

# COMMENT

## Comment: Blinking at Reality: An Examination of *Bray v. Alexandria*

By MARJORIE RICHTER\*

[W]hile racial criteria presumptively reflect invidious prejudice—and thus unequal protection—gender distinctions are in many ways part of the essential fabric of society. Unthinkingly to equate racial categories with gender categories for purposes of federal statutory or constitutional guarantees of civil rights is to blink at reality.<sup>1</sup>

Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself . . . does not remotely qualify for . . . derogatory association with racism. To the contrary, we have said that “a value judgment favoring childbirth over abortion” is proper and reasonable . . . .<sup>2</sup>

In enacting a law such as § 1985(3) for federal courts to enforce, Congress asked us to see through the excuses—the “rational” motives—that will always disguise discrimination. Congress asked us to foresee, and speed, the day when such discrimination, no matter how well disguised, would be unmasked.<sup>3</sup>

### Introduction

The Supreme Court remains ambivalent about abortion. On the one hand, the 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>4</sup> upheld *Roe v. Wade*<sup>5</sup> and said that the right to abortion was, indeed, protected by the Constitution. On the other hand, *Casey*

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1. Petitioners' Reply Brief at 5, *Bray v. Alexandria*, 113 S. Ct. 753 (1993) (No. 90-985), available in LEXIS, GENFED library, BRIEFS file [hereinafter Petitioners' Reply Brief].

2. *Bray v. Alexandria*, 113 S. Ct. 753, 762 (1993) (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

3. *Id.* at 789 (Stevens, J., dissenting).

4. 112 S. Ct. 2791 (1992).

5. 410 U.S. 113 (1973).

allowed new restrictions.<sup>6</sup> In January 1993, the Court had an opportunity to examine the abortion issue from a different perspective. *Bray v. Alexandria*<sup>7</sup> posed the question of whether 42 U.S.C. § 1985(3)<sup>8</sup> provides federal protection to clinics against anti-abortion protesters who blockade them.<sup>9</sup> The Court held that it does not.

Anti-abortion protesters have significantly impaired the ability of women to obtain abortions.<sup>10</sup> Thus while *Bray*, unlike *Casey*, did not endorse new government restrictions on the right to abortion, the effect of *Bray* may be to make abortions harder to obtain.

When he heard about the *Bray* decision, Randall Terry, the head of Operation Rescue, said: "God be praised. The most potent weapon the child killers had against us was the illegal use of the federal judiciary. That weapon was . . . smashed to pieces. This is really going to help us in our recruiting. Look out, here we come."<sup>11</sup>

Federal legislators, however, immediately made plans to introduce legislation that would provide federal protection to the clinics. On the day of the *Bray* decision, Rep. Charles E. Schumer, D-N.Y., chairman of the House Judiciary Subcommittee on Criminal Justice, said he would sponsor legislation to ensure that "the right to choose is a meaningful not just a technical" constitutional right.<sup>12</sup>

The March 10, 1993 murder of Dr. David Gunn outside a Pensacola, Florida medical clinic underscored the urgency of the problem. The next day, within minutes after being confirmed by the Senate, Attorney General Janet Reno denounced the murder as "horrible" and said she would explore whether federal laws could be immediately invoked to prevent such violence.<sup>13</sup> Justice Department officials, however, found that the *Bray* decision effectively precluded any such immediate action,

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6. The Court found the following requirements constitutional: a 24-hour waiting period, parental consent for minors, and the requirement that names and addresses of abortion recipients be reported to the state. *Casey*, 112 S. Ct. 2791 (1992).

7. 113 S. Ct. 753 (1993).

8. Section 1983 is a Reconstruction era civil rights statute that created a federal cause of action for people who are targets of a conspiracy to deprive them of equal protection of the laws or to hinder officials from securing equal protection. See discussion *infra* part I.B.

9. *Bray*, 113 S. Ct. at 753.

10. See discussion *infra* part I.A.

11. Dick Lehr, *Court Limits Protection From Abortion Protests; Rules Civil Rights Law Does Not Apply*, BOSTON GLOBE, Jan. 14, 1993, Metro/Region Section, at 1.

12. Marcia Coyle & Cris Carmody, *Hill Leaders Plan to Seek "Klan Law" Reversal*, NAT'L L.J., Jan. 25, 1993, at 5. The bill, known as the Freedom of Access to Clinic Entrances Act, was subsequently introduced, and as of mid-June 1993, awaited further action in the House. The Senate Labor and Human Resources Committee approved a similar bill on June 23, 1993, and sent it to the full Senate. *Senate Panel OKs Bill to Bar Blockades of Abortion Clinics*, S.F. CHRON., June 24, 1993, at A5.

13. Michael Isikoff, *Administration Will Attempt to Make Obstructing Abortion Clinics a Felony*, WASH. POST, Mar. 24, 1993, at A13.

including ordering the use of U.S. Marshals to guard the clinics.<sup>14</sup> Instead, the Justice Department reportedly pushed to toughen the pending Freedom of Access to Clinic Entrances Act, seeking to bar any interference with or threats to doctors or other medical personnel and to impose harsher penalties, including criminal sanctions of up to twenty years in prison.<sup>15</sup> Anti-abortion advocates claimed the proposed Act was unconstitutional and vowed an immediate legal challenge if it passed.<sup>16</sup>

The controversy this issue has generated is apparent in the *Bray* decision itself. As was true in *Casey*, the various opinions in *Bray* show striking disagreement among the Justices. There were five opinions: the opinion of the Court, written by Scalia and joined by Rehnquist, White, Kennedy, and Thomas; a concurrence by Kennedy; a dissent by Stevens joined by Blackmun; a dissent by O'Connor, also joined by Blackmun; and an opinion written by Souter concurring in the judgment in part and dissenting in part. Not only did the Justices differ as to what the proper outcome should be, but they also fundamentally disagreed about how to frame the issues of the case. Even more striking, the Justices did not agree on what issues were properly before the Court. Justices Stevens, O'Connor, Blackmun, and Souter would have decided the case on the basis of an issue that the majority held was not before them because it had not been properly raised.<sup>17</sup> Overall, the tone of the opinions was acrimonious. The majority opinion, for example, attacked the dissents in twelve footnotes, some quite lengthy.

The importance of *Bray* goes beyond its holding. By emphasizing that "a value judgment favoring childbirth over abortion is proper and reasonable,"<sup>18</sup> the Court provided one more precedent on which it may rely to further weaken the right to abortion. By distinguishing abortion seekers from women in general, the Court ignored the reality that only women have abortions, and it created a new legal fiction that can only obscure the truth.

The Court did not go quite as far as Operation Rescue urged. It did not distinguish racial from gender discrimination by claiming, as Operation Rescue did, that gender distinctions were "part of the essential

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14. *Id.* This would certainly seem to undermine Justice Kennedy's argument that § 1985(3) was unnecessary to protect clinics and their patients because "[i]n the event of a law enforcement emergency as to which State and local resources are inadequate . . . the Attorney General is empowered to put the full range of federal law enforcement resources at the disposal of the State, including the resources of the United States Marshals service." *Bray*, 113 S. Ct. at 769 (Kennedy, J., concurring).

15. Isikoff, *supra* note 13, at A13. Attorney General Reno said: "We have concluded that passage of this legislation is a priority, it is important, and we're going to work with Congress in every way to secure passage." *Id.*

16. *Id.*

17. *See infra* parts I.F.4 and III.B.

18. *Bray*, 113 S. Ct. at 762.

fabric of society.”<sup>19</sup> But the Court did make two unfortunate distinctions. First, it explicitly stated that “the goal of preventing abortion . . . does not remotely qualify for . . . derogatory association with racism.”<sup>20</sup> Second, it expressly declined to decide whether the statute could apply to discrimination based on anything other than race.<sup>21</sup> Thus, the Court refused to apply the ideals embedded in the statute to what, in Justice O’Connor’s words, was a “modern-day paradigm of the situation the statute was meant to address.”<sup>22</sup>

Discrimination takes many forms. By refusing to “see through the excuses—the ‘rational’ motives—that will always disguise discrimination,”<sup>23</sup> it was the Court, not those seeking to end discrimination, that was blinking at reality.

Part I of this Comment discusses the background of the case: the anti-abortion protests; the statutory and case law history of § 1985(3); sex discrimination, the right to travel, and the right to abortion doctrine; the 1985(3) case law in the abortion clinic blockade context; and the facts, procedural history, and lower court decisions in *Bray*. Part II briefly summarizes the various *Bray* opinions. Part III presents an analysis of the case which attempts to show that the majority’s result and reasoning are flawed.

## I. Background

### A. Anti-Abortion Protests

Operation Rescue and other anti-abortion protesters have staged many of what they term “rescues” in the past few years. The protesters’ immediate goal is to disrupt abortion clinic operations. Their ultimate goal is to shut the clinics down.<sup>24</sup> The conflict between the demonstrators and those seeking to enter the clinics has often ended up in the federal courts.<sup>25</sup>

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19. Petitioners’ Reply Brief at 5.

20. *Bray*, 113 S. Ct. at 762.

21. *Id.* at 759.

22. *Id.* at 805 (O’Connor, J., dissenting).

23. *Id.* at 780 (Stevens, J., dissenting).

24. *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1488 (E.D. Va. 1989), *aff’d*, 914 F.2d 582 (4th Cir. 1990), *rev’d in part, vacated in part sub nom. Bray v. Alexandria*, 113 S. Ct. 753 (1993).

25. See *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624 (11th Cir. 1992); *Volunteer Medical Clinic v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991); *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *Roe v. Abortion Abolition Soc’y*, 811 F.2d 931 (5th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987); *Northern Va. Women’s Medical Ctr. v. Balch*, 617 F.2d 1045 (4th Cir. 1980); *Women’s Health Care Services v. Operation Rescue-Nat’l*, 773 F. Supp. 258 (Kan. 1991); *Planned Parenthood Ass’n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617 (N.D. Cal. 1991); *Lucero v. Operation Rescue of Birmingham*, 772 F. Supp. 1193 (N.D. Ala. 1991), *aff’d*, 954 F.2d 624 (11th Cir. 1992); *NOW v. Operation Rescue*, 747 F. Supp. 760 (D.D.C. 1990), *aff’d*

Operation Rescue defined “rescues” in its literature as “physically blocking abortion mills with [human] bodies, to intervene between abortionists and the innocent victims.”<sup>26</sup> Randall Terry, Operation Rescue’s founder and National Director, described it this way: “[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.”<sup>27</sup>

“Rescue” demonstrations have been carried out nationwide. Often, the demonstrators greatly outnumber the local police.<sup>28</sup> The threat posed by anti-abortion protesters is hardly trivial. For example, a protest group’s intimidation of doctors in North Dakota was so effective that by February 1992, there was only one clinic left in the state that would still perform abortions.<sup>29</sup>

The violence has been escalating. The National Abortion Federation, which represents 200 clinics, said that reported vandalism more than doubled from 1991 to 1992, and cases of arson rose from four in 1990 to twelve last year.<sup>30</sup> In April 1993, the fire-bombing of a clinic in Corpus Christi, Texas destroyed a building and caused \$1 million in damages.<sup>31</sup> In March 1993, four health care workers were hospitalized when a chemical was sprayed into eight California clinics in Riverside and San Diego counties.<sup>32</sup>

On March 10, 1993, Dr. David Gunn was shot to death during an anti-abortion protest outside a Pensacola, Florida clinic. Michael Griffin, an anti-abortion protestor who apparently was not an active member

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914 F.2d 582 (4th Cir. 1990), *rev'd in part, vacated in part sub nom.* *Bray v. Alexandria*, 113 S. Ct. 753 (1993); *Southwestern Medical Clinics v. Operation Rescue*, 744 F. Supp. 230 (D. Nev. 1989); *Cousins v. Terry*, 721 F. Supp. 426 (N.D.N.Y. 1989); *National Abortion Fed'n v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989); *New York State NOW v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989), *aff'd*, 919 F.2d 1339, 1359 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *Roe v. Operation Rescue*, 710 F. Supp. 577 (E.D. Pa. 1989), *aff'd in part, rev'd in part*, 919 F.2d 857 (3d Cir. 1990); *NOW v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582, 585 (4th Cir. 1990), *rev'd in part, vacated in part sub. nom.* *Bray v. Alexandria*, 113 S. Ct. 753 (1993); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989); *Portland Feminist Women's Health Ctr. v. Advocates for Life*, 712 F. Supp. 165 (D. Or. 1988), *aff'd*, 859 F.2d 681 (9th Cir. 1988); *New York State NOW v. Terry*, 697 F. Supp. 1324 (S.D. N.Y. 1988); *Northeast Women's Ctr. v. McMonagle*, 665 F. Supp. 1147 (E.D. Pa. 1987), *aff'd in part, rev'd in part*, 868 F.2d 1342 (3d Cir. 1989).

26. *NOW v. Operation Rescue*, 726 F. Supp. at 1488 (quoting OPERATION RESCUE - NATIONAL DAY OF RESCUE—Oct. 29, 1988).

27. *Id.* (quoting Terry’s affidavit).

28. *See infra* part I.F.1.a.

29. *60 Minutes* (CBS television broadcast, Feb. 2, 1992).

30. Larry Rohter, *Doctor is Slain During Protests Over Abortions*, N.Y. TIMES, Mar. 11, 1993, at 1.

31. *Id.*

32. *Id.*

of any organized group, shot Dr. Gunn three times in the back.<sup>33</sup> Anti-abortion activists generally condemned the killing, but some donated money to a legal defense fund for Griffin.<sup>34</sup>

Although Randall Terry called the killing an “inappropriate, repulsive act,” he also described Dr. Gunn as a murderer of babies.<sup>35</sup> A year earlier, Terry had distributed “Wanted” fliers targeting Dr. Gunn that gave the doctor’s itinerary, and said “We Need Your Help to Stop David Gunn . . . . REWARD: Babies’ Lives Will be Saved if He Stops!!!!!!”<sup>36</sup> A few days before the killing, Terry had said at a Melbourne, Florida rally that “[t]he weak link is the doctor . . . . We’re going to expose them. We’re going to humiliate them.”<sup>37</sup>

Thus, while most anti-abortion activists condemned the killing,<sup>38</sup> it is clear that their confrontational tactics helped create the conditions in which such a murder could occur.

## B. 42 U.S.C. § 1985(3)<sup>39</sup>

§ 1985(3) is a civil rights law that provides injured parties, or parties deprived of their constitutional rights, a federal cause of action against persons conspiring to deprive them of the equal protection of the laws, or against persons conspiring to hinder officials from securing to all persons the equal protection of the laws. *Bray* was the first case where the

33. *Id.*

34. William Booth, *At Abortion Clinic, A Collision of Causes*, WASH. POST, Mar. 12, 1993, at 1.

35. *Id.*

36. *Id.*

37. Rohter, *supra* note 30, at 1.

38. Some of the more radical groups, however, said they would “not mourn the death of a doctor who performed abortions.” *Id.*

39. The full text of the section is as follows:

If one 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 the 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 one or more of the conspirators.

42 U.S.C. § 1985(3) (1980).

Supreme Court considered the statute in the context of abortion blockades.

The *Bray* Court treated the statute as if it were comprised of two discrete clauses, and held that the first, but not the second, was properly before the Court. The first clause, which the Court called the "deprivation clause"<sup>40</sup> prohibits conspiracies to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." The second, which the Court called the "hindrance clause,"<sup>41</sup> covers conspiracies "for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within each State or Territory the equal protection of the laws."

*Bray* was the first case where the Court considered a hindrance clause claim. Some of the lower court abortion blockade decisions, however, relied on the "preventing or hindering" language without treating the language as necessarily being part of a separate and distinct clause.<sup>42</sup>

### 1. Statutory History<sup>43</sup>

The statute now codified as 42 U.S.C. § 1985(3) was originally enacted as part of section 2 of the 1871 Ku Klux Klan Act.<sup>44</sup> The 1871 Act was one of several Congressional reactions to violence in the Reconstruction South,<sup>45</sup> and was one of the first statutes passed pursuant to the Enforcement Clause<sup>46</sup> of the Fourteenth Amendment.<sup>47</sup> When the 1871 Act was originally enacted, section 2 had both a criminal and a civil component.<sup>48</sup>

The Act was intended to protect targets of Klan violence. Blacks were the major, but not the exclusive, target. The Klan also attacked white supporters of blacks, Republicans, northerners who had come

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40. *Bray*, 113 S. Ct. at 765.

41. *Id.* at 764.

42. *See infra* part I.E.

43. For a thorough discussion of the statutory history, see Rudolph 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 (1992).

44. *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1239 (3d Cir. 1978), *vacated*, 442 U.S. 336 (1978).

The complete text of section 2 of the 1871 Act is reprinted *id.* at 1262-63.

The *Bray* opinions refer to the Act as the "Ku Klux Act." Most other sources refer to it as the "Ku Klux Klan Act."

45. *Id.* at 1239.

46. U.S. CONST. amend. XXIV, § 5. ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.")

47. 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, 88 n.3 (1985).

48. Scott-McLaughlin, *supra* note 43, at 1380-81 n.71. In 1874, the criminal provisions were codified as § 5519 and the civil counterpart as § 1980 of the Revised Statutes of 1873-74. *Id.* In 1979, the civil provision was given its current designation of § 1985(3). *Id.* at 1381.

south after the war, native southerners who supported Reconstruction policies, and government officials.<sup>49</sup> According to at least one commentator, the Act was designed to protect *all* classes of citizens targeted by the Klan or other organizations; no supporter of the Act indicated any intention to limit the statute's application to conspiracies motivated by racial animus.<sup>50</sup> Senator Edmunds, who managed the bill on the Senate floor said, in what has become a phrase often quoted in arguments that the Act should be broadly interpreted, 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."<sup>51</sup>

Concerns that section 2 of the 1871 Act might exceed Congress's power under the Fourteenth Amendment by extending into areas traditionally reserved to the states prompted the House to amend the original bill.<sup>52</sup> The main restriction placed on the statute's scope was the requirement that actionable conspiracies be motivated by a purpose to deny equal protection of the laws.<sup>53</sup>

## 2. *The Supreme Court's Construction of § 1985(3)*

### a. *Harris and Baldwin*

Eleven years after the 1871 Act was enacted, the Court, in *United States v. Harris*,<sup>54</sup> declared that the criminal counterpart<sup>55</sup> to § 1985(3) was unconstitutional. The Court found that the statute exceeded Congress's power to enact legislation under the Thirteenth Amendment<sup>56</sup> because its reach went beyond protecting former slaves.<sup>57</sup> The Court also held that the statute exceeded Congress's power under the Fourteenth Amendment because it prohibited private actions.<sup>58</sup>

In 1887, the Court reaffirmed *Harris* in *Baldwin v. Franks*.<sup>59</sup> After the *Harris* and *Baldwin* decisions, § 1985(3) remained largely unused for

49. Scott-McLaughlin, *supra* note 43, at 1364.

50. *Id.*

51. *Bray*, 113 S. Ct. at 773 (Souter, J., concurring in part and dissenting in part) (quoting Senator Edmunds, CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871)). Justice O'Connor also quoted the phrase in her opinion. *Id.* at 800 (O'Connor, J., dissenting).

52. *Id.* at 772 (Souter, J., concurring in part and dissenting in part) (citing Mark Fockle, Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402, 417 (1979)).

53. *Id.*

54. 106 U.S. 629 (1882).

55. § 5519 of the Revised Statutes of 1873-74.

56. "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.

57. *Harris*, 106 U.S. at 641.

58. *Id.* at 639.

59. 120 U.S. 678 (1887).



seventy years.<sup>60</sup>

b. *Collins*

In 1951, the Court restricted the civil statute's scope in *Collins v. Hardyman*<sup>61</sup> by holding that it protected only against state actions.<sup>62</sup> *Collins* involved a group of individuals who conspired for the purpose of preventing a political club from meeting to adopt a resolution opposed to the Marshall Plan.<sup>63</sup> The majority held that the statute exceeded Congress's Fourteenth Amendment powers.<sup>64</sup> The dissent argued that Congress had the power, separate and apart from the Fourteenth Amendment, to protect constitutional rights from deprivations by private persons.<sup>65</sup>

c. *Griffin*

(1) *Private Action*

In 1971, the Court in *Griffin v. Breckenridge*,<sup>66</sup> while not explicitly overruling *Collins*,<sup>67</sup> held that § 1985(3) did apply to private conspiracies. In *Griffin*, three black plaintiffs alleged that while they were traveling on a public highway, a group of whites attacked them in the mistaken belief that the blacks were civil rights workers.<sup>68</sup> There was no claim that the attack involved any action by state officials or that defendants even pretended to act under color of state law.<sup>69</sup> Nevertheless, the Court held that the complaint stated a cause of action under the statute.<sup>70</sup>

The Court noted that "in the light of the evolution of decisional law,"<sup>71</sup> many of the constitutional problems the *Collins* Court had faced no longer existed, and that "[l]ittle reason remains, therefore, not to accord the words of the statute their apparent meaning."<sup>72</sup> The Court dis-

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60. *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1239 (3d Cir. 1978), *vacated*, 442 U.S. 336 (1978).

61. 341 U.S. 651 (1951).

62. *Id.* at 661-62.

63. *Id.* at 653-54.

64. *Id.* at 658. The Court stated that "since the decision . . . in the Civil Rights Cases, the principle has become firmly embedded in our constitutional law that . . . the [Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Id.* (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

65. *Id.* at 664 (Burton, J., dissenting).

66. 403 U.S. 88 (1971).

67. The Court in *Griffin* stated that *Collins* had been decided based on statutory construction rather than on constitutional grounds. *Id.* at 99. For a discussion of this point, see Scott-McLaughlin, *supra* note 43, at 1386 n.101.

68. *Griffin*, 403 U.S. at 89-92.

69. *Id.* at 88.

70. *Id.* at 107.

71. *Id.* at 96.

72. *Id.*

cussed judicial construction of related laws, the structural setting of the statute, and the legislative history,<sup>73</sup> and concluded that “as applied to this complaint, we have no doubt” that the enactment of the statute was within Congress’s constitutional power.<sup>74</sup>

The Court also noted that the similar language in the statute and the Fourteenth Amendment did not mean that the statute must be bound by the Amendment’s limitations. Although Fourteenth Amendment jurisprudence made it difficult to imagine “equal protection” in a private party context, the Court noted that there was nothing inherent in the phrase itself that would limit it to state action.<sup>75</sup>

## (2) *The Animus Clause*

Despite its holding that the statute reached private actions, the Court was concerned about the statute’s breadth:

That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. . . . 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 . . . . The language requiring *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.<sup>76</sup>

The requirement of “class-based, invidiously discriminatory animus” became a key element in the *Bray* majority’s rationale for denying the clinics’ claims of protection under the statute. The phrase “racial, or perhaps otherwise” also became important in subsequent litigation. The *Griffin* Court itself was careful to note that it was leaving the class-based issue open: “We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than ra-

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73. The Court cited various statements made in the 42 congressional debates, including the following: “[T]he United States always has assumed to enforce, as against the States, *and also persons*, every one of the provisions of the Constitution.” *Id.* at 100 (citing Representative Shellabarger (the House’s sponsor of the bill), CONG. GLOBE, 42d Cong, 1st Sess., 68 (1871)) (emphasis supplied by *Griffin*); “I do not want to see [this measure] so amended that there shall be taken out of it the frank assertion of the power of the national Government to protect life, liberty, and property, irrespective of the act of the State.” *Id.* at 101 (citing Representative Shanks, CONG. GLOBE, 42d Cong., 1st Sess. 141 (1871)); and “Congress must deal with individuals, not States. It must punish the offender against the rights of the citizen.” *Id.* (citing Senator Pool, CONG. GLOBE, 42d Cong. 1st Sess. 608 (1871)).

74. *Id.*

75. *Id.* at 97.

76. *Id.* at 102.

cial bias would be actionable under the portion of § 1985(3) before us.”<sup>77</sup>

d. *Carpenters*

In 1983, the Court in *United Brotherhood of Carpenters and Joiners v. Scott* (hereinafter *Carpenters*)<sup>78</sup> voted 5-4<sup>79</sup> to place further restrictions on § 1985(3). The majority stated that the statute itself provided no substantive rights to plaintiffs, and that the protected rights, privileges, and immunities must therefore be found elsewhere.<sup>80</sup> The Court held that a conspiracy against non-union workers and more generally, conspiracies motivated by economic bias, were not covered by § 1985(3).<sup>81</sup>

Once again, the majority of the Court refused to decide the broader question of whether the section covered any non-racial discrimination.<sup>82</sup> Although the *Carpenters* majority admitted that the question was “close”<sup>83</sup> and that there was “some legislative history to support the view that § 1985(3) has a broader reach,”<sup>84</sup> they ultimately decided simply “not [to] affirm” the notion that the statute’s reach should extend beyond racial discrimination.<sup>85</sup>

Most important in terms of the *Bray* majority’s use of *Carpenters* as precedent was the finding in *Carpenters* that a showing of state action was a necessary part of a § 1985(3) claim.<sup>86</sup> The state action requirement had not been present in *Griffin*. On the contrary, the *Griffin* Court stated that “on their face, the words of the statute fully encompass the conduct of private persons.”<sup>87</sup> Furthermore, the *Griffin* Court argued that the broad judicial interpretation of Reconstruction civil rights statutes in general and the criminal analogue of § 1985(3) in particular;<sup>88</sup> companion statutory provisions that did explicitly mention state action;<sup>89</sup> and the legislative history<sup>90</sup> all “point[ed] unwaveringly”<sup>91</sup> at § 1985(3)’s cover-

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77. *Id.* at 102 n.9. The Court stated that “since the allegations of the complaint bring this cause of action so close to the constitutionally authorized core of the statute, there has been no occasion here to trace out its constitutionally permissible periphery.” *Id.* at 107.

78. 463 U.S. 825 (1983).

79. Justices Burger, White, Powell, Stevens, and Rehnquist were in the majority; Justices Blackmun, Brennan, Marshall, and O’Connor dissented.

80. *Carpenters*, 463 U.S. at 833.

81. *Id.* at 838.

82. *Id.* at 835.

83. *Id.* at 836.

84. *Id.*

85. *Id.* at 835.

86. Specifically, the Court said that if plaintiffs base a § 1985(3) claim on a right protected only against official conduct, they must prove “that the state was somehow involved in or affected by the conspiracy.” *Id.* at 833.

87. *Griffin v. Breckenridge*, 403 U.S. 88, 96 (1971).

88. *Id.* at 97-98.

89. *Id.* at 98-99.

90. *Id.* at 99-101.

91. *Id.* at 101.

age of purely private conspiracies.

In order to harmonize their decision with *Griffin*, the *Carpenters* majority emphasized that *Griffin* had been decided on the basis of violations of Thirteenth Amendment and right to travel guarantees.<sup>92</sup> In a significant phrase later adopted in *Bray*, the *Carpenters* majority characterized *Griffin* as a case where “we upheld the application of § 1985(3) to private conspiracies aimed at interfering with rights constitutionally protected against private, as well as official, encroachment.”<sup>93</sup>

Justice Blackmun, joined by Justices Brennan, Marshall, and O'Connor, dissented. Justice Blackmun wrote:

In *Griffin v. Breckenridge*, we reaffirmed our general approach to Reconstruction civil rights statutes including § 1985(3). Those statutes are to be given “a sweep as broad as [their] language.” In the 12 years since *Griffin*, that principle has not lost its vitality. I see no basis for the Court's crabbed and uninformed reading of the words of § 1985(3).<sup>94</sup>

### C. Sex and Pregnancy Discrimination

#### 1. Sex Discrimination, Pregnancy Discrimination, and Equal Protection Doctrine.

The equal protection language in § 1985(3)<sup>95</sup> is similar to language in the Fourteenth Amendment.<sup>96</sup> The *Bray* Justices disagreed about the influence that Fourteenth Amendment doctrine should have in construing the meaning of “equal protection” in the statute.<sup>97</sup> They also disagreed about how the constitutional doctrine itself, as applied to sex and pregnancy discrimination, should best be understood.

Before 1971, women were viewed, for equal protection purposes, as fundamentally different from men; thus it was reasonable and constitutional for legislation to classify persons according to their sex.<sup>98</sup> The first

92. *Carpenters*, 463 U.S. at 832-33. The *Griffin* Court had stated that the Thirteenth Amendment's protection extended “far beyond” prohibiting the actual imposition of slavery or involuntary servitude and that Congress was “wholly within its powers under § 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men.” *Griffin*, 403 U.S. at 105.

93. *Carpenters*, 463 U.S. at 833.

94. *Id.* at 854 (Blackmun, J., dissenting) (citations omitted).

95. “If one or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . .” 42 U.S.C. § 1985(3) (1993).

96. “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws” U.S. CONST. amend. XIV, § 1.

97. See discussion *infra* part III.A.1.a.(2).

98. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 179 n.35 (1982); HERMA H. KAY, SEX-BASED DISCRIMINATION 18-20 (1988).

Supreme Court decision to invalidate a gender classification under the Equal Protection Clause was *Reed v. Reed*,<sup>99</sup> where the Court said that a statute creating a preference for men over women of the same entitlement class in estate administration violated the Equal Protection Clause "by providing dissimilar treatment for men and women who are . . . similarly situated."<sup>100</sup> The applicable standard was that sex-based classifications must have a "fair and substantial relation to the object of the legislation."<sup>101</sup>

Two years later in *Frontiero v. Richardson*,<sup>102</sup> a plurality of the Court<sup>103</sup> struck down a law that allowed servicemen, but not servicewomen, to claim their spouses as dependents without demonstrating actual dependency. The plurality said that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."<sup>104</sup>

The *Frontiero* plurality's strict scrutiny standard for sex discrimination, however, was never adopted by a majority of the Court. The standard that now appears to control is the one announced in *Craig v. Boren*,<sup>105</sup> that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>106</sup> The *Craig* standard is often termed an intermediate standard of review;<sup>107</sup> it is more stringent than the "rational relationship" test<sup>108</sup> but less stringent than the "strict scrutiny" test applied to suspect classifications such as race and national origin, and to classifications impacting fundamental rights such as voting and interstate travel.<sup>109</sup>

The question of whether discrimination based on pregnancy should be considered sex discrimination has been problematic for both the Court and legal theorists.<sup>110</sup> The Court so far has held that pregnancy discrimi-

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99. 404 U.S. 71 (1971).

100. *Id.* at 77.

101. *Id.* at 76.

102. 411 U.S. 677 (1973).

103. The plurality consisted of Justices Brennan, Douglas, White, and Marshall.

104. *Frontiero*, 411 U.S. at 688.

105. 429 U.S. 190 (1976).

106. *Id.* at 197. *Craig* struck down a law prohibiting the sale of "non-intoxicating" beer to males under 21 and females under 18.

107. KAY, *supra* note 98, at 44.

108. *Id.* at 19. The rational relationship test was articulated in *McGowan v. Maryland*, 366 U.S. 420 (1961): "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426. In practice, the test is very lenient, permitting the use of most legislative classifications. KAY, *supra* note 98, at 19.

109. The strict scrutiny test is typically articulated as a requirement that a classification must be necessary to a compelling state purpose. Williams, *supra* note 98, at 178 n.22.

110. *Id.* at 190-200.

nation is not prohibited by the Equal Protection Clause. In *Geduldig v. Aiello*<sup>111</sup> the Court upheld a pregnancy-based distinction that had been challenged on equal protection grounds. The classification at issue was a California insurance system's exclusion of pregnancy benefits from its coverage. The Court found the "line drawn by the state . . . rationally supportable."<sup>112</sup> The text of the opinion did not discuss sex discrimination, focusing instead on the question of costs; the critical portion of the opinion where sex discrimination was addressed was confined to the now notorious<sup>113</sup> footnote 20:

The dissenting opinion to the contrary, this case is thus a far cry from those like *Reed v. Reed* and *Frontiero v. Richardson*, involving discrimination based upon gender as such.<sup>114</sup> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation . . . .

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes

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111. 417 U.S. 484 (1974).

112. *Id.* at 495.

113. *Geduldig* has been widely criticized. See Respondents' Brief at 17 n.43, *Bray v. Alexandria*, 113 S. Ct. 753 (1993) (No. 90-985), available in LEXIS, GENFED library, BRIEFS file (citing Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983-84 nn.107-09 (1984), as the source for several dozen citations of articles critical of *Geduldig* and *Gilbert*).

114. Justice Brennan, joined by Justices Douglas and Marshall, dissented, asserting that *Reed* and *Frontiero* mandated a stricter standard of scrutiny. Brennan wrote:

[B]y singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout. In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.

*Geduldig*, 417 U.S. at 501 (Brennan, J., dissenting). The dissent found in the majority's decision an apparent "willing[ness] to abandon [the] higher standard of review [of *Reed*, *Frontiero*, and other cases]" and declined to join "the Court's apparent retreat." *Id.* at 503.

members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.<sup>115</sup>

The Court relied on the *Geduldig* majority's footnote 20 to uphold a similar disability plan in *General Electric Co. v. Gilbert*.<sup>116</sup> In response, Congress overruled *Gilbert* in 1978 by enacting the Pregnancy Discrimination Act (PDA)<sup>117</sup> which amended Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy.<sup>118</sup>

Several Supreme Court cases used the PDA to strike down pregnancy based classifications. In *Newport News Shipbuilding and Dry Dock Co. v. EEOC*<sup>119</sup> the Court held that an insurance plan that provided full maternity benefits for female employees but only partial maternity benefits for the wives of male employees violated the PDA by discriminating against the male employees.<sup>120</sup> In *Automobile Workers v. Johnson Controls*<sup>121</sup> the Court held that the PDA barred an employer from excluding fertile women from jobs entailing risk of harm to fetuses which the women might conceive,<sup>122</sup> stating that "[t]he bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job. . . . [The] policy explicitly discriminates against women on the basis of their sex . . . . [It] creates a facial classification based on gender."<sup>123</sup>

The reach of the PDA, however, does not extend beyond employment, and doctrine established in cases applying the PDA does not control when claims are based on other statutes or on the Fourteenth Amendment Equal Protection clause. Even though Congress, in enacting the PDA, intended to express disapproval of both the holding and reasoning of *Gilbert*,<sup>124</sup> and even though *Newport News* and *Johnson Controls* clearly equated pregnancy discrimination with sex discrimination, the rationale of *Geduldig* and *Gilbert*—that classifications based on pregnancy are not necessarily sex-based classifications—while seemingly discredited, has not actually been overruled outside the employment context. The issue has not been resolved; an important aspect of *Bray* is the disagreement between the majority and dissents about the "continu-

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115. *Id.* at 496-97 n.20 (citations shortened).

116. 429 U.S. 125 (1976).

117. 42 U.S.C. § 2000e(k) (1993).

118. *Newport News Shipbldg. & Dry Dock Co. v. EEOC*, 462 U.S. 669, 670 & n.1 (1983).

119. 462 U.S. 669 (1983).

120. *Id.*

121. 111 S. Ct. 1196 (1991).

122. The Company's policy was the following: "[I]t is [Johnson Controls'] policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure." *Id.* at 1200. The policy defined "women . . . capable of bearing children" as "[a]ll women except those whose inability to bear children is medically documented." *Id.*

123. *Id.* at 1202.

124. *Newport News*, 462 U.S. at 678.

ing vitality"<sup>125</sup> of *Geduldig* and its applicability to a § 1985(3) claim.<sup>126</sup>

## 2. Sex Discrimination and § 1985(3)

The question of whether § 1985(3) covers sex or pregnancy discrimination arises because of the unresolved "perhaps" in the *Griffin* requirement that there be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus."<sup>127</sup>

The issue of § 1985(3)'s coverage of sex discrimination was directly addressed for the first time at the appellate level in 1978 in *Novotny v. Great American Federal Savings & Loan Association*,<sup>128</sup> where the Third Circuit held that § 1985(3) did protect against conspiracies motivated by discriminatory animus against women.<sup>129</sup> The circuit court reviewed the statutory history and concluded that the drafters did not intend to exclude women.<sup>130</sup> It also relied on *Frontiero v. Richardson*, *Reed v. Reed*, and *Craig v. Boren* to conclude that sex discrimination was "inherently invidious."<sup>131</sup>

The Supreme Court overturned *Novotny*<sup>132</sup> on the narrow issue that a § 1985(3) complaint could not rest on a right created by Title VII.<sup>133</sup> The issue of sex discrimination was not mentioned in the plurality's opinion, but the concurring and dissenting opinions did discuss it. Justice Powell stated that § 1985(3) should apply only to conspiracies that "violate . . . fundamental rights derived from the Constitution,"<sup>134</sup> and that there was no constitutionally created right to be free from private sex discrimination.<sup>135</sup> Justice Stevens expressed a similar view.<sup>136</sup> Justice White, in a dissent joined by Justices Brennan and Marshall, said that it "is clear that sex discrimination may be sufficiently invidious to come

125. *Bray*, 113 S.Ct. at 761 n.3.

126. See discussion *infra* part III.A.1.a.(3).

127. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). See discussion *supra* part I.2.c.(2).

128. 584 F.2d 1235 (3d Cir. 1978), *vacated*, 442 U.S. 366 (1979).

129. *Id.* at 1262. The case involved a male employee fired for advocating equal rights for women within his company.

130. *Id.* at 1241-43.

131. *Id.* at 1243.

132. *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979).

133. The relevant words of § 1985(3) define the cause of action as a conspiracy "for the purpose of depriving . . . any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3) (1980). At issue here is *which* laws are included in "the laws." The majority held that if a Title VII violation could be asserted through § 1985(3), a plaintiff could avoid Title VII's detailed administrative procedures and limitations on damages. *Novotny*, 442 U.S. at 375-76. (For an opposing view, see the dissent of Justices White, Brennan, and Marshall, *id.* at 385-396).

134. *Id.* at 379 (Powell, J., concurring).

135. *Id.* at 381.

136. *Id.* at 381-85 (Stevens, J., concurring). This appears quite different from his opinion in *Bray*. See *infra* note 258 and accompanying text.



within the prohibition of section 1985(3).<sup>137</sup>

The Supreme Court also considered the class-based animus clause in *Carpenters*. The majority, while identifying one specific class (economic) that was not protected, again specifically declined to decide which classes were.<sup>138</sup> *Bray* also declined to decide which classes were covered.<sup>139</sup> Thus, to date, the Supreme Court has left the question open.

In cases involving abortion clinic blockades, a further question arises: if § 1985(3) does protect women as a class, does that mean it also protects women seeking abortions? Before *Bray*, the Supreme Court had not addressed the question of abortion seekers as a class; numerous lower courts, however, had. Most of the lower courts that addressed the issue ruled that blockades against abortion seekers do constitute gender-based animus for purposes of § 1985(3).<sup>140</sup>

#### D. The Requirement of a Right Protected Against Private Infringement

After *Carpenters*, § 1985(3) plaintiffs, in addition to showing a class-based, invidiously discriminatory animus, were also required to show there was a conspiracy which involved state action or, if the conspiracy was private, that it was aimed at a right the Constitution protects against private infringement.

The most common and successful way that plaintiffs in lower court § 1985(3) abortion blockade cases met this requirement was by alleging infringement of the right to interstate travel.<sup>141</sup> It certainly appeared

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137. *Id.* at 389 n.6 (White, J. dissenting).

138. Justice Blackmun, in a dissent joined by Justices Brennan, Marshall, and O'Connor assumed that sex discrimination was covered:

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

*United Bhd. of Carpenters and Joiners v. Scott*, 463 U.S. 825, 853 (1983) (Blackmun, J., dissenting) (emphasis in original).

139. *See infra* part III.A.1.a.(1).

140. *See* *Southwestern Medical Clinics v. Operation Rescue*, 744 F. Supp. 230 (D. Nev. 1989); *Roe v. Operation Rescue*, 710 F. Supp. 577, 581 (E.D. Pa. 1989); *Cousins v. Terry*, 721 F. Supp. 426, 430 (N.D.N.Y. 1989); *New York State NOW v. Terry*, 704 F. Supp. 1247, 1259 (S.D.N.Y. 1989), *aff'd*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947; *Portland Feminist Women's Health Ctr. v. Advocates for Life*, 712 F. Supp. 165, 169 (D. Or. 1988), *aff'd*, 859 F.2d 681 (9th Cir. 1988); *but see* *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989); *Roe v. Abortion Abolition Soc'y*, 811 F.2d 931 (5th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987); *National Abortion Fed'n v. Operation Rescue*, 721 F. Supp. 1168, 1171 (C.D. Cal. 1989).

141. *See, e.g.* *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1493 (E.D. Va. 1989), *aff'd*, 914 F.2d 582, 585 (4th Cir. 1990), *rev'd in part, vacated in part sub nom.* *Bray v. Alexandria*, 113 S. Ct. 753 (1993); *See also* *Women's Health Care Services v. Operation Rescue-Nat'l*, 773 F. Supp. 258, 266 (D. Kan. 1991), *rev'd. sub nom.* *Volunteer Medical Clinic v. Operation*

well settled that proving interference with the right to travel was sufficient to meet the requirement articulated in *Carpenters*.<sup>142</sup> The *Carpenters* Court itself said that § 1985(3) “constitutionally can and does” protect the right to travel guaranteed by the Federal Constitution from interference by purely private conspiracies.<sup>143</sup> The Court in *Griffin* made the same point, stating that “[o]ur cases have firmly established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference.”<sup>144</sup> Furthermore, the Court has explicitly recognized that the right to travel interstate to seek abortions is constitutionally protected.<sup>145</sup>

Some plaintiffs claimed that demonstrators infringed their right to abortion.<sup>146</sup> Such claims have not been successful in establishing the requisite conspiracy. The right to abortion is generally recognized as being based on the right to privacy guaranteed under the Fourteenth Amendment,<sup>147</sup> and since the Amendment only addresses state action, the right to abortion does not meet the requirement that private conspiracies be aimed at a right guaranteed against private interference.

### E. State Action

If plaintiffs can show that a conspiracy involved state action, they do not need to show that it was aimed at a right guaranteed against private impairment. Some plaintiffs have tried this tactic, with mixed success.

The district court in *Women's Health Care* held that plaintiffs had demonstrated the requisite state involvement<sup>148</sup> by showing that Operation Rescue had purposefully acted to circumvent effective police protec-

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Rescue, 948 F.2d 218 (6th Cir. 1991). (*Volunteer Medical Clinic* overruled *Women's Health Care* on the facts alone; although the circuit said it could not rule for plaintiffs because they had made no allegations that patients travelled interstate, it reaffirmed the rule that the right to travel was constitutionally protected against private interference. *Volunteer Medical Clinic*, 948 F.2d at 227.)

142. See *Carpenters*, 463 U.S. at 832-33. The *Bray* Court, however, held otherwise. See *infra* part II.A.2.a.

143. *Carpenters*, 463 U.S. at 832-33.

144. *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971). The right to travel from one state to another is not explicitly mentioned in the Constitution, but it is nevertheless considered a basic constitutional right. *Shapiro v. Thompson*, 394 U.S. 618, 629-631 (1969); *United States v. Guest*, 383 U.S. 745, 757-760 (1960).

145. *Doe v. Bolton*, 410 U.S. 179, 200 (1973).

146. See, e.g. *NOW v. Operation Rescue*, 726 F. Supp. at 1493-94; *Women's Health Care Services*, 773 F. Supp. at 265.

147. Like the right to interstate travel, the right to privacy, although not explicitly mentioned in the Constitution, is considered a constitutional right. See *Roe v. Wade*, 410 U.S. 113 (1973).

148. The court said: “To state a claim under § 1985(3), the plaintiff need not demonstrate the existence of state actors in the conspiracy. It is sufficient if the plaintiff demonstrates state involvement generally, or that the conspiracy is directed at influencing the activity of the

tion of the plaintiffs and their supporters.<sup>149</sup> Similar arguments were also successful in *New York State NOW v. Terry*<sup>150</sup> and *Portland Feminist Women's Health Center v. Advocates for Life*.<sup>151</sup> But *Women's Health Care Services* was overruled; the appellate court said the involvement of the police was not enough to show state action and that there was no evidence of police complicity with the demonstrators.<sup>152</sup> *Roe v. Operation Rescue*<sup>153</sup> reached a similar conclusion. The district court in *NOW v. Operation Rescue* called this argument (which it did not reach) "doubtful."<sup>154</sup>

In summary, before *Bray* the law was as follows: The Supreme Court left open the question of whether class-based animus could be based on anything other than racial bias, but most of the lower courts held that it applied to animus directed at women in general and at abortion seekers in particular. The Court had imposed a state action or right protected against private infringement requirement on § 1985(3); in the abortion blockade context, this was met most successfully by showing violations of the right to interstate travel.

## F. Facts and Procedural History of *Bray*

### 1. District Court Decision

#### a. Facts

The District Court for the Eastern District of Virginia decided the case, then called *NOW v. Operation Rescue*,<sup>155</sup> in December 1989, and issued a permanent injunction against the protests.<sup>156</sup> The plaintiffs were nine clinics that provided abortions or abortion counseling and five pro-

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State." *Women's Health Care Services*, 773 F. Supp. at 265 (emphasis added). For support, the court cited *Carpenters*, 463 U.S. at 830.

149. *Women's Health Care Services*, 773 F. Supp. at 265-66. The court quoted the "preventing or hindering" language of the hindrance clause, but did not otherwise emphasize the fact that it was relying on the hindrance clause. *Id.* at 265. For authority, the court cited Justice Stevens's concurrence in *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 336, 384 (1979).

150. 704 F. Supp. 1247, 1260 (S.D.N.Y. 1989), *aff'd*, 886 F.2d 1339 (2d Cir. 1989), *cert denied*, 110 S. Ct. 2206 (1990). This was also a hindrance claim argument.

151. 712 F. Supp. 165, 168 (D. Or. 1988), *aff'd*, 859 F.2d 681 (9th Cir. 1988).

152. *Volunteer Medical Clinic v. Operation Rescue*, 948 F.2d 218, 227 (6th Cir. 1991).

153. 710 F. Supp. 577, 582-83 (E.D. Pa. 1989).

154. *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1494 n.11 (E.D. Va. 1989). Justice Souter, however, relied on a factual finding from the district court case to support his contention that the hindrance clause issue had been properly raised. *Bray*, 113 S. Ct. at 770 (Souter, J., concurring in part and dissenting in part) (citing *NOW v. Operation Rescue*, 726 F. Supp. at 1489 n.4).

155. 726 F. Supp. 1483, 1488 (E.D. Va., 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd in part, vacated in part sub nom.* *Bray v. Alexandria*, 113 S. Ct. 753 (1993).

156. *Id.* at 1487.

choice organizations;<sup>157</sup> the defendants, Operation Rescue and six individual anti-abortion activists.<sup>158</sup>

Plaintiffs sought an injunction to prevent the protesters “from trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from, any facility in the Washington Metropolitan area that offers and provides legal abortion services and related medical and psychological counselling.”<sup>159</sup> Plaintiffs alleged two violations of § 1985(3)—conspiracy to interfere with the right to interstate travel and conspiracy to interfere with privacy rights—and three pendent state causes of action—trespass, public nuisance, and tortious interference with business.<sup>160</sup>

The court made the following factual findings: Defendants had a “deep commitment” to stopping abortion.<sup>161</sup> Their “rescue” demonstrations created a substantial risk that patients might suffer physical harm<sup>162</sup> as well as stress, anxiety, and mental harm.<sup>163</sup> Substantial numbers of patients travelled from out of state to reach the clinics. “Rescues” thus obstructed and interfered with the women’s interstate travel.<sup>164</sup> Defendants’ use of “rescue” demonstrations was not a recent phenomenon<sup>165</sup> and was geographically widespread; “rescues” had been enjoined in New York, Pennsylvania, Washington, Connecticut, California, and the Washington Metropolitan area.<sup>166</sup> Defendants would not assure the court that they planned to refrain from conducting “rescue”

157. *Id.* The organizations were: National Organization for Women, 51st State National Organization for Women, Maryland National Organization for Women, Virginia National Organization for Women, and Planned Parenthood of Metropolitan Washington, D.C., Inc. *Id.*

158. *Id.* at 1487-88. Randall Terry was one of the individual defendants. He was in jail at the time of the *NOW v. Operation Rescue* decision. *Id.* at 1488.

159. *Id.* at 1486.

160. *Id.* at 1490-95.

161. *Id.* at 1488.

162. *Id.* at 1489. The court found the witnesses “convincingly illustrated this point.” *Id.* The court gave as an example patients who had received a pre-abortion laminaria to achieve cervical dilation. “In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding, and other potentially serious complications.” *Id.* If the rescuers have closed the clinic, patients must either delay treatment, which is risky, or seek it elsewhere. There were, however, “numerous economic and psychological barriers” to obtaining treatment elsewhere. *Id.* For indigent patients, in particular, obtaining treatment elsewhere might be impossible. *Id.* at 1489 n.3.

163. *Id.* at 1489.

164. *Id.*

165. *Id.* For example, for the preceding five years Operation Rescue had been targeting one of the plaintiff clinics on an almost weekly basis. *Id.* In one of those demonstrations, the clinic was closed for more than six-and-a-half hours, despite the efforts of police. The police, as was typical during the demonstrations, were outnumbered by the demonstrators. *Id.* at 1489 & 1489 n.4. Beyond trespassing and blocking entrances and exits, demonstrators have blocked access to and from the parking lots, damaged clinic signs and fences, and scattered nails in the parking lots and abutting public streets. *Id.* at 1489-90.

166. *Id.* Recent demonstrations were carried out in violation of federal injunctions in the District of Columbia and Maryland: *Id.*

demonstrations. The court concluded that there was a substantial likelihood that defendants would, in fact, carry out such demonstrations in Northern Virginia in the immediate future.<sup>167</sup> The court also concluded that “unless the threatened and unlawful acts to those clinics are immediately and permanently enjoined substantial and irreparable harm will be suffered by the plaintiffs and their members and patients who seek the services of the clinics.”<sup>168</sup>

b. Legal Issues

(1) § 1985(3) Issues

(a) Right to Interstate Travel

The district court cited *Griffin v. Breckenridge*<sup>169</sup> and *United Brotherhood of Carpenters and Joiners v. Scott*<sup>170</sup> for the proposition that a cause of action under § 1985(3) has four essential elements:

(i) a conspiracy; (ii) 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; [and] (iii) an act in furtherance of the conspiracy; (iv) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.<sup>171</sup>

The court disposed of the first element quickly, finding “[a]mple record evidence” of a conspiracy among defendants.<sup>172</sup>

As a threshold issue for the “purpose” element, the court stated that the conspiracy must be “motivated by a specific class-based, invidiously discriminatory animus,”<sup>173</sup> citing a Fourth Circuit case rather than *Griffin* for this characterization. Although the circuit’s language is similar, it appears broader than the language used in *Griffin*.<sup>174</sup> The district court, again citing the Fourth Circuit, held that gender-based animus satisfied the second element because, to meet the class-based animus requirement, the class must possess “discrete, insular and immutable characteristics comparable to those characterizing classes such as race, national origin and sex.”<sup>175</sup> It held that plaintiffs’ members and patients formed a “sub-

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167. *Id.*

168. *Id.*

169. 403 U.S. 88 (1971).

170. 463 U.S. 825 (1983).

171. *Now v. Operation Rescue*, 726 F. Supp. 1483, 1492 (E.D. Va. 1989).

172. *Id.*

173. *Id.* (citing *Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985)).

174. *Griffin*, 403 U.S. at 88. The *Griffin* Court said that “some racial, or perhaps otherwise class-based, invidiously discriminatory animus” must motivate the conspiracy. *Id.* at 102.

175. *NOW v. Operation Rescue*, 726 F. Supp. at 1492 (citing *Buschi*, 775 F.2d at 1257).

set” of a gender-based class meeting these requirements.<sup>176</sup> It concluded that “a conspiracy to deprive women seeking abortions of their rights guaranteed by law is actionable under Section 1985(3).”<sup>177</sup>

Once past this threshold question, the court held that the second element of the claim was satisfied because defendants engaged in this conspiracy for the purpose “of depriving women seeking abortions and related medical and counselling services, of the right to travel.”<sup>178</sup> Citing *Doe v. Bolton*,<sup>179</sup> the court stated that the right to travel included the right to unobstructed interstate travel to obtain an abortion and other medical services.<sup>180</sup> The court found that plaintiff clinics provided services to patients who travelled from out of state, and did not believe that clinic closings affected only intra-state travel from the street to the doors: “Were the [c]ourt to hold otherwise, interference with the right to travel could occur only at state borders.”<sup>181</sup> Furthermore, the court held that plaintiffs need not show state action, because the right to interstate travel was protected from purely private as well as governmental interference.<sup>182</sup>

The court quickly disposed of the third and fourth elements of the claim. It found that the “overt act” requirement was “plainly satisfied,”<sup>183</sup> and that the “injury” requirement was satisfied because of the continued threat to plaintiffs’ exercise of their federally guaranteed right to travel.<sup>184</sup> The court concluded that all of the elements of a violation of 1985(3) were “clearly established” and that plaintiffs were therefore entitled to relief.<sup>185</sup>

#### (b) Right to Privacy

Plaintiffs’ second claim under § 1985(3) was that defendants’ demonstrations “infringe[d] on the fundamental right of plaintiffs’ members and patients to obtain an abortion.”<sup>186</sup> The court seemed quite eager to avoid deciding this issue: “[I]t is unnecessary and imprudent to venture into this thicket.”<sup>187</sup> The court found it unnecessary to address the right

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176. *Id.* The court stated that “[t]here is, to be sure, a lack of uniformity among courts on this issue [b]ut the majority of courts have concluded that a gender-based animus satisfies the conspiracy requirement of § 1985(3).” *Id.* at 1492-93 (citations omitted).

177. *Id.* at 1493.

178. *Id.*

179. 410 U.S. 179 (1973).

180. *NOW v. Operation Rescue*, 726 F. Supp. at 1493.

181. *Id.*

182. *Id.* (citing *Griffin*, 403 U.S. at 105-06 and *New York State NOW v. Terry*, 886 F.2d 1339, 1360 (2d Cir. 1989)).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 1494.

to privacy because it had already ruled in favor of plaintiffs on the interstate travel claim. It found it imprudent to address the issue because it considered the claim "problematic."<sup>188</sup> Plaintiffs had argued, with what the court characterized as "some lack of clarity," that "the putative right to an abortion is of such a fundamental character as to be guaranteed against all interference, not just governmental interference."<sup>189</sup> The court thought the claim was problematic not only because it was "novel," but also because the recent decision in *Webster v. Reproductive Health Services*<sup>190</sup> "suggest[ed] that the law concerning a putative abortion right is in a state of flux."<sup>191</sup>

## (2) State Law Issues

The court ruled in favor of plaintiffs on their trespass and public nuisance claims.<sup>192</sup> It dismissed without prejudice the tortious interference with business relationships claim.<sup>193</sup>

## (3) Remedy

The district court held that plaintiffs were entitled to injunctive relief because there was no adequate remedy at law, the balance of the equities "weigh[ed] decisively" in plaintiffs' favor, and the public interest would be served.<sup>194</sup> It enjoined defendants from "in any manner or by any means, trespassing on, blockading, impeding or obstructing access to or egress from" the premises of the plaintiff clinics and other clinics in specified Virginia cities and counties.<sup>195</sup> However, the court denied plaintiffs' request for a nationwide injunction. It also turned down plaintiffs' request to enjoin "those 'rescue' activities that tend to intimidate, harass or disturb patients or potential patients" on the ground that defendants have a First Amendment right to express their views.<sup>196</sup>

## 2. Appellate Court Decision

In a short opinion, the Fourth Circuit affirmed the district court's

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188. *Id.*

189. *Id.* The court here, unlike the *Bray* dissenters, assumed that state action was required for a § 1985(3) claim. *Id.* at n. 11. The court did note that there was "some authority" for finding that the failure of protestors to notify police could constitute state action, but plaintiffs had not argued the point. *Id.*

190. 492 U.S. 490 (1989).

191. *NOW v. Operation Rescue*, 726 F. Supp. at 1494. The court explained that *Webster* left *Roe* "ripe for attack" by casting doubt on the future validity of the trimester framework. *Id.* at 1494 n.13.

192. *Id.* at 1494-95.

193. *Id.* at 1495.

194. *Id.* at 1496.

195. *Id.* at 1497.

196. *Id.*

decision in all respects.<sup>197</sup> The appellate court explained: "We affirm the judgment because the district court found that the activities of appellants in furtherance of their beliefs had crossed the line from persuasion into coercion and operated to deny the exercise of rights protected by law."<sup>198</sup> The appellate court also found that the legal premises of the district court on the class-based animus question were "consistent with the law of the circuits."<sup>199</sup> Like the district court, the appellate court specifically declined to reach the question of whether § 1985(3) could encompass violations of a right to privacy.<sup>200</sup>

### 3. *First Argument Before Supreme Court*

In their briefs, the clinics based their argument on (1) former circuit court and Supreme Court opinions dealing with § 1985(3) and related statutes; (2) the statute's language; (3) the legislative history; and (4) the statute's "basic purpose to provide protections to persons who may be victimized by private actions directed at their rights."<sup>201</sup>

Operation Rescue also relied on the legislative history,<sup>202</sup> as did the Justice Department which, although it conceded that "the breadth of the terms used . . . could be read to encompass gender-based animus,"<sup>203</sup> argued that there was no need for the Court to decide the issue; the relevant issue was not whether women as a whole constitute a protected class, but whether women seeking abortions do.<sup>204</sup> This was the position that the Court adopted.

The Justice Department's brief relied heavily on *Geduldig v. Aiello*.<sup>205</sup>

Although *Geduldig* did not involve Section 1985(3), the Court's reasoning in that case is applicable here. In fact, this Court's analysis in *Geduldig* applies even more forcefully in the abortion context. Here, as in *Geduldig*, there are two relevant categories — persons involved in the abortion process, and everyone else — and neither class is exclusively female; each category includes both women and men.<sup>206</sup>

The Justice Department distinguished *Automobile Workers v. Johnson Controls*<sup>207</sup> and *Newport News Shipbuilding and Dry Dock Co. v.*

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197. *NOW v. Operation Rescue*, 914 F.2d 582, 586 (4th Cir. 1990).

198. *Id.* at 585.

199. *Id.*

200. *Id.* at 586.

201. Respondents' Brief, *supra* note 113, at 11-12.

202. Petitioners' Reply Brief, *supra* note 1, at 5 n.7.

203. Brief for United States at 10-11, *Bray v. Alexandria*, 113 S. Ct. 753 (1993) (No. 90-985), available in LEXIS, GENFED library, BRIEFS file.

204. *Id.* at 11.

205. 417 U.S. 484 (1974). See discussion *supra* part I.C.1.

206. Brief for United States, *supra* note 203, at 14.

207. 111 S. Ct. 1196 (1991). See discussion *supra* part I.C.1.



*EEOC*<sup>208</sup> on the grounds that Congress drew “a line for purposes of Title VII that differs from the one that this Court drew for equal protection purposes in *Geduldig*,” and that *Geduldig*, therefore, still applied.<sup>209</sup> Respondents replied that *Geduldig* did not apply because it did not deal with the specific § 1985(3) issue and because *Johnson Controls* and *Newport News* have made *Geduldig* largely irrelevant.<sup>210</sup>

Operation Rescue contended that opposition to abortion was not gender-based discrimination because it was directed only at a minority “subset” of women, that is, those seeking an abortion or abortion counseling.<sup>211</sup> Respondents replied that many sex-discrimination cases apply to “subsets” of women; for example, *Johnson Controls* applied only to women of childbearing age who wished to work in jobs where exposure to lead may be a risk.<sup>212</sup>

#### 4. *Decision to Hold Over for Rehearing*

*Bray* was argued, but not decided, during the 1991-92 term.<sup>213</sup> It was reargued in 1992. The plaintiffs moved to file a supplemental brief on reargument. The Court, with Justices Stevens, Blackmun, and O'Connor dissenting on the record, granted the motion with respect to arguments addressing the potential significance of *Casey* and the availability of injunctive relief, but denied the motion with respect to arguments addressing the hindrance clause.<sup>214</sup>

## II. Summary of the Case

### A. The Majority Opinion - Justices Scalia, Rehnquist, White, Kennedy, and Thomas

The majority characterized the case as presenting the question of whether the first clause (the “deprivation” clause) of § 1985(3)<sup>215</sup> pro-

208. 462 U.S. 669 (1983). See discussion *supra* part I.C.1.

209. Brief for United States, *supra* note 203, at 14-15.

210. Respondents' Brief, *supra* note 113, at 16.

211. Brief for United States, *supra* note 203, at 12.

212. Respondents' Brief, *supra* note 113, at 17.

213. The Court did not explain why it decided to hold the case over for reargument. At the time, many observers speculated that the case, which was argued before Clarence Thomas joined the Court, had split evenly. A spokeswoman for NOW speculated that the delay was political, intended to protect President Bush from an unfavorable reaction. Others, however, suggested this was unlikely, because the decision to reargue was unanimous. Ruth Marcus, *Court Postpones Abortion Protest Case*, WASH. POST, June 9, 1992, at A1.

214. *Bray*, 113 S. Ct. at 14 (1992). Justice O'Connor merely said she would grant the entire motion; Justice Stevens, joined by Justice Blackmun, made a stronger argument in favor of hearing the hindrance claim. *Id.* Although Justice Souter did not dissent on the record, he said in *Bray* that he had voted to grant the motion to hear the hindrance claim argument. *Id.* at 771 (Souter, J., dissenting in part and concurring in part).

215. “If two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . the party so

vides a federal cause of action against persons obstructing access to abortion clinics<sup>216</sup> and held that it does not.<sup>217</sup>

Relying on *Griffin* and *Carpenters*,<sup>218</sup> the majority said there are two requirements a plaintiff must show to prove a violation of the “deprivation” clause of § 1985(3): “(1) that ‘some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators’ action,’ and (2) that the conspiracy ‘aimed at interfering with rights’ that are ‘protected against private, as well as official, encroachment.’ ”<sup>219</sup>

The Court held that neither requirement was satisfied. There was no class-based animus because “women seeking abortions” are not a protected class<sup>220</sup>; furthermore, even if “women in general” were a protected class (an issue the Court declined to address), the protests were not aimed at women generally.<sup>221</sup>

There was no protected right because the right to interstate travel, while protected against private interference, was not implicated in this case,<sup>222</sup> and the right to abortion is not protected against private interference.<sup>223</sup>

Although the majority held that the claim that defendants had violated the “hindrance” clause was not before the Court,<sup>224</sup> they discussed it anyway and implied that it would fail.<sup>225</sup>

The Court remanded the case for consideration of whether the state-law claims alone could support the injunction.<sup>226</sup>

## B. The Concurrence: Justice Kennedy

Justice Kennedy, who joined in the opinion of the Court, also wrote separately in order to point out that a federal remedy already exists: 42 U.S.C. § 10501 gives states the right to petition the U.S. Attorney Gen-

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injured or deprived may have an action for the recovery of damages . . . against one or more of the conspirators.” 42 U.S.C. § 1985(3).

216. *Bray*, 113 S. Ct. at 757-778.

217. *Id.* at 758.

218. *See supra*, parts I.B.2.c.-d.

219. *Bray*, 113 S. Ct. at 758 (citing for the first proposition, *Griffin*, 403 U.S. at 102 and, for the second proposition, *Carpenters*, 463 U.S. at 833).

220. *Id.* at 759.

221. *Id.* at 759-762.

222. *Id.* at 762-63.

223. *Id.* at 764.

224. *Id.* at 764-65.

225. *Id.* at 765-67.

226. *Id.* at 768. Even if the injunction remains in place, the plaintiffs will have lost the benefit of federal law enforcement. This is important because organized abortion protesters can often overwhelm local police departments. *See* Federal News Service, *Hearing of the Senate Labor Committee*, May 12, 1993.

eral for federal law enforcement assistance.<sup>227</sup>

### C. Souter, Concurring in Part and Dissenting in Part

On the basis of stare decisis, Justice Souter agreed with the majority's reliance on *Griffin* and *Carpenters* in construing the "deprivation" clause.<sup>228</sup> To the extent that the Court's decision was based on that clause, he concurred in the judgment.

The passage devoted to Justice Souter's concurrence was very short. Virtually all of Souter's opinion was devoted to his dissent, which focused on the "hindrance" clause.<sup>229</sup> He extensively criticized *Griffin* and *Carpenters* and said that the restrictions these cases imposed on the first clause should not be applied to the second. He believed that *Bray* should have been decided on the basis of hindrance clause claims. Although he believed that the claim could be supported by reading "between the lines" of the District Court's conclusions, he would have remanded the case for an express finding that the protests had a purpose of preventing or hindering the authorities from securing the equal protection of the laws.<sup>230</sup>

### D. Dissent: Justices Stevens and Blackmun

In a strong dissent, Justice Stevens defended the position of the plaintiffs. He called the actions of Operation Rescue "a striking contemporary example of the kind of zealous, politically motivated, lawless conduct that led to the enactment of the Ku Klux Act in 1871 and gave it its name."<sup>231</sup>

The plain language of the text, Stevens said, clearly shows that the statute covers the plaintiffs.<sup>232</sup> Furthermore, there was no reason to go beyond the language. Although *Griffin* had imposed a narrowing construction, it did so for reasons that did not apply here.

The question of whether the statute applies to sex discrimination was "easily answered"<sup>233</sup> in the affirmative. Furthermore, the protests discriminated against women.<sup>234</sup> Therefore, the class-based animus re-

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227. *Id.* at 769. Justice Stevens had the following reaction: "Justice Kennedy's reminder that the Court's denial of any relief to individual respondents does not prevent their States from calling on the United States, through its Attorney General, for help is both puzzling and ironic, given the role [the Bush] Administration has played in this and related cases in support of Operation Rescue." *Id.* at 799 n.38 (Stevens, J., dissenting) (citations omitted).

228. *Id.* at 769-770 (Souter, J., concurring in part and dissenting in part).

229. He called it the "prevention" clause, but for consistency this Comment uses "hindrance," the term used in all the other opinions.

230. *Bray*, 113 S. Ct. at 779.

231. *Id.* at 782.

232. *Id.*

233. *Id.* at 785.

234. *Id.* at 785-89.

quirement was satisfied. The protected right requirement was also satisfied because the plaintiffs' right to travel had been "deliberately and significantly infringed."<sup>235</sup> Justice Stevens also believed that the plaintiffs "unquestionably" had established a claim under the "hindrance" clause,<sup>236</sup> because the demonstrators hindered the police from protecting "women's constitutionally protected right to choose whether to end their pregnancies."<sup>237</sup>

#### E. Dissent: O'Connor and Blackmun

Justice O'Connor argued that the language of the statute clearly covered the protesters' actions.<sup>238</sup> The protesters' actions also met the class-based animus requirement; they were directly related to the ability to become pregnant and to terminate pregnancies, characteristics "unique to the class of women."<sup>239</sup>

Justice O'Connor reaffirmed her *Carpenters* dissent and declined to discuss the merits of the majority's argument that the private impairment requirement was not satisfied.<sup>240</sup> Instead, she based her conclusion on her belief that the plaintiffs "unquestionably" established a claim under the "hindrance" clause; the District Court's factual findings were sufficient to establish a "hindrance" clause claim.<sup>241</sup>

### III. Analysis

#### A. The Deprivation Clause<sup>242</sup>

##### 1. Griffin and Carpenters

##### a. Are Griffin and Carpenters Still Good Law?

*Griffin v. Breckenridge*<sup>243</sup> and *United Brotherhood of Carpenters and Joiners v. Scott*<sup>244</sup> imposed requirements on § 1985(3) plaintiffs that are not present in the text of the statute itself.<sup>245</sup> *Carpenters* was a close decision; four members of the Court<sup>246</sup> wrote a strong dissent, stating they saw "no basis for the Court's crabbed and uninformed reading of § 1985(3)."<sup>247</sup> The *Griffin* decision has also been controversial. Thus,

235. *Id.* at 795.

236. *Id.*

237. *Id.* at 796.

238. *Id.* at 799-800 (O'Connor, J., dissenting).

239. *Id.* at 802.

240. *Id.* at 801, 804.

241. *Id.* at 804-05.

242. See *supra* parts I.B.2.c.-d.

243. 403 U.S. 88 (1971).

244. 463 U.S. 825 (1983).

245. See discussion *supra* parts I.B.2.c.-d.

246. Justices Blackmun, Brennan, Marshall, and O'Connor.

247. *Carpenters*, 463 U.S. at 854 (Blackmun, J., dissenting).

*Bray* presented the Court with an opportunity to reexamine whether the § 1985(3) precedents were correctly decided.<sup>248</sup>

The fact that Justices Stevens, O'Connor, Blackmun, and Souter all expressed varying degrees of uneasiness either with the precedents themselves or with their applicability to this particular case shows that this was a difficult question.

For the majority, however, it was a non-issue. They did not even go so far as to expressly decline to consider it. Instead, they simply stated, "[o]ur precedents establish that . . ." <sup>249</sup> and went on to quote the language from *Griffin* and *Carpenters* that provided the framework on which they based their decision.<sup>250</sup>

The majority's reliance on the *Griffin* and *Carpenters* requirements was crucial to its conclusion that § 1985(3) did not apply to abortion blockades. Justices Stevens, O'Connor, Blackmun, and Souter, however, believed that despite the precedents, the statute should or (in the case of Souter) probably should apply. They took different approaches to reaching this conclusion. Justice Stevens did not attack the validity of the precedents but instead argued that they did not apply to this case. Justice O'Connor reaffirmed her *Carpenters* dissent and said that even if she had agreed with the *Carpenters* decision, she would still find the statute applied here. Justice Souter extensively criticized *Griffin* and, especially, *Carpenters*, but said that stare decisis compelled him to go along with the majority's decision to the extent it was based on the deprivation clause. He said that the precedents, however, only applied to the deprivation clause, that there was no need to import them into the hindrance clause, that the hindrance clause was properly before the Court, and that it probably applied to this case.<sup>251</sup>

Thus, *Griffin* and *Carpenters* remain good law, but the interpretation of the law appears unstable; four Justices argued that the precedents should not be applied as stringently as had been done by the *Bray* majority. Upcoming changes in the membership of the Court could easily tip the balance. That would be a welcome change; a more generous approach would give needed protection to people seeking to exercise their constitutional rights in the face of mob violence.

#### b. *Griffin's* Class-Based Animus Requirement

##### (1) *Does Class-Based Animus Extend Beyond Race?*

The question of whether class-based animus extends beyond race was left open in *Griffin*, which stated there must be "some racial, or per-

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248. See generally Scott-McLaughlin, *supra* note 43 (arguing that *Griffin* unduly restricted the statute's scope and that an activist Court could address this question in *Bray*).

249. *Bray*, 113 S. Ct. at 758.

250. See *supra* note 219 and accompanying text.

251. See *infra* part III.B.

haps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."<sup>252</sup> The majority in *Bray* did not answer the question, holding only that § 1985(3) did not apply to the specific situation before it.<sup>253</sup>

Justice Stevens, however, said that the question left open in *Griffin* was "easily answered."<sup>254</sup> "The text of the statute," he wrote, "provides no basis for excluding from its coverage *any* cognizable class of persons who are entitled to the equal protection of the laws,"<sup>255</sup> and the legislative history confirms that the statute, though primarily motivated by the violence directed at recently emancipated citizens, protects all citizens.<sup>256</sup> Justice O'Connor agreed and added that at "the very least," the statute should apply to classes that merit a heightened scrutiny standard under the Fourteenth Amendment Equal Protection Clause.<sup>257</sup>

Justices Stevens, O'Connor, and Blackmun did not attack the *Griffin* requirement itself; instead, they argued that the requirement did not limit the statute's application only to classes based on race. Justice Souter, however, challenged the *Griffin* requirement directly:

[W]hile [the *Griffin*] treatment did, of course, effectively narrow the scope of the clause, it did so probably to the point of overkill, unsupported by any indication of an understanding on the part of Congress that the animus to deny equality of rights lying at the heart of an equal protection violation as the legislation's sponsors understood it would necessarily be an animus based on race or some like character.<sup>258</sup>

He believed that *Griffin* wrongly construed the statute more narrowly than "its obvious cognate in the [Fourteenth] Amendment"<sup>259</sup> and thought that instead, it should be applied to any form of discrimination that would be impermissible under Fourteenth Amendment Equal Protection rational basis scrutiny.<sup>260</sup> This strong statement in favor of an extremely broad application is undercut, however, by Souter's insistence on following the *Griffin* decision even though he disagreed with it.

Thus, there are three clear votes for extending the classes protected under the deprivation clause. The unanswered question in *Griffin* and *Bray*—whether § 1985(3) applies to classes other than race—could eventually, after changes in Court personnel, be answered in the affirmative.

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

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

254. *Id.* at 785 (Stevens, J., dissenting).

255. *Id.* (emphasis added).

256. *Id.*

257. *Id.* at 801. (O'Connor, Justice, dissenting).

258. *Id.* at 772 (Souter, J., concurring in part and dissenting in part) (citing *Griffin*, 403 U.S. at 100; CONG. GLOBE, 42d Cong., 1st Sess. at App. 188 (remarks of Rep. Willard) (1871); CONG. GLOBE, 42d Cong., 1st Sess. at 478 (remarks of Rep. Shellabarger) (1871)).

259. *Bray*, 113 S. Ct. at 722 (Souter, J., concurring in part and dissenting in part).

260. *Id.* at 773.

This would be a good result; Justice Stevens's argument that the statutory text and legislative history mandate such a result is persuasive and sound.

(2) *Does Class-Based Animus Apply to Women?*

The majority rejected what it called the "apparent conclusion" of the district court that opposition to abortion constitutes discrimination against a class composed of "women seeking abortion."<sup>261</sup> Because it believed that a class defined in that way would not qualify for protection under § 1985(3), the majority found it unnecessary and specifically declined to decide whether, as a general rule, discrimination against women would be actionable under the statute.<sup>262</sup>

Justices Stevens and O'Connor, by contrast, both directly addressed the question.<sup>263</sup> Justice Stevens said that "women are unquestionably a protected class,"<sup>264</sup> and Justice O'Connor said that she "think[s] they are."<sup>265</sup> Both Justices relied on Fourteenth Amendment Equal Protection doctrine. Justice Stevens defined a protected § 1985(3) class broadly as "any cognizable class of persons entitled to the equal protection of the laws."<sup>266</sup> He stated that women were such a class because "[t]his Court has repeatedly and consistently held that gender-based classifications are subject to challenge on Constitutional grounds."<sup>267</sup>

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261. *Bray*, 113 S. Ct. at 759. What the district court actually said was that "[p]laintiffs' members and patients constitute a *subset* of a gender-based class meeting [the] requirements" of class-based discriminatory animus. *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1492 (E.D. Va. 1989) (emphasis added). See *supra* note 176 and accompanying text.

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

263. Justice Souter did not directly address the specific question of sex discrimination, instead arguing more generally that the statute "ought" to cover any discrimination that would be impermissible under rational basis scrutiny. *Id.* at 773 (Souter, J., concurring in part and dissenting in part). What the statute "ought" to cover, however, is not what Souter believes it *does* cover after *Griffin*.

264. *Id.* at 787 (Stevens, J., dissenting).

265. *Id.* at 802 (O'Connor, J., dissenting).

266. *Id.* at 785 (Stevens, J., dissenting).

267. *Id.* at 785 (citing *Reed v. Reed*, 404 U.S. 71 (1971); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982)). Stevens's view in *Bray* appears different from his view in his 1979 *Novotny* concurrence, where he said:

Private discrimination on the basis of sex is not prohibited by the Constitution. The right to be free of sex discrimination by other private parties is a statutory right that was created almost a century after § 1985(3) was enacted. Because I do not believe that statute was intended to provide a remedy for the violation of statutory rights—let alone rights created by statutes that had not yet been enacted—I agree with the Court's conclusion that it does not provide respondent with redress for injuries caused by private conspiracies to discriminate on the basis of sex.

*Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 385 (1979) (Stevens, J., concurring).

Stevens's *Novotny* concurrence and his *Bray* dissent may be distinguishable. In *Bray*, he said that women are a protected *class* (thus fulfilling the *Griffin* requirement), while in

Justice O'Connor reached the same result, but her definition of protected classes is somewhat narrower than Stevens's: "At the very least, the classes protected by § 1985(3) must encompass those classifications that we have determined merit a heightened scrutiny of state action under the Equal Protection Clause of the Fourteenth Amendment. Classifications based on gender fall within that narrow category of protected classes."<sup>268</sup>

Justice Stevens also discussed the legislative history, and in doing so, made an important point:

Given then prevailing attitudes about the respective roles of males and females in society, it is possible that the enacting legislators did not anticipate protection of women against class-based discrimination. That, however, is not a sufficient reason for refusing to construe the statutory text in accord with its plain meaning, particularly when that construction fulfills the central purpose of the legislation.<sup>269</sup>

I agree with Justice Stevens. Attitudes toward sex discrimination are different now than they were in the nineteenth century, and the law should, if not lead, at least reflect that change.

Furthermore, by saying that race but not sex discrimination is clearly actionable under the statute, the Court sends a message—just as it does by applying only an intermediate level of scrutiny in Equal Protection Clause sex discrimination claims—that it is hesitant to deter sex discrimination with the full use of all the powers at its disposal.

### (3) *Does Class-Based Animus Apply to Abortion-Seekers?*

The majority quickly dismissed the notion that a group defined as "women seeking abortions" could be a qualifying class. To the majority, all that "women seeking abortions" connoted was "a group of individuals" whose actions the protesters had interfered with.<sup>270</sup>

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*Novotny*, he believed that being free from private sex discrimination was not a protected *right* (thus violating the requirement that we now identify with *Carpenters*). Still, the contrast in tone between these two opinions is striking.

268. *Bray*, 113 S. Ct. at 801. (O'Connor, J., dissenting) (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-26 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976)). Elsewhere in her opinion, however, in reaffirming her *Carpenters* dissent, O'Connor expressed a broader view. She said she believed that

"instead of contemplating a list of actionable class traits, . . . Congress had in mind a functional definition of the scope of [§ 1985(3)]," and intended to "provide a federal remedy for all classes that seek to exercise their legal rights in unprotected circumstances similar to those of the victims of Klan violence."

*Id.* at 801 (O'Connor, J., dissenting) (quoting *Carpenters*, 463 U.S. at 851 (Blackmun, J., dissenting)). Thus, in *Carpenters*, she would have found that § 1985(3) protected a class consisting of non-union employees.

269. *Id.* at 785 (Stevens, J., dissenting).

270. *Id.* at 759.



The majority spent more time arguing that the protests were not directed at women in general. They presented a complicated rationale. Operation Rescue described its motivation as stopping abortion. It did not define its activities as being directed at women in general. The majority, apparently placing great weight on Operation Rescue's own description of its intent, concluded that unless opposition to abortion can "reasonably be presumed to reflect a sex-based intent" or unless intent is irrelevant, there would be no class-based animus.<sup>271</sup>

In arguing that opposition to abortion does not reflect a sex-based intent, the majority presented an unconvincing hypothetical example meant to contrast with Operation Rescue's actions: a tax on yarmulkes would be a tax on Jews because the wearing of yarmulkes is "an irrational object of disfavor" that is "engaged in exclusively or predominantly" by Jews.<sup>272</sup> The majority argued that opposition to abortion, by contrast, is not irrational: "Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward (or indeed any view at all concerning) women as a class."<sup>273</sup> As support, the Court stated that men and women are on both sides of the abortion issue.<sup>274</sup> But this makes little sense. If Jews were on both sides of the issue of yarmulke taxation, would that make the tax any less class-based?

More important in terms of the impact of this case is the Court's view that there are "common and respectable" reasons for opposing abortion. This may certainly be true, but the fact is that abortion is constitutionally protected, and § 1985(3) is designed to protect people seeking to exercise their constitutional rights. That a desire to interfere with such rights may be "common" is irrelevant. It is *because* there is opposition that rights need to be legally protected; if there were no opposition, there would be no need for protective laws. For example, it is ludicrous to think that enforcement of § 1985(3) against Klan activities would be denied based on an argument that racism is common; instead, that would be an argument for the necessity of the statute.

While the fact that yarmulkes are worn "exclusively or predominantly" by Jews apparently convinced the Court that any infringement would be discriminatory, the fact that abortions are obtained exclusively by women did not lead the Court to a similar conclusion. The majority cited *Geduldig v. Aiello* for the proposition that laws affecting pregnancy are not necessarily sex-based classifications.<sup>275</sup>

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271. *Id.* at 766.

272. *Id.* at 760.

273. *Id.*

274. *Id.*

275. *Id.* at 760 (citing *Geduldig*, 417 U.S. at 496 n.20).

Justices Stevens and O'Connor both distinguished statutory from constitutional standards. Because *Geduldig* construed the reach of the Equal Protection Clause, and because the two Justices believed that § 1985(3) should be interpreted more broadly than the constitutional clause, they asserted that *Geduldig* did not apply.<sup>276</sup>

Justice Stevens cited the PDA,<sup>277</sup> *Newport News Shipbuilding & Dry Dock co. v. EEOC*,<sup>278</sup> and *Automobile Workers v. Johnson Controls*<sup>279</sup> as support for his argument that for statutory purposes, pregnancy discrimination is sex discrimination.<sup>280</sup> Justice O'Connor also relied on the PDA and *Newport News* for the same point.<sup>281</sup> Justice Stevens said that "as a matter of statutory interpretation, [he has] always believed that rules that place special burdens on pregnant women discriminate on the basis of sex."<sup>282</sup> Neither Justice O'Connor nor Justice Stevens indicated they would necessarily be willing to apply a similar interpretation to constitutional claims. This is unfortunate; strong statements from them might have hastened *Geduldig's* demise. Nevertheless, their comments on why they believe that under § 1985(3) discrimination against abortion seekers is class-based animus are eloquent and based, unlike the majority's opinion, on common sense.<sup>283</sup>

276. *Id.* at 790-92 (Stevens, J., dissenting); *Id.* at 803.

277. 42 U.S.C. § 2000e(k) (1993); *see supra* part I.C.I.

278. 462 U.S. 669, 670 & n.1 (1983); *see supra* part I.C.I.

279. 111 S. Ct. 1196 (1991); *see supra* part I.C.I.

280. *Bray*, 113 S. Ct. at 791-92 (Stevens, J., dissenting).

281. *Id.* at 803 (O'Connor, J., dissenting).

282. *Id.* at 791 (Stevens, J., dissenting).

283. The comments are worth quoting at length. Justice O'Connor wrote:

The victims of [defendants'] tortious activities are linked by their ability to become pregnant and by their ability to terminate their pregnancies, characteristics unique to the class of women. [Defendants'] 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.* at 802 (O'Connor, J., dissenting).

Justice Stevens expressed a similar view:

[The animus] requirement—as well as the central purpose of the statute—is satisfied if the conspiracy is aimed at conduct that only members of the protected class have the capacity to perform. It is not necessary that the intended effect upon women be the sole purpose of the conspiracy. It is enough that the conspiracy be motivated "at least in part" by its adverse effects upon women. . . . Even assuming that the ultimate and indirect consequence of [defendants'] blockade was the legitimate and non-discriminatory goal of saving potential life, it is undeniable that the conspirators' immediate purpose was to affect the conduct of women. Moreover, [defendants] target women *because* of their sex, specifically, because of their capacity to become pregnant and to have an abortion.

*Id.* at 787 (Stevens, J., dissenting) (citing *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (footnotes omitted)).

Justice Stevens's interpretation of the demonstrators' motives is more insightful than the majority's:

Ambivalence towards abortion pervades the majority's opinion. Not only did the majority emphasize that there are "respectable" reasons for opposing abortion, but they also said:

[T]wo of our cases deal specifically with the disfavoring of abortion, and establish conclusively that it is not *ipso facto* sex discrimination. In *Maher v. Roe*<sup>284</sup> and *Harris v. McRae*,<sup>285</sup> we held that the constitutional test applicable to government abortion-funding restrictions is not the heightened-scrutiny standard that our cases demand for sex-based discrimination, see *Craig v. Boren*,<sup>286</sup> but the ordinary rationality standards.<sup>287</sup>

Furthermore, the court stated that "[w]hether one agrees or disagrees with the goal of preventing abortion, that goal in itself . . . does not remotely qualify for" the type of animus implied by "some racial, or otherwise class-based, invidiously discriminatory animus," nor does it qualify for "such derogatory association with racism."<sup>288</sup> The Court again cited *Maher v. Roe*<sup>289</sup> and *Harris v. McRae*,<sup>290</sup> this time for the following proposition: "[W]e have said that 'a value judgment favoring childbirth over abortion' is proper and reasonable enough to be implemented by the allocation of public funds."<sup>291</sup>

Thus abortion remains constitutional, but the Court is sympathetic to abortion's opponents. It has approved limitations on public funding and, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>292</sup> approved barriers placed in the way of abortion seekers. Here, the Court refused to allow the protections of § 1985(3) to be applied in the abortion context. It apparently did all of these based on its "value judgment" that opposition to abortion is "respectable" and "proper and reasonable." A change in the Court's personnel could make a difference, but at this mo-

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It is also obvious that [defendants'] conduct was motivated "at least in part" by the invidious belief that individual women are not capable of deciding whether to terminate a pregnancy, or that they should not be allowed to act on such a decision. [Defendants'] blanket refusal to allow any women access to an abortion clinic overrides the individual class members' choice no matter whether she is the victim of rape or incest, whether the abortion may be necessary to save her life, or even whether she is merely seeking advice or information about her options. [Defendants'] conduct is designed to deny *every* woman the opportunity to exercise a constitutional right that *only* women possess.

*Id.* at 788. Stevens also commented that defendants' "conduct evidences a belief that it is better for a woman to die than for the fetus she carries to be aborted." *Id.* at 788 n.21.

284. 432 U.S. 464 (1977).

285. 448 U.S. 297 (1980).

286. 429 U.S. 190 (1976).

287. *Bray*, 113 S. Ct. at 761 (citing *Maher*, 432 U.S. at 470-71 and *Harris*, 448 U.S. at 322-24).

288. *Id.* at 762.

289. 432 U.S. at 472.

290. 448 U.S. at 325.

291. *Bray*, 113 S. Ct. at 762.

292. 112 S. Ct. 2791 (1992).

ment, based on this case, the future of the right to abortion appears to be hanging by a thread.

## 2. *The Carpenters Requirement*

The majority in *Bray* simply cited *Carpenters* for the proposition that a § 1985(3) conspiracy must infringe a right that is guaranteed against private impairment.<sup>293</sup> Justice Souter, however, argued that the drafters had not meant for the section to have such a narrow scope; Justice Stevens argued that the requirement had been fulfilled because of the protesters' infringement of the right to travel;<sup>294</sup> and Justice O'Connor, in this as in all aspects of the discussion of the *Carpenters*-derived requirement, declined to specifically comment.<sup>295</sup>

### a. Interstate Travel

Although it had previously appeared well settled that abortion clinic blockades interfered with the right of interstate travel,<sup>296</sup> the Court in *Bray* reached the opposite conclusion. The majority stated that a protected right must be consciously "aimed at," not merely incidentally affected.<sup>297</sup> Here, the protesters were trying to stop abortion, not travel. Furthermore, the Court argued that the protesters had not even affected interstate travel; the only travel prevented was in the immediate vicinity of the clinics.<sup>298</sup>

Justice Stevens strongly disagreed. He said that the right to interstate travel for the purpose of seeking an abortion was clearly constitutionally protected,<sup>299</sup> and he argued that the majority had misread the precedents.<sup>300</sup>

The Court's argument that plaintiffs' right to travel was not infringed was not as explicitly value laden as its argument that plaintiffs were not a protected class. Nevertheless, it could very well be similarly value driven, designed to justify rejecting what in prior cases had been plaintiffs' least controversial claim.

### b. Right to Abortion

The question of whether interference with the right to abortion could satisfy the requirement articulated in *Carpenters*—interference

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293. *Id.* at 762. (citing *United Bhd. of Carpenters and Joiners v. Scott*, 463 U.S. 825, 833 (1983)).

294. *Id.* at 792-95 (Stevens, J., dissenting).

295. *Id.* at 804 (O'Connor, J., dissenting).

296. See *supra* part I.D.

297. *Bray*, 113 S. Ct. at 762.

298. *Id.* at 763.

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

300. *Id.* at 793-95.

with a right protected against private infringement—was one of the few issues that did not provoke an argument: *none* of the Justices claimed that it could.<sup>301</sup> The majority argued that the right to abortion is not among those few rights protected against private infringement: “It would be most peculiar to accord it that preferred position, since it is much less explicitly protected by the Constitution than, for example, the right of free speech rejected for such status in *Carpenters*.”<sup>302</sup>

Assuming that the *Carpenters* requirement is valid, then the majority’s argument is probably uncontroversial; most constitutional rights are not protected against private action. But it is noteworthy that the Court chose to say that the right to abortion is “much less protected by the Constitution” than are other rights; this is one more piece of evidence showing how precarious the constitutional right to abortion is at the moment.

The Court doesn’t explain *why* it believes abortion is less protected than other rights. In comparing abortion to free speech, the majority presumably were relying on the fact that free speech is explicitly mentioned in the Constitution, while abortion is not. But the majority never explained why they believe abortion differs from the right to interstate travel,<sup>303</sup> neither of which is explicitly mentioned.

## B. The Hindrance Clause

An odd feature of the *Bray* decision is that much of the argument focused on the question of whether the hindrance clause<sup>304</sup> applied, an issue the majority said was not before the Court.<sup>305</sup> After asserting that it could not reach the question, the majority went on to discuss it anyway, saying that “it would seem” that a claim under the hindrance

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301. Justice Stevens, apparently content to rest his arguments on the infringement of interstate travel, did not raise the question, not even to expressly decline to consider it. Justices Souter and O’Connor also failed to reach the issue. The claim had also usually failed in the prior lower court abortion blockade cases. *See supra* part I.D.

302. *Id.* at 764.

303. Although the majority found that the right to travel did not *apply* to this case, it did not dispute that the right itself is valid and is protected against private infringement: “There are few such rights [that are protected against private, as well as official, encroachment]. We have hitherto recognized only the Thirteenth Amendment right to be free from involuntary servitude, and, in the same Thirteenth Amendment context, the right of interstate travel.” *Id.* (citations omitted).

304. The hindrance clause covers conspiracies for “the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons . . . the equal protection of the laws.” 42 U.S.C. § 1985(3) (1993). *See supra* part I.B. and part I.F.4.

305. The majority said that plaintiffs’ complaint did not set forth a claim under the clause, that neither the district nor appellate court considered it, that it was not included in the petition for certiorari, that the issue was first suggested by questions from the bench during argument, and that the Court had declined to accept the hindrance clause section of plaintiffs’ supplemental brief on reargument. *Id.* at 764-65.

clause, like one under the deprivation clause, requires showing a class-based, invidiously discriminatory animus and a right protected against private infringement—showings that the majority had already determined had not been made.<sup>306</sup>

Justices Souter, Stevens, and O'Connor all believed that the plaintiffs did have a claim under the hindrance clause. Neither Justice O'Connor nor Justice Stevens addressed the majority's contention that the issue had not been properly raised, but both asserted that plaintiffs had "unquestionably" established a claim under the second clause.<sup>307</sup> Justice Souter believed it was "reasonable" for plaintiffs to move to file a supplemental brief on reargument on the issue.<sup>308</sup> Although Souter voted to grant plaintiffs' motion, he would have been satisfied with the majority's order if it had meant that the claim was simply being left to be considered at a later date, for example, on remand.<sup>309</sup> But he believed that the Court, by "expressing skepticism" that the clause could be a basis for relief, began "to close the door," a move he called "unfair to [plaintiffs] after their request was denied."<sup>310</sup>

Justice Souter appears to be correct. Although the majority's discussion of the issue is dicta, it is likely to influence the later proceedings in this case. Worse, it could discourage future abortion blockade cases. By holding that such cases are not actionable under the deprivation clause, the only option the Court left for potential § 1985(3) abortion clinic plaintiffs is to assert a hindrance claim. By casting doubt on the validity of the claim, the majority appears to be trying to deny that option as well, thus assuring that § 1985(3) will be unavailable altogether for abortion clinic plaintiffs.

### Conclusion

Even if legislation is enacted that will provide increased federal law enforcement protection for abortion clinics and their patients, there may still be negative repercussions from the *Bray* decision. The Court repeatedly emphasized that abortion is disfavored and that opposition to abortion is reasonable, thus continuing its trend toward casting doubt on whether the constitutional right to abortion will continue to be upheld.

The Court also continued its trend toward construing civil rights laws narrowly. It passed up an opportunity to extend the protection of § 1985(3) to women or other non-racial groups whose constitutional rights are infringed, and it refused to apply the statute to the abortion blockade situation, even though the dissenters argued strongly that it

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306. *Id.* at 765-67.

307. *Id.* at 795 (Stevens, J., dissenting) and 804 (O'Connor, J., dissenting).

308. *Id.* at 770-71 (Souter, J., concurring in part and dissenting in part).

309. *Id.* at 771.

310. *Id.*

clearly should apply. The Court was similarly ungenerous in its construction of constitutional law; it provided what is perhaps the narrowest interpretation yet of the right to interstate travel, and it affirmed the continuing validity of the doctrine asserted in *Geduldig v. Aiello*, that pregnancy discrimination does not need to be treated as sex discrimination for Fourteenth Amendment Equal Protection purposes.

Any of these could be relied on as a precedent to continue narrowing statutory and constitutional rights. Much depends, however, on the future composition of the Court. Justice White was a member of the *Bray* majority; with his retirement, only four of the *Bray* majority Justices remain. A new Justice (or, eventually, new Justices) could cause the balance to tip and start a much needed reversal of the Court's current trends.

