HINDERING THE APPLICABILITY OF 42 U.S.C. § 1985(3) TO ABORTION PROTESTS: BRAY
v. ALEXANDRIA WOMEN'S HEALTH CLINIC

INTRODUCTION

After the Civil War, Congress enacted the Civil Rights Act of 1871 ("Act" or "section 1985(3)") as a remedy to the growing number of Ku Klux Klan riots in the South. The Act prohibited state officials from violating the constitutional rights of citizens and also prohibited acts of mob violence. After the Reconstruction Era, the Act fell into disuse and was not revitalized until the civil unrest of the 1960s. Now codified at section 1985(3), the Act contains two clauses, the "deprivation" clause and the "hindrance" clause. The deprivation clause protects against conspiracies seeking to deprive individuals of their equal rights. The hindrance clause protects against conspiracies seeking to hinder local police in the equal protection of an individual's rights.

2. United Bhd. of Carpenters, 463 U.S. at 839 (Blackmun, J., dissenting).

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 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 person conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against one or more of the conspirators.

5. Id.
6. Id.
However, from its inception the courts have disagreed on the elements of a cause of action under section 1985(3).\(^7\)

In Bray v. Alexandria Women’s Health Clinic,\(^8\) the United States Supreme Court had an opportunity to determine whether section 1985(3) creates a federal remedy against abortion protestors who obstructed ingress to and egress from abortion clinics.\(^9\) Based on the Court’s holding in Griffin v. Breckenridge,\(^10\) the Court determined that the abortion clinics’ cause of action failed under the deprivation clause of section 1985(3) because it did not state a right that was both protected against private interference and the subject of an alleged conspiracy.\(^11\) However, a plurality of the Court suggested that the requirements of Griffin would apply equally to an alleged violation of the hindrance clause of section 1985(3).\(^12\) Therefore, the plurality would require proof of a “class-based, invidiously discriminatory animus” for an alleged cause of action under the hindrance clause.\(^13\)

This Note first reviews the holding of the Court in Bray v. Alexandria Women’s Health Clinic.\(^14\) This Note then addresses the ambiguities in the federal cases that have analyzed and applied section 1985(3).\(^15\) Finally, this Note analyzes the Court’s misapplication of the hindrance clause in Bray,\(^16\) and concludes that the hindrance clause of section 1985(3) creates a federal cause of action against abortion protestors.\(^17\)

**FACTS AND HOLDING**

Operation Rescue is an organization whose members oppose the legalization of abortions and seek to prevent further abortions by organizing anti-abortion demonstrations.\(^18\) The groups’ demonstrations (“rescue demonstrations”) generally include trespassing on abortion

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\(^7\) See infra notes 90-201 and accompanying text.

\(^8\) 113 S. Ct. 753 (1993).


\(^10\) 403 U.S. 88 (1971).

\(^11\) Bray, 113 S. Ct. at 764.

\(^12\) See id. at 765.

\(^13\) Id.

\(^14\) See infra notes 18-71 and accompanying text.

\(^15\) See infra notes 72-201 and accompanying text.

\(^16\) See infra notes 202-55 and accompanying text.

\(^17\) See infra notes 256-69 and accompanying text.

clinics' premises and obstructing ingress to and egress from abortion clinics. In the past, rescue demonstrations successfully targeted several Washington, D.C., metropolitan area clinics, forcing clinic closures and destroying property. On one occasion in October of 1988, Operation Rescue members succeeded in closing down an abortion clinic for six-and-one-half hours, notwithstanding attempts by the police department at bringing order. Members damaged fences, defaced clinic signs, and blocked access to the clinic's parking lot. In order to prevent the passage of cars, members spread nails across the parking lots and public streets in the vicinity of the clinic.

On November 8, 1989, nine Washington, D.C., abortion clinics along with several pro-choice organizations filed a motion for a temporary restraining order in the United States District Court for the Eastern District of Virginia. The purpose of the motion was to enjoin Operation Rescue from conducting anti-abortion demonstrations at abortion clinics in the Washington, D.C., metropolitan area. The motion was based on Operation Rescue's alleged plans for a series of meetings and rescue demonstrations targeted at abortion clinics in the Washington, D.C., metropolitan area.

The abortion clinics asserted two causes of action based on violations of section 1985(3), which provides a remedy against conspiracies that (1) "depriv[e], 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" ("deprivation clause") or (2) "prevent[ ] or hinder[ ] 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" ("hindrance clause"). First, the abortion clinics claimed that Operation Rescue had violated section 1985(3) by conspiring to interfere with the right of the clinic's patients to interstate travel. Second, the abortion clinics claimed that the rescue demonstrations had violated section 1985(3) by infringing on the fundamen-

21. Id. at 1489. Trial testimony disclosed that although 240 demonstrators were arrested, police were still inhibited from preventing the closing of the clinic for over six hours. Id. at 1490 n.4.
22. Id. at 1489-90.
23. Id. at 1490.
25. Bray, 113 S. Ct. at 758.
tal right to privacy.\textsuperscript{29} Acknowledging that the second claim lacked state action as required under the deprivation clause, the abortion clinics argued that the right to obtain abortions is so fundamental as to be guaranteed against all interference, both public and private.\textsuperscript{30}

After an expedited hearing the district court granted the abortion clinics' motion for a temporary restraining order.\textsuperscript{31} After a two-day trial on the merits, the court granted the abortion clinics' request for a permanent injunction.\textsuperscript{32} The court enjoined Operation Rescue from "trespassing on, blockading, impeding or obstructing access to or egress from" the Washington, D.C., metropolitan area abortion clinics.\textsuperscript{33} In determining that the abortion clinics had stated a cause of action under section 1985(3), the court held that Operation Rescue's activities amounted to a conspiracy to deprive women seeking abortions and related services of the right to interstate travel in search of medical services, thus violating the deprivation clause.\textsuperscript{34} The court reasoned that Operation Rescue's gender-based animus satisfied the required "purpose of depriving ... a person ... of the equal protection of the laws" because Operation Rescue's purpose was to deny women as a class the equal protection of the law.\textsuperscript{35}

Operation Rescue appealed the decision to the United States Court of Appeals for the Fourth Circuit.\textsuperscript{36} The Fourth Circuit affirmed the district court's holding.\textsuperscript{37} The court relied on the district court's finding that Operation Rescue's activities furthered their purpose of preventing abortions and coercively operated to deny the pa-

\textsuperscript{29} Id. at 1493.
\textsuperscript{30} Id. at 1493-94.
\textsuperscript{31} Id. at 1486.
\textsuperscript{32} Id. at 1486-87.
\textsuperscript{33} Id. at 1497.
\textsuperscript{34} Id. at 1493. The court outlined the elements of a cause of action under 42 U.S.C. § 1985(3) as:
\begin{itemize}
  \item[(i)] a conspiracy;
  \item[(ii)] for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;
  \item[(iii)] an act in furtherance of the conspiracy;
  \item[(iv)] whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.
\end{itemize}
Id. at 1492 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971)).

The court further relied on testimony that rescue demonstrations, which block ingress to and egress from abortion clinics, create a substantial risk that existing or prospective patients may suffer physical or mental harm. Id. at 1489. The court further relied on the fact that 20-30\% of patients served by some of the targeted clinics had engaged in interstate travel to reach the clinics. Id.

\textsuperscript{35} National Org. for Women, 726 F. Supp. at 1492 (citations omitted).
\textsuperscript{36} National Org. for Women, 914 F.2d at 585.
\textsuperscript{37} Id.
tients' right to interstate travel in violation of the deprivation clause of section 1985(3). The United States Supreme Court granted Operation Rescue's writ of certiorari. Justice Antonin Scalia, writing for the plurality, ordered the judgment of the court of appeals reversed in part, vacated in part, and remanded for further proceedings consistent with the opinion. Due to the clinics' failure to prove the requisite class-based animus, the Court held that no cause of action existed under the deprivation clause of section 1985(3) against groups or persons obstructing access to abortion clinics. The Court further found that a claim based on the hindrance clause of section 1985(3) was not included within the writ for certiorari and therefore was not properly before the Court.

Relying on a two-part test established in *Griffin v. Breckenridge* and *United Brotherhood of Carpenters and Joiners of America v. Scott,* the Court articulated the requirements for proving a private conspiracy in violation of the deprivation clause of section 1985(3). The two-part test requires a plaintiff to prove: (1) that a racial, or otherwise "class-based, invidiously discriminatory animus lay behind the conspirators' actions" and (2) that the conspirators aimed at interfering with rights that are protected against both private and state encroachment. In an attempt to avoid converting the deprivation clause into a "general federal tort law," the Court rejected the district court's conclusion that opposition to abortion constitutes discrimination against women as a class. The Court reasoned that the class-based animus requirement demands a purpose that focuses upon women by reason of their sex alone.

The Court stated that the only way the abortion clinics' class-based animus contention could have been established was if "(1) . . . opposition to abortion can reasonably be presumed to reflect a sex-

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38. *Id.* The court further noted that the district court's holding that petitioner's gender-based animus satisfied the purpose requirement of the deprivation clause of § 1985(3) had been illuminated by other circuits. *Id.*

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

40. *Id.* at 768.

41. *Id.* at 758-64.

42. *Id.* at 764-65.

43. 403 U.S. 88 (1971).


45. *Bray,* 113 S. Ct. at 758 (quoting United Bhd. of Carpenters & Joiners of Am., 463 U.S. 825, 833 (1983); *Griffin,* 403 U.S. at 102).

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

47. *Id.* at 758-59.

48. *Id.* at 759. The Court noted that Operation Rescue defined their purpose as stopping the practice of abortion and reversing its legalization, without reference to women. *Id.* at 759-60.
based intent, or (2) ... if intent is irrelevant, and a class-based animus can be determined solely by effect.\textsuperscript{49} The Court noted that there are reasons for opposing abortion other than hatred toward women as a class.\textsuperscript{50} Furthermore, the Court stated that even though only women can become pregnant, not every classification based on pregnancy is a sex-based classification.\textsuperscript{51}

The Court further held that the abortion clinics’ federal claim failed because a violation of the deprivation clause requires the intent to deprive individuals of rights protected against private encroachment, and no such intent was established.\textsuperscript{52} The Court then stated that a conspiracy is a denial of equal protection based on a protected right that is “aimed at,” and not incidentally affected.\textsuperscript{53} The fact that the protected right of interstate travel was incidentally affected would not suffice.\textsuperscript{54}

In reviewing a suggested cause of action under the hindrance clause, the Court determined that the hindrance clause issue was not properly before the Court.\textsuperscript{55} However, the Court went on to analyze the hindrance clause, suggesting that a cause of action under the clause would require the same “class-based, invidiously discriminatory animus” that is required under the deprivation clause.\textsuperscript{56} Even if the claim passed the class-based animus requirement, the Court further determined that the hindrance clause claim would fail unless the clause “applies to a private conspiracy aimed at rights that are constitutionally protected only against official (as opposed to private) encroachment.”\textsuperscript{57}

Justice John Paul Stevens, joined by Justice Harry H. Blackmun, dissented and determined that the plurality ignored the congressional intent of section 1985(3) in its determination of the deprivation clause claim.\textsuperscript{58} Justice Stevens determined that the purpose of section 1985(3) was to protect individuals from being deprived of their consti-

\textsuperscript{49} Bray, 113 S. Ct. at 760.
\textsuperscript{50} Id. The Court reasoned that because men and women are on both sides of the abortion issue, opposition to abortion is not based on hatred toward women. Id.
\textsuperscript{51} Bray, 113 S. Ct. at 760 (citing Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974)).
\textsuperscript{52} Id. at 762.
\textsuperscript{53} Id. (citing United Bhd. of Carpenters, 463 U.S. at 833).
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 764-65. The plurality opinion noted that the abortion clinics admitted that their complaint did not set forth a hindrance clause claim. Id. at 764.
\textsuperscript{56} Bray, 113 S. Ct. at 765. The Court reasoned that “[t]he language requiring intent to deprive of equal protection, or equal privileges and immunities” in the deprivation clause appears in the hindrance clause as well. Id. at 765-66.
\textsuperscript{57} Bray, 113 S. Ct. at 766.
\textsuperscript{58} Id. at 780 (Stevens, J., dissenting).
HINDRANCE CLAUSE

The facts disclosed by the record convinced Justice Stevens that both the language of section 1985(3) and its legislative history supported a finding that Operation Rescue’s conspiracy met the class-based animus requirement and violated the patients’ constitutionally protected right to interstate travel.

Justice Stevens, strongly disagreeing with the second part of the plurality’s determination, found that the abortion clinics “unquestionably established” a claim under the hindrance clause. Justice Stevens determined that a conspiracy by strength in numbers that interferes with local authorities in their protection of constitutional rights is precisely what the hindrance clause was designed to counteract.

Justice Stevens found that Operation Rescue hindered the local authorities from protecting a woman’s right to privacy. He acknowledged that the right to privacy is protected only against state infringement. However, he argued that a conspiracy interfering with the duties of local law enforcement authorities “entails sufficient involvement with the State to implicate the federally protected right to choose an abortion” and thus gives rise to a claim under the hindrance clause.

Justice Stevens determined that the plurality’s suggested class-based animus requirement was inapplicable to the hindrance clause. Justice Stevens strictly construed the class-based animus requirement as solely limiting the deprivation clause, not the hindrance clause. Justice Stevens reasoned that the language in Griffin limiting its holding to the deprivation clause, combined with the rationale in Griffin limiting the equal protection language found in the depriva-

59. Id. (Stevens, J., dissenting).
60. Id. at 785 (Stevens, J., dissenting).
61. Id. at 795 (Stevens, J., dissenting). Several Justices disagreed with the plurality’s interpretation of the hindrance clause: Justice David H. Souter wrote an opinion concurring in part and dissenting in part. Justice Sandra Day O’Connor wrote a dissenting opinion in which Justice Harry A. Blackmun joined. Id. at 769, 799.
62. Bray, 113 S. Ct. at 796 (Stevens, J., dissenting). The record disclosed that the Falls Church Police Department, consisting of 30 officers, arrested 240 demonstrators, but still were unable to inhibit the demonstrators from closing the clinic for more than six hours. See National Org. for Women, 726 F. Supp. at 1489 n.4.
63. Bray, 113 S. Ct. at 796 (Stevens, J., dissenting).
64. Id. (Stevens, J., dissenting).
66. Bray, 113 S. Ct. at 797 (Stevens, J., dissenting).
67. Id. at 796-97 (Stevens, J., dissenting).
tion clause, justified giving an entirely different construction to the "equal protection" language of the hindrance clause.\textsuperscript{66}

However, in a faithful effort to follow the Griffin class-based animus requirement as suggested by the plurality, Justice Stevens found that a class-based animus could be inferred by construing conduct covered under the hindrance clause as "a large-scale conspiracy that violates the victims' constitutional rights by overwhelming the local authorities and that, by its nature, victimizes predominantly members of a particular class."\textsuperscript{69} Justice Stevens found that the above stated construction would not only perfectly describe the conduct of the Ku Klux Klan, but would also encompass the activities of Operation Rescue.\textsuperscript{70}

Based on the above stated reasoning, Justice Stevens determined that the decision of the Fourth Circuit should be affirmed, and Operation Rescue should be permanently enjoined both under the deprivation clause claim and the hindrance clause claim.\textsuperscript{71}

BACKGROUND

What is currently codified at section 1985(3) was originally enacted as part of section 2 of the Civil Rights Act of 1871.\textsuperscript{72} The Civil Rights Act was Congress' response to General Ulysses S. Grant's request for additional legislation to curb mob violence in the South subsequent to the Civil War.\textsuperscript{73} Section 1 of the Civil Rights Act

\textsuperscript{66} Id. at 797 (Stevens, J., dissenting). Justice Stevens noted that the rationale of Griffin to limit the deprivation clause of § 1985(3) from becoming "a general federal tort law" is inapplicable to the hindrance clause because of the language confining the hindrance clause's reach to conspiracies directed at the "constituted authorities of any State or Territory." Id. See Griffin, 403 U.S. at 102.

\textsuperscript{69} Id. See Griffin, 403 U.S. at 102.

\textsuperscript{70} Bray, 113 S. Ct. at 797-98 (Stevens, J., dissenting). The activities of the Ku Klux Klan originally prompted the enactment of what is now 42 U.S.C. § 1985. See infra notes 72-74 and accompanying text.


The Supreme Court on several occasions has analyzed the legislative history of § 2 of the Civil Rights Act of 1871. See United Bd. of Carpenters, 463 U.S. at 839-47 (Blackmun, J., dissenting). For other discussions on the legislative history of § 2 of the Civil Rights Act, see McCord v. Bailey, 636 F.2d 606, 615-17 (D.C. Cir. 1980) cert. de-
prohibited state officials from violating the constitutional rights of citizens, while section 2 of the Act prohibited mob violence.⁷⁴

After introducing the Civil Rights Act, section 2 was amended in 1871 to include language imposing liability on persons "conspiring together for the purpose, either directly or indirectly, or depriving any person or any class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."⁷⁵ According to Representative Shellabarger, the introducer of the amendment, "[t]he object of the amendment [was] . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights shall be within the scope of the remedies of this section."⁷⁶
Section 1985(3) as codified is comprised of two main clauses, the “deprivation” clause and the “hindrance” clause. The deprivation clause states as follows:

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

The hindrance clause states as follows:

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

Section 1985(3) applies to both private conspiracies and public conspiracies. As applied to section 1985(3), a private conspiracy aims at interfering with an individual’s rights that are constitutionally protected against either private or state encroachment. Thus far, the United States Supreme Court has recognized only the rights granted under the Thirteenth Amendment to the United States Con-
stitution and the right to interstate travel as being protected against private or state encroachment. On the other hand, a public conspiracy reaching the level of a section 1985(3) claim aims at interfering with an individual's rights that are constitutionally protected against state encroachment only. An alleged public conspiracy under section 1985(3) that aims at the privileges and immunities of citizenship secured by the Equal Protection or Due Process Clauses of the Fourteenth Amendment or freedom of speech under the First Amendment requires either state involvement or an aim to influence state activities.

Although the deprivation clause may apply to both private and public conspiracies, an alleged private conspiracy under the deprivation clause requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action" in order to prohibit interpreting section 1985(3) as a general federal tort law. The "class-based, invidiously discriminatory animus" language merely requires the purpose of a conspiracy to be aimed at depriving individuals of the equal protection of the laws. Unlike the "equal protection" language under the Fourteenth Amendment, the "equal protection" language under the deprivation clause is defined in terms of a class-based animus.

A cause of action under the hindrance clause for either a private conspiracy or a public conspiracy requires some amount of state involvement or an aim to influence state activities. Unlike its decisions concerning the deprivation clause, the United States Supreme Court has not been clear as to whether a private conspiracy in violation of the hindrance clause requires the same class-based animus. For purposes of this Note, it is important to understand the requirements for a cause of action under the deprivation clause and the reasoning for such requirements in order to comprehend the possible applicability of those same requirements to the hindrance clause.

THE DEPRIVATION CLAUSE

Subsequent to its use to curb post-Civil War violence, section 1985(3) lay dormant for almost a full century until the 1971 decision

83. Peavey, 775 F. Supp. at 78 (citing United Bhd. of Carpenters, 463 U.S. at 833).
85. Griffin, 403 U.S. at 101-02.
86. Id. at 102.
87. See id.
88. United Bhd. of Carpenters, 463 U.S. at 830.
89. See Griffin, 403 U.S. at 101-02.
in *Griffin v. Breckenridge*. In *Griffin*, the United States Supreme Court addressed the issue of whether the deprivation clause of section 1985(3) was meant to encompass private conspiracies. In *Griffin*, an action was brought to recover damages based on a racially motivated conspiracy in violation of section 1985(3). Although the Court in *Griffin* never expressly stated that it was focusing on the deprivation clause, the Court suggested it was focusing on the deprivation clause by quoting language from the clause and limiting its holding to the "portion of § 1985(3) before [them]."*

The petitioners in *Griffin* were two black adults residing in Mississippi. Prior to the alleged cause of action, the petitioners were performing various errands requiring them to travel on local, state, and federal highways. The respondents, Lavon Breckenridge and James Calvin Breckenridge, mistakenly believed that the driver of the automobile in which the petitioners were riding was a civil rights worker. Due to their mistaken belief, the Breckenridges blocked a public highway, forced the petitioners and the driver from their car, and clubbed them while threatening imminent death for failure to obey orders. The District Court for the Southern District of Mississippi, relying on *Collins v. Hardyman*, dismissed the complaint for failure to state a cause of action under section 1985(3). In *Collins*, the United States Supreme Court construed section 1985(3) as applying solely to public conspiracies, and not to private conspiracies. Because the petitioners in *Griffin* failed to allege that the Breckenridges' conspiracy involved the color of state law, their complaint was dismissed. While expressing doubts as to the continued validity of *Collins*, the Court of Appeals for the Fifth Circuit affirmed the judgment of the lower court.

The United States Supreme Court in *Griffin* granted certiorari and reversed and remanded the judgment dismissing the petitioner's

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91. *Griffin*, 403 U.S. at 96.
92. Id. at 90-92.
93. Id. at 96, 102 n.9.
94. Id. at 89.
95. Id. at 90.
96. Id.
97. Id. at 90-91.
98. 341 U.S. 651 (1951).
101. See *Griffin*, 403 U.S. at 92.
102. Id. Judge Goldberg's opinion suggested that § 1985(3) may be able to encompass private conspiracies but noted that the Supreme Court would have to make such a determination. Id. at 92-93 (citing *Griffin v. Breckenridge*, 410 F.2d 817, 823, 825-27 (5th Cir. 1969), rev'd, 403 U.S. 88 (1971).
Without deciding the correctness of the Collins decision on its facts, the Court held that the language of section 1985(3) expressly encompasses the conduct of private and public conspiracies. The Court followed its prior decisions, which accorded other Reconstruction Civil Rights statutes "a sweep as broad as [their] language." The Court reasoned that the language of the deprivation clause does not inherently require the action resulting in a deprivation to be inflicted by state officers. Relying on the legislative history of the Civil Rights Act, the Court interpreted the required deprivation of equal protection, or equal privileges and immunities language, as meaning "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." The Court then held that section 1985(3) may constitutionally reach private conspiracies aimed at racial discrimination. However, the Court failed to determine whether a conspiracy motivated by an intent other than racial bias would be actionable under the deprivation clause.

In 1979, the United States Supreme Court in Great American Federal Savings & Loan Association v. Novotny considered whether a conspiracy resulting in employment discrimination constituted a deprivation of equal protection or equal privileges and immunities under section 1985(3). Although the issue before the Court presumably was limited to the deprivation clause of section 1985(3), the Novotny opinion generally referred to section 1985(3) as a whole, and failed to distinguish between the deprivation clause and the hindrance clause. In the Novotny case, Novotny was a secretary, director, and loan officer of the Great American Federal Savings and Loan Association. Novotny was not re-elected to his board position and was sub-

103. Griffin, 403 U.S. at 107.
104. Id. at 96.
105. Id. at 97 (citing United States v. Price, 383 U.S. 787, 801 (1966)).
106. Griffin, 403 U.S. at 97. The Court noted three possible interpretations for a state action limitation under § 1985(3): (1) "action under color of state law," (2) "interference with or influence upon state authorities," or (3) "a private conspiracy so massive and effective that it supplants those authorities and thus satisfies the state action requirement." Id. at 98. However, the Court stated that each of the possible interpretations has already been codified in other parts of the Civil Rights Act of 1871. Id. at 98-99.
107. Griffin, 403 U.S. at 102.
108. Id. at 104.
109. Id. at 102 n.9.
112. See Novotny, 442 U.S. at 372.
113. Id. at 368.
sequently fired for sympathizing with female employees who were denied equal employment opportunities.\textsuperscript{114} Novotny filed a complaint against the directors of Great American Federal Savings and Loan Association under Title VII of the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission and thereafter received a right-to-sue letter.\textsuperscript{115} Novotny then filed an action in the District Court for the Western District of Pennsylvania for damages under section 1985(3) as a result of an alleged conspiracy to deprive him of his equal rights under the law.\textsuperscript{116} After determining that no conspiracy existed as a matter of law, the court dismissed Novotny's complaint.\textsuperscript{117} Novotny appealed and the Court of Appeals for the Third Circuit unanimously reversed the lower court's judgment.\textsuperscript{118} The court held that Novotny had standing to sue under section 1985(3) because the court found that the conspiracy was motivated by a class-based animus against women.\textsuperscript{119}

The United States Supreme Court vacated the judgment of the Third Circuit and remanded the case for further proceedings.\textsuperscript{120} The Court found that section 1985(3), unlike Title VII, provides no rights; it simply provides a remedy when some otherwise defined federal rights are breached by a conspiracy.\textsuperscript{121} The Court held that Title VII violations may not be the basis for a cause of action under section 1985(3).\textsuperscript{122} The congressional history suggested that Title VII was designed to provide nonadversarial, nonjudicial resolution of employment discrimination claims based on voluntary compliance.\textsuperscript{123} The Court reasoned that the crucial administrative process could be bypassed by allowing Title VII violations to be asserted through section 1985(3).\textsuperscript{124}

In his concurring opinion, Justice John Paul Stevens explained the difference between constitutional rights that are protected against private encroachment and those that are protected against state en-

\textsuperscript{114} Id. at 368-69.
\textsuperscript{115} Id. at 369.
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 369.
\textsuperscript{118} Id. at 369-70.
\textsuperscript{119} Id. at 370. The court of appeals held that Title VII was the source of the respondent's right asserted under § 1985(3). Id. The court further determined that intracorporate conspiracies are within the realm of § 1985(3). Id.
\textsuperscript{120} Novotny, 442 U.S. at 378. Justice Potter Stewart wrote the opinion of the Court. Justice Lewis F. Powell and Justice John Paul Stevens wrote concurring opinions. Justice Byron R. White wrote a dissenting opinion in which Justices William J. Brennan and Thurgood Marshall joined. Id. at 367.
\textsuperscript{121} Novotny, 442 U.S. at 376.
\textsuperscript{122} Id. at 378.
\textsuperscript{123} Id. at 372-73.
\textsuperscript{124} Id. at 375-76.
HINDRANCE CLAUSE

croachment only.125 Justice Stevens stated that private conspiracies to deprive individuals of some constitutional rights, such as the right to be free from slavery and the right to engage in interstate travel, are actionable under section 1985(3) without regard to state involvement.126 Justice Stevens further stated that public conspiracies to affect privileges and immunities of citizenship that are secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment require state involvement before an action may be maintained.127 Justice Stevens further underscored that "if private persons take conspiratorial action that prevents or hinders the constituted authorities of any State from giving or securing equal treatment, the private persons would cause those authorities to violate the Fourteenth Amendment; the private person would then have violated [the hindrance clause of] § 1985(3)."128 Justice Stevens' concurring opinion suggested that the burden of proof for state involvement under the hindrance clause was minor.129

In 1983, the United States Supreme Court in United Brotherhood of Carpenters and Joiners of America v. Scott130 considered the scope of a cause of action under section 1985(3).131 Although the issue before the Court was limited to the deprivation clause, the United Brotherhood of Carpenters opinion referred generally to section 1985(3) and did not distinguish between the deprivation clause and the hindrance clause.132 In United Brotherhood of Carpenters, A. A. Cross Construction Co. hired nonunion labor to complete a government construction project.133 Due to the construction company's policy of hiring nonunion labor, a protest was organized by several local unions to express displeasure with the hiring practice.134 During the protest, members assaulted and beat the construction company's employees and burned construction equipment.135 The construction company and its employees filed suit against the unions and various union

125. Id. at 381-85 (Stevens, J., concurring).
126. Id. at 383 (Stevens, J., concurring).
127. Id. at 384-85 (Stevens, J., concurring) (citing Shelley v. Kraemer, 334 U.S. 1 (1947)).
128. Id. at 384 (Stevens, J., concurring).
129. See id. at 385 (Stevens, J., concurring).
132. United Bhd. of Carpenters, 463 U.S. at 827.
133. Id.
134. Id. at 828.
135. Id. The respondents included two construction company employees and the construction company itself. Id. The petitioners included a building and trades council, 25 local unions, and various named individuals. Id.
The construction company and its employees alleged a violation of their First Amendment rights under section 1985(3). The District Court for the Eastern District of Texas, in awarding a permanent injunction against the unions, determined that there was a cause of action under section 1985(3) due to the class-based animus of the petitioners. The court found that nonunion laborers and employers were a protected class under section 1985(3). The Court of Appeals for the Seventh Circuit affirmed the decision of the lower court. The court of appeals agreed with the district court and added that the union's conspiracy deprived the construction company's employees of their First Amendment right not to associate with a union.

The United States Supreme Court granted certiorari and reversed the judgment of the court of appeals. The Court held that section 1985(3) is not violated by a conspiracy to infringe on First Amendment rights "unless it is proved that the State is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the State." The Court further held that section 1985(3) is applicable to private conspiracies "aimed at interfering with rights constitutionally protected against private, as well as official, encroachment." The holding in United Brotherhood of Carpenters resulted in a new two-part test to be met by a plaintiff alleging a private conspiracy in violation of the deprivation clause of section 1985(3): (1) the plaintiff must show "some racial, or perhaps otherwise class-based, invidiously discriminatory animus" on the part of the conspirators and (2) that the conspiracy "aimed at interfering with [the plaintiff's] rights" that are
HINDRANCE CLAUSE

"constitutionally protected against private, as well as official, encroachment." The test set forth in United Brotherhood of Carpenters remains the current test for determining a cause of action for a private conspiracy under the deprivation clause of section 1985(3).

THE HINDRANCE CLAUSE

Unlike the deprivation clause, the hindrance clause has not been readily asserted as a cause of action under section 1985(3). As a result, the elements for a valid claim under the hindrance clause remain unclear. The courts have added to the confusion by failing to distinguish between the hindrance clause and the deprivation clause, when adjudicating claims under section 1985(3). The courts appear to have applied section 1985(3) as a general remedy to different causes of action instead of viewing each clause as an independent cause of action made up of several elements. However, in the following cases the courts have attempted to articulate the requisite elements for a cause of action under the hindrance clause.

In 1989, the District Court for the Southern District of New York in New York State National Organization for Women v. Terry considered the issue of violations of the Fourteenth Amendment right to privacy under section 1985(3). In Terry, members of Operation Rescue organized a week of protests at New York City area abortion clinics. Members of several women's organizations and abortion providers sought to enjoin Operation Rescue from demonstrating by filing for a temporary restraining order. Despite the New York Supreme Court's issuance of a temporary restraining order, several protests occurred throughout the week-long Operation Rescue mission. Subsequently, the New York Supreme Court found Operation

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145. Bray, 113 S. Ct. at 758.
146. See id.
147. See Bray, 113 S. Ct. at 783 (Stevens, J., dissenting).
148. See id. at 765; id. at 796-97 (Stevens, J., dissenting).
149. See supra notes 93, 112, 132 and accompanying text.
150. See supra notes 90-146 and accompanying text.
151. See infra notes 152-201 and accompanying text.
154. Terry, 704 F. Supp. at 1250-51. The purpose of the week-long protest was to focus on one particular abortion clinic in an attempt to close the clinic. Id. at 1251.
155. Terry, 704 F. Supp. at 1251.
156. See id. at 1251-53. At one protest location, 503 protestors blocked access to an abortion clinic for over five hours. Id. at 1251. At another site, despite delivery of an updated restraining order, several hundred demonstrators were arrested for blocking ingress to and egress from a clinic for over two hours. Id. at 1251-52. Despite another
Rescue to be in civil contempt.\textsuperscript{157} Upon learning of yet another Operation Rescue mission, the abortion providers immediately filed motions for summary judgment and for a permanent injunction.\textsuperscript{158}

After determining that the abortion providers had standing to maintain an action in federal court, the district court denied Operation Rescue's motion to dismiss and granted the abortion providers' motion for summary judgment.\textsuperscript{159} In addressing the abortion providers' claim of a conspiracy to infringe upon the Fourteenth Amendment right to privacy, the court held that Operation Rescue had acted to render police officials incapable of securing women "the equal protection of the laws."\textsuperscript{160} Because Operation Rescue failed to notify police officials of their next target and closed off access to abortion clinics due to a large number of protestors, police officials were unable to secure the women's constitutional rights.\textsuperscript{161} The court further determined that such action by Operation Rescue satisfied the requisite state involvement for public conspiracy claims based on violations of the Fourteenth Amendment under the hindrance clause of section 1985(3).\textsuperscript{162}

The Court of Appeals for the Sixth Circuit interpreted the state action requirement of the hindrance clause in \textit{Volunteer Medical Clinic, Inc. v. Operation Rescue}.\textsuperscript{163} In \textit{Volunteer Medical Clinic}, the court addressed the issue of the requisite level of state involvement in an alleged public conspiracy to violate the Fourteenth Amendment.
right to privacy under the hindrance clause. Operation Rescue failed to acknowledge requests of the appellee, Volunteer Medical Clinic, Inc., to disperse from the clinic's premises. As a result, several protestors were arrested. The clinic filed a section 1985(3) action alleging, among other things, a violation of women's right to privacy. The District Court for the Eastern District of Tennessee held that the clinic had established a valid claim under section 1985(3). The court found that Operation Rescue's actions constituted a class-based animus against women and that there was sufficient evidence showing that "the defendants have greatly interfered and hindered the local police authority's ability to secure equal access to medical treatment for women who choose abortion."

On appeal, the court of appeals held that because women constituted a protected class, the clinic met its burden of showing a sufficient class-based animus. Both the district court and the court of appeals presumed that the Griffin class-based animus requirement applied to both the deprivation clause and the hindrance clause. However, the court of appeals held that the clinic failed to allege the requisite level of state action for a violation of the Fourteenth Amendment under the hindrance clause. The court relied on Lugar v. Edmondson Oil Co., which required a deprivation of rights under the Fourteenth Amendment to be "fairly attributable to the State." The court reasoned that although Operation Rescue may have partly

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165. Volunteer Medical Clinic, 948 F.2d at 220.
166. Id. The Knoxville Police Department arrested approximately 80 protestors. Id. The protestors were charged with criminal trespass. Id.
167. Volunteer Medical Clinic, 948 F.2d at 220. The clinic's complaint further alleged several tortious claims, including trespass, intentional infliction of emotional harm, creation of a public nuisance, and interference with a business. Id. The complaint also requested an injunction against Operation Rescue. Id. The district court immediately entered a temporary restraining order against Operation Rescue. Id. Seventeen days later, Operation Rescue staged another protest on the clinic's property in violation of the injunction. Id. at 221. The clinic then amended its complaint to include alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Id. See 18 U.S.C. §§ 1961-68 (1989).
168. Volunteer Medical Clinic, 948 F.2d at 222. The district court dismissed the clinic's claim based on interstate travel and found the RICO claim to be vague. Id. After the clinic filed an amended RICO claim, the district court issued a permanent injunction against the appellants. Id.
169. Volunteer Medical Clinic, 948 F.2d at 222.
170. Id. at 225.
171. See id. at 222, 223-25.
172. Id. at 227, 228.
intended to overwhelm the police, the intent alone did not create the requisite connection between Operation Rescue and the State.\textsuperscript{175} Without the requisite connection, the clinic failed to make out the requisite state involvement for a valid claim based on a violation of the Fourteenth Amendment under the hindrance clause.\textsuperscript{176}

In \textit{Women's Health Care Services v. Operation Rescue},\textsuperscript{177} the United States District Court for the District of Kansas considered the issue of violations of the Fourteenth Amendment right to privacy under section 1985(3).\textsuperscript{178} In \textit{Women's Health Care Services}, Women's Health Care Services filed an action for preliminary injunction to prevent Operation Rescue from blocking access to their clinic.\textsuperscript{179} The court granted a temporary restraining order against Operation Rescue until the court determined whether to grant a preliminary injunction.\textsuperscript{180} After a hearing, the court granted a preliminary injunction and enlarged the terms of the prior temporary restraining order.\textsuperscript{181}

In determining whether to grant a preliminary injunction, the court considered the clinic's likelihood of prevailing on the alleged violation of the Fourteenth Amendment right to privacy under the hindrance clause.\textsuperscript{182} The court determined that the clinic had met the requisite state involvement by showing that Operation Rescue purposefully interfered with the local law enforcement authorities' ability to protect the equal rights of the clinic and its patients.\textsuperscript{183} As a result, the court entered a preliminary restraining order to prevent Operation Rescue from preventing ingress to and egress from the clinic operated by Women's Health Care Services. \textit{Id.}

\begin{footnotesize}
\begin{itemize}
  \item[175] First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. \textit{Lugar}, 457 U.S. at 937.
  
  \item[176] \textit{Volunteer Medical Clinic}, 948 F.2d at 227.
  
  \item[177] \textit{Id.} at 227-28.
  
  
  
  \item[179] \textit{Women's Health Care Servs.}, 773 F. Supp. at 260. The court earlier had entered a temporary restraining order to prevent Operation Rescue from preventing ingress to and egress from the clinic operated by Women's Health Care Services. \textit{Id.}
  
  \item[180] \textit{Id.} The court set forth four factors that a movant must establish to obtain a preliminary injunction: "(1) irreparable injury to the movant, (2) that the threatened injury outweighs whatever damage may be caused by the injunction, (3) the injunction is not adverse to the public interest, and (4) there is a substantial likelihood the movant will eventually prevail on the merits." \textit{Id.} at 261.
  
  \item[181] \textit{Women's Health Care Servs.}, 773 F. Supp. at 261. The court also evaluated the clinic's other claims under § 1985(3), including class-based animus and the right to travel, as well as the clinic's state claims. \textit{See id.} at 263-69.
  
  \item[182] \textit{Id.} at 265-66. The court found that the Operation Rescue protestors overwhelmed the small police forces that had responded to the protests. \textit{Id.}
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the court determined that it was likely that Operation Rescue had violated the Fourteenth Amendment rights of Women's Health Care Services. The court further stated that a private action that limits the state's ability to guarantee equal protection of the laws may result in the state either "unwillingly or unwittingly" furthering the intent of the conspiracy.

Although the Supreme Court has not directly determined whether the Griffin class-based animus requirement applies to the hindrance clause, the Court has held that the class-based animus requirement does not apply to the first clause of section 1985(2). In Kush v. Rutledge, the United States Supreme Court addressed the issue of whether a racial or class-based animus is required to establish a cause of action under the first clause of section 1985(2). The first clause of section 1985(2) proscribes conspiracies to intimidate witnesses from attending or testifying in federal court. In Kush, the respondent, Kevin Rutledge, was a white football player at Arizona State University. Rutledge asserted that Arizona State University violated section 1985(2) by conspiring to intimidate potential witnesses to deter them from testifying in a federal lawsuit. Rutledge had originally filed a complaint alleging that particular football coaches had conspired to force Rutledge to relinquish his rights to a football scholarship by means of embarrassment, harassment, defamation, and intentional infliction of mental distress.

The United States District Court for the District of Arizona dismissed the entire action, stating that the Eleventh Amendment acted as a bar and that Rutledge failed to allege any civil rights violations. The Court of Appeals for the Ninth Circuit reversed the lower court's judgment and remanded to the district court requiring Rutledge to make his section 1985(2) claim more definite and cer-

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184. See Women's Health Care Servs., 773 F. Supp. at 266.
185. Id. at 265 (citing Novotny, 442 U.S. at 384 (Stevens, J., concurring)). However, the court suggested that questions remained in the present action as to the lack of zeal-ousness of the local law authorities. Id. at 266.
188. Kush, 460 U.S. at 720.
189. Id. at 723. See supra note 74 (setting forth the provisions of § 1985(2) proscribing conspiracies to intimidate witnesses).
191. Id. at 720-21. Mr. Rutledge asserted several common law and statutory claims against Arizona State University and its officials. Id. at 720. The petitioners before the Court in the matter included the athletic director, the head football coach, and the assistant football coach. Id. at 720-21.
In its writ for certiorari, Arizona State University argued that Rutledge's claim must be dismissed for failing to claim a motivation based on a "racial, or perhaps otherwise class-based, invidiously discriminatory animus."\textsuperscript{195}

The United States Supreme Court granted certiorari, rejected Arizona State University's contention, and affirmed the judgment of the court of appeals.\textsuperscript{196} The Court held that the \textit{Griffin} class-based animus requirement was inapplicable to the first clause of section 1985(2).\textsuperscript{197} The Court expounded three reasons for its holding.\textsuperscript{198} First, the \textit{Griffin} opinion, in dealing with the deprivation clause, made no reference to suggest that its reasoning may apply to any other portions of section 1985.\textsuperscript{199} Second, the \textit{Griffin} opinion relied heavily on the legislative history of the amendment to the Ku Klux Klan Act of 1871, which added the "equal protection" language in response to objections that the broad language of the original bill created a general federal tort law.\textsuperscript{200} Third, the "equal protection" language, which provides the basis for the \textit{Griffin} class-based animus requirement, does not appear in the first clause of section 1985(2).\textsuperscript{201}

**ANALYSIS**

Since its rejuvenation in \textit{Griffin v. Breckenridge},\textsuperscript{202} there has been a great deal of confusion in the application of section 1985(3).\textsuperscript{203} The courts have attempted to articulate the required elements for making out valid claims under both the "deprivation" clause and the "hindrance" clause.\textsuperscript{204} The United States Supreme Court has set forth a two-part test for determining a cause of action under the deprivation clause of section 1985(3).\textsuperscript{205} However, the Court has added to the confusion through its attempts at interpreting the test's applicability to section 1985(3) generally, without expressly stating whether

\begin{itemize}
\item \textsuperscript{194} \textit{Id.} at 722 n.2.
\item \textsuperscript{195} \textit{Id.} at 720.
\item \textsuperscript{196} \textit{Id.} at 720, 727.
\item \textsuperscript{197} \textit{Id.} at 726.
\item \textsuperscript{198} \textit{Id.}
\item \textsuperscript{199} \textit{Id.} The \textit{Griffin} opinion expressly confined the class-based animus requirement to "the portion of § 1985(3) now before" the Court. \textit{Id.} (quoting \textit{Griffin}, 403 U.S. at 99, 102 n.9).
\item \textsuperscript{200} \textit{Kush}, 460 U.S. at 726 (citing \textit{Griffin}, 403 U.S. at 99-100). The Court reasoned that the legislative history doesn't apply to the parts of § 1985 prohibiting "interference with federal officers, federal courts, or federal elections." \textit{Id.}
\item \textsuperscript{201} \textit{Kush}, 460 U.S. at 726. \textit{See} 42 U.S.C. § 1985(2), (3) (1989). \textit{See supra note 74} (setting forth the provisions of § 1985(2)) and \textit{supra} note 3 (setting forth the provisions of § 1985(3)).
\item \textsuperscript{202} 403 U.S. 88 (1971).
\item \textsuperscript{203} \textit{See supra} notes 90-201 and accompanying text.
\item \textsuperscript{204} \textit{See supra} notes 90-201 and accompanying text.
\item \textsuperscript{205} \textit{See Bray v. Alexandria Women's Health Clinic}, 113 S. Ct. 753, 758 (1993).
\end{itemize}
the test applies to the deprivation clause, to the hindrance clause, or to both.\textsuperscript{206} Only after a thorough reading of the case may a reader come away with an understanding as to which clause the Court was referencing, usually by way of the Court’s use of the key word “depriving,” which suggests applicability to the deprivation clause.\textsuperscript{207}

It is now fairly well established that in order to bring a cause of action under the deprivation clause of section 1985(3) a plaintiff must meet a two-part test by proving both a class-based animus and that the rights being interfered with are protected against either private or state encroachment.\textsuperscript{208} The courts have failed to clarify the requirements for a cause of action under the hindrance clause.\textsuperscript{209}

In Bray v. Alexandria Women’s Health Clinic,\textsuperscript{210} the plurality opinion of the United States Supreme Court determined that the hindrance clause issue was not properly before the Court.\textsuperscript{211} Although technically dicta, the Court further stated that a claim based on the hindrance clause would require the same “class-based, invidiously discriminatory animus” that is required for a claim based on the deprivation clause.\textsuperscript{212} The Court also stated that a hindrance clause claim would fail regardless of the lack of class-based animus unless the state was directly involved in the public conspiracy.\textsuperscript{213} Therefore, the plurality of the Court stated that a valid cause of action under the hindrance clause would require a class-based animus and direct state involvement.\textsuperscript{214}

Justice John Paul Stevens, in his dissent, argued that the respondents had established a cause of action under the hindrance clause of section 1985(3).\textsuperscript{215} Justice Stevens, citing Kush v. Rutledge,\textsuperscript{216} further claimed that the plurality opinion was incorrect in stating that the Griffin class-based animus requirement is applicable to the hindrance clause.\textsuperscript{217} Justice Stevens also concluded that the requisite amount of state involvement would be satisfied if the conspirators’ ac-
tions resulted in a "large-scale conspiracy" affecting the state's ability to protect the constitutional rights of the victims of the conspiracy. 218

Two issues are present in determining whether the abortion clinics could have properly asserted a hindrance clause claim as a remedy against violations of the Fourteenth Amendment right to privacy. 219 First, is the Griffin class-based animus requirement applicable to the hindrance clause? 220 Second, does a public conspiracy require direct state involvement? 221

Class-Based Animus

As Justice Stevens correctly determined, the Griffin class-based animus requirement should be inapplicable to claims based on the hindrance clause of section 1985(3). 222 The reasoning set forth in Kush, which held that the Griffin class-based animus requirement was inapplicable to section 1985(2), should apply equally to the hindrance clause of section 1985(3). 223 The Court in Kush based its reasoning on three factors: (1) the scope of the Griffin opinion, (2) the broad sweep of the original language of section 1985, and (3) the "equal protection" language of section 1985(3). 224

The "class-based, invidiously discriminatory animus" requirement should be applicable solely to the deprivation clause of section 1985(3). 225 The Court in Griffin dealt exclusively with the deprivation clause and clearly limited its holding to claims based on the deprivation clause. 226 The Court determined that there were two parts to section 1985(3), the deprivation clause and the hindrance clause. 227 Application of the class-based animus requirement to the hindrance clause would result in duplicate coverage, which the Griffin Court believed Congress never intended. 228 Because the class-based animus requirement would be the same for both clauses, a valid hindrance clause claim automatically would satisfy the required elements for a valid deprivation clause claim. 229 Likewise, failure to make out a valid deprivation clause claim automatically would result in a failure

218. Id. at 796 (Stevens, J., dissenting).
219. Id.
220. See supra notes 90-109, 186-201 and accompanying text.
221. See supra notes 125-46, 152-85 and accompanying text.
222. See Bray, 113 S. Ct. at 797 (Stevens, J., dissenting).
224. See supra notes 198-201 and accompanying text.
225. Kush, 460 U.S. at 726.
226. See Griffin, 403 U.S. at 99, 102 n.9.
227. Id. at 99.
228. Id.
229. See id.
to make out a valid hindrance clause claim.\(^\text{230}\) Therefore, applying the class-based animus requirement to the hindrance clause would deprive the hindrance clause of its independent effect.\(^\text{231}\)

Congressional concern with not interpreting section 1985(3) as a general federal tort law applies only to the deprivation clause.\(^\text{232}\) Unlike section 1985(2), the deprivation clause and the hindrance clause both contain “equal protection” language.\(^\text{233}\) Admittedly, the source of the \textit{Griffin} class-based animus requirement was the language in the deprivation clause requiring the purpose of the conspiracy to deprive individuals of “the equal protection of the laws.”\(^\text{234}\) \textit{Griffin}’s reasoning for the class-based animus requirement specifically relies on the expressed concern of Representative Cook that Congress has no “right to punish an assault and battery when committed by two or more persons within a State.”\(^\text{235}\) Even if the hindrance clause is “accord[ed] a sweep as broad as its language,” the hindrance clause still would be unable to reach general tort law claims, such as assault and battery.\(^\text{236}\) Because the reach of the hindrance clause is confined to conspiracies directed at “constituted authorities of any State or Territory,” Justice Stevens correctly determined that the hindrance clause should be given a different construction than that given to the deprivation clause.\(^\text{237}\) The hindrance clause merely requires the victim to show a violation of his or her constitutional rights along with an interference with state officials.\(^\text{238}\)

The plurality in \textit{Bray} incorrectly suggested that the class-based animus requirement of the deprivation clause equally applies to the hindrance clause.\(^\text{239}\) By giving the hindrance clause a more natural construction based on its already limiting language, the plurality’s analysis should have determined that Operation Rescue’s activities are exactly the activities prohibited by the hindrance clause.\(^\text{240}\) After determining that the patients’ Fourteenth Amendment right to pri-

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\(^{230}\) See id. See Bray, 113 S. Ct. at 765-66.

\(^{231}\) See \textit{Griffin}, 403 U.S. at 99.

\(^{232}\) See \textit{Kush}, 460 U.S. at 726.

\(^{233}\) See 42 U.S.C. § 1985(2), (3) (1989). See supra note 74 (setting forth the provisions of § 1985(2)) and supra note 3 (setting forth the provisions of § 1985(3)).

\(^{234}\) See \textit{Griffin}, 403 U.S. at 102.

\(^{235}\) \textit{Id.} at 101-02.

\(^{236}\) See \textit{Bray}, 113 S. Ct. at 797 (Stevens, J., dissenting). See \textit{Griffin}, 403 U.S. at 97.

\(^{237}\) See \textit{Bray}, 113 S. Ct. at 797 (Stevens, J., dissenting).

\(^{238}\) \textit{Id.} Justice Stevens further stated that the class-based animus requirement simply does not apply to the hindrance clause. \textit{Id.}

\(^{239}\) See \textit{Bray}, 113 S. Ct. at 765.

\(^{240}\) See \textit{id.} at 796-97 (Stevens, J., dissenting). Justice Stevens stated that Congress designed the hindrance clause to counteract conspiracies that by strength in numbers seek to prevent local law enforcement from protecting individual's constitutional rights. \textit{Id.}
vacy had been violated by Operation Rescue's conspiracy, the plurality should have determined whether there was sufficient state involvement to make out a claim under the hindrance clause.241

STATE INVOLVEMENT

In determining that Operation Rescue's conspiracy hindered local law enforcement officials from protecting the patients' Fourteenth Amendment right to privacy, Justice Stevens reluctantly acceded that the right to privacy is protected solely against state infringement.242 However, as Justice Stevens emphatically announced, a conspiracy that purposefully prevents local law enforcement officials from safeguarding individuals' constitutional rights sufficiently involves the state for a cause of action under the hindrance clause.243

Justice Stevens has consistently upheld the notion that conspirators violate section 1985(3) by preventing or hindering law enforcement authorities from protecting the equal rights of individuals.244 In Great American Federal Savings & Loan Association v. Novotny,245 Justice Stevens discerned from the legislative history of the Civil Rights Act of 1871 that Congress enacted both section 1 of the Act, the predecessor to section 1983, and section 2 of the Act, the predecessor to section 1985(3), to create federal remedies for the deprivation of constitutional rights, particularly under the Fourteenth Amendment.246 Section 1983 provides a remedy for infringement of an individual's constitutional rights directly resulting from an action by state authority.247 On the other hand, the hindrance clause provides a remedy for infringement of an individual's constitutional rights resulting from influence upon or interference with state authorities.248 Although both section 1983 and the hindrance clause of section 1985(3) must reach public conspiracies, a requirement that the abortion clinics prove state involvement beyond Operation Rescue's intent to influence the state's activity under the hindrance clause would, in

241. See id. at 796 (Stevens, J., dissenting).
242. Id.
243. Id.
244. Compare Bray, 113 S. Ct. at 796 (Stevens, J., dissenting) (stating that conspirators violate § 1985(3) by preventing or hindering law enforcement authorities from protecting the equal rights of individuals) with Novotny, 442 U.S. at 384 (Stevens, J., concurring) (stating that conspirators violate § 1985(3) by preventing or hindering law enforcement authorities from protecting the equal rights of individuals).
246. Novotny, 442 U.S. at 382-83 (Stevens, J., concurring).
247. Id. at 383 (Stevens, J., concurring). See supra note 76 and accompanying text.
the words of the Court in Griffin, "duplicate the coverage" of section 1983.249

In United Brotherhood of Carpenters and Joiners of America v. Scott,250 Justice Harry H. Blackmun's dissenting opinion interpreted the majority's holding as merely requiring an intent of the conspirators to cause the state or a state actor to deprive the victims of their constitutional rights as a result of an alleged public conspiracy in violation of section 1985(3).251 The plurality in Bray should have applied such an analysis in determining whether Operation Rescue's actions hindered the police from protecting the patients' Fourteenth Amendment right to privacy.252 Had the Court in Bray applied such an analysis, the plurality would have determined that Operation Rescue had sufficiently involved the state in depriving women of their right to privacy in violation of the hindrance clause.253 Operation Rescue successfully closed down abortion clinics for over six hours despite attempts by local law enforcement to re-establish order.254 The lack of order caused by Operation Rescue's mob protests resulted in the deprivation of the patients' constitutional right to privacy because the police were unable to safeguard the patients' rights.255 Therefore, Operation Rescue's acts should have constituted a public conspiracy in violation of the hindrance clause.256

RECONCILING JUSTICE STEVENS' OPINION WITH THE PLURALITY OPINION IN BRAY v. ALEXANDRIA WOMEN'S HEALTH CLINIC

Justice Stevens' dissenting opinion draws a line between the potential broad scope of a cause of action under the deprivation clause and the limited scope of a cause of action under the hindrance clause.257 Due to its potential broad scope, a cause of action under the deprivation clause requires the confining requirement of a "class-based, invidiously discriminatory animus."258 Unlike the deprivation clause, the language of the hindrance clause limits its applicability to conspiracies that involve both violations of an individual's rights and

249. See Novotny, 442 U.S. at 383 (Stevens, J., concurring); Griffin, 403 U.S. at 99.
251. United Bhd. of Carpenters, 463 U.S. at 840 n.2 (Blackmun, J., dissenting).
252. See Bray, 113 S. Ct. at 796 (Stevens, J., dissenting).
253. See id.
254. See supra notes 19-22 and accompanying text.
255. See Bray, 113 S. Ct. at 796 (Stevens, J., dissenting).
256. See id.
257. See id. at 797 (Stevens, J., dissenting).
258. See supra note 109 and accompanying text.
state involvement.\textsuperscript{259} Therefore, the class-based animus requirement is not necessary to limit the scope of the hindrance clause.\textsuperscript{260}

However, as the plurality opinion suggests, Justice Stevens' determination of the requisite state involvement is troublesome because he simply assumes that a "large-scale conspiracy" interfering with the state's ability to protect an individual's constitutional rights meets the requirement.\textsuperscript{261} Justice Stevens failed to address what constitutes a "large-scale conspiracy."\textsuperscript{262} Common sense might suggest that any protest that is successful in deterring police from re-establishing order for any significant length of time should constitute a "large-scale conspiracy" under the hindrance clause of section 1985(3).\textsuperscript{263}

Although the plurality opinion in Bray determined that a hindrance clause claim was not properly before the Court, they then went through a detailed analysis of the hindrance clause.\textsuperscript{264} A proper analysis of the hindrance clause should have determined that a cause of action under the hindrance clause merely requires a violation of an individual's protected rights and some level of state involvement.\textsuperscript{265} If the plurality had analyzed the actions of Operation Rescue based on this criteria, then the Court would have determined that had the hindrance clause been properly before the Court, the clinics would have had a proper cause of action.\textsuperscript{266}

CONCLUSION

The hindrance clause of section 1985(3) provides a cause of action against conspiracies seeking to hinder local police in the equal protection of an individual's rights.\textsuperscript{267} In Bray v. Alexandria Women's Health Clinic,\textsuperscript{268} the plurality suggested that the "class-based, invidiously discriminatory animus" requirement, which confines the scope of the deprivation clause, should apply equally to the hindrance clause.\textsuperscript{269} However, in making such a suggestion, the plurality overlooked the narrow boundaries set forth in the language of the hindrance clause. A cause of action under the hindrance clause does not accrue unless there is both a violation of an individual's constitutional

\begin{footnotesize}
\textsuperscript{259} Bray, 113 S. Ct. at 797 (Stevens, J., dissenting).
\textsuperscript{260} Id.
\textsuperscript{261} See id. at 796-79.
\textsuperscript{262} See id. at 796-97 (Stevens, J., dissenting).
\textsuperscript{263} See supra notes 20-23, 156, 166, 183 and accompanying text.
\textsuperscript{264} See Bray, 113 S. Ct. at 764-65.
\textsuperscript{265} See supra note 240 and accompanying text.
\textsuperscript{267} Id.
\textsuperscript{268} 113 S. Ct. 753 (1993). See supra note 3 (setting forth the provisions of § 1985(3)).
\end{footnotesize}
rights and some level of state involvement. Unlike the concerns regarding the scope of the deprivation clause, the hindrance clause does not create a general federal tort law.

The hindrance clause should be interpreted as providing a separate and distinct cause of action under section 1985(3) from that of the deprivation clause. Applying the class-based animus requirement to the hindrance clause merely duplicates the coverage of the deprivation clause.

Due to the increase in anti-abortion protest demonstrations around the country, federal courts have become burdened with motions for injunctive relief to protect the rights of patients and abortion clinics. The onslaught of requests for injunctive relief will not cease until either Congress or the United States Supreme Court sends a message to the protestors that their unlawful actions will not be dealt with lightly. Applying the hindrance clause of section 1985(3) to conspiracies that overwhelm local police in their protection of a woman's constitutional rights is just that message.

*Todd C. Coleman—'95*

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