement of Sen. Edmunds). *See supra* note 177 and accompanying text (discussing the legislative history of § 1985(3)).

249 Justice Souter asserted that the "principal curb placed on the statute's scope was the requirement that actionable conspiracies . . . be motivated by a purpose to deny equal protection of the laws." *Bray*, 113 S. Ct. at 772 (Souter, J., concurring in part and dissenting in part). *See supra* note 165-86 and accompanying text (discussing Justice Souter's concurrence); *see also supra* notes 223-46 and accompanying text (discussing Justice O'Connor's dissent).

a class under § 1985(3).[250] The fact that Operation Rescue does not target *all* women does not negate a finding of animus based on gender.[251] Anti-abortion protesters target women who exercise their right to obtain an abortion; these women possess this right because they are women and because they have the physical capability to become pregnant.[252] Congress has acknowledged that

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250 The class of women possesses "immutable characteristics" and has been the subject of historically "pervasive discrimination." *See* Novotny v. Great Am. Fed. Savs. & Loan Ass'n, 584 F.2d 1235, 1243 (3d Cir. 1978), *rev'd on other grounds*, 442 U.S. 366 (1979).

One commentator argued that § 1985(3) is "nothing more than an extension of the [F]ourteenth [A]mendment." Schindler, *supra* note 40, at 107. Because classifications based on gender receive heightened scrutiny under the Fourteenth Amendment, such an analysis would afford women protection under § 1985(3) as well. *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973). *See supra* note 72 (analyzing the *Frontiero* decision).

Just over a year after the *Bray* Court decided that women were not a class for purposes of § 1985(3), the Court examined whether the Equal Protection Clause proscribes gender discrimination in the peremptory challenge context. J.E.B. v. Alabama ex rel. T.B., No. 92-1239, 1994 U.S. LEXIS 3121 (U.S. Apr. 19, 1994). Justice Blackmun, writing for the Court in *J.E.B.*, held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality." *Id.* at *4. The Court declared that "[a]ll persons, when granted the opportunity to serve on a jury, have the right not be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *Id.* at *25. The Court's holding in *J.E.B.* lends further support to the proposition that *Bray* was wrongly decided.

251 Lucero v. Operation Rescue of Birmingham, 954 F.2d 624, 632 (11th Cir. 1992) (Kravitch, J., dissenting).

252 *See id.* (footnote omitted). The Eleventh Circuit held in *Lucero* that the plaintiffs failed to establish that the defendants were motivated by a gender-based animus. *Id.* at 628. Rather, the court explained, the "defendants' actions were motivated by a disapproval of a certain activity, namely the abortion of a fetus, and therefore were designed to prevent individuals, women and men alike, from engaging in that activity." *Id.* In dissent, Judge Kravitch refuted the majority's conclusion, arguing:

> The women who seek entry to [the abortion] clinic—and are thus the objects of defendants' conspiracy—are linked by their ability to bear children and to undergo abortion, abilities that are unique to them as women. If they were not women they could not be pregnant and could not seek abortions. Defendants are motivated by a desire to stop these women, and those who champion them, from obtaining abortions. This is the animus that drives the defendants to blockade clinics and refuse doctors and patients entry to medical offices. . . . The majority's insistence that Operation Rescue opposes a "practice" that has nothing to do with women brings abstraction to a new level of absurdity. It is impossible to sever the link between abortion and gender. Only women can become pregnant and only women have abortions. For too long women have been invisible in much of the law. The majority now erases women from pregnancy, childbirth, and abortion as well.

Id. at 632 (Kravitch, J., dissenting).

Justice O'Connor, dissenting in *Bray*, concluded that women are a protected class

gender and pregnancy are inseparable.[253] So too should the Court.

Alternatively, the Court could have, as the dissenters suggested, granted a remedy under the hindrance clause of § 1985(3).[254] Operation Rescue's own literature reveals a *purpose* to prevent or hinder law enforcement authorities from securing a woman's right to obtain an abortion.[255] Thus, the protesters conceded a violation of the hindrance clause, and the Court could have granted the respondents relief even without holding that women are a protected class under § 1985(3).

As dissenting Justices Stevens and O'Connor correctly identified, this case is neither about abortion nor opposition to abortion.[256] Rather, the issue that should have been examined was whether the federal government should intervene when constitutionally protected rights are being abridged by private conspiracies. Thus framed, the resolution of the question seems clear: federal jurisdiction is proper when private actors deprive a class of people

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under § 1985(3). *Bray*, 113 S. Ct. at 802 (O'Connor, J., dissenting). Specifically, the Justice asserted:

> If women are a protected class under § 1985(3), and I think they are, then the statute must reach conspiracies whose motivation is directly related to characteristics unique to that class. The victims of petitioners' tortious actions are linked by their ability to become pregnant and by their ability to terminate their pregnancies, characteristics unique to the class of women. Petitioners' activities are directly related to those class characteristics and therefore, I believe, are appropriately described as class based within the meaning of our holding in *Griffin*.

Id.

253 *See* Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1988).

254 Justice Stevens declared that the protesters had unequivocally violated § 1985(3)'s hindrance clause. *Bray*, 113 S. Ct. at 795 (Stevens, J., dissenting) (footnote omitted). *See supra* notes 213-16 and accompanying text (outlining Justice Stevens's contention that the protesters' violation of the hindrance clause established a cause of action under § 1985(3)); *see supra* note 7 (discussing the hindrance clause of § 1985(3)); *see also supra* notes 243-47 and accompanying text (discussing Justice O'Connor's dissenting opinion stating that the respondents were entitled to federal protection under the hindrance clause).

255 In his treatise on the organization he founded, Randall Terry beseeched Christians to participate in abortion protests. RANDALL A. TERRY, OPERATION RESCUE 198-99 (1988). Terry urged that if large numbers of people attended sit-ins, they could "totally *clog the system*. The police, the district attorney, the courts, and the jails are not prepared or designed to deal with such huge numbers." *Id.* at 199 (emphasis in original).

Terry advised "rescuers" not to bring any money for bond or bail to a "rescue." *Id.* at 231. "By telling the authorities that *no one* is posting bond or bail, we force them to jail all of us (which would place a crushing burden on the already overcrowded penal system) or to release all of us." *Id.* (emphasis in original).

256 *See supra* notes 188-246 and accompanying text (discussing Justice Stevens's and Justice O'Connor's dissenting opinions).

of equal protection of the law or thwart law enforcement authorities' ability to secure such equal protection.

Just one year after denying abortion clinics a federal remedy under 42 U.S.C. § 1985(3), the Court provided such relief in *National Organization for Women, Inc. v. Scheidler*.[257] In *Scheidler*, NOW sued the Pro-Life Action Network (PLAN), Joseph Scheidler, and other anti-abortion groups under the Sherman Act and the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970.[258] The petitioners alleged that the respondents were part of a nationwide conspiracy to close abortion clinics through a pattern of racketeering.[259] NOW fur-

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257 No. 92-780, 1994 U.S. LEXIS 1143 (U.S. Jan. 24, 1994) (per curiam).

258 *Id.* at *6. 18 U.S.C. § 1962, entitled "Prohibited activities," provides:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of any unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962 (1988). For a more in depth discussion of RICO in the abortion protest context, see Adam D. Gale, Note, *The Use of Civil RICO Against Antiabortion Protesters and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341 (1990); John H. Henn & Maria Del Monaco, *Civil Rights and RICO: Stopping Operation Rescue*, 13 HARV. WOMEN'S L.J. 251 (1990).

259 *Scheidler*, 1994 U.S. LEXIS at *7-8. The petitioners claimed that the anti-abortion groups had engaged in extortion, a violation of the Hobbs Act. *Id.* at *8 (citing 18 U.S.C. § 1951 (1988)). The Hobbs Act defines extortion as "the obtaining of prop-

ther claimed that the respondents' conspiracy had damaged the abortion clinics' business and property interests.[260]

Framing the issue as whether plaintiffs must demonstrate that defendants acted with an economic purpose to state a claim under RICO, the *Scheidler* Court held that the statute contains no such requirement.[261] Chief Justice Rehnquist, writing for a unanimous Court, commenced by noting that no "economic motive" requirement appears in either § 1961 or § 1962(c).[262] The Chief Justice explained that § 1962(c) encompasses the activities of enterprises that "affect" commerce.[263] The Court determined that an enterprise can have a deleterious effect on commerce without a motivation to increase its profits.[264] Further, Chief Justice Rehnquist refused to infer that because the term "enterprise" was used in § 1962, subsections (a) and (b), "economic motive" was required by subsection (c).[265] The Court declared that the text of subsections (a) and (b) demands only that the enterprise or its profits be illegally created.[266]

The Chief Justice reasoned that the predicate acts required

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erty from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

260 *Scheidler*, 1994 U.S. LEXIS at *8. The district court dismissed the petitioners' complaint, holding that because Scheidler was a political adversary rather than a business rival, the Sherman Act did not apply. *Id.* at *9 (citing National Org. for Women, Inc. v. Scheidler, 765 F. Supp. 937, 941 (N.D. Ill. 1991)). The court also dismissed the petitioners' RICO claim. *Id.* Declaring that an economic motive requirement was part of the statute, the district court determined that the petitioners' claim must fail because they did not allege that the respondents acted with a "'profit-generating purpose.'" *Id.* The Seventh Circuit affirmed the lower court's decision, agreeing that "'non-economic crimes committed in furtherance of non-economic motives'" fall outside the scope of RICO. *Id.* at *9-10 (quoting National Organization for Women, Inc. v. Scheidler, 968 F.2d 612, 625, 631 (7th Cir. 1992)). Subsequently, the Supreme Court of the United States granted certiorari to resolve the federal appellate courts' varying interpretations of RICO's "economic motive" requirement. *Id.* at *10 (citations omitted).

261 *Id.* at *6.

262 *Id.* at *14. Section 1962(c) renders it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c) (1988).

263 *Scheidler*, 1994 U.S. LEXIS at *15.

264 *Id.*

265 *Id.* at *16. The Court reasoned that because "the enterprise in subsection (c) is not being acquired, it need not have a property interest that can be acquired nor an economic motive for engaging in illegal activity; it need only be an association in fact that engages in a pattern of racketeering activity." *Id.* at *17-18.

266 *Id.* at *17.

under RICO need not generate a profit for the protesters.[267] Rather, the Court determined, the predicate act requirement is fulfilled when the economy is depleted and businesses such as abortion clinics are injured.[268]

The Court challenged the respondents' assertion that Congress intended to include an "economic motive" requirement in the Act.[269] Refuting the contention that Congress intended RICO to extend only to organized crime, Chief Justice Rehnquist observed that the statute's definition of enterprise seems to encompass both legitimate and illegitimate enterprises.[270] The Court concluded that the language of the statute was unambiguous and that Congress did not demand that an enterprise have an economic motive.[271] Chief Justice Rehnquist determined that the petitioners should be given the opportunity to demonstrate that the respondents engaged in a pattern of racketeering activity, holding only that RICO does not require an economic motive.[272]

The Court has at last provided a federal remedy for the victims

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267 *Id.* at *19.

268 *Id.*

269 *Id.*

270 *Id.* at *19-20 (quotation omitted).

271 *Id.* at *20-21. The Court proffered that "'[t]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Id.* at *22-23 (quoting Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984)).

272 *Id.* at *24. Joining in the majority opinion, Justice Souter, joined by Justice Kennedy, wrote separately to demonstrate why the First Amendment did not compel the Court to read an "economic motive" requirement into RICO. *Id.* (Souter, J., concurring). The concurrence also emphasized that the Court's holding did not prevent protesters from contesting the statute's operation in specific cases. *Id.* at *24, *26 (Souter, J., concurring). Justice Souter underscored that "nothing in the Court's opinion precludes a RICO defendant from raising the First Amendment in its defense in a particular case." *Id.* at *26 (Souter, J., concurring). Even if it were necessary to read an "economic motive" requirement into RICO to avoid First Amendment issues, the concurrence contended that such a requirement would do little to ensure the protection of free speech. *Id.* at *26-27 (Souter, J., concurring). Justice Souter explained:

> [A]n economic-motive requirement would protect too much with respect to First Amendment interests, since it would keep RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling. An economic-motive requirement might also prove to be underprotective, in that entities engaging in vigorous but fully protected expression might fail the proposed economic-motive test (for even protest movements need money) and so be left exposed to harassing RICO suits.
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> An economic-motive requirement is, finally, unnecessary, because legitimate free-speech claims may be raised and addressed in individual RICO cases as they arise.

Id. at *26 (Souter, J., concurring). Finally, Justice Souter acknowledged that RICO

of violent protests at abortion clinics throughout the nation. In the past, state laws have done little to combat the lawlessness that often accompanies highly organized and widespread abortion protests.[273] Nonetheless, it is difficult to reconcile *Bray* and *Scheidler*.

claims could discourage protected speech and warned courts applying the statute to remain cognizant of this possibility. *Id.* at *28 (Souter, J., concurring).

[273] *See supra* note 247 (discussing the inadequacy of state law remedies). States are, however, taking steps to fill the void created by the federal government's inaction in this arena. In *Horizon Health Center v. Felicissimo*, for example, the New Jersey Supreme Court upheld the Chancery Division's authority to issue an injunction restricting the expressive activities of Helpers of God's Precious Infants (Helpers). Horizon Health Ctr. v. Felicissimo, No. A-63, 1994 WL 117098, at *1 (N.J. April 6, 1994). Helpers staged a full-scale demonstration on the sidewalk and street in front of the Horizon Health Center (Center). *Id.* at *2. The masses of people made it difficult for patients and staff to enter the Center, and, once they did, the noise from the protest infiltrated the clinic. *Id.* (citation omitted). Justice Clifford, writing for the unanimous court, affirmed the Chancery Division's authority to enjoin the Helpers' nonviolent expression. *Id.* at *4.

The court articulated that "[f]or a content-based restriction in a traditional public forum to be valid, the restriction must pass muster under the strictest scrutiny: it must be 'necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.'" *Id.* at *6 (quotation omitted). Justice Clifford observed, however, that "reasonable time, place, and manner restrictions in traditional public forums are valid" as long as they are content-neutral, narrowly tailored, further an important governmental objective, and do not foreclose alternate means of communication. *Id.* The court determined that the injunction against Helpers was content neutral. *Id.* at *8. Further, the justice declared, the maintenance of health is an important governmental objective. *Id.* at *9. Therefore, the court enunciated, New Jersey has a substantial interest in safeguarding access to clinics' medical services. *Id.* at *10.

The court concluded that the portions of the injunction prohibiting trespassing and obstructing access to the Center were narrowly tailored to serve significant government interests. *Id.* at *13. By contrast, Justice Clifford submitted that the injunction's place restriction could be more narrowly drawn. *Id.* Finally, the court articulated that the injunction, once modified, would afford Helpers sufficient alternative means of expression. *Id.* at *14. In closing, Justice Clifford noted that the court decided the case under the First Amendment rather than the New Jersey Constitution. *Id.* at *15.

In a consolidated case decided the same day, the New Jersey Supreme Court upheld injunctions prohibiting anti-abortion groups from picketing within a specified zone around two doctors' homes. Murray v. Lawson, Nos. A-42, A-65, 1994 WL 117097, at *1 (N.J. April 6, 1994). Following the reasoning of *Horizon*, the court concluded that the injunctions were content neutral. *Id.* at *6. Justice Clifford, again writing for a unanimous court, further declared that the preservation of residential privacy was an important governmental interest. *Id.* at *8. The justice pronounced that the 300-foot restriction imposed by the district court in *Murray v. Lawson* was narrowly tailored and therefore permissible. *Id.* at *11. Because the district court in *Boffard v. Barnes* enjoined protesting within "the immediate vicinity of" the doctor's residence, however, Justice Clifford remanded the case to the Chancery Division to define the prohibition in more detail. *Id.* at *12 (quotation omitted). Finally, because the injunctions banned picketing only within the delineated zones, the court averred that the defendants had sufficient alternative avenues of communication. *Id.*

Additionally, in *Operation Rescue v. Women's Health Center*, the Florida Supreme Court upheld a permanent injunction that restricted the activities of anti-abortion

In *Bray*, the Court clung tenaciously to § 1985(3)'s legislative history and refused to look beyond the impetus behind the statute: protection of the newly emancipated slaves.[274] On the other hand, the *Scheidler* Court did just the opposite, holding that on its face, RICO contains no "economic motive" requirement.[275] These decisions are inherently inconsistent and may cause confusion when the lower courts attempt to glean Congress's intent from legislative history. More importantly, however, both the Court and Congress[276] should be applauded for finally recognizing that a federal

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protesters. Operation Rescue v. Women's Health Center, 626 So. 2d 664, 675 (Fla. 1993). Rejecting the protesters' First Amendment arguments, the court declared:

> While the First Amendment confers on each citizen a powerful right to express oneself, it gives the picketer no boon to jeopardize the health, safety, and rights of others. No citizen has a right to insert a foot in the hospital or clinic door and insist on being heard—while purposefully blocking the door to those in genuine need of medical services. No picketer can force speech into the captive ear of the unwilling and disabled.

Id.

The Supreme Court granted certification and was scheduled to hear arguments on the constitutionality of the permanent injunction on April 28, 1994. Larry Rohter, *Abortion Clinic Fight Heads to Court*, N.Y. TIMES, Apr. 28, 1994, at A16. Bruce Cadle, Florida director of Operation Rescue, claimed that the case was "'not about abortion, but the right of Christians to express their views in the public arena.'" *Id.* The Aware Woman Center for Choice, on the other hand, argued that Operation Rescue's conduct was abusive and unprotected by the First Amendment. *Id.* The Court is expected to render its decision in late June, 1994. *Id.*

274 *See* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 759 (1993).

275 *See Scheidler*, 1994 U.S. LEXIS at *6.

276 On March 23, 1993, the Senate introduced a bill "[to] amend the Public Health Service Act to permit individuals to have freedom of access to certain medical clinics and facilities, and for other purposes." S. 636, 103d Cong., 1st Sess. (1993) (to be codified as Freedom of Access to Clinic Entrances Act). Congress found that:

> (1) medical clinics and other facilities offering abortion services have been targeted in recent years by an interstate campaign of violence and obstruction aimed at closing the facilities or physically blocking ingress to them, and intimidating those seeking to obtain or provide abortion services;
>
> (2) as a result of such conduct, women are being denied access to, and health care providers are being prevented from delivering, vital reproductive health services;
>
> (3) such conduct subjects women to increased medical risks and thereby jeopardizes the public health and safety;
>
> (4) the methods used to deny women access to these services include blockades of facility entrances; invasions and occupations of the premises; vandalism and destruction of property in and around the facility; bombings, arson, and murder; and other acts of force and threats of force;
>
> (5) those engaging in such tactics frequently trample police lines and barricades and overwhelm State and local law enforcement

authorities and courts and their ability to restrain and enjoin unlawful conduct and prosecute those who have violated the law;

(6) such conduct operates to infringe upon women's ability to exercise full enjoyment of rights secured to them by Federal and State law, both statutory and constitutional, and burdens interstate commerce, including by interfering with business activities of medical clinics involved in interstate commerce and by forcing women to travel from States where their access to reproductive health services is obstructed to other States;

(7) prior to the Supreme Court's decision in Bray v. Alexandria Women's Health Clinic (No. 90-985, January 13, 1993), such conduct was frequently restrained and enjoined by Federal courts in actions brought under section 1980(3) of the Revised Statutes (42 U.S.C. 1985(3));

(8) in the Bray decision, the Court denied a remedy under such section to persons injured by the obstruction of access to abortion services;

(9) legislation is necessary to prohibit the obstruction of access by women to abortion services and to ensure that persons injured by such conduct, as well as the Attorney General, can seek redress in the Federal courts;

(10) the obstruction of access to abortion services can be prohibited, and the right of injured parties to seek redress in the courts can be established, without abridging the exercise of any rights guaranteed under the First Amendment to the Constitution or other law; and

(11) Congress has the affirmative power under section 8 of article 1 of the Constitution and under section 5 of the Fourteenth Amendment to the Constitution to enact such legislation.

Id.

The proposed bill amends Title XXVII of the Public Health Service Act (42 U.S.C. 300aaa *et seq.*) by adding the following new section:

SEC. 2715. FREEDOM OF ACCESS TO CLINIC ENTRANCES.

(a) Prohibited Activities.—Whoever—

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons, from—

(A) obtaining abortion services; or

(B) lawfully aiding another person to obtain abortion services; or

(2) intentionally damages or destroys the property of a medical facility or in which a medical facility is located, or attempts to do so, because such facility provides abortion services, shall be subject to the penalties provided in subsection (b) and the civil remedy provided in subsection (e).

S. 636, 103d Cong., 1st Sess. (1993).

President Clinton signed the bill into law on May 26, 1994. Gwen Ifill, *Clinton Signs Bill Banning Blockades and Violent Acts at Abortion Clinics*, N.Y. TIMES, May 27, 1994, at A18. President Clinton proclaimed: "'No person seeking medical care, no physician providing that care should have to endure harassments or threats or obstruction or intimidation or even murder from vigilantes who take the law into their own hands because they think they know what the law ought to be.'" *Id.* An anti-abortion group immediately filed suit to enjoin enforcement of the law. *Id.*

remedy is necessary to curb the use of violence in the battle over abortion.

J. Paige Lambdin