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Bray v. Alexandria Women's Health Clinic: The Supreme Court's Next Opportunity to Unsettle Civil Rights Law

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BRAY V. ALEXANDRIA WOMEN'S HEALTH CLINIC: THE SUPREME COURT'S NEXT OPPORTUNITY TO UNSETTLE CIVIL RIGHTS LAW

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I. INTRODUCTION

In recent years, the Supreme Court's approach to civil rights law has engendered trepidation in the civil rights community. The most glaring example of the Court's approach to civil rights law was its sua sponte re-argument order in *Patterson v. McLean Credit Union*.¹ The only issue that was presented by

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I wish to thank Professors Jay Carlisle and Donald Doernberg for their thoughtful review of an earlier draft of this Article. I also wish to thank Adjunct Professor Elfrida A. Scott-McLaughlin, my colleague and wife, for her constant support, review, and critique of the final draft. Finally, I thank my research assistants, Chris Mellewold, Gary Cohen, and William Devito.

1. 491 U.S. 164 (1989). In its re-argument order, the Court directed the parties to respond to the following question: "Whether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Runyon v. McCrary*, 427 U.S. 160 (1976), should be reconsidered." *Id.* at 171. In *Runyon*, the Court decided that 42 U.S.C. § 1981, which provides, in

the Court's re-argument order was whether 42 U.S.C. § 1981 was enacted pursuant to Congress's Thirteenth² or Fourteenth Amendment³ powers.⁴ Ultimately, the Court affirmed its ruling

pertinent part, that blacks had "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," was enacted pursuant to Congress's power under the Thirteenth Amendment and, therefore, could be used as the basis for a claim against solely private actors. *Runyon v. McCrary*, 427 U.S. 160, 179 (1976).

2. Sections 1 and 2 of the Thirteenth Amendment provide:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII, §§ 1, 2.

3. Sections 1 and 5 of the Fourteenth Amendment provide:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

....

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

4. The question of the source of Congress's power to enact civil rights laws is critical because under the Thirteenth Amendment, Congress has the power to reach private actors. The Court in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), said that Congress had the power under the Thirteenth Amendment to "rationally . . . determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 440. Relying on the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court held that Congress had the power to enact laws to prohibit private individuals from engaging in acts of racial discrimination. *Jones*, 392 U.S. at 438-39.

In contrast, Congress's power under the Fourteenth Amendment is limited to situations wherein the action that results in the deprivation of constitutional rights can be traced to a state actor. Justice Bradley, speaking for the Court in the *Civil Rights Cases*, stated that:

The first section of the Fourteenth Amendment . . . is prohibitory in its character, and prohibitory upon the States.

....

. . . [T]he last section of the amendment invests Congress with power to enforce it by appropriate legislation. . . . [Congress may] adopt appropriate legislation correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void and innocuous. . . . [S]uch legislation must . . . be predicated upon . . . State laws or State proceedings, and be directed to the correction of their operation and effect.

Civil Rights Cases, 109 U.S. at 10-12. Thus, if the Court had decided in *Patterson* that *Runyon* had been incorrectly decided and that the statute in question was enacted pursuant solely to Congress's power under the Fourteenth Amendment, then the scope of § 1981 would be limited to remedying deprivations of the right to contract on the basis of race wherein state laws or officials connected with the state had denied blacks the right to contract.

in *Runyon v. McCrary*,⁵ despite the view of certain members that *Runyon* had been decided incorrectly,⁶ and held that § 1981 was enacted pursuant to Congress's Thirteenth Amendment powers.⁷

Notwithstanding the reaffirmance of *Runyon*, civil rights scholars and lawyers are still concerned about the Court's approach to civil rights. Their anxiety over the Court's approach may increase during the October 1991 Term of the Court. During that term, the Court will again have the opportunity to unsettle an entire body of civil rights law when it re-examines another post-Civil War civil rights statute—42 U.S.C. § 1985(3)⁸—the Ku Klux Klan Act of 1871. *Bray v. Alexandria Women's Health Clinic*⁹ presents the Court with the opportunity to revisit that statute in a slightly unusual context. In *Bray*, several abortion clinics and abortion rights organizations applied for permanent injunctions to enjoin an anti-abortion organization and its members from "trespassing on, blockading, impeding, or obstructing ingress to or egress from" facilities providing abortion services.¹⁰ The district court held that the blockading of abortion facilities by the defendants infringed upon the constitutional right to travel of women seeking to obtain abortions at

5. 427 U.S. 160 (1976).

6. Justices Brennan, Marshall, Blackmun, and Stevens dissented from this part of the opinion. *Patterson v. McLean Credit Union*, 491 U.S. 164, 189 (1989).

7. *Id.* at 171-75.

8. Section 1985(3) provides:

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

42 U.S.C. § 1985(3) (1988).

9. *National Org. for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991).

10. *Id.* at 584.

clinics in the Washington, D.C., metropolitan area in violation of 42 U.S.C. § 1985(3).¹¹ The Fourth Circuit affirmed the district court's issuance of a permanent injunction on the ground that the activities of the defendants "had crossed the line from persuasion into coercion and operated to deny the exercise of rights protected by law."¹² The court also affirmed the district court's holdings that "gender-based animus satisfie[d] the 'purpose' element of § 1985(3)" and that blocking abortion facilities which serve an interstate clientele violates the constitutional right to travel.¹³

The Court in *Bray* will have the opportunity to decide several key issues regarding the coverage of § 1985(3). One issue is whether women or women seeking an abortion constitute a class under the statute. Another issue is whether private actors can violate the federal constitutional right to interstate travel when they hinder access to abortion clinics. Those are the nominal issues that the Court can be expected to address; however, there are broader issues that an activist Court may reach out to answer, as the current Court attempted to do in *Patterson*. Those issues could involve a question similar to the one raised in the *Patterson* re-argument order: whether or not the interpretation of 42 U.S.C. § 1985(3) adopted by the Court in *Griffin v. Breckenridge*¹⁴ should be reconsidered.

In *Griffin*, the Court effectively reversed its prior determination of the elements needed for a claim under § 1985(3) and the source of Congress's power to enact the statute. Previously, in *Collins v. Hardyman*,¹⁵ the Court held that § 1985(3) was enacted pursuant to Congress's Fourteenth Amendment powers and thus could only reach deprivations of constitutional rights by state actors.¹⁶ In *Griffin*, the Court stated that private actors could be held liable under § 1985(3) and that Congress had the power to sanction private discrimination under the Thirteenth Amendment.¹⁷ Given the apparent conflict between the two

11. *Id.*

12. *Id.* at 585.

13. *Id.*

14. 403 U.S. 88 (1971).

15. 341 U.S. 651 (1951).

16. *Id.* at 657-59.

17. *Griffin*, 403 U.S. at 105. The Court held that "Congress was wholly within its powers under . . . the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men." *Id.*

cases regarding the scope of § 1985(3) and the constitutional power that Congress exercised when it enacted the statute, the Court in *Bray* may be presented with another opportunity to thwart the Reconstruction Congress's efforts to provide a federal remedy for the deprivation of constitutional rights by private citizens or organizations.

A review of the legislative history of § 1985(3) reveals that Congress's purpose in enacting the statute was to provide a federal remedy for the deprivation of the newly acquired constitutional rights of the freed slaves and other classes of persons whose rights were being denied by terrorist organizations because of their political views. The debates are replete with references to the violence and brutality directed at these classes of citizens and the complete failure of state or local officials to take any steps to remedy this situation. In addition, the members of the forty-second Congress were concerned about the rights and safety of southern-born white citizens who had supported the federal government and of northerners who had moved to the South after the Civil War in an effort to rebuild that war-torn region. The legislative record is full of examples of violence and intimidation directed at those two classes of white citizens. In short, the evil that Congress sought to address was wanton violence directed at black and white citizens at the hands of private, marauding, masked organizations. With respect to which rights Congress sought to protect under the statute, the legislative history reveals that when Congress used the term "privileges and immunities" in § 1985(3), it intended that all rights which the Constitution afforded to United States citizens were to be included within the penumbra of § 1985(3). As to the source of Congress's power to enact this law, the debates show that the Thirteenth, Fourteenth, and Fifteenth Amendments were looked to as authorization for the enactment of the Ku Klux Klan Act of 1871.

Finally, an analysis of the legislative history demonstrates that both *Collins* and *Griffin* unduly restricted the scope of § 1985(3). *Collins* restricted the statute to incidents solely involving state actors.¹⁸ *Griffin* limited the statute to cases in which a racially discriminatory, class-based animus was present,¹⁹ thereby making it uncertain whether classes other than

18. *Collins*, 341 U.S. at 659.

19. *Griffin*, 403 U.S. at 102.

racial groups could sue under the statute. The Court in *Bray* will have the chance to address these issues and to resolve the questions left unanswered in *Griffin*.

In Part II of this Article, the legislative history of the Act is scrutinized to determine the factual predicate that led to the enactment of § 1985(3) and the classes Congress sought to protect under its provisions. The legislative history is also analyzed to determine which rights Congress sought to protect in § 1985(3). Part III discusses the Supreme Court's misinterpretation of the statute and attempts to provide guidance as to the proper outcome in *Bray*.

II. THE CONGRESSIONAL RESPONSE TO THE KU KLUX KLAN

A. *The Evil To Be Remedied*

The impetus for the Ku Klux Klan Act of 1871 was a request by President Grant for additional legislation to deal with the growing crisis in the southern states.²⁰ Several issues emerge from the message Grant sent to Congress. First, a breakdown of law and order existed in the southern states, which endangered life and limb. Second, the state governments were powerless to remedy this emergency. Third, Grant did not believe that he legally had the authority to intervene. The state of affairs that Grant wanted addressed resulted from the resistance mounted by former Confederate soldiers and slave masters to the emancipation of the slaves, the political alliance between the freed persons and the Republican Party, and the destruction of the southern "way of life."²¹ On March 28, 1871, in response to Grant's request for additional legislation, Representative Samuel

20. On March 23, 1871, President Grant sent the following message to Congress:

A condition of affairs now exists in some of the States of the Union rendering life and property insecure The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of the State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.

President Grant's Message to Congress, CONG. GLOBE, 42d Cong., 1st Sess. 236 (Mar. 23, 1871).

21. See generally W.E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION IN AMERICA (1935); JOHN H. FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR (Daniel J. Boorstin ed., 1961); KENNETH STAMPP, THE ERA OF RECONSTRUCTION: 1865-1877 (1965).

Shellabarger introduced House Bill 320, which was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes."²²

22. Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871) (codified in part at 42 U.S.C. §§ 1983, 1985 (1988)). Section one of the bill provided a remedy for persons whose constitutional rights had been violated by individuals acting under the color of law. That section was later codified at 42 U.S.C. § 1983. Pub. L. No. 96-170, 93 Stat. 1289 (1979). As originally introduced, section two provided criminal penalties in cases of conspiracies to violate constitutional rights by committing the crimes of murder, robbery, assault and battery and other crimes. Ku Klux Klan Act, ch. 22, 17 Stat. 13, 13 (1871). On April 5, 1871, Shellabarger introduced an amended version of section two that provided:

That if two or more persons within any State or Territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States, or by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States against the will and contrary to the authority of the United States, or by force, intimidation, or threat to prevent any person from accepting or holding any office of trust or place of confidence under the United States, or from discharging the duties thereof, or by force, intimidation, or threat to induce any officer of the United States to leave any State, district, or place where his duties as such officer might lawfully be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or by force, intimidation, or threat to deter any witness in any court of the United States from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such witness in his person or property on account of his having so testified, or by force, intimidation, or threat to influence the verdict of any juror in any court of the United States, or to injure such person in his person or property on account of any verdict lawfully assented to by him, or shall conspire together for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or to injure any person in his person or property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States, or district or supreme court of any Territory of the United States having jurisdiction of similar offenses, shall be punished by a fine not less than \$500 nor more than \$5,000, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less than six months nor more than six years, as the court may determine, or by both such fine and imprisonment as the court shall determine; and if any one or more persons engaged in such conspiracy, such as is defined in the preceding section, shall do or cause to be done any act in furtherance of the object of such conspiracy, whereby any person shall be 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 of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like

Throughout the debate on the bill, the speakers discussed the evidence and nature of the problem that the Klan and similar organizations presented. The incidents graphically demonstrated the evil that the Klan represented, its purposes, and the methods used to effectuate its ends. The evidence revealed that the Klan used violence and terror against blacks, supporters of blacks, and Republicans in an effort to undo the gains of the Reconstruction era. The Klan also directed its anger at northerners (carpetbaggers) who had come south after the war and at native southerners (scalawags) who supported the Reconstruction policies of the federal government. In addition, by using the same tactics against government officials, the Klan sought to supplant state and local governments. In some instances, those officials either acquiesced or conspired with the Klan. Finally, the Klan vented its fury on indicia of federal authority.

With respect to the purpose of the Klan, Representative William Stoughton canvassed the available evidence²³ about the Klan in North Carolina. He stated that the Klan had a political purpose and was composed of members of the Democratic and Conservative Parties.²⁴ It used murders, whippings, intimidation, and violence in pursuit of its political objectives. Stoughton contended that no Klansmen in North Carolina had been convicted of a crime.²⁵ He explained this by observing that a

cases in such courts under the provisions of the act of April 9, 1866, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means for their vindication."

CONG. GLOBE, 42d Cong., 1st Sess. 477 (1871) [hereinafter CONG. GLOBE]. Section three gave the President the right to dispatch federal troops to deal with violence when a state was unable to protect its citizens from lawlessness. *Id.* at 317. Section four empowered the President to declare martial law when a state government was supplanted by an armed assemblage or when the state conspired with such groups to deprive citizens of constitutional rights. *Id.*

23. There were no evidentiary hearings held prior to the introduction of the Ku Klux Klan Act. Congress relied on a report issued by a Select Committee of the Senate to Investigate Alleged Outrages in the Southern States. *See* S. REP. NO. 1, 42d Cong., 1st Sess. (1871). While the Committee was established to examine the existence of the Klan in the southern states, it was only able to investigate conditions in North Carolina. The report concluded that the Klan was responsible for numerous murders, whippings, and shootings in that State. Regarding the purpose of the Klan, the report found that the Klan was opposed to the policies of Reconstruction, including the enfranchisement of blacks. *See* EVERETTE SWINNEY, *SUPPRESSING THE KU KLUX KLAN: THE ENFORCEMENT OF THE RECONSTRUCTION AMENDMENTS 1870-1877* (1987); ALLEN W. TRELEASE, *WHITE TERROR, THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION* (1971).

24. CONG. GLOBE, *supra* note 22, at 320.

25. *Id.*

Klansman was required to commit perjury if called as a witness in the trial of a fellow traveler and to vote to acquit, notwithstanding the evidence, if selected as a juror in cases involving Klansmen.²⁶

In support of his assertions, Stoughton relied on the testimony of James E. Boyd before the Senate Select Committee. Boyd was a lawyer, former Confederate soldier, and a Klansman from Alamance County, North Carolina.²⁷ He testified that the Klan's purpose was to defeat the Reconstruction policy of Congress and to prevent blacks from voting.²⁸ He further testified that the Klan was supportive of the policies of the Democratic Party.²⁹ Regarding the membership of the Klan, Boyd stated that the majority consisted of former Confederate soldiers and that it was a well-organized, paramilitary-type organization.³⁰ Boyd averred that the Klan used any means necessary to carry out its objectives, including murder.³¹ He stated that there were forty thousand members of the Klan in North Carolina.³²

Representative Garfield, who shared Stoughton's views of the purpose of the Klan, stated:

To state the case in the most moderate terms, it appears that in some of the southern States there exists a wide spread secret organization, whose members are bound together by solemn oaths to prevent certain classes of citizens of the United States from enjoying these new rights conferred upon them by the Constitution and laws; that they are putting into execution their design of preventing such citizens from enjoying the free right of the ballot box and other privileges and immunities of citizens, and from enjoying the equal protection of the laws.³³

Other speakers in the House supported the thesis that the Klan was a covert, terrorist organization designed to eliminate the gains of Reconstruction.³⁴

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*; see also SWINNEY, *supra* note 23, at 132-33.

33. CONG. GLOBE, *supra* note 22, app., at 153.

34. Representative George F. Hoar suggested that the Klan was attempting to restore the state of affairs that existed before the Civil War.

In many States of this Union, ever since they came into existence as part of the Union, all rights, civil, political, and personal, have been denied to one part of their population. So far was there from being any tendency to correct this evil . . .

In the Senate, similar views about the aim of the Klan were expressed. Senator John Pool stated that the North Carolina Klan had between forty and sixty thousand members and that its members were ordered by the organization to commit crimes in furtherance of its objectives.³⁵ Senator Oliver P. Morton believed that the purpose of the Klan was to use terror and violence to intimidate blacks and others from supporting the Republican Party and its political objectives.³⁶

The proponents of the Ku Klux Klan Act of 1871 relied on evidence which revealed that the Klan was a paramilitary organization that used violence to achieve its political objectives. The victims of that violence were blacks,³⁷ supporters of blacks,³⁸

that the civil right of discussing . . . the rightfulness . . . of this state of things and the political right of voting to put an end to it was also denied, with penalty of banishment or death to any person of the dominant race whose sense of public duty might so incline him. It is true this penalty was not expressed in terms on the statute-books; but it was executed by the mob . . . [W]hen it was found that the association under the General Government with other States where attachment to civil liberty prevailed endangered this state of things, the people of these States sought to destroy the nation itself rather than run the risk that . . . the indirect influence of this association might overthrow the tyranny they had established. The principal danger that menaces us to-day is from the effort within the States to deprive considerable numbers of persons of the civil and equal rights which the General Government is endeavoring to secure to them.

Id. at 335. Representative John Coburn, in discussing the Klan's purpose, painted a picture of total lawlessness in the South.

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

Id. at 459; *accord id.* at 443-49 (remarks of Rep. Butler); *id.* at 320-21 (remarks of Rep. Stoughton); *id.* at 339 (remarks of Rep. Kelley); *id.* at 437 (remarks of Rep. Cobb).

35. *Id.* app., at 107. Senator Pool quoted the Klan's oath to illustrate its purposes: "That you will oppose all Radicals and negroes in all their political designs." *Id.*

36. Senator Morton stated:

We are not at liberty to doubt that the purpose is by these innumerable and nameless crimes to drive those who are supporting the Republican party to abandon their political faith or to flee from the State. A single murder of a leading Republican will terrify a whole neighborhood or county. The whipping of a dozen negroes, because they are negroes and asserting their right to the equal enjoyment of liberty, property, and the expression of their opinions, will have the effect to terrify those who live for miles around.

Id. app., at 252. Thus, in Morton's view, the evil was not merely that the Klan engaged in racially motivated or politically motivated violence against individuals, rather, Morton was concerned that the impact of the terror spread far beyond the victims of the Klan. *Compare id.* at 157 (remarks of Sen. Sherman) *with id.* at 197 (remarks of Sen. Ames).

37. There were numerous examples of Klan violence directed at blacks. When speaking before Senate Select Committee, Representative Stoughton quoted the testimony of

symbols of the federal government,³⁹ and Republicans.⁴⁰ Addi-

Thomas W. Willeford, a former member of the North Carolina Klan, who stated that the purpose of the Klan was to damage the Republican Party by burning, stealing, whipping blacks, and murdering. *Id.* at 320. Stoughton also quoted the testimony of Caswell Holt who stated that he had been whipped and shot by the Klan because he had voted for the Republican party. Holt testified that blacks in his vicinity did not feel safe and that many had decided to leave. *Id.* at 321. Stoughton recounted an incident which occurred in Mississippi wherein Klansmen attacked and shot at blacks who were attending a trial. *Id.* at 322. As further evidence of the Klan's propensity for violence against blacks, Stoughton relied on the testimony of James E. Boyd, who stated:

The most serious instance in my county . . . was the hanging of a negro man by the name of Outlaw, who was taken from his house . . . about one o'clock at night, by a band of from eighty to a hundred men, and hung upon an elm tree, not very far from the courthouse door.

Id. at 320. When Boyd was asked what offense Outlaw had committed, Boyd replied, "I never heard of any." *Id.* Boyd also testified that another black man, William Puryear, was murdered because it was feared that he had witnessed the lynching of Outlaw. *Id.*; see also *id.* at 332 (remarks of Rep. Hoar).

Representative Butler recounted an incident wherein the Klan fired on a house occupied by blacks and severely injured a black resident. *Id.* at 445. Another incident involved the Klan forcing a black minister to flee his home in Mississippi and subsequently burning his home and church to the ground. *Id.* Senator Morton suggested that one of the reasons for the attacks on blacks was their former status. He stated that "colored people, because of prejudices against their race, because they were formerly slaves and ha[d] been released against the will of their masters" were subjected to Klan violence. *Id.* app., at 251.

38. Representative Butler described the following incident:

I . . . call the attention of the House to a publication of the American Missionary of October, 1870, of the taking from the hands of the officer of the law and murder of Rev. W.C. Luke, a clergyman of the Methodist Episcopal church, and a missionary . . . whose only offense was that he was teaching the blacks the rudiments of an education under a commission from his bishop. Himself and four of his pupils were taken from the hands of the sheriff, who had arrested them, although they had done no wrong, and at midnight, by a band of thirty armed ruffians, hanged to trees, his murderers even refusing to transmit a last letter written to his wife and little ones as he was preparing to yield up his spirit to Him who gave it.

Id. at 446.

39. Representative Butler stated that federal agents were whipped and shot at for attempting to carry out their duties. *Id.* at 445. Butler also read into the record the following letter regarding an incident that took place in St. Augustine, Florida, wherein purchasers of property from the federal government were ejected:

Hordes of ruthless, armed men . . . entered by force and took possession of property purchased by loyal citizens from the agents of the United States Government, and occupied by feeble, invalid ladies; and by these armed men these ladies, with their furniture and their protectors, were forcibly thrust out of doors. And the intruders now hold possession in fearless defiance of any law that now exists

Id. at 447. When the intruders were brought before a justice of the peace, he dismissed the criminal complaint on the grounds that there was no law against entering a house. *Id.*

40. According to Representative Butler, 2,000 Republicans were killed, wounded by gunshot, or seriously injured by Klansmen or members of other similar organizations. *Id.* at 444. He quoted the following language from the report of the Senate committee which investigated the Klan:

tionally, the Klan sought to obstruct local government with its tactics.⁴¹ At times, local officials acquiesced or conspired with

In this part, including that part of Orleans comprised in this district, and St. Bernard, St. Helena, and Washington, the Republican party had a majority in 1868 of over one thousand, receiving 8,565 votes. Over three hundred leading and active Republicans, white and colored, were killed, wounded or otherwise cruelly maltreated by Ku Klux, and other instruments of violence and intimidation, within sixty days preceding the election.

Terror and dread took possession of the unprotected people, thousands of colored Republicans and some whites voted the Democratic ticket from compulsion and fear, and the great mass remained away from the polls, and the eighty-five hundred and sixty-five Republican votes were reduced to eighty-four

Id. Butler also read into the record the affidavit of Henderson Cash, a South Carolina Republican, who had been threatened by the Klan:

Spartanburg, South Carolina:

Personally appeared Henderson Cash before me, Enoch Cannon, notary public, and made oath that he was always loyal to the United States Government; that he is now forced to denounce the Federal Republican party to save his life, and that the Ku Klux had given him notice if he did not denounce Republicanism that they would kill him; and that they had been to and broke into his house on the night of the 25th of February; but that he (Cash) was in the forest . . . for the safety of his life. Said Cash further says that there is a general reign of terror in the community . . . and that loyal men are afraid to sleep at home in consequence of the many brutal outrages inflicted upon loyal men for the support of the Republican party.

Id. at 447. Based on the evidence available, Butler concluded that one of the purposes of the Klan was to eliminate the Republican Party as a political force in the southern states. The race of the Republican voter was insignificant, the aim of the Klan was to prevent black and white voters from supporting the party of Reconstruction, and the same means were employed to effectuate that end: terror and violence. *See, e.g., id.* at 391 (remarks of Rep. Elliot) ("The white Republican of the South is also hunted down and murdered or scourged for his opinion's sake, and during the past two years more than six hundred loyal men of both races have perished in my State alone."); *id.* at 460 (remarks of Rep. Coburn) ("Republicans are whipped, overawed, burned out, banished, or murdered because they have political opinions . . ."); *id.* at 702 (remarks of Sen. Edmunds); *id.* app., at 252 (remarks of Sen. Morton).

41. Representative Jeremiah M. Wilson contended that the Klan's purpose was to overthrow state governments.

[W]hat is the purpose of all this bloody work? I assert—and all well-authenticated evidence proves the truth of the assertion—that it is for the express purpose of controlling government in the States where these things are done, by preventing citizens from exercising their legitimate constitutional privileges. It is to overthrow by force and violence political opinion; it is to destroy by violence the freedom of the ballot-box, and therefore it is the most dangerous form of domestic violence and rebellion against the laws.

Id. at 484. Perhaps the most glaring example of the Klan's efforts to render the state and local governments null and void was the following notice from Union County, South Carolina, read into the record by Representative Butler:

(Special Orders No. 3, K.K.K.)

"Ignorance is the curse of God."

For this reason we are determined that members of the Legislature, the

the Klan.⁴²

In addition to the racial and Republican targets of the Klan, the Klan also victimized groups of individuals that held political views in conflict with Klan values. Representative Maynard stated his belief that the violence of the Klan, in addition to being directed at blacks, was also visited upon "the native Unionist, the native loyal man . . . held up to odium as the enemy of his region, as the enemy of his people, who has sold himself to the enemies of his country."⁴³ Maynard was particularly concerned about the safety of those who held views that were unpopular in the region.⁴⁴ In his opinion, § 1985(3) was

school commissioner, and the county commissioners of Union, shall no longer officiate.

Fifteen days' notice from this date is therefore given, and if they, one and all, do not at once and forever resign their present inhuman, disgraceful, and outrageous rule, then retributive justice will as surely be used as night follows day.

Id. at 448. After this notice was posted, the Klan notified the Governor of South Carolina that all state officials were to resign. The Governor appealed to the President to aid him in putting down this rebellion against the state government. *Id.* Butler contended that the Klan orchestrated the impeachment of the governor of North Carolina because he used military forces to stop Klan violence. *Id.* at 443. Other incidents in the record involved the murder of a state senator in the jury room of a courthouse on the day when a Democratic Party convention was in session; the arrest of the mayor of Meridian, Mississippi, by the Klan, who then ordered him to leave town; and the murder of a judge and eight to ten blacks after a riot in a courtroom. *Id.* at 443, 445.

In addition to attacks on the executive and judicial branches of government, the Klan also sought to intimidate law enforcement officers. In one case, a local sheriff was murdered because he had arrested a Klan member. *Id.* at 444. In other cases, local law enforcement authorities were implicated in Klan violence. Representative Butler recounted an incident in Tennessee wherein a group of Klansmen fired into the home of two black men who returned their fire. After the Klan had been repelled, the occupants of the house discovered that the local constable and deputy sheriff were among the dead Klansmen. *Id.* at 445. The view of the Klan as an organization that sought to overthrow state and local authority is supported by historians of this period. See generally DAVID M. CHALMERS, *HOODED AMERICANISM* (1965); FRANKLIN, *supra* note 21.

42. Representative Aaron F. Perry eloquently addressed this problem.

Where these gangs of assassins show themselves the rest of the people look on, if not with sympathy, at least with forbearance. . . . Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished.

CONG. GLOBE, *supra* note 22, app., at 78. See, e.g., *id.* at 368 (remarks of Rep. Sheldon); *id.* at 107 (remarks of Sen. Pool).

43. *Id.* app., at 309.

44. In this regard, he stated:

[T]he unpopular man, the man who entertains odious sentiments, the man whose

designed to protect all classes of persons who were subjected to attack for their political views or racial group.⁴⁵

Representative Maynard's views regarding the classes to be protected under § 1985(3) were shared by members of the Senate. Senator Morton argued that the statute was designed to protect the rights of any class of citizens. He stated:

If there be organizations in any of the States having for their purpose to deny to any class or condition of men equal protection, to deny to them the equal enjoyment of rights that are secured by the Constitution of the United States, it is the right and duty of Congress to make such organizations and combinations an offense against the United States.⁴⁶

Senator Edmunds also believed that the § 1985(3) was not limited to cases involving racially discriminatory animus. He stated:

We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that his conspiracy was formed against this man because he was a Democrat, . . . or because he was a Catholic, . . . or because he was a Vermonter, . . . then this section could reach it.⁴⁷

Thus in both the Senate and the House concerns were expressed about the deprivation of rights by the Klan based on a variety of identifiers, such as race, political views, religion, or

religion . . . is at variance with the common belief, the man whose political views do not accord with the generally received opinions of the community in which he resides, finds his personal security very often in peril from the ebullitions of passion and the gusts of anger which agitate his immediate neighbors, and which are not regulated or influenced by the wider and broader opinions that obtain elsewhere in the land and among the whole people.

Id. app., at 311.

45. He stated:

Under this section I hold that if a body of men conspire to drive out all the northern men, all the "Yankees," all the "carpet-baggers" from the community, their offense comes within the condemnation of this provision. If they combine to prevent the colored men from voting, the case is the same. If they combine to prevent men from voting the Republican ticket, the provision meets that case.

Id. app., at 310; *see also id.* at 320-21 (remarks of Rep. Stoughton); *id.* at 339 (remarks of Rep. Kelley); *id.* app., at 262 (remarks of Rep. Dunnell); *id.* app., at 277 (remarks of Rep. Porter); *id.* at 394 (remarks of Rep. Rainey); *id.* at 459 (remarks of Rep. Coburn); *id.* app., at 185 (remarks of Rep. Platt); *id.* app., at 300 (remarks of Rep. Stevenson).

46. *Id.* app., at 251.

47. *Id.* at 567; *see also id.* at 568 (remarks of Sen. Edmunds); *id.* at 606 (remarks of Sen. Pool); *id.* at 686 (remarks of Sen. Schurz).

regional origins. In the minds of those who supported the statute, it was designed to remedy the denial of the rights guaranteed under the Constitution to all classes of citizens targeted by the Klan or other organizations. No supporter indicated any intention to limit the application of the statute to conspiracies motivated by racial animus.

The incidents discussed by the supporters of the statute confirm that the Klan was an organization prone to violence and was comprised of private individuals and local law enforcement officers, many of whom were former Confederate soldiers and members of either the Democratic or Conservative Parties. They engaged in violence and acts of intimidation against groups or individuals in an effort to reverse the gains of the Reconstruction era. Essentially, the Klan viewed with hostility blacks and others who either aided blacks or had come to the South after the Civil War. In addition to the use of brutal tactics against individuals, the Klan also sought to render local governments ineffective, including judicial officers, law enforcement agents, and other elected officials. Its goal was to replace the organs of elected government with Klan rule. Many of these local governments were at that time controlled by blacks and Republicans.

Faced with this breakdown of law and order, and the refusal, reluctance, or inability of state and local governments to provide redress for Klan victims, Grant sent the aforementioned message to Congress.⁴⁸ In response, Congress adopted the Ku Klux Klan Act of 1871. The Act's provisions provided remedies for the various types of problems caused by the Klan.⁴⁹ Congress sought to provide a federal venue and cause of action to address the complete breakdown of law and order in the South. The question of which constitutional rights Congress sought to protect when it enacted § 1985(3) remains unanswered.

B. The Rights To Be Protected

During the debates on § 1985(3), Congress was confronted with facts showing a complete breakdown of law and order in

48. See *supra* note 20 and accompanying text.

49. Section one (§ 1983) of the Ku Klux Klan Act of 1871 provided a federal remedy where persons, acting under color of law, deprived others of their constitutional rights. See *supra* note 22. Section two (§ 1985(3)) was designed to punish, criminally and civilly, conspiracies to deprive others of their constitutional rights. The third section gave the President the power to intervene militarily to suppress violence when state officials requested such help. Section four provided that martial law could be declared by the President when state authorities conspired with Klan or similar organizations.

the former Confederate states. Secret, paramilitary, terrorist organizations threatened and intimidated local law enforcement and other government officials from performing their duties. Blacks, their supporters, Republicans, and others sympathetic to the Union were intimidated, brutalized, and murdered because of their political persuasion or opinions, or, in the case of ex-slaves, because of their former status. In the face of this onslaught, the state and local governments stood powerless to provide shelter from the ever-increasing storm. In short, the Klan had replaced the traditional arbiters of government with a reign of terror. Many members of Congress believed that the states were either unable or unwilling to provide protection against the Klan. Thus, they sought to establish a federal forum for the preservation of constitutional rights in § 1985(3).

By its terms, § 1985(3) provided a federal remedy when two or more persons entered into a conspiracy to deprive others of equal protection of the laws or equal privileges and immunities under the laws. The language employed by Congress raises two questions. One, what rights did Congress seek to protect when it enacted the statute? Two, was the statute aimed at deprivations of those rights by private or state actors? A review of the positions of the legislators reveals that Congress sought to protect rights which flowed from the Thirteenth, Fourteenth, and Fifteenth Amendments. With respect to the equal protection clause of § 1985(3), many of the speakers shared the view that, under the Fourteenth Amendment, the states were under an affirmative duty to ensure that equal protection of the laws was afforded to persons within their borders, and that the failure to protect the targeted groups of persons from the Klan was a denial of equal protection. With respect to the privileges and immunities clause of § 1985(3), many of the speakers asserted that the statute was designed to provide a federal remedy for the deprivation of any privilege or immunity that the citizen had under the Constitution. Thus, that clause as used in § 1985(3) was not limited to deprivations of purely Fourteenth Amendment rights.

Commenting on the constitutional amendments that allowed Congress to enact § 1985(3), Representative Perry made it clear that he believed the conditions in the South demonstrated that rights secured by the three post-Civil War amend-

ments were in jeopardy.⁵⁰ Similarly, Representative Garfield, speaking in support of the bill, asserted that the adoption of those three amendments brought about a fundamental shift in power between the states and the national government.⁵¹ He contended that, before the war, the protection of life and property of private citizens was purely within the province of the state. The enactment of these three amendments, however, enlarged Congress's power to legislate to ensure that rights secured by the Thirteenth, Fourteenth, and Fifteenth Amendments were not denied or abridged.⁵² Garfield believed that Congress had the power to provide for the punishment of both private and state actors who deprived others of the rights secured by these amendments.⁵³

Although some members believed that Congress had the power to enact the Ku Klux Klan Act of 1871 under all three post-Civil War amendments, the majority of the debates focused on whether Congress had the power under the Fourteenth Amendment to punish private persons when the state failed to protect its residents from Klan violence.⁵⁴ One theory advanced

50. Representative Perry stated:

The privileges and immunities secured to a large class of citizens by the thirteenth, fourteenth, and fifteenth articles of amendment to the Constitution of the United States are abridged. They are deprived of life, liberty and property without due process of law. Their right to vote is abridged or denied on account of race, color, or previous condition of servitude, and the equal protection of the law is denied them.

CONG. GLOBE, *supra* note 22, app., at 78. Representative Maynard asserted that under § 1985(3) Congress was protecting, *inter alia*, Fifteenth Amendment rights. *Id.* app., at 310.

51. *Id.* app., at 149-50.

52. *Id.*; *see also id.* app., at 83 (remarks of Rep. Bingham) ("The powers of the States have been limited and the powers of Congress extended by the . . . [t]hirteen[th], fourteen[th], and fifteen[th] [amendments]."); *id.* at 693-96 (remarks of Sen. Edmunds). Further support for this view can be found in the title of the Act, to wit: "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and For Other Purposes." Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871).

53. CONG. GLOBE, *supra* note 22, app., at 153 ("[Congress had the] power . . . to provide by law for the punishment of all persons, official or private, who shall invade these rights, and who by violence, threats, or intimidation shall deprive any citizen of their fullest enjoyment.").

54. The debates concerning the power of Congress under the Fourteenth Amendment are significant in that many of the members of Congress in 1871 were also members in 1866 when the Fourteenth Amendment was adopted. The following Senators voted in favor of the Fourteenth Amendment and were supporters of the Ku Klux Klan Act: Anthony, Conkling, Edmunds, Ferry, Morrill of Vermont, Pomeroy, Cragin, Nye, Ramsey, Sherman, Stewart, and Wilson. *Id.* at 709. The following members of the House were involved in the enactment of both the Fourteenth Amendment and the Ku Klux Klan Act: Bingham, Kelley, Cook, Dawes, Garfield, Mercur, Myers, Scofield, and Shellabarger. *Id.* at

by the supporters of the Act was that the states were under an affirmative duty to provide for the equal protection of the laws to all persons within their borders. These legislators believed that the southern states, by failing to punish or convict Klan members of any crimes, either actively encouraged the violence or tacitly acquiesced in it. This failure to prosecute was viewed as a denial of equal protection of the laws since it was only the victims of Klan violence who were not protected by law-enforcement authorities. In the view of the proponents of the affirmative duty to provide equal protection, when the state, through malfeasance or nonfeasance, failed to afford classes of persons such protection, then the Congress was empowered to act in its stead to prevent the deprivation of rights secured by the Equal Protection Clause.⁵⁵ The legislators who adhered to this view seemed to assume that there was a conspiracy, or perhaps a tacit agreement, between the state or local officials and the Klan. The former had abdicated their responsibility to enforce the law, while the latter carried out the purpose of the gentlemen's understanding—the effective denial of all rights recently

522. Representative Bingham has been credited as the drafter of the original equal protection language of the Fourteenth Amendment. *Id.* app., at 86.

55. Representative Coburn supported this view of the Fourteenth Amendment. The failure to afford protection equally to all is a denial of it.

Affirmative action or legislation is not the only method of a denial of protection by a State A State may by positive enactment cut off from some the right to vote, to testify or to ask for redress of wrongs in court This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his persecutor, and treat the one as a nonentity and the other as a good citizen. . . . A systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection . . . and justifies . . . the active interference of the only power that can give it. . . .

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

Id. at 459. See, e.g., *id.* at 334 (remarks of Rep. Hoar) (where state does not protect a particular class of its citizens from violence, state denies equal protection); *id.* at 428 (remarks of Rep. Beatty) (The state denied equal protection by failing to "bring the guilty to punishment or afford protection or redress to the outraged and innocent."); *id.* app., at 79 (remarks of Rep. Perry) (Equal Protection Clause commands that "no State shall fail to afford or withhold the equal protection of the laws."); *id.* app., at 182 (remarks of Rep. Mercur) ("[T]he word 'deny' . . . means to refuse, or to persistently neglect or omit to give that 'equal protection' imposed upon the State by the Constitution."); *id.* at 506 (remarks of Sen. Pratt); *id.* app., at 251-52 (remarks of Sen. Morton); *id.* at 608 (remarks of Sen. Pool); *id.* at 409 (remarks of Sen. Frelinghuysen).

acquired by the freed black, the rights of those who supported them, and the rights of other groups who espoused political views inimical to the Klan.⁵⁶

While there were numerous legislators who supported the view that the Equal Protection Clause of the Fourteenth Amendment imposed an affirmative duty on the states to protect equally all persons in their life, liberty, and property, there was a sharp divergence of views regarding whether Congress had the power under that Amendment to punish private actors. Two views emerged. The radical view was that where the state refused to do anything to protect persons within its borders, the federal government had the power to replace the state, in one sense providing the protection that the state neglected to furnish, and punish private actors.⁵⁷ Under this theory, even where state law provided for the punishment of crimes committed by Klansmen, if the state failed to prosecute and thereby tacitly per-

56. Representative George F. Hoar illustrated this conspiracy theory by alluding to the conditions in South Carolina, which was three-fifths black.

[S]uppose that in that State, with its constitution providing trial by jury, providing an independent judiciary, providing for equality of civil rights, providing the right to vote and to hold office of every citizen, there should be a conspiracy upon the part of a certain portion of the people that by intimidation, by murder, by outrage, this majority of the people dare not exercise those rights which their State constitution undertakes to declare for them. Suppose that by that conspiracy, secret but understood . . . every person who dared to lift his voice in opposition to the sentiment of this conspiracy found his life and property insecure. Suppose that conspiracy takes possession of the jury-box, and under its rule no one of the majority of that State can gain his case on whatever evidence Suppose . . . that the constitution of the State all the time declaring that there shall be punishment of crime, to a particular class of citizens there is no criminal remedy enforced for any crime committed upon them.

Id. at 333. The state of affairs Hoar hypothesized was in fact the reality of life for blacks and others groups with unpopular political views in the South. The evidence before Congress established that a group of private citizens, acting in concert, through terror and violence prevented blacks and Republicans from casting votes for the party of their choice, that their lives were unprotected by law enforcement authorities, and that no Klansman had been convicted of any crimes in any of the states.

57. Representative David P. Lowe supported this view of Congress's authority. The argument leads to the deduction that while the first section of the [fourteenth] amendment prohibits all deprivations of rights by means of State laws, yet all rights may be subverted and denied, without color of law, and the Federal Government have no power to interfere. All you have to do . . . to drive every obnoxious man from a State, or slay him with impunity, is to have the law all right on the statute-book, but quietly permit rapine and violence to take their way, without the hinderance of local authorities. . . . The rights and privileges of citizens are not only not to be denied by a State but they are not to be deprived of them.

Id. at 375.

mitted such violence to take place, Congress could step in and punish the private individuals without any allegation that they induced a state official not to perform his duty under the Federal Constitution to afford equal protection.⁵⁸

The conservative view was that if the state's officials refused to afford equal protection, Congress could punish the official for such a refusal, but Congress could only sanction private actors or conspirators when they prevented the state officer from performing his federal constitutional obligation of providing equal protection. In order for the private persons' conduct to be actionable, they must have induced the state officer, by violence or threats, to neglect his duty to provide protection. Under this theory, Congress had the power under the Fourteenth Amendment to punish private persons only when they interfered with a state officer's duty to protect equally the life, liberty, and property of those residing within the state.⁵⁹ In the revised draft of section two of the Act, both views of the Fourteenth Amendment were included.⁶⁰

58. See, e.g., *id.* at 368 (remarks of Rep. Sheldon) ("Shall it be said that the citizen may be wrongfully deprived of his life, liberty, and property . . . and the national arm cannot be extended to him because there is a State government whose duty is to afford him redress, but refuses or neglects to discharge that duty?"); *id.* at 334-35 (remarks of Rep. Hoar); *id.* at 501 (remarks of Sen. Frelinghuysen); *id.* app., at 68-71 (remarks of Rep. Shellabarger) (Act was designed to remedy denial of equal protection by providing federal intervention against individuals); *id.* app., at 251 (remarks of Sen. Morton).

59. Representative Horatio C. Burchard contended that the federal government could punish "the [state] officer who violates his official constitutional duty" to provide equal protection, and Congress had the power to "punish the illegal attempts of private individuals [who sought] to prevent the performance of official duties in the manner required by the Constitution and laws of the United States." *Id.* app., at 314. Representative Luke P. Poland shared this view of Congress's power under the Fourteenth Amendment:

I cannot agree . . . that if the State authorities fail to punish crime committed in the State therefore the United States may step in and by a law of Congress provide for punishing that offense

When the State has provided the law, and has provided the officer to carry out the law, then we have the right to say that anybody who undertakes to interfere and prevent the execution of that State law is amenable to this provision of the Constitution, and to the law that we may make under it declaring it to be an offense against the United States.

Id. at 514; accord *id.* at 486 (remarks of Rep. Cook); *id.* at 579 (remarks of Sen. Trumbull).

60. The revised draft of section two provided:

That if two or more persons . . . shall conspire together for the purpose . . . of depriving any person or class of persons of the equal protection of the laws . . . or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws . . . each and every person so offending shall be deemed guilty of a high crime.

While there was some disagreement in Congress regarding its power under the Fourteenth Amendment to legislate against private individuals for deprivations of the Equal Protection Clause, it appears to have been the consensus that when Congress used the terms "privileges and immunities" in § 1985(3), it intended to protect all privileges and immunities that a citizen had under any provision of the Constitution. Among the privileges and immunities that Congress sought to protect was the right to vote as secured by the Fifteenth Amendment and freedom of speech.⁶¹ Other speakers expressed the view that the privileges and immunities protected under § 1985(3) were those that all citizens of free governments enjoyed.⁶² Senator Morton

Id. at 477. The first clause of the revised draft seeks to punish a conspiracy to deny equal protection without reference to any interference with state officers. The second clause addresses that issue. Thus, it would appear that both theories of the Fourteenth Amendment were incorporated into the revised bill. For a thorough discussion of the different views of the speakers regarding Congress's power under the Fourteenth Amendment to punish individuals, see generally 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 (1967); Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964).

61. In discussing what was meant by the term "privileges and immunities" as used in § 1985(3), Representative Maynard stated:

I suppose it embraces all privileges and immunities secured by the Constitution; for example, those guaranteed by the constitutional provision . . . securing to citizens of each State "all privileges and immunities of citizens in the several States." It would include also the right of voting secured by the fifteenth amendment; it would include any of the personal rights which the Constitution guarantees to the citizen.

CONG. GLOBE, *supra* note 22, app., at 310.

62. Representative Hoar addressed himself to the meaning of the term "privileges and immunities" as used in the Fourteenth Amendment and the Act: "[W]hat is comprehended in this term, 'privileges and immunities?' Most clearly it comprehends all the privileges and immunities declared to belong to the citizen by the Constitution itself. . . . [I]t comprehends those privileges and immunities which [are] . . . fundamental and essential to citizenship." *Id.* at 334. In support of his thesis, Hoar relied on the opinion of Judge Washington in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230), wherein the court was called upon to interpret the meaning of the Privileges and Immunities Clause found in Article IV of the Constitution.

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments.

Id. at 551. The court went on to hold that included among the privileges and immunities of Article IV were, *inter alia*, the enjoyment of life and liberty, the right to acquire property, and the right of interstate travel. *Id.* at 551-52. According to Hoar, § 1985(3) was intended to protect all of these rights against deprivation by a conspiracy of persons. CONG. GLOBE, *supra* note 22, at 334; *accord id.* at 69 (remarks of Rep. Shellabarger, relying on *Corfield*) ("Congress [has the] power to legislate directly for enforcement of such rights as are fundamental elements of citizenship."); *id.* at 475 (remarks of Rep. Dawes)

expressed the view that among the privileges and immunities protected was the right to interstate travel.⁶³ The opposition argued that under the Fourteenth Amendment, only those rights that were acquired by virtue of United States citizenship could be protected under that Amendment and, by seeking in § 1985(3) to protect all fundamental privileges and immunities that were secured by any clause of the Constitution, Congress was exceeding its Fourteenth Amendment powers.⁶⁴ Thus, both the sponsors and opponents agreed that the phrase "privileges and immunities" as used in § 1985(3) was intended to reach and protect rights found not only in the Fourteenth Amendment but elsewhere in the Constitution.

When it enacted the Ku Klux Klan Act of 1871, Congress was faced with a guerilla rebellion in the former Confederate states. Whereas during the war the soldiers of the South wore grey uniforms, they now donned white sheets and hoods. Nevertheless, their purpose was the same—to challenge federal sovereignty. During the Civil War, the southern military establishment declared that the federal government had no authority over the southern states and seceded from the Union. After the war, the remnants of the southern military established an organization to carry on the mission of the former Confederacy—to deny the former slaves, their supporters, and union sympathizers all their constitutional rights.

In the face of massive evidence of the breakdown of law and order in the southern states, Congress designed a bill that it

("The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill."); *id.* app., at 188-89 (remarks of Rep. Willard). For a thorough discussion of this issue, see generally Neil H. Cogan, *Section 1985(3)'s Restructuring of Equality: An Essay on Texts, History, Progress, and Cynicism*, 39 RUTGERS L. REV. 515 (1987).

63. Senator Morton said:

When the war ended many men who had been in the Union Army remained in the South, intending to make it their home and identify themselves with its fortunes. Others emigrated from the North, taking with them large capital This was their right . . . but they were denounced as adventurers and intruders, and the odious slang of "carpet-baggers" was reechoed by the Democracy of the North, who sent word to the South that these men had no rights they were bound to respect.

Emigration is a part of the genius of the American people. . . . To emigrate from State to State, and there to enjoy all the privileges and immunities of citizens of the United States, is guaranteed by the Constitution

CONG. GLOBE, *supra* note 22, app., at 253.

64. *Id.* app., at 47-48 (remarks of Rep. Kerr); *id.* app., at 216 (remarks of Sen. Thurman).

hoped would provide federal remedies for the deprivations of constitutional rights. During the debates, the proponents of the Ku Klux Klan Act expressed grave concerns about the safety and security of blacks, Republicans, northerners who moved south after the war, and native-born southerners who were loyal to the national government. Clearly, these groups were intended to come within the coverage of the statute since they had been targeted by the Klan. There is ample evidence, however, that Congress did not intend to limit the protection of the statute to only the groups that it identified in the debates. Congress sought to provide a remedy for any group that was singled out by an organization or individuals acting in a conspiracy to deprive that group of rights secured by the Constitution. The key factor was not the composition of the group; rather, it was the motivation of the conspirators. If the actions of the conspirators, motivated not out of a personal vendetta against another individual, but against a group as a whole, had the purpose or the effect of denying constitutional rights, then such a conspiracy would come within the purview of § 1985(3). There is no support for the theory that the statute was designed solely to protect blacks.

In summary, throughout the debates, the rights that were to be protected under § 1985(3) were foremost in the minds of the sponsors. Congress sought to protect all rights held by citizens under the Constitution. While the sponsors referred to the Thirteenth, Fourteenth, and Fifteenth Amendments as potential sources of Congress's power, no legislator sought to limit the reach of the Act to only those amendments. With respect to the equal protection clause of § 1985(3), clearly Congress sought to vindicate Fourteenth Amendment rights. Under the privileges and immunities clause of the statute, however, Congress sought to vindicate any right that a citizen had under any provision of the Constitution. As to the issue of whether the Act was designed to reach private or state actors, there is no indication in the legislative history that Congress intended § 1985(3) to be limited solely to cases involving government officials.⁶⁵ Thus,

65. The view that § 1985(3) was intended to reach private persons is buttressed when the statute is compared with § 1983, which was originally section one of the Act. Whereas § 1983 explicitly contains a requirement that the person causing the constitutional deprivation acted "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory," § 1985(3) contains no such provision. Thus, the debates regarding whether Congress had the authority under the Fourteenth Amendment to punish individuals, the language used in § 1985(3), and the other provisions of the larger Act, point to the conclusion that § 1985(3) was intended to reach private actors. Additionally, the majority of the

when Congress passed the Ku Klux Klan Act, it intended the statute to serve as a protector of the constitutional rights of all citizens against deprivations at the hands of private individuals. Despite that noble intention, the statute has never been accorded the scope that Congress intended.

III. THE SUPREME COURT'S MISINTERPRETATION OF § 1985(3)

Since its enactment in 1871, § 1985(3) has been of little utility because of a long string of cases incorrectly decided by the United States Supreme Court. From the nineteenth century to the present, the Court has been unwilling to allow the statute to serve the noble ends for which it was enacted—to provide a federal remedy for the deprivation of constitutional rights. The Court has limited the scope of the statute by imposing a state action requirement,⁶⁶ a class-based animus prerequisite,⁶⁷ and by circumscribing the classes of individuals that could rely on § 1985(3) as a federal remedy.⁶⁸ In the October 1991 Term, the Court will have the opportunity to consider whether women or women seeking an abortion constitute an appropriate class under § 1985(3).⁶⁹ The Court may also address the issue of which rights are protected under the statute. In this section, the cases interpreting § 1985(3) and the possible outcome of the *Bray* case will be discussed in light of the legislative history of the statute.

A. *United States v. Harris*

Until 1951, § 1985(3) lay dormant, in large part due to the Supreme Court's decision in *United States v. Harris*,⁷⁰ wherein the criminal counterpart to § 1985(3) was declared unconstitutional.⁷¹ *Harris* involved an indictment under § 5519 of twenty

examples cited by the proponents of the statute involved deprivations at the hands of private individuals and not state actors. See *Griffin v. Breckenridge*, 403 U.S. 88, 98-99 (1971).

66. *Collins v. Hardyman*, 341 U.S. 651, 655 (1951).

67. *Griffin*, 403 U.S. at 102.

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

69. *National Org. for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990), cert. granted sub nom. *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991).

70. 106 U.S. 629 (1882).

71. *Id.* at 641. When the Ku Klux Klan Act of 1871 was enacted, section two had a criminal and civil component. Both remedies sought to punish deprivations of constitutional rights under the same set of circumstances, i.e., conspiracies aimed at depriving any person or class of persons of equal protection of the laws or of equal privileges and immunities under the laws. *Id.* at 632. When the United States Statutes were revised in 1874, the

men who removed four prisoners from jail and beat them.⁷² The Court considered the constitutionality of § 5519 under the Thirteenth, Fourteenth, and Fifteenth Amendments.⁷³

With respect to the Thirteenth Amendment, the Court acknowledged that Congress was empowered thereunder "to protect all persons within . . . the United States from being . . . subjected to slavery or involuntary servitude, except as a punishment for crime."⁷⁴ The Court also recognized that Congress had the power to enact legislation securing the equality guaranteed by the Thirteenth Amendment.⁷⁵ The Court, however, viewed § 5519 as exceeding the scope of Congress's power under that Amendment. The fatal flaw in § 5519 was that its reach was not solely limited to deprivations by whites of rights secured by the Thirteenth Amendment for the former slaves.⁷⁶ Thus, unlike the *Griffin* Court, the *Harris* Court saw no class-based animus requirement in the criminal counterpart to § 1985(3). In fact, the Court concluded that under its terms, whites could be protected as well as blacks.⁷⁷

Additionally, the Court in *Harris* had little trouble declaring that § 5519 exceeded Congress's power under the Fourteenth Amendment because that Amendment was directed at state action and private persons were subject to the provisions of § 5519.⁷⁸ Similarly, the Court declared that the Fifteenth

criminal provisions were codified as § 5519 of the Revised Statutes of 1873-74 and the civil counterpart was codified as § 1980 of the Revised Statutes of 1873-74. The civil provision was designated as § 1985(3) in the 1979 United States Code.

72. *Harris*, 106 U.S. at 630-31.

73. *Id.* at 636-37.

74. *Id.* at 640.

75. *Id.*

76. The Court stated:

Under that section it would be an offence for two or more white persons to conspire . . . for the purpose of depriving another white person of the equal protection of the laws. It would be an offence for two or more colored persons, enfranchised slaves, to conspire with the same purpose against a white citizen or against another colored citizen who had never been a slave.

Id. at 641.

77. *Id.*

78. According to the Court, § 5519 was not limited

to take effect only in case the State shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty, or property without due process of law, or deny to any person the equal protection of the laws. It applies, no matter how well the State may have performed its duty. Under it private persons are liable to punishment for conspiring to deprive any one of the equal protection of the laws enacted by the State.

Id. at 639.

Amendment could not provide Congress with a source of power to enact the statute since that Amendment related to the right to vote, and § 5519 was "framed to protect from invasion by private persons, the equal privileges and immunities under the laws, of all persons and classes of persons."⁷⁹ Having determined that the statute was not authorized under these amendments, the Court declared § 5519 unconstitutional.⁸⁰

The *Harris* Court partially recognized the purpose of section two⁸¹ of the Ku Klux Klan Act, but it did not adequately consider the legislative history of the Act in order to determine which rights Congress sought to protect. The Court was correct when it ruled that section two was intended to reach private action. The legislative history is replete with incidents of private marauders, not directly aided by the state, terrorizing certain segments of the southern population. The Court also correctly determined that the statute was designed to protect all classes of persons.

With respect to the constitutionality of the statute, the Court misread the legislative history concerning which rights Congress sought to protect. The sponsors of the bill sought to protect all persons from deprivations of any rights secured by the Constitution. When discussing the privileges and immunities clause of section two, the legislators made it clear that they did not intend to limit that clause solely to Fourteenth Amendment rights.⁸² They declared that whatever privileges and immunities a citizen had, those were to be protected by section two.⁸³ Thus, under a broad reading of the statute, privileges and immunities flowing from the Thirteenth, Fourteenth, and Fifteenth Amendments or from any constitutional source could be protected under section two. Additionally, where there is interference with a state official's duty to provide equal protection, which appears to have been the case in *Harris*, Congress would arguably have the power under the Fourteenth Amendment to enact a statute to remedy such conduct.⁸⁴ In fact, by its terms, section two created a claim where the conspirators prevented or

79. *Id.* at 637.

80. *Id.* at 644.

81. For purposes of clarity, in this section both § 1985(3) and § 5519 will be discussed as section two of the Act.

82. *See supra* notes 50-53, 61-64 and accompanying text.

83. *See supra* notes 61-64 and accompanying text.

84. The Court, in *Collins*, suggested that where private individuals seek to manipulate state officials or to impede them in the performance of their duties, a conspiracy to

hindered a state officer from securing the equal protection of the law to all persons.⁸⁵ Nevertheless, the *Harris* Court ignored the legislative history regarding the rights to be protected and narrowly interpreted the Constitution to declare the criminal counterpart to § 1985(3) unconstitutional.

B. Collins v. Hardyman

After the decision in *Harris*, § 1985(3) was not invoked until 1951. In *Collins v. Hardyman*,⁸⁶ it was alleged that a group of individuals, opposed to the political views and opinions of a California political club, conspired for the purpose of preventing the club from holding a meeting to discuss and adopt a resolution opposed to the Marshall Plan.⁸⁷ The conspirators went to the meeting, assaulted the members of the club, and used other violent means to break up the meeting. The plaintiffs contended that their rights to assemble peaceably and petition the federal government for redress of grievances were violated by the conspirators.⁸⁸ Thus, they sued under § 1985(3).⁸⁹

Although the plaintiffs alleged no Fourteenth Amendment violations, in a 6-3 decision, the Court considered the statute as an enactment pursuant to Congress's Fourteenth Amendment powers. The Court noted that

[s]ince the decision . . . in the *Civil Rights Cases*, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.⁹⁰

In the Court's view, the Fourteenth Amendment protected individuals from state action and not against wrongs by other individuals. After concluding that only state action could run afoul of the Fourteenth Amendment, and considering the statute in question as solely an exercise of Congress's powers under that Amendment, the Court, constrained by its own limited analysis of the source of Congress's power to enact § 1985(3), held that

deprive another person of equal protection of the laws would fall within the ambit of the Fourteenth Amendment. *Collins v. Hardyman*, 341 U.S. 651, 661-62 (1951).

85. *See supra* notes 8, 22.

86. 341 U.S. 651 (1951).

87. *Id.* at 653.

88. *Id.* at 654-55.

89. *Id.* at 653-54.

90. *Id.* at 658 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)) (citation omitted).

state officials must be involved in a conspiracy to deprive another person of the constitutional rights protected by the statute.⁹¹ Private persons acting without state cooperation or participation could not violate the statute.⁹² The dissent took issue with the majority's limited view of the power of Congress to enact a statute that proscribed private conduct violative of constitutional rights. Justice Burton, joined by Justices Black and Douglas, believed that Congress had the power, separate and apart from the Fourteenth Amendment, to protect constitutional rights from deprivations by private persons.⁹³ The dissent contended that this is what Congress had done when it enacted § 1985(3).⁹⁴

While the majority viewed § 1985(3) as solely an exercise of Congress's power under the Fourteenth Amendment, the dissent, consistent with the legislative history of the statute, viewed it as protecting a far broader category of rights than those delineated in the Fourteenth Amendment. Whereas rights flowing from that Amendment can only be violated by state conduct, the dissent alluded to another set of rights that could be invaded by private persons. Among those rights was the right to petition peaceably the federal government for redress of grievances.⁹⁵

91. *Id.* at 655.

92. *Id.* at 655, 658-59, 661.

93. *Id.* at 664 (Burton, J., Black, J., Douglas, J., dissenting).

94. *Id.* at 663-64.

95. *Id.* at 663. Other constitutional rights that are protected from invasion by private individuals are the federal right to free access to the seat of government, *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 43-44 (1867); the right peaceably to assemble to petition the government, *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) ("The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances . . . in an attribute of national citizenship . . ."); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872); the right of protection from attack while in the custody of a federal marshal, *Logan v. United States*, 144 U.S. 263, 285 (1892), the right to inform federal officers of violations of federal law, *In re Quarles*, 158 U.S. 532, 535-36 (1895); the right to interstate travel, *United States v. Guest*, 383 U.S. 745, 757-60 (1966); *Slaughter-House Cases*, 83 U.S. at 79-80; *Crandall*, 73 U.S. (6 Wall.) at 44, 48-49.

Congress's power to protect persons against deprivations by private individuals of the rights of national citizenship is implied from the Constitution and is not derived from any particular provision. See, e.g., Daniel P. Sheehan & Robert D. Rapp, *The Scope and Application of 42 U.S.C. § 1985(3): Beyond the Fourteenth Amendment Question*, 2 ANTIOCH L.J. 131, 145-47 (1982); Marilyn R. Walter, *The Ku Klux Klan Act and the State Action Requirement of the Fourteenth Amendment*, 58 TEMP. L.Q. 3, 50-52 (1985).

It is well established that Congress has the power to legislate for the protection of these fundamental rights against private interference. See, e.g., *Guest*, 383 U.S. at 759 n.17 ("[T]he constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private."); *Guinn v. United States*, 238 U.S. 347, 362-64 (1915); *In re Quarles*, 158 U.S. at 536-37; *Logan v. United States*, 144 U.S. 263,

The majority ignored this point and limited the scope of the statute to Fourteenth Amendment deprivations, thereby emasculating § 1985(3) by removing from its penumbra private conduct violating constitutional rights. Although the allegations in *Harris* clearly came within the category of constitutional rights that Congress has the power to protect against the invasion of private actors, the Court held that the complaint failed to state a claim under § 1985(3).

C. Griffin v. Breckenridge

The Court revisited § 1985(3) in 1971, one hundred years after the statute's enactment. *Griffin v. Breckenridge*⁹⁶ involved a racial incident in Mississippi reminiscent of the type of conduct that formed part of the motivation for the passage of the law originally.⁹⁷ The plaintiffs alleged that the white defendants had entered a conspiracy for the purpose of depriving them of certain rights secured by the Constitution.⁹⁸ Those rights included the right to freedom of speech, movement, and assembly, the right to petition the government for redress of grievances, the right to be secure in their persons and their homes, and the right not to be enslaved. It was alleged that the conspirators had injured the plaintiffs and deprived them of the aforementioned rights in violation of § 1985(3).⁹⁹ On the basis of *Collins*, the court of appeals affirmed the district court's dismissal of the complaint.¹⁰⁰

284 (1892); *United States v. Waddell*, 112 U.S. 76, 79 (1884); *Ex Parte Yarbrough*, 110 U.S. 651, 665 (1884); see also Howard M. Feuerstein, *Civil Rights Crimes and the Federal Power to Punish Private Individuals for Interference with Federally Secured Rights*, 19 VAND. L. REV. 641, 651-65 (1966).

96. 403 U.S. 88 (1971).

97. The facts in *Griffin* were remarkably similar to the Klan's activities in the nineteenth century. The plaintiffs, black citizens of Mississippi, alleged that they were traveling in a vehicle on federal, state, and local highways, when a group of whites attacked them in the mistaken belief that the black passengers were civil rights workers. *Id.* at 89-92.

98. *Id.*

99. *Id.* at 92.

100. *Griffin v. Breckenridge*, 410 F.2d 817, 826 (5th Cir. 1969), *rev'd*, 403 U.S. 88 (1971). The court of appeals questioned the soundness of *Collins* but noted that it was required to follow the *Collins* Court's holding that only conspiracies under color of law could be reached under § 1985(3). *Id.* The court also considered plaintiffs' non-Fourteenth Amendment claims, such as the right to interstate travel, as potentially viable, since those claims did not require state action. The court was constrained, however, by the holding in *Collins* that Congress did not intend for the statute to reach those claims. *Id.* at 822-23.

With respect to the constitutional issue, the Supreme Court avoided explicitly overruling *Collins* by noting that in that case the Court had not based its decision on constitutional grounds, but upon a construction of the statute itself.¹⁰¹ The Court did note that the *Collins* majority had observed that if the complaint alleging a private conspiracy was construed as meeting the requirements of the statute, serious constitutional issues would have been raised. Nevertheless, the *Griffin* Court held that many of the constitutional problems noted in *Collins* no longer existed because of the evolution of decisional law since that case was decided.¹⁰²

Freed from the constraints of *Collins*, the Court turned its attention to identifying a source for Congress's power to enact a statute banning private conspiracies that violated constitutional rights. The Thirteenth Amendment, the Court concluded, authorized Congress to legislate against private individuals. The Court observed that "there has never been any doubt of the power of Congress to impose liability on private persons" under that Amendment.¹⁰³ The Thirteenth Amendment not only prohibited state laws upholding slavery, Congress was also given the power "rationally to determine . . . the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."¹⁰⁴ Based upon its Thirteenth Amendment analysis, the Court held that Congress was "wholly within its powers under . . . the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men."¹⁰⁵ While upholding the statute under the Thirteenth Amendment, the Court expressly chose not to consider its constitutionality under the Fourteenth Amendment.¹⁰⁶

101. *Griffin v. Breckenridge*, 403 U.S. 88, 94 (1971). While technically the Court was correct, the dissent in *Collins* suggested that the majority had decided that § 1985(3) had been enacted pursuant to Congress's Fourteenth Amendment powers. *Collins v. Hardyman*, 341 U.S. 651, 663 (1951) (Burton, J., Black, J., Douglas, J., dissenting). Similarly, the court of appeals in *Griffin* implied that *Collins* had construed the statute as enforcing solely Fourteenth Amendment rights. *Griffin*, 410 F.2d at 819.

102. *Griffin*, 403 U.S. at 95-96.

103. *Id.* at 104-05; see also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-40 (1968) (holding that Congress may pass laws regulating the acts of private individuals pursuant to the Thirteenth Amendment in order to eliminate all racial discrimination).

104. *Griffin*, 403 U.S. at 105 (quoting *Jones*, 392 U.S. at 440).

105. *Id.*

106. *Id.* at 107.

Additionally, the Court stated that the statute protected rights that did not rest on either the Thirteenth or Fourteenth Amendment and that Congress was empowered to enact such legislation.¹⁰⁷ The Court held that the right to interstate travel was constitutionally protected against private and governmental interference and that it was recognized as one of the rights and privileges of national citizenship.¹⁰⁸

Having identified two sources of Congress's power to legislate to prohibit private persons from denying constitutional rights, the Court scrutinized the allegations of the complaint to see if a proper § 1985(3) claim had been alleged.¹⁰⁹ With respect to the Thirteenth Amendment claim, the plaintiffs had alleged that one of the rights violated by the conspirators was their right not to be enslaved.¹¹⁰ The Court held that a conspiracy aimed at depriving blacks of the rights the laws secured to all free persons violated the Thirteenth Amendment.¹¹¹ As to the right to interstate travel claim, the Court noted that the plaintiffs alleged that one of the purposes of the conspiracy was to deprive them of their right to travel the public highways.¹¹² This violated the privileges and immunities section of the Act. Thus, on the basis of the allegations of the complaint, the plaintiffs had established a claim under both of the constitutional sources of power identified by the Court.¹¹³

In *Griffin*, the Court gave § 1985(3) a reading more consistent with its legislative history, but nevertheless prevented the statute from having as broad an impact as was originally intended. The Court correctly determined that the statute was not limited by the Fourteenth Amendment's state action constraints. Instead, the statute could be used, as its sponsors intended, to vindicate privileges and immunities that had as their source the Thirteenth Amendment or the fundamental rights of national citizenship. Nevertheless, the Court, concerned that § 1985(3) could become a general federal tort law, read into the statute a requirement that the *Harris* and *Collins* courts had not. The *Griffin* Court, in order to avoid the broad reach of the language of the statute, replaced the state action requirement with a

107. *Id.* at 104.

108. *Id.* at 105-06; see *supra* note 95 and accompanying text.

109. *Griffin*, 403 U.S. at 102.

110. *Id.* at 91.

111. *Id.* at 105.

112. *Id.* at 103.

113. *Id.* at 102-03.

class-based animus element. The Court concluded that, in order to make out a claim under the statute, a plaintiff had to prove that there was a "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."¹¹⁴ The Court declined to decide whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable despite evidence that the sponsors of the bill intended it to reach more than racial classes.¹¹⁵ In fact, the sponsors made clear that they intended the statute to protect those who had been deprived of their constitutional rights due to their political views, religious beliefs, and regional origins, as well as racial status.

Another difficulty created by the Court's insertion of a racially based, class animus prerequisite was whether that requirement solely pertained to claims based on violations of the Thirteenth Amendment. Arguably, if a claim was based on that Amendment, some racial animus would have to be demonstrated, since slavery in the United States was based on race. The question is whether such would be the case if the rights sought to be protected emanated from other constitutional

114. *Id.* at 102.

115. *Id.* at 102 n.9. In this regard, the Court made reference to the remarks of Senator Edmunds wherein he stated that:

We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, . . . or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, (which is a pretty painful instance that I have in my mind in the State of Florida within a few days where a man lost his life for that reason) then this section would reach it.

CONG. GLOBE, *supra* note 22, at 567. Senator Morton remarked:

If there be organizations in any of the States having for their purpose to deny to any class or condition of men equal protection, to deny to them the equal enjoyment of rights that are secured by the Constitution of the United States, it is the right and duty of Congress to make such organizations and combinations an offense against the United States

Id. app., at 251; *see id.* at 332 (remarks of Rep. Hoar) ("[L]arge numbers of our fellow citizens are deprived of the . . . fundamental rights of citizens . . . because of their attachment to their country, their loyalty to its flag, or because their opinions on questions of public interest coincide with those of a majority of the American people."); *id.* app., at 311 (remarks of Rep. Maynard) ("[T]he unpopular man, the man who entertains odious sentiments, the man whose religion . . . is at variance with the common belief, the man whose political views do not accord with the generally received opinions of the community in which he resides, finds his personal security . . . in peril . . ."); *see also supra* notes 43-47 and accompanying text.

sources, such as the fundamental rights of national citizenship.¹¹⁶ The *Griffin* Court was silent on this question. It was this silence as to the types of classes that came within the protection of the statute and whether all claims involving deprivations of constitutional rights would require class-based animus that led to further confusion regarding the scope of the statute.

D. United Brotherhood of Carpenters, Local 610 v. Scott

In 1983, the Court re-examined § 1985(3) and attempted to grapple with some of the issues left unresolved in *Griffin*. Specifically, in *United Brotherhood of Carpenters, Local 610 v. Scott*,¹¹⁷ the Court addressed whether classes other than racial groups were entitled to relief under the statute and what rights, other than Thirteenth Amendment rights, could form the basis for a claim under § 1985(3).¹¹⁸ In a 5-4 decision, the Court held that a proper claim could be based on non-Thirteenth Amendment rights (here the First Amendment), but re-injected the state action requirement of *Collins*.¹¹⁹ The Court also chose to narrowly limit the types of classes entitled to sue under § 1985(3).

Scott involved mob violence during the course of a labor dispute.¹²⁰ A construction company (A.A. Cross Construction Co., Inc.) hired nonunion employees for a construction job in Port Arthur, Texas. These employees, some of whom were from outside the Port Arthur area, were threatened by local residents, who told them that Port Arthur was a union town and that the company's hiring of nonunion workers would cause trouble.¹²¹ A citizens' protest was organized by a local union. Truckloads of men went to the job site, "assaulted and beat Cross employ-

116. The Court in *United States v. Guest*, 383 U.S. 745 (1966), a case involving an indictment under 18 U.S.C. § 241 and alleging a conspiracy to deprive blacks of the free exercise and enjoyment of rights secured to them by the Constitution, held that:

[I]f the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel, or to oppress a person because of his exercise of that right, then, whether or not motivated by racial discrimination, the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought.

Id. at 760. A similar conclusion should be reached when a claim alleging deprivation of the right of interstate travel is asserted under § 1985(3). Otherwise, blacks would have their rights to such travel protected by the statute, but whites would be at the mercy of the mob or those who sought to interfere with such rights.

117. 463 U.S. 825 (1983).

118. *Id.* at 835.

119. *Id.* at 834.

120. *Id.* at 828.

121. *Id.*

ees, and burned and destroyed construction equipment.”¹²² Several employees filed suit under § 1985(3), alleging that the mob had conspired against them because they refused to join a union and that the conspirators had denied the plaintiffs their First Amendment associational rights.¹²³

The majority confronted the constitutional issue by discussing whether the statute was limited to protecting Thirteenth Amendment rights alone.¹²⁴ The Court re-affirmed *Griffin*’s holding that the statute protected rights other than Thirteenth Amendment rights.¹²⁵ Among the rights protected was the right of interstate travel. The Court concluded that § 1985(3) protected those rights from interference by purely private conspiracies.¹²⁶ The Court was of a different view, however, concerning whether the statute provided a remedy for the deprivation of Fourteenth and First Amendment rights in the absence of state involvement.

With respect to the plaintiffs’ First Amendment claims, the majority observed that such claims were only actionable if the state was involved in the conspiracy or if the aim of the conspiracy was to influence the activity of the state.¹²⁷ This conclusion was based on the Court’s declaration that First Amendment rights were protected against state incursion through the Due Process Clause of the Fourteenth Amendment and that the Fourteenth Amendment prohibited state conduct and not that of individuals.¹²⁸ The Court avoided overruling *Griffin*’s holding that there was no state action requirement in § 1985(3) by distinguishing the rights infringed upon in *Griffin* from those asserted in *Scott*. The Court stated that the rights involved in *Griffin*, Thirteenth Amendment rights and rights of national citizenship, were properly protected against private conspiracies, but the *Scott* Court held that *Griffin* had not categorically stated “that even when the alleged conspiracy is aimed at a right that is by definition a right that is only against state interference the plaintiff . . . need not prove . . . state involvement of some sort.”¹²⁹ While the majority did acknowledge that the complaint in *Grif-*

122. *Id.* at 827-28.

123. *Id.* at 828.

124. *Id.* at 832-33.

125. *Id.* at 832.

126. *Id.* at 832-33.

127. *Id.* at 830-31.

128. *Id.*

129. *Id.* at 833.

fin had alleged a deprivation of First Amendment rights, the action was not sustained on that basis.¹³⁰

After resurrecting the state action requirement of *Collins*, the Court turned its attention to the types of classes protected under the statute. With respect to the categories of classes protected under the statute, the majority in *Scott* was of a mind to limit it solely to racial groups, but chose not to go that far.¹³¹ The Court opined, without citation to the legislative history or its own precedent, that the "predominant purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters."¹³² The Court acknowledged that there was evidence that the statute was designed to have a broader reach, but declined to give that evidence any weight.¹³³ Furthermore, the majority stated that the *Griffin* Court was aware of this evidence and did not base its definition of the categories of classes protected by the statute on it.¹³⁴ The Court concluded that even if the statute was designed to reach conspiracies "aimed at any class . . . on account of its political views or activities, or at any of the classes posited by Senator Edmunds, we find no convincing support in the legislative history . . . that the provision was intended to reach conspiracies motivated by bias towards others on account of their *economic* views, status, or activities."¹³⁵ Thus, the Court held that § 1985(3) could not reach conspiracies motivated by economic animus.¹³⁶

130. *Id.* While the Court may have been correct regarding the treatment of the First Amendment claims in *Griffin*, the dissent in *Collins* was prepared to find a violation of § 1985(3) based on the First Amendment in the absence of state involvement of any kind. *Collins v. Hardyman*, 341 U.S. 651, 663 (1951).

131. The Court stated: "[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." *Scott*, 463 U.S. at 836.

132. *Id.*

133. The Court quoted Senator Edmunds' statement that "if a conspiracy were formed against a man 'because he was a Democrat . . . or because he was a Catholic, . . . or because he was a Vermonter . . . then this section could reach it.'" *Id.* at 837; *see also supra* notes 43-47 and accompanying text. Although Senator Edmunds was the Senate floor manager of the bill, the Court refused to accord his views any weight because "§ 1985(3) . . . [in] its present form, was proposed, debated and adopted . . . [in the House], and the Senate made only technical changes to the bill." *Scott*, 463 U.S. at 837.

134. *Scott*, 463 U.S. at 837. In fact, the reason for the *Griffin* Court's refusal to decide this issue was that it was not necessary, based on the facts of that case, to reach it. The *Griffin* Court stated that "[w]e need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under . . . § 1985(3)." *Griffin v. Breckenridge*, 403 U.S. 88, 102 n.9 (1971).

135. *Scott*, 463 U.S. at 837.

136. *Id.* at 838.

The dissent took the majority to task for its conclusions that the statute had a state action requirement under certain circumstances and that it was designed to reach only racial classes. First, the dissent relied extensively on the legislative history to refute the majority's conclusion regarding state action.¹³⁷ According to the dissent, the Republican supporters of the statute held two views of Congress's power under the Fourteenth Amendment.¹³⁸ The radical Republicans believed that the Fourteenth Amendment had altered the balance of power between the states and the national government and that Congress was empowered to enact legislation to protect life, liberty, and property.¹³⁹ The moderate Republicans thought that the Fourteenth Amendment's Equal Protection Clause implied that the states had an affirmative duty to afford equal protection.¹⁴⁰ When the state neglected or refused to provide equal protection, Congress was empowered to step in and punish all persons, private or official, who deprived another of constitutional rights.¹⁴¹ The dissent believed that these comments, and others relied upon in its opinion,¹⁴² supported the conclusion that the statute was designed to protect persons who were the victims of "private conspiracies motivated by the intent to interfere in the equal exercise and enjoyment of their legal rights"¹⁴³ and that Congress did not intend any state action requirement.¹⁴⁴

Having concluded that there was no state action requirement in § 1985(3), the dissent sharply criticized the majority for adopting a prerequisite of state involvement virtually identical to

137. *Id.* at 841-47 (Blackmun, J., Brennan, J., Marshall, J., O'Connor, J., dissenting).

138. *Id.* at 842-43.

139. *Id.* at 842; *see, e.g.*, CONG. GLOBE, *supra* note 22, app., at 73 (remarks of Rep. Blair); *id.* app., at 85 (remarks of Rep. Bingham); *id.* app., at 141 (remarks of Rep. Shanks); *see also supra* notes 55-59 and accompanying text.

140. *Scott*, 463 U.S. at 843 (Blackmun, J., Brennan, J., Marshall, J., O'Connor, J., dissenting) (citing CONG. GLOBE, *supra* note 22, app., at 153 (remarks of Rep. Garfield)); *see also supra* note 53 and accompanying text.

141. *Scott*, 463 U.S. at 843 (Blackmun, J., Brennan, J., Marshall, J., O'Connor, J., dissenting).

142. The dissent relied on the additional comments of Representative Garfield, CONG. GLOBE, *supra* note 22, app., at 153 (an equal protection claim is established when the state refuses to enforce the provisions of its own laws); Representative Shellabarger, *id.* at 478 (the object of the statute was to prevent deprivations which attacked the equality of rights of American citizens); and Representative Willard, *id.* app., at 188 (the statute was designed to punish a denial of equality). *See Scott*, 463 U.S. at 843-46 (Blackmun, J., Brennan, J., Marshall, J., O'Connor, J., dissenting).

143. *Scott*, 463 U.S. at 847 (Blackmun, J., Brennan, J., Marshall, J., O'Connor, J., dissenting).

144. *Id.*

that of the *Collins* Court.¹⁴⁵ The dissent also noted that the *Harris* Court had held that the statute reached private conspiracies.¹⁴⁶ Additionally, they stated that *Griffin* expressly rejected any suggestion found in *Collins* that there was a state action requirement in § 1985(3).¹⁴⁷

Finally, the dissent disparaged the majority's refusal to extend the protections of § 1985(3) beyond racial classes.¹⁴⁸ They acknowledged that the types of classes covered by the statute were unclear.¹⁴⁹ Under their reading of the language of § 1985(3), however, it could include a wide variety of class-based denials of equal protection and equal enjoyment of rights. Reviewing the legislative history, the dissent reached the conclusion that the forty-second Congress viewed the Klan as a political organization whose violence was premised on the political viewpoints of its victims.¹⁵⁰ The Klan's goal was to overthrow the Reconstruction policy of Congress in order to place Democrats in office. Blacks were clearly victimized by the Klan's use of terror, but according to the dissent, this was because of the identification of blacks with the Republican Party and Reconstruction.¹⁵¹

Based on the legislative history, the dissent was of the view

145. *Id.* at 848-49.

146. *United States v. Harris*, 106 U.S. 629, 639 (1882) ("Under . . . [§ 1985(3)] private persons are liable to punishment for conspiring to deprive any one of the equal protection of the laws. . . ."); *cf.* *United States v. Williams*, 341 U.S. 70, 76 (1951) (plurality opinion) (finding similar conspiracy provision, 18 U.S.C. § 241, reaches private action).

147. *Scott*, 463 U.S. at 849-50 (Blackmun, J., Brennan, J., Marshall, J., O'Connor, J., dissenting). In rejecting a state action requirement, the *Griffin* Court relied upon other provisions of the Ku Klux Klan Act and the legislative history. The Court postulated three possible forms for a state action limitation and concluded that each had been covered under other provisions of the Act. With respect to a possible requirement that the action of the conspirators be under color of state law, the Court concluded that section one of the Ku Klux Klan Act (currently codified as 42 U.S.C. § 1983 (1988)) covered that situation, and that to read such a requirement into § 1985(3) would deprive that section of all independent effect. *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971). Similarly, another clause of § 1985(3) provided a remedy where the conspirators sought to interfere with or influence state authorities. Finally, section three of the Act provided for military action at the command of the president where massive private lawlessness rendered state authorities powerless. *Id.* at 98-99. Thus, from a statutory construction analysis, the Court found no basis for implying a state action limitation on § 1985(3). The legislative history that the *Griffin* Court reviewed led to a similar conclusion. *Id.* at 100-01.

148. *Scott*, 463 U.S. at 850 (Blackmun, J., Brennan, J., Marshall, J., O'Connor, J., dissenting).

149. *Id.*

150. *Id.* at 850-51; *see also supra* notes 33-36 and accompanying text.

151. *Scott*, 463 U.S. at 850 n.15 (Blackmun, J., Brennan, J., Marshall, J., O'Connor, J., dissenting).

that Congress intended to provide a federal remedy for all classes whose rights were violated in circumstances similar to those of the victims of Klan violence.¹⁵² They contended that the forty-second Congress enacted § 1985(3) because of its perception that the Klan was committing atrocities against persons who, "largely because of their political affiliation, were unable to demand protection from local law enforcement officials."¹⁵³ Accordingly, the statute was designed to provide a remedy "to any class of persons, whose beliefs or associations placed them in danger of not receiving equal protection of the laws from local authorities."¹⁵⁴ The dissent concluded that although "certain class traits, such as race, religion, sex, and national origin" met this requirement per se, "other traits also may implicate the functional concerns" of the statute "in particular situations."¹⁵⁵ Thus, the dissent would have found the nonunion employees in *Scott* a cognizable class under § 1985(3).

On one hand, the *Scott* Court upheld the holding of *Griffin* that non-Thirteenth Amendment rights were actionable under § 1985(3). This view of the statute is supported by the legislative history wherein the sponsors of the bill stated that their intent was to protect all privileges and immunities that a citizen had under any provision of the Constitution.¹⁵⁶ By requiring state action when certain constitutional rights were alleged to have been infringed upon, however, the *Scott* Court resurrected *Collins* and threw the continued vitality of the statute into question.

The *Griffin* Court had demonstrated adequately that when the statute was read in its original context, it became obvious that a state action limitation would make § 1985(3) superfluous.¹⁵⁷ The legislative history demonstrates that the cause for Congress's concern was not that state officials were actively denying constitutional rights. Instead, Congress was concerned that private actors had taken the law into their own hands and, thereby, prevented state officials from affording equal protection to all classes.¹⁵⁸ These persons, at times acting under the aegis of the Klan, used intimidation, terror, and violence in pursuit of their political objectives. Thus, the *Scott* dissent correctly con-

152. *Id.* at 851.

153. *Id.* at 853.

154. *Id.*

155. *Id.*

156. See *supra* notes 61-64 and accompanying text.

157. *Griffin v. Breckenridge*, 403 U.S. 88, 98-99, 100-01 (1971).

158. See *supra* notes 33-36 and accompanying text.

cluded that the purpose of the statute was to provide a remedy against private individuals who infringed on constitutional rights. Additionally, the dissent correctly described the factual situation in the South in 1871 wherein blacks, and others with unpopular views, were unable to acquire protection from local law enforcement, either because the Klan had entered into a tacit agreement with the state officials, or because they were powerless to stop the Klan. Thus, the primary purpose of the statute was to provide a remedy against the acts of private persons, and not against the acts of the state.

Finally, the *Scott* Court's refusal to extend the scope of classes protected under the statute is inconsistent with the legislative history. The forty-second Congress was concerned with attacks against blacks, their supporters, Republicans, religious figures, northerners, southern union sympathizers, and symbols of the federal government.¹⁵⁹ There was ample evidence that Congress was concerned with the deprivation of rights against a wide variety of individuals, and the Court in *Harris* had so concluded.¹⁶⁰ Thus, a proper view of the statute would be that when a group is attacked or its members deprived of their constitutional rights because of an identifiable group characteristic such as race, sex, national origin, or political views that the conspirators oppose, § 1985(3) should provide a remedy. Additionally, where a conspiracy seeks to deny to others their constitutionally secured right to interstate travel, or any other fundamental right of national citizenship, no showing of class-based animus should be required.¹⁶¹

E. Bray v. Alexandria Women's Health Clinic

In the October 1991 Term, the Supreme Court will have another opportunity to clarify or to restrict further the reach of § 1985(3).¹⁶² In *Bray*, the court of appeals affirmed the district court's issuance of a permanent injunction under § 1985(3) preventing Operation Rescue and several individual members from blockading, trespassing, or otherwise preventing access to

159. See *supra* notes 36-39 and accompanying text.

160. The *Harris* Court stated that "[u]nder [§ 1985(3)] it would be an offence for two or more white persons to conspire . . . for the purpose of depriving another white person of the equal protection of the laws." *United States v. Harris*, 106 U.S. 629, 641 (1882).

161. See *United States v. Guest*, 383 U.S. 745, 760 (1966).

162. *National Org. for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990),

abortion facilities.¹⁶³ The Fourth Circuit also upheld the district court's finding that gender-based discrimination satisfied the class-based animus requirement of § 1985(3) and that Operation Rescue and the other defendants had violated the right of women to travel interstate.¹⁶⁴

In *Bray*, the Court is presented with several options. One, it could declare that *Griffin* was decided incorrectly and hold that *Collins*'s state action requirement applies to all claims asserted under § 1985(3). Two, it could hold that women or women seeking an abortion do not constitute a valid class for § 1985(3) purposes. Three, it could undercut the right of women to an abortion by ruling that § 1985(3) was not intended to protect women seeking an abortion, since the evil to be remedied by Congress was Klan terror against blacks and their supporters. However, a careful review of the facts presented by the case, the legislative history of § 1985(3), and the Court's precedent under that statute should result in the affirmance of the opinions of the lower courts.

In the district court, the plaintiffs included nine clinics that provided abortions and abortion counselling to residents of the Washington, D.C., metropolitan area.¹⁶⁵ Five organizations also sued on behalf of their members. Among the organizational plaintiffs were the National Organization for Women and Planned Parenthood of Metropolitan Washington, D.C. Operation Rescue and several of its members were named as defendants. The district court found that Operation Rescue was an unincorporated association whose members oppose abortion and its legalization.¹⁶⁶ The organization and its members would blockade an abortion clinic's entrances and exits, thereby effec-

cert. granted sub nom. *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991). Among the issues presented by the petition for certiorari are the following:

1. Whether women seeking abortions constitute a class for the purpose of the class-based animus requirement of § 1985(3).
2. Whether opposition to abortion is discrimination per se against women for the purpose of satisfying the class-based animus requirement of the statute.
3. Whether purely private actors who hinder access to abortion facilities violate the constitutional right to interstate travel because some of the facility's patients travel interstate.

163. *National Org. for Women*, 914 F.2d at 585.

164. *Id.* at 584-85.

165. *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1487 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom.* *Bray v. Alexandria Women's Health Clinic*, 111 S. Ct. 1070 (1991).

166. *Id.*

tively closing the facility and denying women access.¹⁶⁷

The district court found that the purpose of Operation Rescue's blockading of abortion clinics was to disrupt operations at those facilities and to cause the clinic to cease operation entirely. By disrupting these clinics, the defendants hoped to "prevent abortions," "dissuade women from seeking a clinic's abortion services," and "to impress upon members of society the . . . intensity of their anti-abortion views."¹⁶⁸ The court found that the practice of preventing access to these facilities could be harmful to the health of women seeking or undergoing abortion-related treatment.¹⁶⁹ In addition to the risk to the physical health of the patients, the court concluded that these blockades could impose stress, anxiety, and mental harm to patients or potential patients.¹⁷⁰

The court also found that substantial numbers of women seeking abortions in the Washington, D.C., metropolitan area traveled interstate to reach the clinics.¹⁷¹ The court held that the blockading of abortion clinics had the effect of "obstructing and interfering with the interstate travel of these women."¹⁷² The court further found that Operation Rescue was able to close down clinics notwithstanding the efforts of the local police to prevent the clinics from being closed.¹⁷³ The court found that

167. *Id.*

168. *Id.* at 1488.

169. The court found that for some women who elect to undergo an abortion, a pre-abortion laminaria is inserted to achieve proper cervical dilation. In order to avoid infection, such devices must be removed in a timely fashion. If the defendants closed a facility, women seeking laminaria removal would be placed at risk or would have to seek services elsewhere. *Id.* at 1489. There were numerous economic and psychological barriers to obtaining these services elsewhere. The court found that indigent or impecunious patients were provided abortion services at nominal fees by the clinics, whereas hospitals would require insurance or full payment. *Id.* Thus, for these women, Operation Rescue's blockade of an abortion facility could impose serious health risks.

170. *Id.*

171. Approximately 20-30% of the patients served at the Commonwealth Women's Clinic in Falls Church, Virginia, came from out of state. The records of these patients revealed they had permanent residences in Maryland, the District of Columbia, Pennsylvania, Texas, West Virginia, New Jersey, New York, and Florida. A majority of the patients at the Hillview Women's Center in Forestville, Maryland, traveled interstate to reach the clinic. *Id.*

172. *Id.*

173. To support this conclusion, the court relied on trial testimony relating to the closing of the Commonwealth Women's Clinic. The clinic had been the object of Operation Rescue's blockades on almost a weekly basis for five years prior to the litigation. On October 29, 1988, the clinic was closed by the blockade despite the efforts of the Falls Church Police Department to keep the facility open. The testimony revealed that the department consisted of thirty deputized officers. On the date in question, the blockaders

"[l]imited 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."¹⁷⁴

After determining that the defendants engaged in conduct that could result in a deprivation of constitutional rights, the court analyzed the facts to ascertain whether a § 1985(3) violation was established. The court found that gender-based discrimination satisfied the class-based discriminatory animus element of the statute.¹⁷⁵ Thus, a conspiracy to deprive women seeking abortions of their right to travel interstate to obtain such services was actionable under the statute.¹⁷⁶ Based on its factual findings, the court concluded that the defendants had engaged in a conspiracy for the purpose of depriving women seeking abortions or related medical services of the right to travel interstate.¹⁷⁷ The court further found that since the right to travel interstate is protected against purely private as well as governmental interference, there was no need to show state action.¹⁷⁸

Although the plaintiffs argued that the defendants had violated the privacy rights of women seeking abortions, the court declined to base its decision on that ground.¹⁷⁹ Having found

outnumbered the police officers, and, even though 240 arrests were made, the clinic was closed for more than six hours. *Id.* at 1489 n.4.

174. *Id.*

175. In reaching that conclusion, the court noted that the majority of courts have concluded that gender-based animus satisfies the conspiracy requirement of the statute. *Id.* at 1492; *see, e.g.*, *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988); *Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985); *Roe v. Operation Rescue*, 710 F. Supp. 577, 581 (E.D. Pa. 1989); *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247, 1259 (S.D.N.Y.), *aff'd*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 712 F. Supp. 165, 169 (D. Or. 1988).

176. *National Org. for Women*, 726 F. Supp. at 1493.

177. *Id.* at 1492-93.

178. *Id.*

179. The plaintiffs contended that the conspiracy infringed on the constitutional right of women to obtain an abortion. The court stated that "[w]here the claimed abortion right is a penumbral privacy right emanating from the First Amendment, state action must be shown to support a claim under Section 1985(3)." *Id.* at 1493 n.11; *accord* *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 833 (1983); *see also* *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1358 (2d Cir. 1989) (stating requirement that state action must be demonstrated when the right asserted is a guarantee against government interference), *cert. denied*, 110 S. Ct. 2206 (1990). The district court acknowledged that there was authority for the proposition that where conspirators render local police officials "incapable of securing equal access to medical treatment for women who choose abortions," the state action requirement is satisfied. *National Org. for Women*, 726 F. Supp. at 1493 n.11; *see also* *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366,

that the plaintiffs had established a violation of § 1985(3), the court issued a permanent injunction against the defendants preventing them from further blockades of certain Washington, D.C., metropolitan area abortion clinics.¹⁸⁰

The Fourth Circuit upheld the district court's opinion and the issuance of the permanent injunction. The circuit court agreed that gender-based animus satisfied the purpose element of § 1985(3) and stated that such a conclusion was consistent with the law of other circuits.¹⁸¹ The circuit court also upheld the district court's conclusion that blocking access to medical services provided by abortion facilities that serve an interstate clientele violates the constitutional right to interstate travel.¹⁸²

The granting of the petition for certiorari in *Bray* presents the Court with the opportunity either to interpret § 1985(3) consistently with the intent of the forty-second Congress and the Court's own precedent or to unsettle an entire body of law. Essentially, there are two major issues presented by this case. First, whether women or women seeking an abortion constitute

384 (1979) ("[I]f 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 Fourteenth Amendment . . ."); cf. *Scott*, 463 U.S. at 853 (Blackmun, J., dissenting) ("Congress intended to provide a remedy to any class of persons, whose beliefs or associations placed them in danger of not receiving equal protection of the laws from local authorities."). The district court declined to reach the merits of this argument, in part because of its conclusion that the right to an abortion is in flux. *National Org. for Women*, 726 F. Supp. at 1494; see, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 518 (1989) ("We have not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice.' We think the *Roe* trimester framework falls into that category.") (citations omitted); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 421 (1983); *Harris v. McRae*, 448 U.S. 297, 301 (1980).

180. *National Org. for Women*, 726 F. Supp. at 1496-97. Other courts have similarly enjoined blockades of abortion clinics. See, e.g., *Cousins v. Terry*, 721 F. Supp. 426, 432 (N.D.N.Y. 1989); *New York State Nat'l Org. for Women v. Operation Rescue*, 704 F. Supp. 1247, 1276 (S.D.N.Y. 1989); *Roe v. Operation Rescue*, 710 F. Supp. 577, 589 (E.D. Pa. 1989); *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371, 382-83 (D. Conn. 1989); *Northeast Women's Ctr. v. McMonagle*, 665 F. Supp. 1147, 1159 (E.D. Pa. 1987).

181. *National Org. for Women v. Operation Rescue*, 914 F.2d 582, 585-86 (4th Cir. 1990), cert. granted sub nom., *Bray v. Alexandria Women's Clinic*, 111 S. Ct. 1070 (1991); see, e.g., *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989), cert. denied, 110 S. Ct. 2206 (1990); *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988); *Stathos v. Bowden*, 728 F.2d 15, 20 (1st Cir. 1984); *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1244 (3d Cir. 1978), vacated on other grounds, 442 U.S. 366 (1979); *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979); *Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978).

182. *National Org. for Women*, 914 F.2d at 585; accord *New York State Nat'l Org. for Women*, 886 F.2d at 1360-61.

a proper class for protection under § 1985(3). Second, whether the statute was designed to provide a remedy for deprivations of the fundamental rights of national citizenship.

Griffin held that an essential element of a § 1985(3) claim was that the defendants must act upon some class-based, invidiously discriminatory basis.¹⁸³ Because that case involved a conspiracy by a group of whites against blacks traveling on the highways of Mississippi, the Court chose not to speculate as to the parameters of the class-based animus requirement. The majority in *Scott* opined that only racial classes were protected under the statute, but declined to limit the reach of § 1985(3) so narrowly.¹⁸⁴ The dissent in *Scott* stated that a conspiracy against women would be actionable under the statute,¹⁸⁵ and a number of circuits have so concluded.¹⁸⁶ A possible rule as to the types of classes that would come within the purview of § 1985(3) would be that where the class consists of members who have been subjected to discriminatory treatment as a group, the class-based requirement would be satisfied. Clearly, women as a group have been subjected to discriminatory treatment in many different contexts.¹⁸⁷ As Justice Brennan stated in *Frontiero*:

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.

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

184. *Scott*, 463 U.S. at 836-37.

185. *Id.* at 853 (Blackmun, J., Brennan, J., Marshall, J., O'Connor, J., dissenting).

186. *See supra* note 181.

187. In 1872, the Court upheld an Illinois statute prohibiting women from practicing law. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872). During the Burger years, the Court struck down a number of gender-based discriminatory classifications as violating the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*, *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (difference in benefits based on gender of unemployed spouse); *Caban v. Mohammed*, 441 U.S. 380, 392 (1979) (state law giving unwed mothers, but not unwed fathers, the right to prohibit adoption); *Orr v. Orr*, 440 U.S. 268, 271 (1979) (requiring only husbands to pay alimony); *Califano v. Goldfarb*, 430 U.S. 199, 204 (1977) (gender-based survival benefits under the Social Security Act); *Stanton v. Stanton*, 421 U.S. 7, 17 (1975) (differences in termination of child support based on child's sex); *Weinberger v. Weisenfeld*, 420 U.S. 636, 639 (1975) (gender-based survivor's benefits under the Social Security Act); *Frontiero v. Richardson*, 411 U.S. 677, 678 (1973) (federal statute requiring women officers in armed services to prove actual dependency of spouses in order to qualify for increased benefits); *Reed v. Reed*, 404 U.S. 71, 77 (1971) (mandatory preference to men over women in the appointment of estate administrators).

....

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.¹⁸⁸

Thus, given the long, sordid history of sex-based discrimination against women as a group, which is analogous to race-based discrimination against blacks, a statute designed to provide a remedy for deprivations of the constitutional rights of the latter should be able to shelter the former from the same types of conduct.

An alternative theory that could result in an affirmance of the lower court's opinion in *Bray* was suggested in *Scott*. The majority, expressing doubts as to whether the statute was designed to protect classes other than blacks and their supporters, noted that there was legislative history to support the view that § 1985(3) had a broader reach and implied that there was some indication that the statute could reach conspiracies aimed at a class on account of its political views or activities.¹⁸⁹ The *Scott* dissent was willing to go further and explicitly hold that the statute was designed to protect those victimized because of their political viewpoint.¹⁹⁰ In Justice Blackmun's view, the statute was designed to protect "all *classes* that seek to exercise their legal rights in unprotected circumstances similar to those of the victims of Klan violence."¹⁹¹ Thus, under this reading of the statute, a class based on unpopular political views would be appropriate for § 1985(3)'s protection.

Utilizing the alternative political conspiracy theory, women seeking an abortion could constitute a proper class in *Bray*. In *Bray*, the Operation Rescue blockaders formed their conspiracy in reaction and opposition to the right of women to seek an abortion. But for the women's political view that they had a constitutional right to seek an abortion, Operation Rescue would not have formed a conspiracy to prevent this class of women from gaining access to the abortion clinics. It is because of their political viewpoint, unpopular with the Operation Rescue activists,

188. *Frontiero*, 411 U.S. at 684-85.

189. *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 836-37 (1983).

190. *Id.* at 850-51 (Blackmun, J., Brennan, J., Marshall, J., O'Connor, J., dissenting).

191. *Id.* at 851.

that these women have been singled out as victims by the blockaders. Just as the Klan used terror tactics to prevent blacks from exercising their newly acquired constitutional rights, Operation Rescue seeks through intimidation to accomplish the same end with respect to women seeking an abortion.

Under the political conspiracy theory, the plaintiffs would have to show that they could not obtain adequate protection from the local police forces. The *Scott* dissenters stated that Congress intended under § 1985(3) to provide a remedy to "any class of persons, whose beliefs or associations placed them in danger of not receiving equal protection of the laws from local authorities."¹⁹² In Justice Blackmun's view, a plaintiff would not have to allege neglect on the part of state officers to enforce the law equally, rather an inference would be raised that there was ineffective state enforcement whenever a conspiracy involved invidious animus towards a class of persons.¹⁹³ This would be especially true when the victimizers targeted a group because of its unpopular political views. This requirement is met in *Bray*. As the district court found, the local police departments were unable to prevent the clinics' closure by the blockaders. In fact, the police on many occasions were outnumbered by the activists.¹⁹⁴ Thus, the local police were unable to prevent the blockaders from denying women seeking abortions access to the clinics. The facts in *Bray* are similar to those that confronted the forty-second Congress and prompted it to enact § 1985(3): the inability or unwillingness of the local law enforcement entities to protect blacks and others in the exercise of their constitutional rights. Therefore, the remedy created to address a similar factual situation should be available to those whose rights are now violated by Operation Rescue's attempt to replace government by law with mob rule.

An alternative theory to avoid the class-based animus prerequisite altogether would be to argue that where a § 1985(3) claim is based on a fundamental right of national citizenship, no discriminatory motivation is required. This rule would be consistent with the legislative history since many proponents of the statute stated that it was designed to protect all classes of citi-

192. *Id.* at 853.

193. *Id.* at 851.

194. *National Org. for Women v. Operation Rescue*, 726 F. Supp. 483, 1489 n.4 (E.D. Va. 1989).

zens.¹⁹⁵ Such a rule would also be consistent with *Harris*, wherein the Court stated that the criminal counterpart to § 1985(3) could reach a private conspiracy by whites to deprive other whites of constitutional rights.¹⁹⁶ Similarly, the *Guest* Court expressly held in a case involving a conspiracy under 18 U.S.C. § 241 to deprive others of the right to interstate travel that there was no need to show racial discrimination when that right of national citizenship was infringed upon by others.¹⁹⁷ This view of the statute would rectify the confusion engendered by the *Griffin* Court's failure to distinguish claims brought under § 1985(3) alleging Thirteenth Amendment violations and claims alleging deprivations of the fundamental rights of national citizenship.

Although the court may disagree as to whether women, or women with unpopular political views in the minds of Operation Rescue's adherents, constitute an appropriate class for § 1985(3) purposes, there should be unanimity regarding the protection of a fundamental right of national citizenship. The *Griffin* Court expressly recognized that the statute protected the right of interstate travel and that Congress may legislate to prevent both private and governmental interference with that right.¹⁹⁸ The *Scott* Court affirmed that § 1985(3) protected the right to interstate travel.¹⁹⁹ In *Bray*, the district court found that a large percentage of women who sought treatment at Washington, D.C., metropolitan area clinics travelled interstate to obtain those services.²⁰⁰ The court further found that the actions of Operation Rescue in blockading abortion clinics interfered with the right of women to travel interstate.²⁰¹ In light of the Supreme Court's prior rulings and the district court's factual findings, there should be little doubt that § 1985(3) protects the constitutional right of women to travel interstate.

IV. CONCLUSION

Based on the legislative history and the Court's own precedent, the Fourth Circuit's affirmance of the district court's issu-

195. See *supra* notes 43-47 and accompanying text.

196. *United States v. Harris*, 106 U.S. 629, 641 (1882).

197. *United States v. Guest*, 383 U.S. 745, 760 (1966).

198. *Griffin v. Breckenridge*, 403 U.S. 88, 105-06 (1971).

199. *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 832-33 (1983).

200. *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1489 (E.D. Va. 1989).

201. *Id.* at 1493.

ance of a permanent injunction against Operation Rescue should be upheld because the factual situation presented by the anti-abortion activists is similar to that of the South in 1871. Then, as now, massive numbers of private individuals formed organizations and took actions designed to frustrate and set at naught constitutional rights. Then, the Klan sought to prevent blacks and others from exercising a host of rights, including those protected under the Thirteenth, Fourteenth, and Fifteenth Amendments, as well as the fundamental rights of national citizenship. Now, individuals militantly opposed to abortions have formed organizations designed to frustrate the right of women to cross state lines for the purposes of seeking abortions. In 1871, the local law enforcement officers stood powerless before the wrath of the Klan, proving completely ineffective in preventing the terror that the Klan visited upon its victims and, at times, tacitly supporting the objectives of the Klan. Similarly, due to the massive numbers of persons blockading abortion clinics under Operation Rescue's aegis and the passions aroused by the abortion issue and Operation Rescue's tactics, local law enforcement officers are unable or unwilling to prevent them from denying access to abortion facilities to women who have traveled interstate to utilize those clinics. Thus, both the factual situation at the time of the enactment of § 1985(3) and that presented by Operation Rescue's obstruction of access to abortion clinics require a similar remedy. Section 1985(3) was designed for that purpose.