

4-1-1993

Bray v. Alexandria Women's Health Clinic: Women Under Siege

Dianne Olivia Fischer

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Civil Rights and Discrimination Commons](#)

Recommended Citation

Dianne Olivia Fischer, *Bray v. Alexandria Women's Health Clinic: Women Under Siege*, 47 U. Miami L. Rev. 1415 (1993)

Available at: <https://repository.law.miami.edu/umlr/vol47/iss5/5>

This Comment is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

COMMENTS

Bray v. Alexandria Women's Health Clinic: Women Under Siege

I. INTRODUCTION	1415
II. THE INTERPRETIVE HISTORY OF THE KU KLUX KLAN ACT	1421
A. <i>Legislative History</i>	1421
B. <i>Judicial History</i>	1422
C. <i>Modern Application</i>	1424
1. <i>COLLINS V. HARDYMAN</i>	1424
2. <i>GRIFFIN V. BRECKENRIDGE</i>	1425
3. <i>UNITED BROTHERHOOD OF CARPENTERS AND JOINERS V. SCOTT</i>	1427
III. ANTI-ABORTION VIOLENCE TAKES TO THE STREETS	1429
A. <i>Civil Disobedience</i>	1429
B. <i>The Inadequacy of State Remedies</i>	1432
IV. ABORTION CASES IN COURT	1435
A. <i>Cases in the Federal Circuits</i>	1436
B. <i>Bray v. Alexandria Women's Health Clinic</i>	1439
1. THE CLASS-BASED ANIMUS REQUIREMENT: WOMEN AS A PROTECTED CLASS	1440
2. OPPOSITION TO ABORTION AS DISCRIMINATION AGAINST WOMEN	1442
3. STATE INVOLVEMENT	1444
a. The Right to Travel	1445
b. The Right to an Abortion	1446
V. CONCLUSION	1447

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage. . . . As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave Codes.

Justice William Brennan¹

I. INTRODUCTION

Until the commencement of the Clinton Administration,² women

1. *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973).

2. The Clinton administration's pro-choice views stand in sharp contrast to the vehement pro-life agendas of the Reagan and Bush administrations. Clinton supports fetal tissue research and testing of the French abortion pill, RU 486. *Roll Call: House of Representatives*,

were fighting a losing battle against pro-life forces for the right to choose an abortion. The battle has reached a stage of historic proportion. Two successive Republican administrations stacked the Supreme Court with Justices believed to be antagonistic³ to *Roe v. Wade*.⁴ Even after recognizing a woman's right to an abortion as fundamental in *Roe*, the Supreme Court joined the fray by chipping away at that right with decisions limiting its scope.⁵

With the repeal of *Roe* seemingly imminent, both pro-choice and pro-life factions have stepped up their political activity. On the pro-life side, the activity has come to resemble "terrorism,"⁶ giving new meaning to the phrase "women in combat."⁷ A case in point is the

Fatal Tissue Research, LOS ANGELES TIMES, Mar. 18, 1993, part 5, at 4; see *French Abortion Pill Due for U.S. Tests, Firm Says*, CHI. TRIB., Mar. 18, 1993, at N18. In addition, he supports two major pieces of legislation now pending in Congress: the first is the Freedom of Choice Bill, H.R. 25, 103rd Cong., 1st Sess. (1993) which would reinforce the Supreme Court's ruling in *Roe v. Wade*, 410 U.S. 113 (1973), legalizing abortion, and greatly limit the scope of state abortion regulations. Kevin Merida, *Doctor's Slaying Spurs Abortion-Rights Lawmakers*, WASH. POST, Mar. 15, 1993, at A11. The second piece of legislation pending is the Freedom of Access to Clinic Entrances Bill, H.R. 796, 103rd Cong., 1st Sess. (1993) which would make it a federal crime to blockade abortion clinics. The bill reads, in part:

Whoever, with intent to prevent or discourage any person from obtaining reproductive health services, intentionally and physically obstructs, hinders, or impedes the ingress or egress of another to a medical facility that affects interstate commerce, or to the structure or place in which the medical facility is located, shall be subject to the penalties provided in subsection (b) of this section [a fine, or imprisonment for not more than one year, in the case of a first conviction under this section, and not more than three years, in the case of a previous conviction] and the civil remedy provided in subsection (c) of this section [treble damages or \$5000 in damages, whichever is greater, appropriate declaratory or injunctive or other equitable relief, and attorney's fees].

Id. A specific provision excepts expression guaranteed by the First Amendment and labor disputes from the bill's coverage.

In addition, President Clinton's appointment of Janet Reno as Attorney General, who is pro-choice, marks "a sharp reversal from the policies of the Justice Department under Presidents Ronald Reagan and George Bush, who used the department as an instrument of their opposition to abortion." David Johnston, *Attorney General Weighs Greater Federal Role in Abortion Rights*, N.Y. TIMES, Mar. 13, 1993, at A6.

3. See, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (Scalia, J., concurring); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (White, J., dissenting); *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) (O'Connor, J., dissenting); *Roe v. Wade*, 410 U.S. 113 (1973) (Rehnquist, J., dissenting); *Doe v. Bolton*, 410 U.S. 179 (1973) (White, J., dissenting).

4. 410 U.S. 113 (1973).

5. See *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791 (1992); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

6. Ellen Goodman, *The New Domestic Terrorists*, BOST. GLOBE, Mar. 14, 1993, at A25.

7. It is important to note that although it is women whose constitutional rights are at stake, pro-life violence is perpetrated against men as well. Perhaps the most extreme example is the recent murder of Dr. David Gunn outside of a Pensacola, Florida clinic, during an anti-abortion demonstration. For further discussion of this incident, see *infra* notes 115-16 and accompanying text.

organized blockading of abortion clinics in cities such as Los Angeles, Chicago, Washington D.C., New York, Wichita, and Buffalo.⁸ In these cities, the anti-abortion movement, spearheaded by Operation Rescue⁹ and its founder, Randall Terry, continued its crusade to prevent women from exercising their constitutional right to abortion.

Operation Rescue follows a three-part plan of attack to achieve its aims: (1) it uses blockades of human bodies to shut down targeted clinics through mob intimidation, (2) it teaches the blockaders tactics to use with police on the scene in order to stymie police efforts to uphold trespass laws once a blockade has begun, and (3) it instructs its followers to refuse to give their names once arrested, leading to the clogging of local jails and court systems¹⁰ so as to effectively frustrate the efforts of the legal system to process the huge numbers of law breakers. Using the three-prong plan, pro-lifers successfully conspire to thwart the efforts of local law enforcement officials who seek to preserve for women the freedom to exercise their constitutional right to seek an abortion.

One hundred and twenty years ago, in the Reconstruction South, a similar conspiracy was perpetrated against newly freed slaves in Southern states. Southern opponents of the Republican government formed the Ku Klux Klan and similar White Supremacist groups,¹¹ which aimed to deprive newly freed Blacks of their rights, recognized

8. For newspaper accounts of abortion clinic violence in these cities, see Lynne Duke & Michael Abramowitz, *Anti-Abortion Protesters Blockade Clinic in Va.*, WASH. POST, Oct. 30, 1988, at B1; Maureen Dowd, *Bush Chides Protesters on 'Excesses'*, N.Y. TIMES, Aug. 17, 1991, § 1 at 7; *Ku Klux Klan Statute Is Right Law in Wichita*, N.Y. TIMES, Sept. 20, 1991, at A26; *'Summer of Mercy' Costs in Wichita*, USA TODAY, Feb. 19, 1992 at 4A; Barbara Whitaker, *320 Anti-Abortion Protesters Arrested*, NEWSDAY, May 7, 1988, at 11.

9. Operation Rescue was the driving force behind abortion clinic blockades since its inception in 1986. Due to increasing political pressure and heavy court fines, Operation Rescue disbanded its national operations and has since splintered into a series of local anti-abortion organizations. See David A. Gardey, Note, *Federal Power to the Rescue: The Use of § 1985(3) Against Anti-Abortion Protesters*, 67 NOTRE DAME L. REV. 707, 708 nn.10-11 (1992); Dawn W. Ceol, *Supreme Court to Hear Va. Abortion Clinic Case*, WASH. TIMES, Feb. 26, 1991, at A3; see also Tamar Lewin, *With Thin Staff and Thick Debt, Anti-Abortion Group Faces Struggle*, N.Y. TIMES, June 11, 1990, at A16.

10. For a description of how Operation Rescue demonstrations burden a court system, see Felicity Barringer, *Abortion Foes Clog Vermont Courts*, N.Y. TIMES, May 7, 1990, at A12.

11. The Klan was one of several White Supremacist groups operating in the postbellum South, committing terrorist acts against newly freed Blacks and Republicans. Other groups included Knights of the White Camelia, the White Brotherhood, the Pale Faces, and the '76 Association. Mark Fockele, Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402, 407-08 n.29 (1979).

under the Thirteenth,¹² Fourteenth,¹³ and Fifteenth¹⁴ Amendments to the United States Constitution. Congress passed these amendments in the wake of the Civil War in order to guarantee Blacks throughout the country the right to be free from bondage, the right to due process and equal protection of the laws, and the right to vote.¹⁵ Opponents of these amendments fought to nullify them through private conspiracies designed to intimidate and coerce Blacks, their supporters, and Republican officials.¹⁶ In response, the forty-second Congress of the United States passed the Ku Klux Klan Act,¹⁷ section two of which was designed to provide a civil remedy against the growing violence by the Ku Klux Klan. Section two of the Act read as follows:

If two or more persons . . . shall conspire together . . . for the purpose, either directly or indirectly, of depriving any person or class of persons of the equal protection of the laws, or of equal

12. The Thirteenth Amendment states:

1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. 2. Congress shall have the power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII, §§ 1-2.

13. The Fourteenth Amendment reads, in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. at amend. XIV, § 1.

14. The Fifteenth Amendment reads:

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
2. The Congress shall have power to enforce this article by appropriate legislation.

Id. at amend. XV, § 1-2.

15. While these amendments were passed in response to racial terrorism in the Southern states, the Fourteenth Amendment has subsequently been construed, in accordance with its broad language, to protect the rights of individuals other than Blacks. *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677 (1973) (disapproving discrimination of women for purely administrative convenience).

16. *Randolph M. Scott-McLaughlin, Bray v. Alexandria Women's Health Clinic: The Supreme Court's Next Opportunity to Unsettle Civil Rights Law*, 66 TUL. L. REV. 1357, 1361-71 (1992).

17. The original act was named "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and For Other Purposes." Ch. 22, 17 Stat. 13 (1871) (current version 42 U.S.C. § 1983 (1993)). The act included seven sections. Some of the other sections created the following: a prohibition against deprivations of rights secured by the Constitution under color of state law; a provision allowing the President of the United States to call out the militia, land and naval forces in the case of insurrection, domestic violence, unlawful combinations or conspiracies; and a provision which allows the President, when such an insurrection becomes a rebellion, to suspend the privileges of habeas corpus under specific circumstances. *Id.* §§ 1-2, 4.

privileges or immunities under the laws . . . if any 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 person so injured or deprived . . . may have . . . an action for the recovery of damages occasioned by such injury or deprivation, against any one or more [of the conspirators].¹⁸

For 120 years following the Act's passage, federal judges have struggled to apply the statute, which is now codified as 42 U.S.C. § 1985(3),¹⁹ in a way that is consistent with the intent of the authors of the bill. Most recently, abortion clinics, under siege by anti-abortion protestors, have brought suits under § 1985(3) to prevent the mob violence perpetrated by Operation Rescue and other anti-abortion groups from taking place outside abortion clinics in the United States.

By asking for protection under this statute, abortion clinics draw an analogy between pro-lifers' intimidation tactics directed toward women and the Ku Klux Klan's terrorism of Blacks and their supporters in the Reconstruction South. Operation Rescue's founder, Randall Terry, frankly admits the objectives of the organization's activities:²⁰ to prevent women from exercising their constitutionally-mandated right to seek abortions and abortion-related services; to prevent clinics which provide such services from operating;²¹ and, finally,

18. 17 Stat. 13-14 (1871).

19. The current version of § 1985(3) reads as follows:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws. . . . If one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1992).

20. *Women's Health Care Servs. v. Operation Rescue-Nat'l*, No. 91-1303-K, 1991 U.S. Dist. LEXIS 14521, at 38 ("The defendants have concededly engaged in criminal activity. Counsel has admitted that 'no doubt,' the activities of Operation Rescue include violation of trespass laws and possible violations of state tort law. Thus, as counsel for defendant Operation Rescue-National has admitted to the court, Operation Rescue functions by calling upon its adherents to break the law.").

21. See RANDALL TERRY, OPERATION RESCUE, NATIONAL DAY OF RESCUE-OCTOBER 29 (1988).

to force the reversal of *Roe v. Wade* and rescind a woman's right to an abortion, by constitutional amendment, if possible.²²

The Supreme Court had an opportunity to offer § 1985(3) protection to women victimized by clinic blockaders in *Bray v. Alexandria Women's Health Clinic*.²³ Instead, five members of the Court construed the statute and criteria for protection narrowly and held that: (1) "women seeking abortions" were not a protected class under § 1985(3);²⁴ (2) even if they were, abortion protestors' activities did not constitute class-based animus because a "sex-based intent" did not underlie their actions;²⁵ and, (3) even if (1) and (2) were satisfied, the protestors did not violate the plaintiffs' constitutionally protected right to travel²⁶ or to seek an abortion.²⁷

Part II of this Comment will review the statutory history of the Ku Klux Klan Act and the evolution of its class-based animus and state involvement requirements, to show that victims of abortion clinic violence are precisely the type that 42 U.S.C. § 1985(3) was designed to protect. The Supreme Court's historic espousal of a negative rights²⁸ approach to constitutional interpretation has eviscerated the protections intended by the forty-second Congress in promulgating § 1985(3). Part III considers pro-lifers' activities, and the abortion context generally, in order to illustrate the similarities between abortion clinic violence and Klan terrorism. Part IV will discuss § 1985(3) cases in the federal courts and the various degrees of success the plaintiff clinics have achieved. This discussion centers around the Supreme Court's decision in *Bray*. This Part evaluates the current state of the class-based animus requirement and considers whether the interference with a woman's right to abortion constitutes gender-based discrimination directed at women as a class and therefore is protected by § 1985(3). Further, Part IV discusses the state involvement requirement implied through the Fourteenth Amendment language of the statute and how it has been interpreted to affect § 1985(3) suits under the doctrines underlying the right to travel and right to an abortion.

22. See ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM* 241 (1990).

23. 113 S. Ct. 753 (1993).

24. *Id.* at 759.

25. *Id.* at 759-60.

26. *Id.* at 762-63.

27. *Id.* at 764.

28. See generally Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990) (challenging the accuracy and intellectual foundations of the negative rights view of the U.S. constitution).

II. THE INTERPRETIVE HISTORY OF THE KU KLUX KLAN ACT

A. Legislative History

The period of history immediately following the Civil War was one of great consternation for the forty-second Congress. The political situation in the Reconstruction South was rife with violence against Southern Blacks and Republicans, which Congress, upon investigation, suspected was politically motivated.²⁹ It is important to note that, at the time of the passage of the Ku Klux Klan Act, the Klan was a political, as well as racist, organization.³⁰ The Klan was generally thought of as a tool of the Democratic party, directing its violence not only at Blacks, but also at supporters and enforcers of Republican policies.³¹ The belief that the Ku Klux Klan Act was designed only to protect Blacks oversimplifies its historic context. In fact, the drafters of the bill intended to proscribe conspiracies against the person, property, and liberty of individuals³² generally, although this proscription was in response to violence directed at Blacks and Republicans.³³

Although the offenses committed by the Klan were violations of state law, the states were either unwilling or unable to successfully prevent Klan activities.³⁴ Klan members allegedly threatened and intimidated local judiciaries to prevent the bringing of suits against others Klan members.³⁵

President Ulysses S. Grant, recognizing the danger of political lawlessness in the unstable South, requested legislation from Congress giving him additional authority to control "[a] condition of affairs [that] . . . exists in some of the states of the Union rendering life and property insecure"³⁶ In response to this plea from the President, Representative Samuel Shellabarger formulated a legislative package, promulgated as "H.R. No. 320, To Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States."³⁷ The proposal was aimed at conspiracies like the Klan, which Con-

29. Fockele, *supra* note 11, at 408; Scott-McLaughlin, *supra* note 16.

30. Fockele, *supra* note 11, at 403; Scott-McLaughlin, *supra* note 16, at 1364.

31. See Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527, 535 (1985); see also Scott-McLaughlin, *supra* note 16; Brian J. Gaj, Note, *Section 1985(2) and its Scope*, 70 CONN. L. REV. 756, 758 (1985).

32. Fockele, *supra* note 11; see notes 183-87 and accompanying text.

33. Fockele, *supra* note 11.

34. CONG. GLOBE, 42nd Cong., 1st Sess. 321 (1871) [hereinafter CONG. GLOBE]; see Gormley, *supra* note 31, at 535; Scott-McLaughlin, *supra* note 16, at 1368-69.

35. Scott-McLaughlin, *supra* note 16, at 1369 n.42 and accompanying text.

36. CONG. GLOBE, *supra* note 34, at 236, col. 1.

37. *Id.* at 317. For synopsis of some of the other sections of the act, see *supra* note 17.

gress believed were aimed at overthrowing the Reconstruction policies of the Republican Congress.³⁸ Forty-two U.S.C. § 1985(3) is the descendant of section two of Shellabarger's legislative package, which was originally intended to operate as a criminal sanction against conspirators "do[ing] any act[s] in violation of the rights, privileges or immunities of another person"³⁹ However, many members of the forty-second Congress maintained that such a law would be an unconstitutional invasion of the states' inherent jurisdiction over crimes.⁴⁰ Therefore, Shellabarger amended the bill, limiting its scope only to civil conspiracies.⁴¹

B. *Judicial History*

The effectiveness of § 1985(3) has waxed and waned with judicial interpretive whimsy. Shortly after the passage of the Ku Klux Klan Act in 1871, the Supreme Court decided the *Slaughter-House Cases*,⁴² which severely limited the scope of the Privileges and Immunities Clause, and by implication, the scope of § 1985(3). In *Slaughter-House*, a group of Louisiana butchers challenged a Louisiana law granting a 25-year monopoly over the slaughter of cattle in several Louisiana parishes to a single corporation. The Supreme Court rejected the butchers' claim that such a statute deprived them of their rights under the Privileges and Immunities Clause, saying that the right of the butchers to carry on business was not incident to national citizenship.⁴³ Therefore, the Supreme Court left it up to the *states* to protect this fundamental right—not the federal government. Although § 1985(3) was not applied in the *Slaughter-House Cases*, the statute's scope was necessarily limited by implication, since by its language § 1985(3) protected against conspiracies which infringed upon rights guaranteed under the Privileges and Immunities Clause.⁴⁴

The decision in *Slaughter-House* marked the acceptance of a neg-

38. Gormley, *supra* note 31, at 535; see also Scott-McLaughlin, *supra* note 16, at 1368 n.41 (quoting remarks of Representative Jeremiah M. Wilson).

39. Janis McDonald, *Starting From Scratch: A Revisionist View of 42 U.S.C. § 1985(3) and Class-Based Animus*, 19 CONN. L. REV. 471, 480 (1987) (quoting from CONG. GLOBE, *supra* note 34, at app. 68).

40. CONG. GLOBE, *supra* note 34, at 366.

41. See Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light On State Action and The Fourteenth Amendment*, 11 ST. LOUIS U. L.J. 331, 351 (1967); McDonald, *supra* note 39, at 478.

42. 83 U.S. (16 Wall.) 36 (1873).

43. The Privileges and Immunities Clause of the Fourteenth Amendment reads: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. U.S. CONST. amend. XIV, § 1.

44. Gormley, *supra* note 31.

ative rights perspective toward the Fourteenth Amendment.⁴⁵ Under such a theory, the federal government was empowered to protect against state deprivation of, but not to facilitate individuals' exercise of, fundamental rights under the Privileges and Immunities Clause.⁴⁶ The Court rejected a broader interpretation of the clause because of the potential impact on federalism. They feared giving the federal government too much power, which could have drastic "consequences [for] . . . the structure and spirit of our institutions."⁴⁷

This perspective on federalism, in which the States are viewed as the most reliable guarantors of civil rights and the federal government must be held in check, emerged as an outdated one after the Reconstruction experience. As the thirty-ninth Congress, which drafted the Fourteenth Amendment, realized,⁴⁸ the States were unable or unwilling to ensure the civil rights of citizens in the South. Justice Swayne, dissenting in *Slaughter-House*, noted that "[the] mischief to be remedied [by the Fourteenth Amendment] was not merely slavery and its . . . consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in some of the States."⁴⁹

Nevertheless, in *Slaughter-House* the Court adopted a negative rights approach to constitutional law generally and toward the Privileges and Immunities Clause specifically. This spilled over into the Court's interpretation of § 1985(3) and severely limited the statute's effectiveness in guaranteeing civil rights.

After *Slaughter-House*, the Supreme Court decided *United States v. Harris*⁵⁰ and further limited protection under § 1985(3) by limiting the Fourteenth Amendment's scope to cases involving affirmative state action.⁵¹ The facts of *Harris* involved the brutal attack by a group of twenty Whites on four Blacks in the custody of a Tennessee sheriff. One of the victims died. The plaintiffs relied on the criminal

45. Gerhardt, *supra* note 28, at 409. Negative rights theory has been justly criticized as relying on a view of Constitutional neutrality, which itself is controversial. See Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 8-9 (1992). Sunstein notes that "[t]he line between constitutionally protected rights and unprotected interests depends not on the distinction between negative and positive rights, but on substantive ideas about what government normally or naturally does." *Id.* at 9.

46. See generally Gerhardt, *supra* note 28.

47. *Slaughter-House*, 83 U.S. (16 Wall.) at 78.

48. Gerhardt, *supra* note 28, at 417.

49. *Slaughter-House*, 83 U.S. (16 Wall.) at 129 (Swayne, J., dissenting); see Scott-McLaughlin, *supra* note 16, at 1362.

50. 106 U.S. 629 (1883).

51. The statutory language of § 1985(3) parallels the language of the Fourteenth Amendment. Compare *supra* note 13 with *supra* note 19.

conspiracy language of the Ku Klux Klan Act in pursuing their cause of action.⁵² The Supreme Court held that the Federal government had no power under the Fourteenth Amendment to address private acts of violence as federal crimes. The Court therefore ruled that the section of the Act which imposed criminal penalties was an unconstitutional infringement on the States' exclusive jurisdiction over criminal acts.⁵³

It is important to note that the enactment of the Ku Klux Klan Act of 1871 occurred prior to the Supreme Court's decision in the *Slaughter House Cases* limiting the scope of the Privileges and Immunities Clause.⁵⁴ The timing of the passage of the Act vis-à-vis the cases interpreting the Fourteenth Amendment indicate that in 1871 Congress did not fully appreciate the Supreme Court's perception of the constitutional limitations of the Fourteenth Amendment. There is the possibility, indeed probability, that Congress intended § 1985(3) to remedy a broader range of civil rights violations than that which the Supreme Court later proposed.⁵⁵

C. Modern Application

1. COLLINS V. HARDYMAN

Because the Supreme Court had so restricted the Act's application in *Harris*, *Slaughter-House*, and the *Civil Rights Cases*, § 1985(3)

52. The criminal conspiracy language was originally part of section 2 and read as follows:

If two or more persons in any State or Territory conspire or go in disguise upon the highway or on the premises of another person or class of persons for the purpose of depriving, either directly or indirectly, any of equal privileges or 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, each of said persons shall be punished by a fine of not less than \$500 nor more than \$5000, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.

17 Stat. 13-14 (1871).

53. *Harris*, 106 U.S. at 638-39. The *Harris* Court also addressed whether the criminal conspiracy language was constitutional under the Thirteenth and Fifteenth Amendments. The Court said that the law exceeded Congress' authority under the Thirteenth Amendment which prohibited slavery. *Id.* at 641; see U.S. CONST. amend. XIII, §§ 1-2. In doing so, the Court relied on the assertion that the law protected Whites as well as Blacks, a proposition later invalidated under the "class based animus" requirement. See *infra* notes 74-78, 92-95 and accompanying text. The Court also said the statute exceeded Congress' authority under the Fifteenth Amendment, "whose sole object [was] to protect . . . the right of citizens of the United States to vote." *Harris*, 106 U.S. at 637.

54. McDonald, *supra* note 39, at 491.

55. Indeed, commentators argue that Congress intended the Fourteenth Amendment and legislation passed under it to protect a broader range of civil rights than the Supreme Court historically has permitted. See Gerhardt, *supra* note 28, at 417-19; Gormley, *supra* note 31, at 534-41; McDonald, *supra* note 39, at 475-92.

went virtually unused from the date of its passage until 1951. In that year, the Supreme Court heard *Collins v. Hardyman*,⁵⁶ a case that involved a dispute between two feuding political factions in California. The plaintiffs alleged that the defendants, in breaking up a political meeting, conspired to deprive plaintiffs of their rights to assemble and to equal privileges and immunities, and brought the action under § 1985(3).⁵⁷ The Court rejected the plaintiffs' argument, saying the action could only be brought in state court, since under the Fourteenth Amendment, the federal government had no power to legislate acts which did not involve state action.⁵⁸ The Court wrote an intentionally vague opinion,⁵⁹ generally understood as holding that state action is a necessary element of § 1985(3),⁶⁰ a requirement that, at least technically speaking, has subsequently been overruled.⁶¹ Despite their restrictive reading of the statute, the *Collins* Court sparked new interest in the statute as a device for safeguarding civil rights at the federal level, albeit 80 years after its enactment.⁶²

2. GRIFFIN V. BRECKENRIDGE

Twenty years after the Supreme Court imposed a state action requirement in *Collins*, the Court overruled it in *Griffin v. Breckenridge*.⁶³ *Griffin* involved the invocation of § 1985(3) against two White males who violently assaulted three Black men in an automobile because they believed one of them to be a civil rights worker.⁶⁴ The district court dismissed the complaint, stating that the plaintiffs failed to meet the *Collins* state action requirement.⁶⁵ The Fifth Circuit affirmed,⁶⁶ although expressing "serious doubts" as to the "continued vitality" of *Collins* and the state action requirement.⁶⁷ The

56. 341 U.S. 651 (1951).

57. *Id.* at 654. § 1985(3) was then numbered 8 U.S.C. § 47(3).

58. 341 U.S. at 637-39.

59. Neil H. Cogan, *Section 1985(3)'s Restructuring of Equality: An Essay on Texts, History, Progress, and Cynicism*, 39 RUTGERS L. REV. 515, 525 (1987).

60. Gormley, *supra* note 31, at 546; Fockele, *supra* note 11, at 422; Gaj, *supra* note 31, at 762.

61. The state action requirement in *Collins* was overruled in *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971); see *infra* notes 63-77 and accompanying text. However, later cases have required "state involvement" in § 1985(3) claims when based on a fundamental right guaranteed only against state interference by the Fourteenth Amendment. See *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 832-34 (1983); *infra* notes 79-88 and accompanying text.

62. Gormley, *supra* note 31, at 546-47.

63. 403 U.S. 88 (1971).

64. *Id.* at 90-91.

65. *Id.* at 93.

66. *Griffin v. Breckenridge*, 410 F.2d 817 (5th Cir. 1969).

67. *Id.* at 834.

Supreme Court reversed, holding that § 1985(3) encompassed private conspiracies, and was not limited to instances of state action as required by *Collins*. Justice Stewart's opinion noted that section one of the Ku Klux Klan Act,⁶⁸ now codified as 42 U.S.C. § 1983, provided a cause of action when state action was involved,⁶⁹ and section two of the Act was directed at private conspiracies.⁷⁰ The Court noted that if burdened with a state action requirement, § 1985(3) would be devoid of any independent effect, since state-sponsored activity was actionable under § 1983.⁷¹ The *Griffin* Court found it "almost impossible to believe that Congress intended" to duplicate the coverage of one or more of the sections.⁷² In finding for the plaintiffs, the Court enumerated the four criteria necessary to bring a successful action under § 1985(3): a complainant must allege (1) a conspiracy (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy, (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.⁷³

The Court also recognized, however, that a violation of § 1985(3) was not intended to give rise to a general federal tort action. Absent the limiting effect of the state action requirement of *Collins*, the provision could be mistakenly interpreted as providing a tort remedy. Therefore, the court stressed that the forty-second Congress intended to limit the scope of the Act to "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."⁷⁴ The Court, in subsequent cases,⁷⁵ has expressly declined to decide whether class-based animus other than racial bias would be actionable under § 1985(3).⁷⁶ Since *Griffin* was decided, federal courts have repeatedly struggled with this issue. The

68. See *infra* note 199 and accompanying text.

69. *Griffin v. Breckenridge*, 403 U.S. 88, 99 (1971).

70. *Id.* at 98-99. Section 3 of the act was directed at massive private lawlessness which rendered state authorities powerless, calling for use of military forces. *Id.*

71. *Id.*

72. *Id.* at 99.

73. *Id.* at 102-03.

74. *Id.* at 102.

75. See, e.g., *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 836 (1983) ("[I]t is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans.").

76. *Griffin*, 403 U.S. at 102 n.9. For an exposition on the development of the class-based animus requirement, see generally Devin S. Schindler, Comment, *The Class Based Animus Requirement of 42 U.S.C. § 1985(3): A Limiting Strategy Gone Awry?*, 83 MICH. L. REV. 88 (1985).

majority of Circuits agree that other groups do qualify for protection from class-based animus.⁷⁷ The Court reconsidered the class-based animus requirement and the state action requirement in the next landmark case involving § 1985(3), *United Brotherhood of Carpenters and Joiners v. Scott*.⁷⁸

3. UNITED BROTHERHOOD OF CARPENTERS AND JOINERS V. SCOTT

The Supreme Court in *Scott* intended to clarify earlier pronouncements regarding the applicability of § 1985(3).⁷⁹ However, the opinion added confusion to an already confusing body of case law. In *Scott*, a government contractor hired non-union workers in a strongly pro-union town.⁸⁰ A citizen protest was staged that ended in fire and violence against the non-union workers.⁸¹ Continued violence was threatened "if the non-union workers did not leave the area or concede to union policies and principles."⁸² The protest caused the contractor to default on its government contract.⁸³ The District Court for the Eastern District of Texas, which identified the issue as whether non-union employees constituted a class for purposes of the requirement of a class-based animus necessary to bring a claim under § 1985(3), held for the plaintiffs.⁸⁴ The Fifth Circuit affirmed, interpreting the action as a claim that the employees' First Amendment right to associate with a union had been violated.⁸⁵ Although the defendants asserted that state action was necessary, the Fifth Circuit denied this claim, citing *Griffin* as overruling the state action require-

77. See *NOW v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (women seeking abortions), *overruled by* *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993); *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir.) (conspiracies "directed against women are inherently invidious and repugnant"), *cert. denied*, 110 S. Ct. 2206 (1990); *Volk v. Coler*, 845 F.2d 1422 (7th Cir. 1988) (sex, religion, ethnicity, and political loyalty); *Conklin v. Lovely*, 834 F.2d 543 (6th Cir. 1987) (political beliefs); *Stathos v. Bowden*, 728 F.2d 15 (1st Cir. 1984) (gender); *Life Ins. Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979) (female purchasers of disability insurance); *Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979) (gender); *cf. Faucher v. Rodziewicz*, 891 F.2d 864, 871 n.4 (11th Cir. 1990) (question whether gender is a protected class left open); *Azar v. Conley*, 456 F.2d 1382, 1386-87 n.5 (6th Cir. 1972) ("middle class white family" might constitute a protected class). *But see Deubert v. Gulf Fed. Sav. Bank*, 820 F.2d 754, 757 (5th Cir. 1987) (only conspiracies motivated by racial animus actionable under § 1985(3)); *Knott v. Missouri Pacific R.R. Co.*, 389 F. Supp. 856 (E.D. Mo. 1975) (§ 1985(3) only protects against racial discrimination), *aff'd*, 527 F.2d 1249 (8th Cir. 1975).

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

79. Gormley, *supra* note 31, at 558.

80. *Scott*, 463 U.S. at 828.

81. *Id.*

82. *Scott v. Moore*, 461 F. Supp. 224, 227 (E.D. Tex. 1978).

83. *Scott*, 463 U.S. at 828.

84. *Id.* at 829.

85. *Id.* at 830.

ment in *Collins*.⁸⁶ The Fifth Circuit further held that § 1985(3) reached conspiracies against politically and economically defined classes, as well as racial classes such as that protected in *Griffin*.⁸⁷

The Supreme Court reversed. In a confusing discussion of applicable precedent and constitutional doctrine, the Court held that a § 1985(3) claim based on the First Amendment requires “that the state is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the state.”⁸⁸ The Court stated that “state involvement” is necessary because the plaintiffs sought to protect a right that is only protected by the Constitution insofar as it is infringed upon by the state.⁸⁹ Since § 1985(3) does not create new rights, but only protects rights found elsewhere in the Constitution,⁹⁰ a private deprivation of the right to associate was not found to be actionable under § 1985(3).⁹¹

Furthermore, the Court stated that even if there had been state involvement, the claim could not be maintained, since it lacked the requisite class-based animus.⁹² The Court stated that “it is a close question whether § 1985(3) was intended to reach any class-based animus other than [racial animus].”⁹³ The Court stated that it certainly was not intended to protect classes characterized by *economic* views, status, or activities.⁹⁴ Because the court construed union affiliation, or lack thereof, as an economic or commercial status, it was beyond the purview of § 1985(3).⁹⁵

It is unclear how the “state involvement” required in *Scott* differs from the state action requirement overruled by *Griffin*. Some courts have construed the state involvement requirement as being less demanding than the affirmative state action required in pure Fourteenth Amendment cases.⁹⁶ Indeed, some courts consider state inaction, or interference with state authorities performing their police functions, as sufficient to support a § 1985(3) claim.⁹⁷ However, other

86. *Id.*

87. *Id.*

88. *Id.* at 830.

89. *Id.*

90. *Id.* at 834.

91. *Id.* at 830-33.

92. *Id.* at 834.

93. *Id.* at 836.

94. *Id.* at 837.

95. *Id.* at 838-39.

96. In the abortion clinic cases, some federal courts have interpreted anti-abortionists' interference with police efforts to maintain order as sufficient to constitute state involvement for § 1985(3) purposes. See *infra* notes 150-61 and accompanying text.

97. However, such interference with state authorities is more effectively dealt with as a violation of the “Hindrance Clause” of § 1985(3). For Justice Scalia's views on such a claim,

courts adamantly refuse to recognize anything less than affirmative state action as adequate for § 1985(3) purposes. This again means that the two sections of the original Ku Klux Klan Act, now known as 42 U.S.C. § 1983 and § 1985(3), are essentially redundant.⁹⁸ In fact, § 1985(3) is narrower in scope than § 1983, since § 1983 requires no proof of a conspiracy.

III. ANTI-ABORTION VIOLENCE TAKES TO THE STREETS

The violence perpetrated at abortion clinics by pro-life activists is precisely the kind of mob intimidation that the forty-second Congress intended to prevent by passing the Ku Klux Klan Act. Operation Rescue and Randall Terry openly assert their unlawful aims,⁹⁹ using inflammatory language designed to instigate tension between the pro-choice and pro-life factions. For example, Operation Rescue's literature pronounces that "while 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."¹⁰⁰ Operation Rescue defines "rescue" as "physically blockading abortion mills with (human) bodies, to intervene between abortionists and the innocent victims."¹⁰¹ The protesters can strike anywhere, at any time, and refuse to give police any warning of the impending disturbance, despite court orders to do so.¹⁰²

A. *Civil Disobedience*

Anti-abortionists have sought to justify their behavior by classifying their activities as akin to the "sit-ins" of the 1960s, "the classic example of disobedience."¹⁰³ Operation Rescue defines its activities using terms that ironically are associated with the civil rights move-

see *Bray*, 113 S. Ct. 753, 764-67 (1993). For the opposite side of the argument, see *id.* at 770-71 (Souter, J., dissenting); *id.* at 795-98 (Stevens, J., dissenting); see also *infra* note 132.

98. Under the "state involvement" rationale, the only instance where state involvement is not required is when a right protected against private interference is implicated, i.e., the right to travel. Because these instances are so rare, and so narrowly construed, see, e.g., *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 762-63 (1993), § 1983 and § 1985(3) are essentially redundant.

99. Susan Faludi, *The Antiabortion Crusade of Randy Terry: Operation Rescue's Jailed Leader and His Feminist Roots*, WASH. POST, Dec. 23, 1989, at C1.

100. TERRY, *supra* note 21.

101. *Id.*

102. See *New York State NOW v. Terry*, 697 F. Supp. 1324, 1328 (S.D.N.Y. 1988).

103. Bruce Ledewitz, *Civil Disobedience, Injunctions, and The First Amendment*, 19 HOFSTRA L. REV. 67, 68 (1990); see generally Charles E. Rice, *Issues Raised By the Abortion Rescue Movement*, 23 SUFFOLK U. L. REV. 15 (1989).

ment:¹⁰⁴ free speech,¹⁰⁵ freedom of assembly, and civil disobedience.¹⁰⁶ Use of these terms obviously is misleading. By using them, anti-abortion forces seek to hide the essence of their movement, which is the *deprivation* of individuals' civil rights, not efforts to guarantee them.¹⁰⁷

Generally, federal judges have recognized the distinction between the pro-life movement and the civil rights movement pro-lifers attempt to emulate with their rhetoric. In *NOW v. Terry*,¹⁰⁸ which involved a § 1985(3) action against abortion blockaders, Judge Cardamone of the Second Circuit stated that

[i]nsofar as appellants' rights of free speech were exercised in close proximity to individual women entering or leaving the clinics so as to tortiously assault or harass them, appellants' rights ended where those women's rights began. There is no constitutional privilege to assault or harass an individual or to invade another's personal space.¹⁰⁹

As attorneys for the National Organization of Women (NOW) have stressed, "What the courts below have enjoined is *not* speech, distributing leaflets, peaceful demonstration, or symbolic expressive conduct designed to persuade women not to exercise their constitutional rights."¹¹⁰ Instead, the judge tailors the order so that "[t]he injunction restricts not legitimate rights of protest, but the tortious interfer-

104. See, e.g., Ledewitz, *supra* note 103; Rice, *supra* note 103.

105. See, e.g., Jerry Gray, *Bill Shields Abortion Clinics From Protests*, N.Y. TIMES, Dec. 23, 1991, at B6 (quoting the president of the New Jersey Right to Life Committee criticizing a bill establishing a buffer zone around health care centers that would be legally off-limits to protesters as creating a "muzzle zone" preventing people from "expressing their free speech." An assemblyman in support of the bill responded that "[t]he anti-abortion groups can exercise their free speech, but they do it from a distance.").

106. Civil disobedience is defined as "[a] form of lawbreaking employed to demonstrate the injustice or unfairness of a particular law and indulged in deliberately to focus attention on the allegedly undesirable law." BLACK'S LAW DICTIONARY 245 (6th ed. 1990). On the other hand, civil conspiracy is defined as "[a] combination of two or more persons who, by concerted action, seek to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means." *Id.* While § 1985(3) does not, on its face, prohibit civil disobedience, it does address and provide a remedy for civil conspiracy.

107. Furthermore, Operation Rescue's claim that injunctive relief violates the demonstrators' First Amendment right of free speech rings particularly hollow in light of the Supreme Court's decision in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). In *Rust*, the Court held valid a regulation of the Department of Health and Human Services prohibiting employees in federally funded clinics from discussing abortion as a family planning option with its patients. *Id.* at 1764.

108. 886 F.2d 1339 (2nd Cir. 1989).

109. *Id.* at 1343.

110. Brief for Respondents at 7, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (No. 90-985) (emphasis added).

ence with the rights of others."¹¹¹ Women seeking abortions at clinics where "rescues" are perpetrated often face hundreds of protesters, long waits in parking lots, and the threat of medical complications from deprivation of medical services as a result of the disruptions instigated by Operation Rescue and its supporters.¹¹² Protesters have become more militant in recent years, going so far as to place children under the wheels of cars to try to keep people out of the clinics.¹¹³ Protesters have chased patients outside abortion clinics, waved dismembered dolls splattered with red paint, and screamed epithets and threats at patients and staff.¹¹⁴

Perhaps the most chilling example of anti-abortion violence is the recent murder of Dr. David Gunn, who performed abortions at clinics in the Pensacola area. Michael F. Griffin, a pro-life demonstrator, shot Dr. Gunn three times in the back as the doctor arrived for work during an anti-abortion demonstration.¹¹⁵ While this is an extreme example, it is indicative of a rise in the extremity of anti-abortion violence.¹¹⁶

A National Abortion Federation report stated that reported anti-abortion vandalism more than doubled from 1991 to 1992, and cases of arson rose from four in 1990 to twelve in 1992.¹¹⁷ The Federation further reported that twenty-seven incidents of anti-abortion violence

111. *Women's Health Care Servs. v. Operation Rescue-Nat'l*, 773 F. Supp. 258, 263 (D. Kan. 1991).

112. See *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1489-90 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd sub nom. Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993).

113. Gray, *supra* note 105.

114. ABORTION CLINIC VIOLENCE: OVERSIGHT HEARINGS BEFORE THE SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 99th Cong., 1st & 2d Sess. 5-9 (1987) [hereinafter OVERSIGHT HEARINGS] (testimony of Mary Bannecker and Heather Green).

115. Larry Rohter, *Doctor is Slain During Protest Over Abortions*, N.Y. TIMES, Mar. 11, 1993, at A1.

116. *Id.* This is not to say that pro-life forces are condoning the murder of Dr. Gunn; indeed, they have been quick to distance themselves from the incident. See Sara Rimer, *The Clinic Gunman and the Victim: Abortion Fight Reflected in Two Lives*, N.Y. TIMES, Mar. 14, 1993, at A24. However, some of the anti-abortion advocates' responses are disturbing. For example, while "Rescue America" states it does not condone the killing, its national director, Don Treshman, was quoted as saying "[w]hile Gunn's death is unfortunate, it's also true that quite a number of babies' lives will be saved." Rohter, *supra* note 115. Randall Terry remarked that "[while] we grieve for him and for his widow and for his children, we must also grieve for the thousands of children that he has murdered." *The Death of Dr. Gunn*, N.Y. TIMES, Mar. 12, 1993, at A28. Matt Trehwella, of "Missionaries to the Unborn," said he "would not condemn someone who killed Hitler's doctors who committed atrocities against human beings, and neither [would he] condemn Michael Griffin." Anthony Lewis, *Abroad at Home: Right to Life*, N.Y. TIMES, Mar. 12, 1993, at A29.

117. Rohter, *supra* note 115.

have taken place in the first two months of 1993.¹¹⁸ In February 1993, activists bombed a clinic in Corpus Christi, causing one million dollars of damage.¹¹⁹

These incidents illustrate the kind of violence federal injunctions are intended to prevent. The injunctions, however, are not designed to silence anti-abortionists or limit their ability or right to protest peacefully, but rather to stop them from violently interfering with the rights of others.

B. *The Inadequacy of State Remedies*

The inability of state authorities to secure the rights of women to choose abortion and the rights of the clinics to provide such services serves as the reason behind the plaintiffs' pursuit of a federal remedy instead of an action under state law. In *NOW v. Operation Rescue*,¹²⁰ the District Court for the Eastern District of Virginia noted that Operation Rescue was able to perpetrate its "rescue" "notwithstanding the efforts of the [local] police department."¹²¹

Typical of most "rescue" demonstrations, the rescuers outnumbered the Falls Church police officers on the scene that day. Even though 240 rescuers were arrested, the police were unable to prevent the closing of the clinic for more than six (6) hours. Limited police department resources combined with the typical absence of any advance notice identifying a target clinic renders it difficult for local police to prevent rescuers from closing a facility for some period of time.¹²²

The history of anti-abortion violence in Pensacola, Florida, where Dr. Gunn was murdered, evidences the ineffectiveness of local law enforcement in guaranteeing the safety of individuals in the face of anti-abortion protest. Pensacola has a long history of anti-abortion violence.¹²³ In 1984, two doctors' offices and a clinic were bombed by anti-abortion protesters.¹²⁴ John Burt, a former Ku Klux Klansman,¹²⁵ is the current regional director of Rescue America, the group that Michael Griffin demonstrated with when he murdered Dr. Gunn. Burt had been arrested in 1986 for his involvement in an incident in which he and other protesters entered a clinic, knocked down

118. *Id.*

119. Lewis, *supra* note 116.

120. 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd sub nom.* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

121. *Id.* at 1489.

122. *Id.*

123. Rohter, *supra* note 115.

124. *Id.*

125. *Id.*

two employees, threw office equipment around, and upended drawers.¹²⁶

Dr. Gunn knew of the dangers.¹²⁷ There were “wanted” posters with his name on them, people following him late at night, hate mail, and death threats.¹²⁸ He “kept three guns in his car—one in the glove compartment, one under the seat, and one in the trunk.”¹²⁹

Pro-life demonstrations clearly are not spontaneous tortious or criminal acts occurring in the heat of the moment. In *Women’s Health Care Services v. Operation Rescue-National*,¹³⁰ a case arising out of Operation Rescue’s demonstrations in Wichita, Kansas in the summer of 1991, Judge Kelly recognized that the illegal acts were organized and committed under the direction of Operation Rescue’s leaders.¹³¹ The demonstrations are specifically targeted to stymie attempts by local authorities to uphold local laws of trespass, nuisance, and business interference.¹³² The organization leaders typically instruct the demonstrators on what actions to take in order to maximize police ineffectiveness. The demonstrators are told to go limp

126. *Id.*

127. Indeed, anti-abortion forces are now targeting doctors. “We’ve found that the weak link is the doctor,” Randall Terry commented at a recent Florida rally. “We’re going to expose them. We’re going to humiliate them.” Lewis, *supra* note 116.

128. Rimer, *supra* note 116.

129. *Id.*

130. 773 F. Supp. 258 (D. Kan. 1991).

131. *Id.* at 262. The court also noted the military nature of the demonstrations:

These leaders often wear distinctive clothing to assist in their control of the protesting crowds. The leaders communicate . . . by means of cellular telephones, . . . hand radios, and . . . bullhorns. . . . To the extent that they are identifiable by the court, all of the leaders supervising the operations of the tortious and criminal actions appear to be national participants in Operation Rescue and are not from Wichita; none of the site leaders are women.

Id.

132. *Id.* at 265-66.

The fact that anti-abortion demonstrators design their protest activity to render local authorities powerless could be construed as a violation of the “Hindrance Clause” of § 1985(3), which prohibits conspiracies “for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws.” In *Bray*, Justices Stevens, O’Connor, Souter, and Blackmun indicated that the facts supported a claim under the Hindrance Clause. *Bray*, 113 S. Ct. 753, 768 (1993) (Stevens, J., dissenting); *id.* at 804-05 (O’Connor, J., dissenting); *id.* at 777 (Souter, J., dissenting). The majority denied application of the Hindrance Clause, stating that the claim had not been stated in the complaint, nor suggested as an argument, by either party to the action. *Id.* at 764. After the case had been held over for reargument, the plaintiffs tried to brief the “Hindrance Clause” argument. Their motion was denied. Even if it had been argued, however, the majority concluded that such a claim would not be viable, because the class-based animus requirement and the state action requirement had not been met, and because the district court did not find that the demonstrators’ purpose had been to prevent or hinder law enforcement. *Id.* at 464-67.

when the police try to lead them away from the clinic.¹³³ “[R]emember, you do not have a name until we tell you you have a name,” Terry yelled to protesters through a bullhorn at a 1989 demonstration in Los Angeles, which Terry dubbed “The Holy Week of Rescue.”¹³⁴ Once the protesters are dragged to vehicles and transported to jail they steadfastly refuse to give their names to officials, leaving authorities unable to process them. Terry’s plan is to crowd already overcrowded local jails with his followers, further burdening local law enforcement.¹³⁵ In fact, Operation Rescue specifically targets towns and cities whose jails are particularly overcrowded.¹³⁶ Even if the police are able to process the demonstrators for violations of state and local law, the sheer numbers of violators often serve only to clog the court systems and further obstruct the legal process.¹³⁷

Even if law enforcement authorities were able to process the large numbers of violators involved in the anti-abortion demonstrations, sometimes law enforcement officials themselves are sympathetic to Operation Rescue’s efforts and refuse to process them. In some instances, law enforcement authorities are unwilling to enforce state and local ordinances which the demonstrators flagrantly violate. In an extreme example, the chief of police in a small North Dakota town was one of the twenty-four members of the Lambs of Christ, an anti-abortion protest group, and was arrested for criminal trespass and other charges during a demonstration outside the Women’s Health Organization in Fargo, North Dakota, on May 31, 1991.¹³⁸ In another demonstration, in Dobbs Ferry, New York, on October 29, 1988, police expressly agreed that no demonstrators would be arrested so long as they agreed to leave the site by noon.¹³⁹ In Buffalo, New York, Mayor James Griffin *invited* Operation Rescue protesters to his city, as a way of advancing his anti-abortion platform.¹⁴⁰

The fact that governmental authorities themselves are acting in complicity with anti-abortion protesters portends a lenient attitude

133. Faludi, *supra* note 99. The demonstrators’ adherence to this command is evidenced by the television images of police dragging or carrying away inert bodies from the scene of the demonstration.

134. *Id.*

135. *Id.*

136. Robert Abrams, *Klan Act Is a Tool for Today*, NAT’L L.J., Feb. 10, 1992, at 15-16.

137. Barringer, *supra* note 10.

138. *Police Chief Fired for Protesting Loses Appeal*, CHI. TRIB., Sept. 18, 1991, at 3. Although the police chief was fired because he was jailed for his participation in the protest, the incident illustrates the degree to which local officials are suspect in their role to enforce local law when the violators are proponents of a particular political platform.

139. *New York State NOW v. Terry*, 704 F. Supp. 1247, 1260 n.16 (S.D.N.Y. 1989).

140. Mimi Hall, *Buffalo Awaits Abortion Battle: Some Fear a Replay of Wichita*, USA TODAY, Feb. 19, 1992 at 4A.

toward the pro-lifers' law-breaking activities. It also sends a message to local police, which may affect the fervor with which they enforce local law. Indeed, in Buffalo, Mayor Griffin's invitation to Operation Rescue had the New York state attorney general, Robert Abrams, and pro-choice leaders concerned that Griffin's city-run police would be lax in enforcing the court injunction that keeps protesters away from clinics.¹⁴¹

The analogy between the attack on abortion rights by Operation Rescue and the Reconstruction activities of the Ku Klux Klan bears repeating. The impetus behind the passing of the Ku Klux Klan Act by the forty-second Congress was recognition on the part of President Grant and members of Congress that certain authorities in Southern states were unable, and often unwilling, to uphold the constitutional rights of newly-freed slaves in the South.¹⁴² Similarly, on the abortion front, there are local governmental authorities who are either overwhelmed by the mob tactics of Operation Rescue or who are in fact sympathetic to their cause and therefore refuse to bring police authority to bear against the lawbreakers. It is in just such a situation where the § 1985(3) remedy is appropriate and necessary.

IV. ABORTION CASES IN COURT

Operation Rescue makes no attempt to work through the political system to achieve its anti-abortion aims, apparently preferring to battle the abortion issue at the clinics and, consequently, in the courts. The organization scorns political discourse, referring to those who seek to outlaw abortion through lawful means as "wimps for life."¹⁴³ It is this sort of purposeful defiance of the legal and political system that overwhelms local authorities and mandates the intervention of the federal courts' broad injunctive powers. Indeed, even armed with federal injunctive orders enforceable through federal marshals, clinics and their patrons are hard pressed to stop a "rescue" once it has begun, much less prevent one of the unannounced demonstrations from happening. Randall Terry has candidly stated his aim of "fac[ing] down" federal courts issuing injunctions.¹⁴⁴

141. *Id.*

142. *See supra* notes 34-41 and accompanying text.

143. Brief for the Respondents at 20, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (No. 90-985).

144. *See New York State NOW v. Terry*, 704 F. Supp. 1247, 1253 (S.D.N.Y. 1989).

A. Cases in the Federal Circuits

Prior to *Bray*, the federal circuits were split on several issues dealing with § 1985(3) in the abortion blockade context.

With the exception of the Fifth and Eleventh Circuits, all of the circuits deciding the issue found that a protected class was involved in the abortion protest cases. However, the courts differed on exactly how the class should be defined.¹⁴⁵

The circuits have also differed as to which, if any, constitutional right is violated in the abortion blockade cases. In bringing § 1985(3) claims, clinics generally rely on violations of both the right to an abortion and the right to interstate travel. However, the right to abortion is problematic in that it is based on the right of privacy, emanating from the Fourteenth Amendment concept of due process, which requires affirmative state action.¹⁴⁶

Clearly, Operation Rescue does not work its deprivations under "color of state law"; if it did, the clinics would have a cause of action under § 1983,¹⁴⁷ and there would be no need to prove the conspiracy element of § 1985(3).¹⁴⁸ However, clinics have attempted to predicate the claim on police inaction or protesters' interference with the

145. *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991) (gender is an immutable characteristic warranting the consideration of women as a protected class under § 1985(3)); *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) (women [seeking abortions] are protected class); *NOW v. Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990) (women seeking abortions are protected class), *rev'd sub nom.* *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993). *Contra* *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624 (11th Cir. 1992) (women seeking abortions are not a protected class); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989) (same); *Roe v. Abortion Abolition Soc'y*, 811 F.2d 931 (5th Cir. 1987) (persons who disagree with anti-abortion protestors do not form a class).

For a discussion of how the federal district courts have treated the issue, see *Women's Health Care Servs. v. Operation Rescue-Nat'l*, 773 F. Supp. 258 (D. Kans. 1991) (conspiracy motivated by gender-based animus is actionable); *see also* *Planned Parenthood v. Doe*, No. 90-CV-1084, 1991 U.S. Dist. LEXIS 13063, at *48 (N.D.N.Y. Sept. 16, 1991) (women seeking abortions are a protected class); *Roe v. Operation Rescue*, 710 F. Supp. 577 (E.D. Pa. 1989) (same), *aff'd on other grounds*, 919 F.2d 857 (3d Cir. 1990); *Cousins v. Terry*, 721 F. Supp. 426, 430 (N.D.N.Y. 1989) (same); *Portland Feminist Women's Health Ctr. v. Advocates for Life*, 712 F. Supp. 165, 169 (D. Or.) (same), *aff'd on other grounds*, 859 F.2d 681 (9th Cir. 1988).

146. *Roe v. Wade*, 410 U.S. 113 (1973). The decision in *Roe* and its foundation in the right of privacy have been criticized by commentators on both sides of the abortion issue. Pro-life activists note that a "right of privacy" does not exist in explicit terms in the Constitution and that its existence is due to judicial activism. Pro-choice activists note the weakness of basing a fundamental right to abortion on a right to privacy and suggest that an equal protection argument would be stronger and more stable. *See generally* Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979).

147. *See supra* notes 68-72.

148. *Id.*

police's ability to keep order on the scene. Lower courts have differed on whether enough state involvement was present in the abortion clinic cases, based on police inaction or hindrance, to support a claim for a violation of the right to an abortion, but most have found that state action was not involved.¹⁴⁹

Some courts have concluded that by actively preventing law enforcement officials from effectively guaranteeing the rights of the clinics and their patrons, Operation Rescue's actions fulfill the "state involvement" requirement of § 1985(3).¹⁵⁰ In *New York State National Organization for Women v. Terry*,¹⁵¹ the District Court found that Operation Rescue, by blocking abortion clinics in large numbers and by refusing to notify police of their targets, acted to render police ineffective and, therefore, satisfied § 1985(3)'s state action requirement.¹⁵² In *Women's Health Care Servs. v. Operation Rescue-National*, the District Court found that because Operation Rescue had purposefully interfered with the ability of police to protect the rights of the plaintiffs, it satisfied the state action requirements.¹⁵³

Some courts have been less receptive to this approach to state

149. See, e.g., *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 227 (6th Cir. 1991) (intent to overwhelm authorities insufficient state action); *Lucero v. Operation Rescue of Birmingham*, 772 F. Supp. 1193, 1198 (N.D. Ala. 1991) (no evidence of state action), *aff'd on other grounds*, 954 F.2d 624 (11th Cir. 1992), *reh'g denied*, 961 F.2d 224 (1992); *Upper Hudson Planned Parenthood, Inc. v. Doe*, No. 90-CV-1084 (1991 U.S. Dist. LEXIS 13063), at *57 (N.D.N.Y. Sept. 16, 1991) (failure to notify police of location of protest not state action); *National Abortion Fed'n v. Operation Rescue*, No. CV 89-1181 AWT, 1990 U.S. Dist. LEXIS 1805 (C.D. Cal. Jan. 31, 1990) (no state action); *Roe v. Operation Rescue*, 710 F. Supp. 577, 583 (E.D. Pa. 1989) (state involvement too limited to constitute state action). *Contra Women's Health Care Servs. v. Operation Rescue-Nat'l*, 773 F. Supp. 258, 266 (D. Kan. 1991) (failure to inform police of location and use of overwhelming police resources constitute sufficient state action); *New York State NOW v. Terry*, 704 F. Supp. 1247 (S.D.N.Y. 1989) (failure to inform police of location and acts of police officials in not arresting protesters if they left before noon); *Portland Feminist Women's Health Ctr. v. Advocates for Life*, 712 F. Supp. 165 (D. Or. 1988) (evidence of attempt to influence government to restrict abortion right sufficient).

150. *Terry*, 704 F. Supp. at 1260 (quoting *Great Am. Fed. Savs. & Loan Ass'n v. Novotny*, 442 U.S. 366, 384 (1979) (Stevens, J., concurring) ("If private persons take conspiratorial action that prevents or hinders the constituted authorities of any state from giving or securing equal treatment, the private persons would cause those authorities to violate the 14th Amendment; the private persons would then have violated § 1985(3).").

151. *Id.*

152. *Id.* at 1260.

153. *Women's Health Care Servs. v. Operation Rescue-Nat'l*, 773 F. Supp. 258, 266 (D. Kan. 1991).

action.¹⁵⁴ In *Volunteer Medical Clinic, Inc. v. Operation Rescue*,¹⁵⁵ the Sixth Circuit recently heard a clinic's § 1985(3) claim and determined that, absent a level of state action normally required by Fourteenth Amendment analysis,¹⁵⁶ a § 1985(3) claim could not succeed if based on a deprivation of the right to choose an abortion. The Court reconciled its decision with the Second Circuit's decision in *NOW v. Terry*¹⁵⁷ by saying that the evidence in *Terry* "suggested a level of state involvement not present in the instant case."¹⁵⁸ The Sixth Circuit presumably relied on the allegation in *Terry* that the police in Dobbs Ferry, New York agreed not to arrest protestors provided they leave before noon.¹⁵⁹ Because most of these cases do not involve such an overt arrangement between the police and the protesters, the claim based on the right to abortion seems tenuous at best, in light of the Court's interpretation of the right to an abortion.¹⁶⁰ The right to travel has proven a more successful approach to the abortion blockade cases under § 1985(3).¹⁶¹

154. See *Upper Hudson Planned Parenthood, Inc. v. Doe*, No. 90-CV-1084, 1991 U.S. Dist. LEXIS 13063, at *57 (N.D.N.Y. Sept. 16, 1991) (rejecting rationale that failure to notify police constituted state action); *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1493 n.11 (E.D. Va. 1989) (finding "doubtful" the argument that the state action requirement is satisfied when "rescuers" refuse to notify the police of their next "rescue" target, thereby rendering police incapable of securing equal access to medical treatment for women seeking abortion).

155. 948 F.2d 218 (6th Cir. 1991).

156. See *Luger v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

157. 886 F.2d 1339 (2d Cir. 1989).

158. *Volunteer Medical Clinic*, 948 F.2d at 228-29.

159. *Id.* (citing *New York State NOW v. Terry*, 704 F. Supp. 1247, 1260 n.16 (S.D.N.Y. 1989)).

160. The Sixth Circuit also distinguishes the case of *Women's Health Care Servs. v. Operation Rescue*, 773 F. Supp. 258 (D. Kan. 1991), noting that in that case "the court indicated that police officers might have displayed an improper lack of zeal in defending the legal rights of plaintiffs and their patients." *Id.* at 228.

161. See *Planned Parenthood Ass'n of San Mateo Cty. v. Holy Angels Catholic Church*, 765 F. Supp. 617, 625 (N.D. Cal. 1991); *Upper Hudson Planned Parenthood, Inc. v. Doe*, No. 90-CV-1084, 1991 U.S. Dist. LEXIS 13063, at *53 (N.D.N.Y. Sept. 16, 1991) (right to travel claim stated); *Cousins v. Terry*, 721 F. Supp. 426 (N.D.N.Y. 1989) (right to travel violated); *New York State NOW v. Terry*, 886 F.2d 1339, 1361 (2d Cir. 1989); *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1493 (E.D. Va. 1989) (large percentage of patients from out-of-state), *aff'd*, 914 F.2d 582, 584 (4th Cir. 1990), *rev'd sub nom Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993); *Roe v. Operation Rescue*, 710 F. Supp. 577, 582 (E.D. Pa. 1989) (one out-of-state patient denied access violates right to travel), *aff'd on other grounds*, 919 F.2d 857 (3d Cir. 1990); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 712 F. Supp. 165, 168 (D. Or. 1988) (conspiracy to deter women from traveling from out-of-state to seek abortion). *But see Lucero v. Operation Rescue of Birmingham*, 772 F. Supp. 1193 (N.D. Ala. 1991) (1.5% out-of-state patients insufficient to implicate the right to travel), *aff'd on other grounds*, 954 F.2d 624 (11th Cir. 1992).

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

The facts of *Bray v. Alexandria Women's Health Clinic* provide a vivid example of how serious a threat pro-life forces pose to the law and order of the cities it targets. In *Bray*, Terry and his followers held clinics hostage for hours at a time over a one-week period.¹⁶²

Operation Rescue argues that state remedies are adequate and appropriate in these cases. In *Bray*, Operation Rescue argued that the suit involved "a simple trespass action,"¹⁶³ redressable through state law. The District Court for the Eastern District of Virginia saw the case differently:

"Rescuers" did more than trespass on to the clinic's property and physically block all entrances and exits. They also defaced clinic signs, damaged fences and blocked ingress into and egress from the Clinic's parking lot by parking a car in the center of the parking lot entrance and deflating its tires. On this and other occasions, "rescuers" have strewn nails on the parking lots and public streets abutting the clinics to prevent the passage of any cars.¹⁶⁴

The district court noted that the purpose of the rescue demonstrations is to disrupt operations at the clinics and ultimately to "cause the clinic to cease operations entirely."¹⁶⁵ The court found that such efforts create "a substantial risk that a clinic's patients may suffer physical and mental harm . . . (i) to women with abortions scheduled for that time, (ii) to women with abortion procedures . . . already underway and (iii) to women seeking counseling concerning the abortion decision."¹⁶⁶ Thus, the court found the demonstrations to be more than "simple trespass," and issued a protective injunction.¹⁶⁷

The district court concluded that "women seeking abortions and counselling at abortion clinics are likely to suffer irreparable physical and emotional damage as a result of defendants' [activities]"¹⁶⁸ and therefore enjoined Operation Rescue from "trespassing on, blockading, impeding or obstructing access to or egress from" abortion clinics

162. See *NOW v. Operation Rescue*, 726 F. Supp. at 1490.

163. Brief of Petitioners, *Bray v. Alexandria Women's Health Center*, 113 S. Ct. 753 (1993) (No. 90-985). The facts of *Bray* militate against Operation Rescue's characterization of the issue as "simple trespass"; the incident involved the violation of private property rights by hundreds of screaming demonstrators who blocked doorways and parking lots for week-long demonstrations, where, for many hours, police were powerless to prevent the demonstrations. *Id.* at 770 (Souter, J., dissenting) and 780-821 (Stevens, J., dissenting).

164. *NOW v. Operation Rescue*, 726 F. Supp. at 1489-90.

165. *Id.* at 1488.

166. *Id.* at 1489.

167. *Id.*

168. *Id.* at 1496.

in the Metropolitan Washington area.¹⁶⁹ The Fourth Circuit Court of Appeals affirmed.¹⁷⁰

In a five-to-four decision, the Supreme Court reversed the Fourth Circuit and denied the clinics' claim. Justice Scalia, writing for the majority, held that § 1985(3) did not provide a federal cause of action against clinic blockaders. The Court's holding rested on the following determinations: (1) that "women seeking abortions" do not constitute a class protected under § 1985(3);¹⁷¹ (2) that the abortion demonstrations did not reflect an animus directed at women generally, but was instead directed at the practice of abortion;¹⁷² (3) that abortion blockaders' activities did not infringe upon women's right to travel because such an infringement was not the blockaders "predominant purpose";¹⁷³ (4) that even if it had been their "predominant purpose," the right to travel was not implicated because the blockaders did not erect "actual barriers to interstate movement," but were "purely intrastate restrictions" that affected intrastate travelers as well as interstate travelers;¹⁷⁴ and finally, (5) that the clinics could not base their claims on the deprivation of the right to abortion, because that right is only protectable against state interference and not against a private conspiracy.¹⁷⁵

1. THE CLASS-BASED ANIMUS REQUIREMENT: WOMEN AS A PROTECTED CLASS

The first issue Justice Scalia addressed in the *Bray* opinion was whether a protected class had been harmed by the blockades. In prior cases, the Supreme Court has expressly left open the question of whether § 1985(3) reaches private conspiracies directed at classes other than those defined racially.¹⁷⁶ Operation Rescue tried to take advantage of this gap in the Supreme Court's civil rights jurisprudence and alleged that § 1985(3) was only intended to protect against racially motivated discrimination.¹⁷⁷

Part of the problem, which inures to the benefit of Operation

169. *Id.* at 1497.

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

171. *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 764 (1993).

172. *Id.* at 762.

173. *Id.* at 762-63.

174. *Id.* at 763.

175. *Id.* at 764.

176. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982).

177. *NOW v. Operation Rescue*, 726 F. Supp. 1483, 1492 (1989).

While the Supreme Court has left the question open, the majority of circuits have found that the classes protected by § 1985(3) are not limited to those involving race. *See supra* note 77.

Rescue, is that women are not afforded the same strict scrutiny required by "suspect class" status assigned to racial groups, but instead occupy a middle ground known as "quasi-suspect," requiring intermediate scrutiny.¹⁷⁸ Operation Rescue argues that under § 1985(3) gender groups do not merit the same constitutional protections as racial classes.¹⁷⁹ However, another section of the Ku Klux Klan Act, 42 U.S.C. § 1983, has not been restricted in the way Operation Rescue suggests.¹⁸⁰ Courts have interpreted § 1983 as protecting a broad spectrum of classifications other than race, including women.¹⁸¹ Furthermore, a majority of the Circuits have found women to be a class falling within the purview of statutory protection for purposes of § 1985(3).¹⁸²

The legislative history of the Ku Klux Klan Act itself supports the notion that women as a class may have been foreseen as potential beneficiaries of the new civil rights legislation.¹⁸³ Representative Shel-labarger, the proponent of the amended section, stated that "the object" was "the prevention of deprivations which shall attack the

178. Classifications based upon gender merit "quasi-suspect status" justifying an intermediate standard of review to determine whether the classification bears a close and substantial relationship to an important government interest. *See, e.g.,* *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"); *Frontiero v. Richardson*, 411 U.S. 677, 682-88 (1973) (applying strict scrutiny to sex based classification); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (giving mandatory preference to one sex over the other is arbitrary). Perhaps the Supreme Court's position reflects the fact that even Supreme Court Justices are not free from gender bias. *See* Sunstein, *supra* note 45, at 29-40 (discussing the possibility that the Supreme Court has relied on constitutionally impermissible gender stereotypes in its abortion decisions).

179. Brief for the Petitioners *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (No. 90-985).

180. 42 U.S.C. § 1983. The original Ku Klux Klan Act, guarantees, in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

181. *See, e.g.,* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (holding that single sex admissions practice violated the Equal Protection Clause); *Craig v. Boren*, 429 U.S. 190 (1976) (holding that gender-based differential in state statute violated the equal protection rights of young men); *Reed v. Reed*, 404 U.S. 71 (1971) (ruling that state statute's mandate of appointing males as administrators of estates violated the Equal Protection Clause).

182. *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 225 (6th Cir. 1991); *Lewis v. Pearson Found., Inc.*, 908 F.2d 318, 325-26 (8th Cir. 1990); *New York State NOW v. Terry*, 886 F.2d 1339, 1358-59 (2nd Cir. 1989); *NOW v. Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990); *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988); *Stathos v. Bowden*, 728 F.2d 15, 20-21 (1st Cir. 1984); *Kimble v. D.J. McDuffy, Inc.*, 623 F.2d 1060, 1066 (5th Cir. 1980); *Life Ins. Co. of N. America v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979).

183. CONG. GLOBE, *supra* note 34, at 478.

equality of rights of American citizens.”¹⁸⁴ Representative Perce said that Congress sought to protect the rights of “citizens throughout the entire country, without regard to the condition, race, or party affiliation of the individual citizen.”¹⁸⁵ Representative Lowe commented that protection is to be given to “all classes in all states; to persons of every complexion and of whatever politics.”¹⁸⁶ Perhaps most telling, Representative Buckley stated that “[t]he proposed legislation . . . is not to protect Republicans only in their property, liberties, and lives, but Democrats as well, not the colored only, but the whites also; yes, even women”¹⁸⁷

2. OPPOSITION TO ABORTION AS DISCRIMINATION AGAINST WOMEN

On the basis of the legislative history of § 1985(3) and judicial interpretation of § 1983 and the Fourteenth Amendment, the plaintiffs in *Bray* argued that women as a class should be protected under § 1985(3). Justice Scalia evaded this logic by characterizing the issue as whether “women seeking abortions” are a class worthy of protection under § 1985(3) and concluding they were not. Operation Rescue, supported by the Solicitor General for the United States as amicus curiae,¹⁸⁸ claimed that its anti-abortion blockades are not directed at women as a class, but instead only at the small subset of women seeking to exercise their right to seek abortions or related services.¹⁸⁹ Such an argument is tantamount to the Klan stating that their activities were not directed at all Blacks but only those who chose to exercise the right to vote.¹⁹⁰

The majority rejected the contention that the abortion blockades at issue in *Bray* constituted discrimination against women as a class. Justice Scalia based this opinion on two observations: (1) that “the characteristic that formed the basis of the targeting here was not womanhood, but the seeking of abortion” for which targeting there are “common and respectable reasons”;¹⁹¹ and (2) that the sexually

184. *Id.* at 478.

185. *Id.* at 512.

186. *Id.* at 376.

187. *Id.* at App. 190.

188. Brief for the United States As Amicus Curiae Supporting Petitioners at 14, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (No. 90-985).

189. Brief for Petitioners at 15-16, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (No. 90-985).

190. *See, e.g.*, *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218, 224-25 (6th Cir. 1991); *New York State NOW v. Terry*, 886 F.2d 1339 (2nd Cir. 1989); Robert Abrams, *1871 Statute Can Control Operation Rescue Group*, N.Y. L.J., Jan. 29, 1992, at 39.

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

discriminatory effect that the demonstrations have on women was not enough to implicate a class-based animus, which requires a "sex-based intent."¹⁹²

In support of his first point, Justice Scalia noted that the defendants must be shown to have been motivated by a "purpose that focuses upon women by reason of their sex,"¹⁹³ which he found not to be the case in the abortion protest context. He found that opposition to abortion, because it is "common and respectable," is not an "irrational surrogate for opposition to (or paternalism toward) women."¹⁹⁴

There are at least two counterarguments to the majority's reasoning. First, opposition to abortion, especially involving a violent interference with a woman's right to choose an abortion, *is* discrimination against women.¹⁹⁵ Under the rubric of equal protection, opposition to abortion advocates the "cooptation of women's bodies for the protection of fetuses,"¹⁹⁶ where no similar obligation exists for men. As Cass Sunstein notes in his article *Neutrality in Constitutional Law*:

abortion should be seen not as murder of the fetus but instead as a refusal to continue to permit one's body to be used to provide assistance to it. The failure to see it in this way is simply a product of the perceived naturalness of the role of women as childbearers—whether they want to assume that role or not.¹⁹⁷

Following Professor Sunstein's reasoning, the majority's determination that opposition to abortion is "common and respectable" is based on "constitutionally unacceptable stereotypes about women's natural or appropriate role."¹⁹⁸

The second counterargument to the Court's ruling that abortion protest is not discriminatory against women is the one the plaintiffs offered in *Bray* and Justice Stevens espoused in his dissent. Stevens wrote:

even assuming that the ultimate and indirect consequence of petitioners' blockade was the legitimate and nondiscriminatory goal of saving potential life, . . . the conspirators' immediate purpose was to affect the conduct of women. Moreover, petitioners target women *because of* their sex, specifically, because of their capacity to become pregnant and to have an abortion.¹⁹⁹

192. *Id.* at 760-61 n.3.

193. *Id.* at 759.

194. *Id.* at 760.

195. See Sunstein, *supra* note 45; see generally Regan, *supra* note 146.

196. Sunstein, *supra* note 45, at 31.

197. *Id.* at 32.

198. *Id.* at 35.

199. *Bray*, 113 S. Ct. 753, 787 (Stevens, J., dissenting) (citations omitted) (emphasis added).

To support its claim that it does not discriminate against women as a class, Operation Rescue argued that "rescues" seek to prevent any individual, male or female, from participating in the abortion process, whether as a recipient or as a practitioner.²⁰⁰ In addition, they pointed to their female membership as evidence that they do not discriminate.²⁰¹

However, these assertions indicate that both Justice Scalia and Operation Rescue have misconstrued the class-based animus requirement under § 1985(3). There is no requirement that any particular number of women must be affected by a conspiracy in order to render it gender discrimination or that *only* women are harmed by such a conspiracy.²⁰² Operation Rescue is attempting to prevent women from exercising a constitutionally-protected right, one that only women can exercise, and that in itself discriminates against women as a class.²⁰³ The fact that women choose or are convinced to participate in such an effort to deny other women the exercise of a constitutional right does not "turn a gender-based conspiracy into a gender-neutral one."²⁰⁴

3. STATE INVOLVEMENT

The majority in *Bray* also denied the plaintiffs' claims under § 1985(3) because the right to travel was not implicated and because the right to abortion is only protected against state action. NOW had sought to avoid the requirement of "state involvement"²⁰⁵ by alleging

200. There is, however, conflicting evidence on this point. In *Women's Health Care Servs. v. Operation Rescue-Nat'l*, the court states:

While Operation Rescue has not prevented *male* patients from entering the clinics, it has prevented *female* patients from entering the clinics, even when the purpose of entering the clinic was not abortion-related. One of the videotapes reveals an incident in which a prospective patient at the clinic on Central Avenue was cut by glass thrown on the sidewalk by Operation Rescue protesters. The victim had to be transported elsewhere for medical attention, since the protestors would not allow her to enter the clinic for treatment of the laceration.

773 F. Supp. 258, 264 n.4 (D. Kan. 1991).

201. Brief for Petitioners at 11, *Bray v. Alexandria Women's Clinic*, 113 S. Ct. 753 (1993) (No. 90-985).

202. *Women's Health Care Servs. v. Operation Rescue-Nat'l*, 773 F. Supp. at 265; *Volunteer Medical Clinic, Inc v. Operation Rescue*, 948 F.2d 218, 225 (6th Cir. 1991); *New York State NOW v. Terry*, 886 F.2d 1339, 1359-60 (2nd Cir. 1989).

203. *Bray*, 113 S. Ct. at 787 n.20, quoting Sunstein, *supra* note 45, at 32-33.

204. Brief for Respondents at 31 n.44, *Bray* (No. 90-985).

205. See *supra* notes 79-98 and accompanying text. Recall that in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Court dispensed with the "state action" requirement erroneously imposed by *Collins v. Hardyman*, 341 U.S. 651 (1951). However, in *Griffin* the Court stated that where the right sought to be protected was only protected by the Constitution insofar as it was infringed upon by state action, some measure of "state involvement" must be proven in order to be actionable under § 1985(3).

a violation of not only a woman's right to abortion but also of her right to travel,²⁰⁶ a right guaranteed as incident to U.S. citizenship against both private and governmental deprivation.²⁰⁷ However, in *Bray*, the majority denied both of these claims.

a. The Right to Travel

The majority in *Bray* rejected the plaintiffs' right to travel claim. Justice Scalia wrote that the plaintiffs had not shown that the anti-abortion protesters' actions were intended to deprive women of their right to travel.²⁰⁸ "[I]t does not suffice for application of § 1985(3) that a protected right be incidentally affected. . . . [The defendant] must act at least in part for the very purpose of producing [the deprivation]." ²⁰⁹ The majority relied on the 1966 case of *United States v. Guest*,²¹⁰ which dealt with 18 U.S.C. § 241, a criminal conspiracy statute.²¹¹ In *Guest*, the Court inferred a "strict scienter" requirement into the criminal statute, which includes an "unequivocal 'intent' requirement."²¹² Justice Scalia equated § 1985(3)'s requirement of "purpose" with 18 U.S.C. § 241's requirement of "intent" and concluded intent was lacking in the clinics' claim.²¹³

In addition to finding no intent to deprive women of their right to interstate travel, Justice Scalia noted that the claim that the right to travel had been violated failed for another reason: no "actual barriers to movement" were erected by the defendants, other than those that affected both interstate and intrastate travelers.²¹⁴ These barriers

206. Although the right to travel has proven to be a more successful basis on which to establish a § 1985(3) claim than the right to abortion, it does little to strengthen the right to abortion in the court system. Therefore, plaintiff clinics and NOW have clearly chosen to use the right to travel as a fallback position.

207. See *Griffin v. Breckenridge*, 403 U.S. at 105 (Burton, J., dissenting) (1976) ("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."); see, e.g., *United States v. Guest*, 383 U.S. 745 (1966) (right to travel basis for federal action based on counterpart statute to § 1985(3), when statute not primarily intended to protect the right to travel); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenback v. McClung*, 379 U.S. 294 (1964) (right to travel sufficient basis for suits under Civil Rights Act of 1964, where statute not primarily intended to protect the right to travel).

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

209. *Id.* at 762-63.

210. 383 U.S. 745 (1966).

211. Justice Scalia mistakenly refers to § 241 as the "criminal counterpart" of § 1985(3). *Bray*, 113 S. Ct. at 762. As Justice Stevens pointed out in his dissent, the criminal counterpart of § 1985(3) was deemed unconstitutional over a century ago in *United States v. Harris*, 106 U.S. 629 (1883). *Id.* at 793; see *supra* notes 50-53 and accompanying text.

212. *Bray*, 113 S. Ct. at 762 n.5.

213. *Id.*

214. *Id.*

would not suffice to sustain a violation of the right to travel unless “applied *discriminatorily* against [interstate travelers].”²¹⁵

Justice Stevens, in his dissent, emphasized Justice Scalia’s misreading of the *Guest* case and criticized his approach to the right to travel:

Discrimination is a necessary element of the class-based animus requirement, not of the abridgement of a woman’s right to engage in interstate travel. . . . The Reconstruction Congress would have been startled, I think, to learn that § 1985(3) protected freed slaves and their supporters from Klan violence . . . only if the Klan members spared *local* African-Americans and abolitionists their wrath. And it would have been shocked to learn that its law offered relief from a Klan lynching of an out-of-state abolitionist only if the plaintiff could show that the Klan specifically intended to prevent his travel between the States.²¹⁶

b. The Right to an Abortion

Justice Scalia found further that the right to abortion is “an inadequate basis for respondents’ § 1985(3) claim” because the right exists only against state interference and “cannot be the object of a purely private conspiracy.”²¹⁷ The majority supported this finding by noting that the right to abortion is part of a right of privacy “much less explicitly protected by the Constitution than, for example, the right of free speech”²¹⁸ Therefore, according to Justice Scalia, the claim of a violation of the right to an abortion could not support the clinics’ § 1985(3) claim absent official state action.

As discussed previously,²¹⁹ although affirmative state action under traditional Fourteenth Amendment due process analysis is absent in the abortion blockade context, it would be an overstatement to say that the state is not involved where there is police inaction or abortion protesters’ interference with police effectiveness on the scene of a protest. Furthermore, the federal government has taken an active role in supporting the pro-life movement generally and the clinic blockade context specifically. Former President Bush, while ostensibly denouncing Operation Rescue’s law breaking activity,²²⁰ frequently voiced his strong anti-abortion views, indirectly condoning

215. *Id.*

216. *Id.* at 795 (Stevens, J., dissenting).

217. *Id.* at 764.

218. *Id.* The right of free speech was found to be an inadequate basis for a § 1985(3) claim in *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 822 (1983); *see supra* notes 78-98 and accompanying text.

219. *See supra* notes 63-73 and accompanying text.

220. *Bush Admonishes Abortion Protesters: ‘Abide by the Law,’* N.Y. TIMES, Aug. 19, 1991,

the efforts of Randall Terry and his zealots. Furthermore, while Bush suggested to the protesters that they "abide by the law," the Justice Department supported Operation Rescue in federal courts by submitting amicus curiae briefs in two cases where Operation Rescue had been sued under § 1985(3).²²¹ When Judge Kelly issued a temporary restraining order in Wichita, Kansas during Operation Rescue's "Summer of Mercy," the Justice Department filed motions *in support* of lifting the court order.²²² The order was intended to stop the violations of state and local law. The Justice Department also submitted the same amicus curiae brief to the United States Supreme Court in *Bray*.²²³ These examples of the federal government's activity in the abortion arena illustrate that the state is not a disinterested observer of the conspiracy.

V. CONCLUSION

The Supreme Court gave women's rights a mighty shove backward with its decision in *Bray*.²²⁴ Although *Roe v. Wade* is not directly implicated, the decision for Operation Rescue may have far reaching consequences, insofar as it permits private individuals to prevent women from exercising their right to choose abortion, where such a prevention by the state would be unconstitutional. Essentially, it would amount to a back door assault on the protections of *Roe*.

The abortion debate, emotionally charged on both sides, has led to extreme behavior from both the pro-choice and the pro-life sides. Huge demonstrations, barrages of literature, and hours of media coverage add fuel to the fire as the Supreme Court comes closer to reconsidering *Roe v. Wade*, at least indirectly.

However, the abortion issue and the attendant moral dilemmas for both choice proponents and right to life activists have little to do with the justness of the abortion clinic violence. Regardless of whether Operation Rescue is correct in its assertion that abortion

at A11. Mr. Bush reportedly refused to interrupt his vacation in Kennebunkport, Maine to meet with Randall Terry and another leader of Operation Rescue, Rev. Patrick J. Mahoney.

221. The Justice Department filed amicus briefs in both *Bray* and in *Women's Health Care Servs. v. Operation Rescue-Nat'l*, 773 F. Supp. 258 (D. Kan. 1991).

222. *U.S. Backs Wichita Abortion Protesters*, N.Y. TIMES, Aug. 7, 1991, at A10. This article mentions that although the presiding judge granted the United States' request for permission to file an amicus curiae brief on behalf of Operation Rescue, he said "I am disgusted by this move by the United States" and recommended that then-Attorney General Richard Thornburgh review videotapes of Operation Rescue's Wichita activities to understand the "mayhem and distress" that had been unleashed on the city.

223. Brief For the United States As Amicus Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (No. 90-985).

224. 113 S. Ct. 753 (1993).

ends human life, such does not justify the violent deprivation of the civil rights of others. There are legitimate and constitutionally-authorized political mechanisms that pro-life supporters have employed in attempting to sway the legislature, both local and national, to enact laws sympathetic to their cause. Their inability to do so successfully should not justify their pursuit of illegal means to try and force their perspective on others through violence and intimidation. The Ku Klux Klan tried this in the late nineteenth century and was made to answer for its behavior in the federal courts of the United States, under 42 U.S.C. § 1985(3). The abortion clinic blockaders should have been made to do the same.

DIANNE OLIVIA FISCHER