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The Supreme Court's Narrow View on Civil Rights

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The right to choose abortion, although recently significantly curtailed from its original scope,[1] is a federally protected liberty interest of women, and is at least protected against the imposition of "undue burdens" by state and local government.[2] Some of the most serious threats to women's ability to choose abortion have come not from government regulation, but from private, national, organized efforts to prevent abortions. In addition to seeking change through the political system, some of these organizations, most notably Operation Rescue, have focused on the providers of abortion, and have attempted to prevent abortions by forcibly closing abortion clinics and harassing and intimidating women and employees entering the clinics. These groups do not shy away from using illegal

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[1] Compare *Planned Parenthood of Southeastern Pennsylvania v Casey*, 112 S Ct 2791 (1992) and *Webster v Reproductive Health Servs*, 492 US 490 (1989) with *Roe v Wade*, 410 US 113 (1973); *Doe v Bolton*, 410 US 179 (1973) and *Thornburgh v American College of Obstetricians & Gynecologists*, 476 US 747 (1986).

[2] See Casey, 112 S Ct 2791 (1992). See also Jane Maslow Cohen, *A Jurisprudence of Doubt: Deliberative Autonomy and Abortion*, 3 Colum J Gender & L 175 (1993). Professor Cohen focuses on women's loss of deliberative autonomy inherent in the Court's approval of mandatory information and waiting periods. The waiting period also imposes considerable economic burdens which may make abortion significantly more expensive and thus difficult to choose for poor women who do not live close to an abortion provider.

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means to accomplish their goal.[3] In *Bray v Alexandria Women's Health Clinic*,[4] the Supreme Court rejected the consensus among lower federal courts[5] that private conspiracies to blockade abortion clinics were subject to federal court injunctions under 42 USC § 1985(3),[6] a provision of the Civil Rights Act of 1871.[7] *Bray* is the latest in a line of decisions that has rendered empty the forty-second Congress's promise of federal court protection against organized groups who interfere with individuals attempting to exercise their federal constitutional rights.

Bray involved Section 2 of the Civil Rights Act of 1871, often referred to as the Ku Klux Klan Act, now codified at 42 USC § 1985(3). The Ku Klux Klan Act was a direct response by Congress to widespread violence in the South against the newly freed slaves and their allies for equal rights.[8] The provision involved in *Bray* provides, *inter alia*, a cause of action in favor of parties injured

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[3] See John Whitehead, *Civil Disobedience and Operation Rescue: A Historical and Theoretical Analysis*, 48 Wash & Lee L Rev 77 (1991); Alissa Rubin, *In God They Trespass: The Faces and Faith Behind Operation Rescue*, The Washington Post (May 16, 1993), p. c01.

[4] 113 S Ct 753 (1993).

[5] See *Volunteer Medical Clinic, Inc. v Operation Rescue*, 948 F2d 218 (6th Cir 1991); *National Organization for Women v Operation Rescue*, 914 F2d 582 (4th Cir 1990); *New York State National Organization for Women v Terry*, 886 F2d 1339 (2d Cir 1989), cert denied, 495 US 947 (1990).

[6] Section 1985(3) provides:

> § 1985. Conspiracy to interfere with civil rights
>
> (3) Depriving persons of rights or privileges
> 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 advoeacy 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 Congtess of the United States; or to injure any citizen in person or property on account of such support or advoeacy; in any ease 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.

[7] See ch 22, 17 Stat 13 (1871).

[8] See Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 Tulane L Rev 2113, 2140–46 (1993).

by conspiracies to "depriv[e] any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."[9] The Court in *Bray* was called upon to address the applicability of this provision to Operation Rescue's efforts to prevent women, by blockading and otherwise temporarily closing abortion clinics, from having abortions.

Owing to inhospitable treatment by the Supreme Court, § 1985(3) has not, in its more than 120 years of existence, proven to be a useful tool in efforts to secure the enjoyment of civil rights.[10] For its first eighty years, § 1985(3) lay dormant, because soon after enactment, the Court held unconstitutional the criminal counterpart to § 1985(3), on grounds equally applicable to § 1985(3) itself.[11] Even after the clouds of unconstitutionality were carried away on the winds of constitutional change, the Court remained unsympathetic to the operation of § 1985(3).

In recent years, the Court has restricted the operation of section 1985(3) through a variety of limiting doctrines. In its first opinion construing the statute, the Court held that the statute's equal protection and equal privileges and immunities language meant that

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[9] The statute also provides a cause of action against conspiracies entered into "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." The primary focus of the Court's decision in *Bray* was on the provision in text, because the Court did not believe that the plaintiffs had raised below a claim under the hindrance clause. The dissenters disagreed with this conclusion, but it is at least clear that the lower courts did not actually decide a hindrance claim, and this article will only raise the hindrance clause when relevant to understanding the main conspiracy provision.

[10] This is in line with the Court's generally conservative treatment of the Reconstruction-era civil rights statutes. For most of the period following the Civil War, the Supreme Court has been a conservatizing influence with regard to the enforcement of Reconstruction-era civil rights statutes, generally narrowing their reach and holding some statutes unconstitutional. See, e.g., *The Slaughter House Cases*, 83 US (16 Wall) 36 (1873); *The Civil Rights Cases*, 109 US 3 (1883) (holding the Civil Rights Act of 1866 unconstitutional); see generally Eugene Gressman, *The Unhappy History of Civil Rights Litigation*, 30 Mich L Rev 1323 (1952); Lawrence, 67 Tulane L Rev (cited in note 8). In recent years, the Court has also construed modern civil rights statutes very narrowly, provoking a response from Congress in the form of the Civil Rights Act of 1991. See note 155. The *Bray* decision has also prompted efforts in Congress to pass specific legislation protecting abortion clinics from activities like those carried out by Operation Rescue. This proposal, if enacted, would protect abortion clinics but would not amend section 1985(3) and thus would not address the issues concerning section 1985(3) discussed in this article. See proposed Freedom of Access to Clinic Entrances Act of 1993, S 636, 103rd Cong, 1st Sess (March 23, 1993).

[11] See *United States v Harris*, 106 US 629 (1883); see also *Baldwin v Franks*, 120 US 678 (1887). This was consistent with the nineteenth-century Court's treatment of other Reconstruction-era civil rights statutes which, as noted above, were either held unconstitutional or construed so narrowly as to be useless.

the statute was aimed primarily at conspiracies entered into by government officials.[12] This virtually eliminated any role for § 1985(3) in combating private activity that prevented the exercise of constitutional rights. The Court later expressed serious doubts concerning the correctness of this view,[13] but erected two limitations on the scope of section 1985(3) in its place, both of which serve to restrict severely the scope of the statute's remedy. First, the Court has required, relying on the use of the word "equal" in the statute, that the conspirators act out of class-based animus. The Court has not yet recognized any such animus beyond that based on race, and has expressed doubts that any non-racial classification can satisfy this requirement.[14] Second, while the *Griffin* Court recognized that the statute reaches private conspiracies to violate constitutional rights,[15] the Court subsequently held in *Carpenters* that a section 1985(3) action against a purely private conspiracy can reach only those few constitutional rights that are capable of violation by private actors.[16] These two requirements serve to severely restrict the utility of section 1985(3) against private conspiracies to deny constitutional rights.[17]

In *Bray*, these Court-imposed requirements doomed the plaintiffs' claim that Operation Rescue's blockades of abortion clinics

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[12] See *Collins v Hardyman*, 341 US 651, 660–62 (1951). For a fuller explanation of this, see notes 61–82 and accompanying text.

[13] See *Griffin v Breckenridge*, 403 US 88 (1971).

[14] Id at 102 n 9. See also *United Brotherhood of Carpenters & Joiners v Scott*, 463 US 825, 836 (1983) ("It 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."); *Bray*, 113 S Ct at 759.

[15] *Griffin*, 403 US at 101.

[16] See *Carpenters*, 463 US at 831–34 (under § 1985, a private conspiracy cannot violate First Amendment rights, but only those rights guaranteed against private as well as public interference—rights under the Thirteenth Amendment and the right to travel). This may be even more restrictive than *Collins v Hardyman*, which at least allowed that an extreme private conspiracy could "work a deprivation of equal protection of the laws, or of equal privileges and immunities under laws." 341 US at 662. For example, private newspaper censorship is not a First Amendment violation, and a firing by a private company without a hearing does not violate due process. For state action doctrine generally, see *Moose Lodge No. 7 v Irvis*, 407 US 163 (1972).

[17] The Court found in *Bray* that a claim under the separate hindrance clause was not presented, but it addressed it anyway in response to the dissenters' that it was presented and made out. The Court, in a somewhat speculative vein, noted that the equality language appears also in the hindrance clause and that it would, in a properly presented case, import the class-based animus and state action requirements into a hindrance claim, thus rendering the hindrance clause also largely useless against private action directed against constitutional rights. 113 S Ct at 765–67.

could be enjoined by federal courts using § 1985(3).[18] The Court held that the class-based animus requirement was not met because opposition to abortion was not equal to animus against women[19] and because the class of women seeking abortions was not a proper class under § 1985(3).[20] The Court further held that Operation Rescue's activities did not violate either the right to travel or the right to abortion. The plaintiffs had relied primarily upon the right to travel since it is protected against private interference, and a large percentage of the women served by the clinics blockaded in *Bray* traveled from out of state to the clinics. The Court rejected both rights as bases for the § 1985(3) claim, the right to travel because women from out of state were treated no worse than women from within the state, and the right to abortion because it is not protected against private interference. Thus, a conspiracy to use illegal means to prevent women from exercising the federal right to have an abortion is not actionable under § 1985(3).

The Supreme Court has relied on two related bases for reading § 1985(3) so narrowly. First, the Court has expressed doubts about the constitutionality of a federal statute that would outlaw all private conspiracies aimed at depriving people of constitutionally protected interests. Second, the Court has stated that it is important to limit § 1985(3) so that it does not become a general federal tort law, displacing state law whenever a conspiracy exists. These two concerns, rooted in federalism, are closely related to grounds the Court has relied upon for reading other Reconstruction-era civil rights laws narrowly,[21] yet neither is a persuasive reason for the

[18] There is another interesting issue of whether injunctive relief is available under section 1985(3). The section itself provides only for a damages remedy, but as originally passed in the Civil Rights Act of 1871, the section allowed, in addition to the damages remedy, for the same remedies as provided in the Civil Rights Act of 1866. The Civil Rights Act of 1866, in turn, contemplated a civil action in federal district court, and did not specify the remedy available. See Civil Rights Act (Enforcement Act) of 1866, ch 31, 14 Stat 27, now codified at 42 USC § 1988. The lower court in *Bray* held that under the federal courts' general remedial discretion, injunctive relief was appropriate. The Supreme Court did not reach the issue. See 113 S Ct at 767 n 16.

[19] *Bray*, 113 S Ct at 759. The Court found it unnecessary to decide whether "women in general" constitutes a qualifying class under § 1985(3).

[20] Id at 759–60.

[21] See, e.g., *Monroe v Pape*, 365 US 167, 187–92 (1961) ("person" in § 1983 does not include municipalities); *Monell v Department of Social Services of City of New York*, 436 US 658 (1978) ("person" includes municipality but municipalities are not liable under ordinary tort rules of respondeat superior); *Pierson v Ray*, 386 US 547 (1967) (provision in § 1983 making all "persons" liable does not overrule common law government official immunities). In the criminal civil rights context, Professor Lawrence has referred to these concerns as the federalism and vagueness problems. See Lawrence, 67 Tulane L Rev at 2119 (cited in note 8).

limits the Court has imposed in this or other contexts. In short, there is no constitutional problem with federal court remedies against private individuals who conspire to deprive people of their constitutional rights even if the conspiracy is not motivated by racial animus, and § 1985(3)'s requirement that the conspirators act for the purpose of depriving their victims of constitutional rights (equal protection or equal privileges and immunities) eliminates the potential that § 1985(3) might displace large portions of state tort law.

This article explores the issues raised by *Bray* as follows. Part I explores the conditions that brought about § 1985(3), how those conditions shaped the statute, and how the statute was received in the Court soon after its passage. Part II analyzes, in light of that history, the development of current doctrine for applying § 1985(3), and traces that development to current § 1985(3) doctrine. Part III looks closely at the principal limiting doctrines, critiques how they were applied in *Bray*, and proposes rules in their place that would answer the Court's federalism concerns while making § 1985(3) a much more effective remedy against private conspiracies to prevent people from exercising constitutional rights. Part IV concludes with some observations regarding the Court's role, since the Civil War, in protecting civil rights.

I

Beginning in 1866, as part of the program of Reconstruction of the Union after the Civil War, the postbellum Congress,[22] through civil rights legislation, made several attempts to protect the rights of the newly freed slaves and their political allies both from government and private discrimination.[23] Many impediments to full participation in society for the newly freed slaves had arisen, and they were created by governmental units, government officials, and private resistance, most notably through the Ku Klux Klan, which enjoyed a very large membership among Southern white

[22] Sometimes over presidential veto; e.g., Civil Rights Act of 1866, ch 31, 14 Stat 29–30 (1866).

[23] These inclnde Civil Rights Act of 1875, ch 114, 18 Stat 335 (1875); Ku Klux Klan Act, ch 22, 17 Stat 13 (1871); Enforcement Act of 1870, ch 114, 16 Stat 140, amended by Act of Feb 28, 1871, ch 99, 16 Stat 433; and the Civil Rights Act of 1866, ch 31, 14 Stat 27.

men at that time.[24] On the government side, some states attempted to restrict black ownership of property and discriminated in the provision of civil remedies, thus making it difficult or impossible for blacks to engage in economic activity. Further, restrictions were placed on the freed slaves' right to vote, and facially neutral criminal laws were enforced in a discriminatory fashion so that blacks were punished severely and those who victimized blacks were not punished at all. Finally, there were instances in which government officials assaulted blacks and their supporters. These attacks went unpunished, thus tending to provide the appearance of government approval to official and private mistreatment of blacks.

Private violence and discrimination against blacks was also viewed by Congress as a serious impediment to full integration into society for the newly freed slaves. There was widespread discrimination in public accommodations such as restaurants and hotels and discrimination in everyday economic transactions. It was also common for whites to act violently toward blacks, and there were several notorious examples of mob violence against blacks that were not adequately dealt with by state and local authorities.[25] The content of the statutes passed by Congress between 1866 and 1875 can be traced to particular problems that generally fall into these categories of both public and private hostility to equality for black citizens, and the combination of public and private violence makes it difficult to distinguish provisions motivated by one or the other.

The legislation attacked the problems that blacks were facing in the South just after the war through a variety of means, including creating civil and criminal penalties for private interference with voting[26] and the exercise of other rights;[27] creating remedies against official deprivations of federal rights;[28] creating substantive rights

[24] See *Collins*, 341 US at 662; see generally Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 Tex L Rev 527, 534–36 (1985).

[25] See Lawrence, 67 Tulane L Rev at 2133–35 (cited in note 8) (discussing riots in Memphis, New Orleans, and Colfax, Louisiana); Gormley, 64 Tex L Rev at 543 n 40 (cited in note 24).

[26] The Enforcement Act of 1870, § 4, provides that a person who is hindered or otherwise intimidated while exercising the right to vote shall receive $500 from the offending party.

[27] The Enforcement Act of 1870, § 17, provides a criminal penalty against any public official who interferes with the Act's guarantee in § 16 that all persons shall enjoy the full and equal benefit of all laws, including the right to make and enforce contracts, to fully participate in court proceedings, and to receive equal punishment.

[28] Enforcement Act of 1870, § 17; Ku Klux Klan Act, § 1; Civil Rights Act of 1866, § 2.

such as granting all persons in the United States the same right as "white citizens" to make and enforce contracts, the right to own property, and the right to use public accommodations;[29] and making conspiracies to deny equal protection and equal privileges and immunities crimes and actionable for civil damages.[30]

These statutes have certain features in common.[31] They do not single out newly freed slaves as the only proper plaintiffs but rather grant rights generally to all potential victims of the specified deprivations.[32] Further, the statutes are largely directed at individuals, both government officials and private citizens, rather than at governmental units.[33]

While the form of civil rights legislation was influenced most heavily by the precise problems blacks were facing after the end of slavery, the decision to aim the statutes primarily at individuals rather than at governmental units appears to have arisen from pressure brought by some members of Congress to preserve as much of the original federalist structure as possible. The choice to employ primarily judicial remedies, both civil and criminal, and against individuals rather than governmental units, was arrived at after balancing several considerations, including effectiveness in protecting federal rights against both public and private violation, ease of administration, and respect for state and local government authority. Criminal and civil remedies against individuals might not be as effective as federal official intervention into the operation of state and local government, but they can be considerably less intrusive on government and thus were arrived at as an appropriate

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[29] Enforcement Act of 1870, § 16; Civil Rights Act of 1866, § 1; Civil Rights Act of 1875, § 1 (held unconstitutional in *The Civil Rights Cases*). While the first two did not specify any remedy, the public accommodations provision of the Civil Rights Act of 1875 Act provided a $500 civil penalty to be recovered by the aggrieved party from the violating party.

[30] Ku Klux Klan Act, § 2 etc.

[31] See generally Lawrence, 67 Tulane L Rev 2113 (cited in note 8).

[32] The exceptions here are 42 USC § 1981 (derived from the Enforcement Act of 1870) and 42 USC § 1982 (derived from the Civil Rights Act of 1866). These provisions grant all persons the same right, *inter alia*, to make and enforce contracts, sue and be sued, and own property, as "white citizens." Despite the seeming illogic of applying the language to protect the rights of whites, the Court has allowed white persons to sue under § 1981 on reasoning that may apply equally to § 1982. See *McDonald v Santa Fe Trail Transp. Co.*, 427 US 273 (1976) (§ 1981 protects whites). See also *Jones v Alfred H. Mayer Co.*, 392 US 409, 437 (1968) (characterizing § 1982 as prohibiting "all racial discrimination . . . in the sale and rental of property.").

[33] Section 1983 is the exception, since it applies both to individuals and municipalities but, according to the Court, not to state governments. See *Monell*, 436 US at 658; *Will v Michigan Dept. of State Police*, 491 US 58 (1989).

method for ensuring that state and local governments recognized the rights of the newly freed slaves while at the same time not unnecessarily intruding on the authority of those governments.

From the start, this legislation did not fare well in the Supreme Court.[34] The Court developed a constitutional theory, rooted in concerns of proper federal-state relations, that confined some of the statutes to a relatively narrow sphere, and provisions that could not credibly be construed to meet the Court's requirements were declared unconstitutional. The basic doctrinal premise under which the Court operated (and still employs to a great extent) was that the Fourteenth Amendment addressed only state action, primarily state laws that were contrary to the Due Process, Equal Protection, and Privileges and Immunities Clauses.[35] The Court took very literally the language in the Fourteenth Amendment limiting its effect to state action. The Fourteenth Amendment itself did not reach private conduct at all, or, in the Court's words, "Individual invasion of individual rights is not the subject-matter of the amendment."[36] Along the same line of reasoning, the Court has stated that the Fourteenth Amendment does not create any individual rights but rather prohibits states from taking certain adverse actions against individuals.[37] This state-action-only theory of the reach of the Fourteenth Amendment still governs our understanding of the amendment today.[38]

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[34] See, e.g., *The Slaughter House Cases*, 83 US (16 Wall) 36 (1873); *United States v Cruikshank*, 92 US 542 (1876); *The Civil Rights Cases*, 109 US 3 (1883); *United States v Harris*, 106 US 629 (1883). For a discussion of the "dreadful deeade" from 1873 to 1883, in which most Reconstruction era civil rights legislation was sharply narrowed by the Supreme Court, see Gormley, 64 Tex L Rev at 541–46 (cited in note 24). While the Court's resistance to civil rights legislation might be chalked up to the prevailing views of the time, I view this more as an explanation than an excuse. Leaders in Congress, subject to the direct politieal pressure of periodic re-election, were much more progressive than the politically insulated members of the Supreme Court, a pattern that has repeated itself often since. Compare Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 Colum L Rev 1622 (1986). In racial, politieal, and economic matters, the nineteenth-eentury Supreme Court was not a progressive institution.

[35] The Court first held that the Privileges and Immunities Clause would not federalize the great body of civil rights at the federal level—only a small subset of rights arising from national citizenship. *The Slaughter House Cases*, 83 US (16 Wall) 36, 79–80 (1873); *United States v Cruikshank*, 92 US 542, 554–55 (1876). The state action requirement was enunciated in *Cruikshank*, *United States v Harris*, 106 US 629, 637–39 (1883) and *The Civil Rights Cases*, 109 US 3, 26 (1883).

[36] *The Civil Rights Cases*, 109 US at 11.

[37] *United States v Harris*, 106 US 629 (1883).

[38] See, e.g., *United States v Price*, 383 US 787, 799 (1966); *Moose Lodge No. 7 v Irvis*, 407 US 163 (1972); *Great American Federal Savings & Loan Assn. v Novotny*, 442 US 366, 372 (1979) (§ 1985(3) does not create new substantive rights; the rights it vindicates must have

The primary theoretical justification the Court relied upon for its construction of the Reconstruction-era amendments and statutes was regard for the proper division of authority over personal relations between the states and the federal government. Under the view prevailing at the Supreme Court during and for a long time after the Reconstruction era, the only legitimate federal interests were abolishing actual slavery and voiding all state laws contrary to the Fourteenth and Fifteenth Amendments. Except for abolishing involuntary servitude, the regulation of relationships among private individuals, including crimes, tort law, and property and contract law, was a matter of state law, and federal intervention into these areas was a threat to the basic principles governing the allocation of power between the federal and state governments.[39]

This theoretical background is most clearly seen in the Court's discussion of the idea that Congress, legislating pursuant to the Fourteenth Amendment, could reach private conduct. The Court rejected any notion that the Fourteenth Amendment might "invest Congress with power to legislate upon subjects which are within the domain of State legislation. . . . It does not authorize Congress to create a code of municipal law for the regulation of private rights."[40] All aspects of relations among private individuals were seen as matters of private and, therefore, state law.

The Court's conclusion that the Fourteenth Amendment itself did not reach private conduct did not answer the question whether Congress intended, or had the power to, reach private conduct in the civil rights statutes of the immediate post–Civil War period. More particularly, that the Fourteenth Amendment itself reaches only state action does not answer whether Congress's enforcement power, granted in § 5 of the amendment, includes the power to reach private conduct that threatens Fourteenth Amendment interests. In the immediate post–Civil War era, the Court did not really separate the two issues, holding that § 5 of the amendment grants Congress only the power to enforce the actual effect of the substantive provisions of the amendment itself. Thus, congressional efforts

an existence of their own—First and Fourteenth Amendment rights do not exist without state action).

[39] This is what Professor Lawrence denominates the "federalism problem." See Lawrence, 67 Tulane L Rev at 2118–22 (cited in note 8). The Court probably also believed that no law, state or federal, should intervene into private social relations, but the dominant concern was the division of authority between state and federal governments.

[40] 109 US at 11.

under the Fourteenth Amendment to reach private civil rights violations were unconstitutional as beyond Congress's power.

The Court saw a difference between the enforcement power granted in the Fourteenth Amendment and other federal powers such as the commerce power. While Congress might have plenary power to regulate all aspects of matters falling within a power enumerated in Article I of the Constitution, the enforcement power of the Fourteenth Amendment was granted only for the purpose of enforcing the amendment's ban on certain state laws or practices, and therefore Congress could not legislate any further than the reach of the amendment. While some constitutional provisions, such as the Commerce Clause, granted Congress powers over a broadly defined subject area, the Fourteenth Amendment enforcement power was different. The Fourteenth Amendment enforcement power granted Congress only the power to remedy violations of the amendment. Thus, while Congress might legislate broadly over interstate commerce,[41] it may not legislate to protect generally Fourteenth Amendment interests. Rather, legislation may be directed only at actual violations of Fourteenth Amendment rights. Since private conduct could not violate the Fourteenth Amendment, public accommodations legislation directed at private innkeepers, for example, and even legislation directed at private conspiracies to prevent people from exercising constitutional rights, was held beyond Congress's power to enforce the Fourteenth Amendment.[42]

This construction of the Fourteenth Amendment was accompanied by a narrow view of the reach of the Thirteenth Amendment. Although the Court acknowledged that the Thirteenth Amendment addressed private conduct, the Court early on held that the Thirteenth Amendment's reach was confined to eliminating slavery. It was simply, to the Court, not slavery for a private individual to discriminate on the basis of race or even to beat or kill a person because of his or her race.[43] While the Court might concede that people have a right, in the abstract sense, to equal access to places

[41] In *The Civil Rights Cases*, the Court suggested that Congress might pass public accommodations civil rights legislation under its commerce power, but not under the Fourteenth Amendment. See 109 US at 18.

[42] 109 US at 11.

[43] Id at 24.

of public accommodation, this right was not granted to blacks by the Thirteenth Amendment but rather was "one of those rights which the states by the Fourteenth Amendment are forbidden to deny to any person."[44] Since, according to the Court, the "Thirteenth Amendment has respect, not to distinctions of race, class, or color, but to slavery," it did not grant Congress the power to pass public accommodations laws or laws regarding private violence against blacks.

It should be obvious that not all of the constitutional underpinnings to the Supreme Court's treatment of the Reconstruction-era civil rights statutes remain the law. While it is still accepted law that the Fourteenth Amendment reaches only state action, the Court has made it much easier for Congress to reach private action in legislation enforcing the Thirteenth and Fourteenth Amendments. Two key changes in Court doctrine have brought this about. First, the Court has construed the Thirteenth Amendment's reach more broadly than merely eliminating the actual relationship of slavery. The Court has characterized the amendment as abolishing all the badges and incidents of slavery, and these include both official and private acts of discrimination against blacks.[45] Congress now has broad power to identify and regulate the badges and incidents of slavery under its Thirteenth Amendment enforcement power, including the power to reach private action. Second, although it has expressed some doubts, it appears likely that the Court would allow Congress the power to legislate against private infringements of the interests protected by the Fourteenth Amendment. The Court has already recognized congressional power, with regard to government official conduct, to go far beyond the judicially recognized reach of the amendment. Under prevailing doctrine, Congress may create new rights and provide remedies to see that these new rights are recognized.[46] The Court has rejected its earlier view that the Thirteenth and Fourteenth Amendment en-

[44] Id.

[45] See *Jones v Alfred H. Mayer Co.*, 392 US 409 (1968) (§ 1982 bars all racial discrimination, private as well as public, and the statute is a valid exercise of congressional power to enforce the Thirteenth Amendment).

[46] That Congress could reach private conduct under § 5 of the Fourteenth Amendment was asserted in Congress during framing of the Civil Rights Act of 1871, but the Supreme Court has not yet so held. See Cong Globe, 42d Cong, 1st Sess 367–68, 607–08 (1871).

forcement powers are fundamentally different from other powers granted in Article I of the Constitution, and has subjected legislation under those powers to the minimal rational basis scrutiny applied to most legislation under Congress's Article I powers.[47] This test, which Reconstruction-era civil rights legislation would meet easily,[48] requires only that Congress might rationally have believed that an action would advance constitutionally legitimate goals.

Under this expansive view of Congress's power to legislate under the post–Civil War amendments, Congress could attack all impediments to full equality and rights. Congress would have broad authority to identify government and private practices that threaten the values underlying the amendments, prescribe substantive standards regulating those practices, and create remedies to enforce those standards. Thus, even though private conduct cannot violate the Fourteenth Amendment, Congress could regulate private racial discrimination and private racial violence to advance the Fourteenth Amendment value of a non-racist society.

This view of Congress's power fits neatly into twentieth-century developments regarding federalism limits on congressional power.[49] Congressional assertions of regulatory power are now subjected to only the most minimal judicial scrutiny, and Congress has not been shy about exercising extensive regulatory power in areas that nineteenth-century judges would have identified as areas within state control.[50] This expansion of federal regulatory power has en-

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[47] See *Katzenbach v Morgan*, 384 US 641 (1966).

[48] It is not difficult to imagine how Congress in 1866, 1871, or 1875 might rationally have believed that in order to promote equality before the law it was necessary to protect persons and groups from private conspiracies against the exercise of constitutional rights.

[49] See *United States v Darby*, 312 US 100 (1941); *Heart of Atlanta Motel, Inc. v United States*, 379 US 241, (1964); *Garcia v San Antonio Metropolitan Transit Auth.*, 469 US 528 (1985).

[50] See Civil Rights Act of 1964, 42 USC § 2000 (1982) (prohibiting discrimination based on race, color, religion, sex, and national origin in puhlic accommodations, restaurants, employment, housing, and education). The Court has recognized broad power to legislate regarding private discrimination under the commerce power. See *Fitzpatrick v Bitzer*, 427 US 445 (1976) (Congress has power, under the Commerce Clause and Fourteenth Amendment, to override state Eleventh Amendment sovereign immunity and subject states to liability for discrimination in employment); *Heart of Atlanta Motel, Inc. v United States*, 379 US at 258–61 (1964) (Title II of the Civil Rights Act of 1964, which prohibits discrimination in places of private accommodation, does not work a deprivation of liberty or property without due process of law, nor a taking of property without just compensation, and is within Congress's commerce power).

tailed a massive shift in governmental power from state government to the federal government, and to a great extent, judicial doctrine in other areas has been consistent with this shift.[51]

In the area of federal civil rights actions, the potentially radical implications of this view of federalism have not been realized.[52] The text, legislative history, and social context underlying § 1985(3) all indicate that the statute was intended to be part of a sweeping federal charter of liberty, granting remedies when private or public groups of individuals prevented people from enjoying their constitutional rights. Limiting doctrines, detailed in the following sections, rooted in the Reconstruction-era Supreme Court's constitutional dogma, have prevented § 1985(3) from becoming an effective tool for ensuring that people can actually enjoy their federal rights. The section that follows traces the doctrinal development of § 1985(3) under which *Bray* was litigated and asks whether the Court's understanding and application of the statute is consistent with contemporary understandings of congressional power and federalism.

II

The life of § 1985(3) can be divided into three stages. The first stage, from enactment until 1951, can be characterized as dormant because all indications were that the Court would find the statute unconstitutional for the same reason that it had struck down § 1985(3)'s criminal counterpart. The second stage, running from 1951 until 1971, is the period in which the Court construed the statute to reach public action only and to be inapplicable to private conspiracies. The final stage, which represents the doctrine prevailing since 1971, allows actions against private conspiracies, but limits the reach of the statute to those private conspiracies involving either joint action with public officials or constitutional rights that can be violated by private action, such as the right to travel. In addition, the Court held that the conspiracy must be motivated

[51] With the exception of some civil rights areas, in which the Court has been particularly sensitive to the federalism aspects of potential civil rights remedies. See *Younger v Harris*, 401 US 37 (1971); *City of Los Angeles v Lyons*, 461 US 95 (1983).

[52] See Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 Stan L Rev 51, 84–88 (1989) (discussing limits on § 1983 actions based on federalism concerns).

by racial or perhaps some analogous class-based bias, thus further restricting both public and private § 1985(3) actions. These stages are discussed below.[53]

A

The first case involving § 1985(3) reached the Supreme Court in 1951, eighty years after its passage. This is because in its 1882 term, in *United States v Harris*,[54] the Supreme Court declared unconstitutional § 1985(3)'s criminal counterpart[55] on grounds that would be equally applicable to the civil conspiracy provision.

The Court in *Harris* held that Congress lacked constitutional power to criminalize private conspiracies to deprive persons of due process and equal protection. The defendants in *Harris* were indicted for conspiring to assault, beat, and in one case kill people who had been arrested and were in custody awaiting trial. The Court construed the language of § 1985(3) (appearing identically in its criminal counterpart) to reach private conspiracies, and then considered whether § 1985(3) was a permissible use of Congress's powers under the Thirteenth, Fourteenth, or Fifteenth Amendment. On the Thirteenth Amendment, the Court held that, even though Congress might reach private conduct under the amendment, the statute went far beyond any conception of slavery—the Court noted that the statute reached even a conspiracy among blacks to deprive whites of equal protection, a result that could not be based on congressional power to outlaw slavery.[56] Similarly, the Court rejected the Fifteenth Amendment as a basis for § 1985(3) on the ground that the statute went far beyond voting rights.[57] These grounds are examples of the nineteenth-century Court's con-

[53] Other doctrines have also been created to limit § 1985(3)'s scope, largely involving the equal protection and equal privileges and immunities aspects of the statute. These additional limitations are addressed below in subsections B and C.

[54] 106 US 629 (1883).

[55] At the time, § 1985(3)'s criminal counterpart was codified at Revised Statutes Section 5519. Section 1985(3) itself has been codified in several different places: the Ku Klux Klan Act of 1871, 17 Stat 13; Rev Stat § 1980 (1878); 8 USC § 47(3); 42 USC § 1985(C) (1976); 42 USC 1985(3). For convenience, the current placement of the civil conspiracy provision at 42 USC § 1985(3) in the United States Code will be referred to throughout the text of this article.

[56] Harris, 106 US at 641.

[57] Id at 637.

sistently narrow reading of the amendments and Congress's power under them.

The Court also rejected, on state action grounds, the Fourteenth and Fifteenth Amendments as bases for Congress's power to enact § 1985(3). The Court characterized the Fifteenth Amendment as not granting to anyone the right to vote but rather as voiding any state law or practice that amounted to "'discrimination in the enjoyment of the elective franchise on account of race, color, or previous condition of servitude.'"[58] With regard to the Fourteenth Amendment, the Court also stated, relying on several previously decided cases under that amendment, that the amendment restrains only state action, and Congress has no power to legislate beyond the bounds of the amendment itself.[59]

This reasoning was consistent with the fabric of the Court's treatment of the post–Civil War civil rights statutes, under which the Court consistently held that Congress lacked the power to reach private conduct through civil rights legislation.[60] And the Court's reasoning applied equally to the civil action for damages against conspiracies granted in § 1985(3). The Court in *Harris* did not rely at all on the criminal aspect of the case or the particular penalty provision of the statute. It relied only on Congress's attempt to go beyond the provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments by regulating relationships among private individuals outside the context of actual slavery. Because the reasoning applied equally to civil and criminal actions, the civil provision was as ineffectual as if it had also been declared unconstitutional.

B

In the late 1940s and early 1950s, several civil cases were brought in federal court under § 1985(3), most arising out of politically motivated violence.[61] While the civil conspiracy provision that is

[58] Id, quoting *United States v Reese*, 92 US 214 (1875).

[59] Harris, 106 US at 638–39, citing *The Slaughter House Cases*, 83 US (16 Wall) 36 (1873); *United States v Cruikshank*, 92 US 542 (1876); *Virginia v Rives*, 100 US 313 (1879).

[60] In the years following the Civil War, the Court held other civil rights statutes unconstitutional for very similar reasons. See notes 10–11; see also *Collins*, 341 US at 657 n 10; *U.S. v Cruikshank*, 92 US 542 (1876); *The Civil Rights Cases*, 109 US 3 (1883).

[61] See *Hardyman v Collins*, 80 F Supp 501 (SD Cal 1948), reversed, 183 F2d 308 (9th Cir 1950), reversed sub nom, *Collins v Hardyman*, 341 US 651 (1951) (defendants, all private individuals, allegedly violently broke up a meeting of the plaintiffs' organization at which the Marshall plan was to be discussed and criticized); see also *Robeson v Fanelli*, 94 F Supp 62 (SDNY 1950) (defendants, including private individuals and government officials, allegedly conspired to disrupt a concert and gathering at which political issues were to be discussed);

§ 1985(3) had not technically been held unconstitutional along with its criminal counterpart, there were several formidable obstacles in the statute's text and nineteenth-century doctrine to the statute becoming an effective tool against private conspiracies.

Ironically, the Court's invalidation of the criminal provision was strong authority that as a matter of statutory text § 1985(3) reached private conspiracies. Recall that the reason the Court held the criminal provision unconstitutional was that it reached private conspiracies[62] and that this was beyond Congress's power.[63] As one lower court noted, the Supreme Court held that "a statute identical in part with [§ 1985(3)] was directed 'exclusively against the action of private persons.'"[64] The congressional intent to reach private conspiracies was, to some, evident from the language describing the potential defendants in § 1985(3) suits—the statute refers to "two or more persons" either conspiring or going in disguise on the highway. Government officials were obviously not the targets of the "disguise" provision, and it would be incongruous to hold that private parties may be sued under the disguise provision but only government officials were the intended targets of the prohibition against other conspiracies.[65] Some courts, ultimately including the Supreme Court, ignored these arguments and held that the statute was intended only to reach actions of public officials.[66] One argument for this was the statute's focus on conspiracies to deny "*equal* protection of the laws or of *equal* privileges and immunities under the laws."[67] In the most explicit discussions of the meaning of the word equal, two different theories emerged, one that held that the "equal protection" and "equal privileges and immunities" language implied state action[68] (and thus private conspiracies were

Ferrer v Fronton Exhibition Co., 188 F2d 954 (5th Cir 1951) (defendants fired plaintiff jai alai players in retaliation for their membership in an organization and hired illegal immigrants in their places).

[62] This point was not really analyzed by the *Harris* Court but rather was taken for granted, which, given how recent the statute had been passed, should be strong evidence that Congress intended the statute to reach private conspiracies.

[63] See *Harris*, 106 US at 639.

[64] *Hardyman*, 183 F2d at 311, quoting *United States v Harris*, 106 US at 640.

[65] *Hardyman*, 183 F2d at 311.

[66] See *Collins v Hardyman*, 341 US 651 (1951).

[67] Section 1985(3) (emphasis added).

[68] *Hardyman*, 80 F Supp at 506. Other courts holding that § 1985(3) did not reach private conspiracies reasoned more generally, without relying on specific statutory language, that the civil rights acts required action under color of law or state action. See *Love v Chandler*, 124 F2d 785 (8th Cir 1942); *Viles v Symes*, 129 F2d 828 (10th Cir 1942).

not redressable under § 1985 (3)), and another that held that the word "equal" meant no more than the violation of a right "which is enjoyed equally by other citizens" (thus allowing actions against purely private conspiracies).[69] A middle position allowed that private conspiracies might implicate "equal" rights but only if the conspiracy was an attempt to influence government officials to treat the victims of the conspiracy unequally.[70]

The other significant problem that advocates of private conspiracy based § 1985(3) suits had to face were the implications of the nineteenth-century Supreme Court's invalidation of the statute's criminal counterpart. Lower courts could not ignore the fact that the Supreme Court had held that there was no congressional power to reach private conspiracies directed at constitutional rights. To avoid the reach of *Harris*, a pair of lower court decisions developed a theory that granted Congress the power to protect a limited set of federal rights against private conduct.[71] The theory was that while most Fourteenth Amendment rights existed only with regard to the relationship between citizens and the states, § 1985(3) could be employed to attack conspiracies against the exercise of a special category of federal rights that implicated the relationship between citizens and the *federal government*. These included, *inter alia*, the right to assemble for the purpose of discussing national issues and petitioning the government for the redress of grievances. The idea was that the federal government has a special interest in constitutional rights that affect the relationship of citizens to the federal government, and this interest implies expanded congressional power.

The courts that allowed suits under § 1985(3) to challenge private

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[69] *Hardyman*, 183 F2d at 312. The other principal case that allowed a § 1985(3) action against a private conspiracy expressed general agreement with this opinion. *Robeson*, 94 F Supp at 66–67.

[70] See *Ferrer v Fronton Exhibition Co.*, 188 F2d 954, 956 (5th Cir 1951). This was partially accepted by the Supreme Court in *Collins*, but only for extreme cases of private domination of government.

[71] See *Robeson v Fanelli*, 94 F Supp 62 (SDNY 1950); *Hardyman*, 183 F2d at 313. The theory here was that some rights uniquely concern rights with regard to the federal government, and so Congress had power (perhaps under Article I) to protect those rights even against private hindrance. Id at 314. Thus, in *Robeson*, the court dismissed claims based on officials' failure to prevent conspiracies to deny equal protection, but allowed claims based on a conspiracy to prevent discussion of national issues. The court reasoned that under *Harris*, the statute cannot constitutionally be read to reach a private conspiracy to deny equal protection. See *Robeson*, 94 F Supp at 67–69.

political violence during this period were in the minority. Most courts did not allow suits against private parties on the ground that the Fourteenth Amendment did not reach private conduct and thus neither could a civil rights statute passed under that amendment. Had they followed the Supreme Court's earlier construction of the same language, they might have held the statute unconstitutional as beyond Congress's Fourteenth Amendment enforcement power.[72] But since even under the more restrictive view of congressional power, § 1985(3) (and its criminal counterpart) could have some constitutional applications to state official conduct, at most it might have been appropriate for the courts to strike down § 1985(3) in part, only insofar as it purported to reach private conduct.

In *Collins v Hardyman*, the Supreme Court ignored the nineteenth-century Court's construction of § 1985(3)'s identically phrased criminal counterpart and held that the statute did not reach private conduct unless the conspiracy was so widespread that it might "dominate and set at naught" the lawful governments and "effectively deprive Negroes of their legal rights and to close all avenues of redress or vindication."[73] Because it treated it as an open question,[74] the Court apparently did not view *Harris* (its earlier holding regarding the criminal statute) as authority on congressional power to provide a civil remedy for private discriminatory violence.

The Court offered two justifications for its decision to construe § 1985(3) to reach, in the main, only public official action. First, the Court noted that construing § 1985(3) to reach private conspiracies

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[72] A more expansive view of Congress's power under the Fourteenth Amendment did not emerge until *Katzenbach v Morgan*, 384 US 641 (1966). See also *United States v Guest*, 383 US 745 (1966). Implicit in the Supreme Court's holding in *Griffin v Breckenridge* that § 1985(3) reaches private conduct is that Congress has power to reach private conduct in a civil rights statute based on its Fourteenth Amendment enforcement power. See the post-*Griffin* case of *Action v Gannon*, 450 F2d 1227 (8th Cir 1977), which interpreted *Griffin* to hold that § 1985(3) applies to private conspiracies to violate Fourteenth Amendment rights and held that Congress has the power to reach private conduct under the Fourteenth Amendment. The seventh circuit disagreed with the eighth. See *Murphy v Mount Carmel High School*, 543 F2d 1189, 1194 (7th Cir 1976); *Cohen v Illinois Institute of Technology*, 524 F2d 818 (7th Cir 1975) (Stevens, J) (interpreting *Griffin* to require either state action or a right capable of violation by private parties). The Supreme Court, in *Carpenters* and *Bray*, adopted the seventh circuit's view of *Griffin*.

[73] Collins, 341 US at 662.

[74] Id.

would present important constitutional problems regarding federalism and Congress's power under the Fourteenth Amendment.[75] The Court hinted that if forced to construe the statute to reach private conduct it might agree with *Harris* and hold the statute unconstitutional. This justification has less to do with Congress's intent and more to do with the Court's attempt to avoid a constitutional question.

The Court also relied on the statutory references to "equal" rights and "equal" privileges and immunities to construe the statute to apply only to state action.[76] The Court's analysis here is interesting on two distinct scores. First, the Court interpreted the "equal protection" and "equal privileges and immunities" language to require that the object of the conspiracy be to affect the plaintiffs' legal rights, somehow either to influence the law, or "obstruct or interfere" with the operation of the law with regard to the plaintiffs' rights.[77] This is a refined version of the view that private parties are incapable of denying equal protection. It recoguizes that private conduct can, in some circumstances, influence the operation of the law so as to prevent people from exercising their rights, but the conduct would have to influence the operation or availability of legal institutions.[78] The Court apparently did not think that private violence, based on a victim's group membership, could be characterized as a denial of equal protection or equal privileges and immunities.

The second significant aspect of the Court's state action analysis is its characterization of the statute as requiring a deprivation of equality and not reaching conspiracies to deprive people of just any right or privilege of a citizen of the United States.[79] The lower court had held that a civil action under § 1985(3) could be brought any time a conspiracy resulted in the deprivation of a federal constitutional right. The court of appeals had relied on the language in the remedial portion of the statute that grants the action for dam-

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[75] Id at 659.

[76] Id at 660–61.

[77] Id at 661.

[78] Id at 662. This view was also adopted by some members of Congress during the debates on the statute. See Cong Globe, 42d Cong, 1st Sess, 456–82 (1871). See generally Stephanie M. Wildman, *42 USC § 1985(3)—a Private Action to Vindicate Fourteenth Amendment Rights: A Paradox Resolved*, 17 San Diego L Rev 317 (1980).

[79] See § 1985(3), as quoted in *Collins*, 341 US at 660.

ages to any person "injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States."[80] The Supreme Court held that this reference in the remedial portion of the statute to any federal right concerned only the result of the conspiracy, and that only conspiracies directed at equality of rights met the substantive requirements of the statute.[81]

Limiting the scope of the cause of action created by § 1985(3) to state action directed at deprivations of equality rendered the statute virtually useless as a tool for securing the full enjoyment of rights. To the framers of the Fourteenth Amendment and the Reconstruction-era civil rights statutes, preventing state deprivation of rights was not sufficient to guarantee the enjoyment of federal rights, because states might be "unable or unwilling"[82] to preserve those rights against both public and private attack. While they may have understood that the Fourteenth Amendment itself would operate only against state action, they thought that they had the power to ensure enjoyment of Fourteenth Amendment rights by legislating against private action interfering with the exercise of those rights, and by passing § 1985(3) they thought they had exercised that power.

c

The doctrinal framework under which *Bray* was decided was established by the Court in the 1971 decision of *Griffin v Breckenridge*.[83] That decision loosened up somewhat on the Court's earlier

[80] Section 1985(3). As noted above, the court of appeals did not think the equality language was important, holding that it meant that a person was deprived of a right possessed by all others. See *Hardyman*, 183 F2d at 312. Note that since this section contemplates damages for the violation of a right *or* for injury to property or person, damages under § 1985(3) should not be limited to damages for actual injury as in § 1983 cases. See *Memphis Community School Dist. v Stachura*, 477 US 299 (1986) (§ 1983 damages are limited to compensation for injuries recognized at common law; no damages for the mere deprivation of a right without further injury).

[81] Other provisions of the Reconstruction-era civil rights statutes, most notably § 1983, are more broad in that they grant remedies for violations of any federal right. See Neil H. Cogan, *Section 1985(3)'s Restructuring of Equality: An Essay on Texts, History, Progress, and Cynicism*, 39 Rutgers L Rev 515, 549–53 (1987).

[82] See *Monroe v Pape*, 365 US 167, 175 (1961) (discussing why Congress did not intend to limit § 1983 actions, derived from § 1 of the Civil Rights Act of 1871, to official conduct in conformity with state law).

[83] 403 US 88 (1971).

view that only the most extreme private conspiracies were within § 1985(3)'s reach,[84] but it established two other requirements that have narrowed greatly the statute's scope. First, the *Griffin* Court held that § 1985(3)'s equality language means that the conspiracy must be motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus[.]"[85] Second, by focusing on the right to travel claims presented in the complaint, the *Griffin* Court laid the groundwork for the principle that private conspiracies are actionable only when they violate constitutional rights that are protected, as a constitutional matter, from private invasion.[86]

The changes in interpretation of § 1985(3) have not been justified by the sorts of arguments that typically accompany abandonment of prior statutory interpretation.[87] There is little indication in any of the Court's opinions that the current interpretation of § 1985(3) is based upon a better understanding of congressional intent than prior Courts or commentators that have read § 1985(3) differently.[88] The Court rarely refers in a serious way to the nineteenth-century Congress's views. Rather, the interpretation the Court has settled on for now was arrived at largely under the influence of constitutional considerations including the desire to avoid transforming a great number of state torts and crimes into federal torts and crimes, doubts about Congress's power under the Fourteenth Amendment to reach private conduct, and the view that it is incongruous to think of private action threatening rights protected by the Constitution itself only against state action.

i. The *Griffin* Court read § 1985(3)'s equality language to require that offending conspiracies be motivated by class-based animus. That Court rejected the *Collins* Court's holding that the equality

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[84] This development is discussed below in Part IIIA.

[85] *Griffin*, 403 US at 102.

[86] See *Griffin*, 403 US at 105–6, as discussed in *United Brotherhood of Carpenters v Scott*, 463 US at 832–33.

[87] See generally Jay I. Sabin, *Clio and the Court Redux: Toward a Dynamic Mode of Interpreting Reconstruction Era Civil Rights Laws*, 23 Colum J L & Soc Probs 369 (1990) (discussing methods of interpreting Reconstruction-era civil rights statutes and advocating a "dynamic" approach).

[88] See Steven F. Schatz, *The Second Death of 42 USC § 1985(3): The Use and Misuse of History in Statutory Interpretation*, 27 BC L Rev 911 (1986); Sabin, 23 Colum J L & Soc Probs 369 (cited in note 87); Mark Fockele, Comment, *A Construction of Section 1985(c) in Light of its Original Purpose*, 46 U Chi L Rev 402, 417 (1979). Compare *Monell v Dept. of Social Services of City of New York*, 436 US 658 (1978) (overruling prior interpretation of § 1983 based on reevaluation of legislative history).

language signified a statutory state action requirement reasoning that only a conspiracy among state actors could work a deprivation "of equal protection *of the laws* or equal privileges and immunities *under the law*." In light of the overwhelming evidence that Congress intended to reach private conspiracies with § 1985(3), the *Griffin* Court rejected this state action interpretation of the equality language,[89] but read that same language to require that the conspiracy be motivated by racial or "perhaps" some other sort of class-based animus.[90] Both of these readings reject the court of appeals in *Collins*'s view that the only importance of the word "equal" was that the conspirators must have treated the victim differently than other citizens were treated.[91]

The opinion in *Griffin* documented thoroughly the textual and historical evidence of congressional intent to reach private conspiracies. The conclusion that the principal aim of § 1985(3) was action by government officials was plainly wrong in light of Congress's direct intention in § 1985(3) to attack the Ku Klux Klan and similar groups. Although many of these groups may have counted Democratic Party government officials among their members, they were private organizations and did not act under color of law. The most powerful pieces of evidence indicating that Congress intended the statute to reach private conspiracies, both relied upon by the *Griffin* Court, are the "disguise" and "hindrance" provisions of § 1985(3). The "disguise" provision, which extends the statute's reach to groups that go in disguise on the highway, is discussed above. The hindrance provision reaches conspiracies or action by persons in disguise that "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."[92] This provision is aimed at private parties hindering government authorities, and is thus not aimed at state action.[93] And there is no mention in the general conspiracy provision of any requirement that the conspirators be state actors, which would be expected if the conspiracy

[89] For a discussion of this development, see notes 92–95 and accompanying text.

[90] See *Griffin*, 403 US at 102, discussed at notes 92–100 and accompanying text.

[91] See *Hardyman*, 183 F2d at 312.

[92] Quotes are from § 1985(3).

[93] Since the hindrance provision achieves this independently, its existence should also rebut the suggestion that any private conspiracy reachable under § 1985(3) must have, as its aim, the disruption of government protection of rights.

section was to be so limited and yet stand alongside two provisions obviously aimed at private parties.

There is also plentiful evidence in addition to the text of § 1985(3) to support applying the statute to private conspiracies. The Reconstruction-era Congress addressed several statutes at government actors only, using the familiar "under color of law" formulation, the best example of which is 42 USC § 1983, which was passed as part of the same statute as § 1985(3). Congress did not, however, insert such language into § 1985(3).[94] Further, the historical background against which § 1985 (3) was drafted belies the notion that it was designed to reach only governmental action. The legislative history is replete with evidence that Congress was moved to act by several notorious instances of mob violence against blacks and their supporters, and that the drafting of the statute was carefully tuned to reach that type of private conduct.[95]

The *Griffin* Court thus rejected the earlier view that § 1985(3)'s equality language required state action, but in the place of this requirement the Court held that the equality language required that the conspiracy be motivated by some sort of class-based animus. In fact, the Court has not recognized any animus other than racial animus as satisfying this requirement for a § 1985(3) cause of action, and in *Bray* the Court characterized the *Griffin* Court's possible extension of § 1985(3) beyond race as "speculative."[96] While the class-based animus requirement is presented as an interpretation of the statute's equality language, it is justified primarily by the Court's professed concern not to create a "general federal tort law" under § 1985(3).[97] In fact, the Court does not pretend that the 1871 Congress intended to limit § 1985(3)'s reach to conspiracies with racial or closely analogous discriminatory motivations. Rather, it

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[94] See § 1 of the Civil Rights Act of 1871, now codified at 42 USC § 1983, discussed in *Griffin*, 403 US at 99.

[95] See note 25 and accompanying text. See also Gormley, 64 Tex L Rev at 565 (cited in note 24); Schatz, 27 BC L Rev at 928–29 (cited in note 88); 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, 411–13 (1967). The *Griffin* Court also relied upon the hindrance clause, and the provision of the 1871 Civil Rights Act authorizing presidential use of military force if the local government authorities are overwhelmed by private lawlessness to establish that Congress addressed conspiracies directed at interfering with government in other provisions. See *Griffin*, 403 US at 99. This supports the argument that the conspiracy and disguise provisions were intended to reach purely private conduct.

[96] *Bray*, 113 S Ct at 759.

[97] See *Griffin*, 403 US at 101–02.

holds out the class-based animus requirement primarily as a way to avoid turning the statute into a "general federal tort law."[98]

The legislative history of § 1985(3) is mixed on whether Congress intended to require class-based animus for a § 1985(3) action, but there is little if any support for limiting eligible classes to racial or closely analogous ones. The most explicit discussion of the issue refers to Democrats, Vermonters, and other groups not racial or similar to racial groups in character, and states that members of such groups would be able to take advantage of § 1985(3) if their federal rights were attacked because of their group identity.[99]

The text of § 1985(3) also provides some evidence that Congress did not seek to impose a requirement of class-based animus at all. The statute reaches conspiracies directed at "any person or class of persons." By expressing itself in the disjunctive here, Congress provided that the conspiracy need not be directed at a "class" but could be motivated by the desire to deny rights to a single person.[100] It would be strange for Congress to state that the conspiracy could be directed at a single person in the first part of a phrase and then in the very next words in the same phrase completely contradict the earlier language by requiring class-based animus. Reading the word "equal" to require class-based animus reinserts what Congress specifically stated was not necessary—that the conspiracy be directed at a class of persons.

ii. Although the *Griffin* Court appears to have firmly rejected the state action requirement of *Collins*, the ghost of the *Collins* Court's views regarding Congress's power to reach private conspiracies still haunts § 1985(3) in the form of the Court's subsequent holding that private conspirators cannot be sued for interfering with rights protected constitutionally only against state action. Recall that the Court's primary justification for holding in *Collins* that the statute reached only government action was the constitutional question regarding congressional power that would arise if § 1985(3) were construed to reach private conduct that did not at least purport to

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[98] Id at 102, quoted in *Bray*, 113 S Ct at 759.

[99] Senator Edmunds remarked that if there were a conspiracy against a person "because he was a democrat, if you please, or because he was a Catholic, or because he was a methodist, or because he was a Vermonter . . . then this section could reach it." Cong Globe, 42d Cong, 1st Sess, at 567 (quoted in *Bray*, 113 S Ct at 773, Souter, J, concurring in part and dissenting in part).

[100] Again, "equal" refers to the rights of the victim as opposed to the rights of non-victims.

be aimed at affecting government action.[101] In *Griffin*, after holding that § 1985(3) was intended to reach private conduct, the Court asked whether Congress had the power to do so,[102] since § 1985(3)'s criminal counterpart had been struck down by the Court on the ground that Congress lacked the power to reach private conduct in civil rights laws.[103] The Court in *Griffin* looked for constitutional power to reach the precise conspiracy alleged in the case and found that, since the conspiracy involved assaulting blacks who were riding in an automobile with a white civil rights worker from a neighboring state, the conspiracy could be reached under the Thirteenth Amendment and the right to travel.[104] The Court specifically stated that it was not reaching any question regarding Congress's Fourteenth Amendment enforcement power.

Contrary to the *Griffin* Court's language and disclaimer, the Court later characterized *Griffin*'s reliance on the Thirteenth Amendment and the right to travel as a holding that § 1985(3) does not reach private conspiracies against the exercise of constitutional rights that are capable of violation only by government officials. For example, the *Bray* Court rejected the plaintiffs' claim there that § 1985(3) was violated by Operation Rescue's conspiracy to deprive them of the opportunity to choose to have abortions on the ground that the right to abortion is not protected by § 1985(3) against a private conspiracy.[105] This is in accord with its earlier rejection in *Carpenters v Scott* of a First Amendment claim under § 1985(3) against a purely private conspiracy.[106] *Carpenters* marked a retreat from *Griffin*'s holding that § 1985(3) was intended to reach private conspiracies, and in practice it eliminates most of the potential reach of the statute. The Court is now basically in the same place it

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[101] *Collins*, 341 US at 659.

[102] See *Griffin*, 403 US at 104.

[103] See *United States v Harris*, 106 US 629 (1883).

[104] The Court held that Congress's power to enforce the Thirteenth Amendment was broad enough to reach such a conspiracy under its new, more expansive view, that the Thirteenth Amendment power included power to "determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." See *Jones v Alfred Mayer Co.*, 392 US at 440, quoted in *Griffin*, 403 US at 105. The Court also held that the complaint raised the possibility that the plaintiffs' "right to travel interstate was one of the rights meant to be discriminatorily impaired by the conspiracy." *Griffin*, 403 US at 106.

[105] See *Bray*, 113 S Ct at 764.

[106] Id, following *Carpenters*, 463 US at 833.

was before *Griffin*, with § 1985(3) practically useless against private conspiracies that threaten constitutionally protected interests.

A close examination of the elements of a § 1985(3) civil action is necessary to understand why this is so. The elements of a claim against a conspiracy under the primary requirements of § 1985(3) are: (1) a conspiracy; (2) for the purpose of depriving "any person or class of persons of the equal protection of the laws or equal privileges and immunities under the laws"; (3) an act in furtherance of the conspiracy; and either (4a) an injury to the plaintiff's person or property or (4b) a deprivation of the plaintiff's "having and exercising any right or privilege of a citizen of the United States."[107] Element (1) is satisfied by a private conspiracy. Element (2) is satisfied, according to *Griffin*, if the conspiracy is motivated by "racial, or perhaps otherwise class-based, invidiously discriminatory animus" and if it is directed at preventing the plaintiffs, because of their race or perhaps other group membership, from enjoying legal rights such as free speech, association, and movement.[108] The *Griffin* Court appeared to conclude, then, that § 1985 (3), as a statutory matter, reached private conspiracies to deprive people of rights protected constitutionally only against state interference, such as speech, assembly, and association. Element (3) is satisfied by any overt act by the private conspiracy in furtherance of the conspiracy. Element (4) is satisfied either by an injury to the victim's person or property (which a private conspiracy can clearly accomplish) or by a deprivation of a right or privilege of a citizen of the United States. The second alternative of this last element may only be susceptible of satisfaction by state action except with regard to those few constitutional rights that can be violated by private action (like the Thirteenth Amendment and the right to travel), but any personal or property injury will satisfy the first alternative of this element anyway, so this is only a slight limitation on the statute's reach.

The Court in *Carpenters* misinterpreted the *Griffin* Court's reliance on the Thirteenth Amendment and the right to travel to uphold the constitutionality of § 1985(3)'s application to private conduct as a statutory requirement (perhaps under element (2)) that

[107] See *Griffin*, 403 US at 102–03, cited with approval in *Carpenters*, 463 US at 828–29. Quotes are from § 1985(3), as quoted in *Griffin*.

[108] See *Griffin*, 403 US at 102–03.

the private conspiracy violate a right susceptible of private violation. The *Griffin* Court never stated this as an element of the statutory cause of action, but the *Carpenters* Court appeared, in line with the earlier Court's view in *Collins*,[109] to interpret the equal protection language to require state involvement for causes of action founded on infringement of rights protected only against state violation.[110] This reasoning marks a partial rejection of *Griffin*, and an embracing of the reasoning in *Collins* that the *Griffin* Court had appeared to reject.

Rather than re-institute state action as an element of most § 1985(3) actions, the *Carpenters* Court should have asked whether Congress has constitutional power to reach conspiracies that have as their purpose the prevention (perhaps by a protected group) of the exercise of a right granted by the Constitution as recognized by the Supreme Court. Even if private conspiracies cannot violate the Fourteenth or First Amendments, Congress might have the power under the Fourteenth to proscribe private interference with those rights that the Court has held may not be denied by government.

While the debates in Congress and the language of the statute are not crystal clear on this point, the only way to make sense of a § 1985(3) that reaches purely private conspiracies is to construe it to reach private conspiracies that threaten interests recognized as constitutionally protected under the Fourteenth Amendment. The Reconstruction-era Congress intended to reach private conspiracies, and it did not mean to reach only conspiracies that violated the right to travel or the Thirteenth Amendment. While the debates show some consciousness of the issue, the forty-second Congress could not have known what ultimately would become the intricacies of Fourteenth Amendment state action doctrine, the limited reach of the Thirteenth Amendment in its early years or the fact that the right to travel would, almost 100 years later, be recognized a right capable of violation by private individuals.[111]

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[109] See *Collins*, 341 US at 651 (relying on equal protection and equal privileges and immunities language to hold that state action is necessary for a violation of § 1985(3)).

[110] See *Carpenters*, 463 US at 831–32.

[111] The state-action-only reach of the Fourteenth Amendment was recognized at least as far back as *United States v Cruikshank*, 92 US 542, 554–55 (1876). See also *Virginia v Rives*, 100 US 313 (1879) ("these provisions of the Fourteenth Amendment have reference to state action exclusively, and not to any action of private individuals"). The Court implied in *United States v Harris*, 106 US 629, 641 (1883), that the Thirteenth Amendment reached

Congress was worried about private mob violence against protected groups, and it was concerned that mobs were thwarting the local justice system by taking the law into their own hands and depriving arrestees of the right to due process, a right that is protected constitutionally only against government deprivation. Congress was attempting, in § 1985(3), to ensure that federal judicial relief was available against private attempts to prevent people from exercising the rights that the Fourteenth Amendment granted them against public denial.[112] Whether Congress has the power to do that has not been resolved because of the *Carpenters* Court's misinterpretation of *Griffin*'s reliance on the Thirteenth Amendment and right to travel to uphold § 1985(3) as a statutory interpretation.

While it is beyond the scope of this article to address exhaustively Congress's power to reach private conduct that interferes with the exercise of rights recognized under the Fourteenth Amendment, there is strong support for such a power in the reasoning underlying the Court's recent jurisprudence on § 5 of the Fourteenth Amendment. The Court has, for the past thirty years, recognized much greater latitude for Congress than under its original view that Congress had power only to remedy actual violations of the Fourteenth Amendment.[113] The Court has allowed Congress not only the power to remedy violations of the Fourteenth Amend-

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private conduct, and stated so more explicitly in *The Civil Rights Cases*, 109 US 3, 23 (1883). See also *Clyatt v United States*, 197 US 207 (1905). Not until *United States v Guest*, 383 US 745, 759–69 & 759n 17 (1966), did the Court hold that the right to travel extended to private conduct. See also id at 762–74 (Harlan, J, concurring) (arguing that right to travel should not apply against private interference). If the forty-second Congress knew that state action was required to make out a § 1985(3) action against a private conspiracy, it was knowingly engaged in virtually futile lawmaking.

[112] Congress meant by "equal protection of the laws or equal privileges and immunities" that all citizens should enjoy the same rights and freedoms as all others, and the mob should not be able to prevent any person from acting in accordance with those rights that were recognized as the rights of citizens under federal law. *Hardyman*, 183 F2d at 312–14.

[113] See notes 35–52 and accompanying text. As noted, the Court now equates the Fourteenth Amendment enforcement power with other legislative powers granted in Article I, and it has held that congressional judgments under the Fourteenth Amendment are entitled to the same judicial deference as legislation passed under Article I's Necessary and Proper Clause. Justice Brennan, concurring in *United States v Guest*, 383 US 745, 784 (1966), argned that "§ 5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. . . . [N]o principle of federalism nor word of the Constitution . . . denies Congress the power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals—not state officers themselves and not acting in concert with state officers—who engage in the same brutal conduct for the same misgnided purpose."

ment but also the power to identify and define threats to the interests protected under the Fourteenth Amendment.[114] The Court has emphatically stated that Congress may legislate under the Fourteenth Amendment even where it is certain that the Court would not find a constitutional violation.[115] Under this reasoning, there is reason to believe that the Court would uphold Congress's decision, in § 1985(3), to protect constitutionally recognized interests against private interference.

There are at least two serious interpretive difficulties with this construction of § 1985(3) and Congress's power. The first is how to distinguish a violation of § 1985(3) from a mill run conspiracy against person or property. The Court has, in many different contexts within civil rights litigation, expressed concern that civil rights actions not displace state authority over tort law and criminal law. Protecting legitimate state authority over these areas has been the most commonly cited reason for construing civil rights legislation, and even underlying constitutional provisions, narrowly.[116] For example, if a gang steals an automobile, under the interpretation of § 1985(3) offered here, could the victim state a claim for a conspiracy to deprive the victim of property without due process of law?

The Court need not impose a strict state action requirement to prevent § 1985(3) from swallowing large portions of state tort law. Rather, this problem should be addressed by requiring, consistent with § 1985(3)'s langnage, that the defendants act with the purpose, in the sense of specific intent, to prevent the plaintiffs from exercising a constitutional right.[117] For example, Operation Rescue acts with the specific purpose or specific intent to prevent women from exercising their right to have an abortion. By contrast, the ordinary crime or tort is not motivated by a purpose or intent to prevent the victim from exercising a constitutional right. The mugger's

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[114] See *Katzenbach v Morgan*, 384 US 641 (1966); *Fullilove v Klutznick*, 448 US 480 (1980).

[115] See *Fullilove*, 448 US at 476–81. The Court held that Congress, under the Fourteenth Amendment, may attack practices that did not involve discriminatory intent but that did tend, in Congress's opinion, to perpetuate the effects of past discrimination.

[116] See *Paul v Davis*, 424 US 693 (1976); *Carpenters*, 463 US at 834–35 (reason for class-based animus requirement is to ensure that § 1985(3) does not become a general federal tort law).

[117] Compare *United States v Guest*, 383 US at 753–54 (requiring "specific intent to interfere" with enumerated rights (relating to enjoyment of public accommodation) for criminal civil rights violation under 18 USC § 241).

purpose is not to prevent the victim from enjoying the right to due process before property is taken but is rather simply to appropriate the property. Similarly, the burglar does not have the purpose of avoiding the warrant requirement but rather simply to enter the home to steal valuables. But Operation Rescue, or a group intent on preventing a politician from speaking at a public rally, has a specific purpose to prevent the victim from exercising a right recognized under the Fourteenth Amendment.[118] While difficult boundary problems undoubtedly exist in distinguishing ordinary crimes and torts from those motivated by a purpose of depriving victims' constitutional rights, attempting to work those problems out would make '§ 1985(3) a more effective tool in preserving disfavored groups' ability to enjoy constitutionally recognized liberties.

The purpose requirement should also solve the paradox of private action impairing rights that can only be denied, as a constitutional matter, by the state. It is not that the private conspiracy itself deprives its victims of their Fourteenth Amendment rights, it is that private action prevents them from exercising rights that government is required by law to recoguize. Thus, while Operation Rescue may not itself violate women's Fourteenth Amendment right to have abortions, it certainly has as its purpose interfering with women's exercise of that right. If a private individual kidnaps a person on their way to a hearing in court in order to prevent the hearing from taking place, and the kidnapper's purpose is to see that a default judgment is entered against the victim, the kidnapper has prevented the victim from having her day in court, that is, the kidnapper has at least indirectly deprived the victim of the opportunity to receive due process of law. Similarly, when a private individual assaults someone who is attempting to make a speech in a public forum, that private individual has prevented the victim from exercising his First Amendment right to make a speech in the public forum.[119] While the notion of a private conspiracy to

[118] The Court in *Griffin* stated that there is no requirement in § 1985(3) of a specific intent to deprive a person of a constitutional right. 403 US at 102, n 10. This statement was made to clarify that the racial animus requirement was distinct from the willfulness requirement for certain civil rights crimes. Id. The proposal in text is that the Court rethink this interpretation of the purpose requirement.

[119] One response to this argument might be that although the private individual should not be required to violate the Constitution, there should at least be a requirement that the conspiracy be directed at somehow preventing the state from recognizing a right that is protected constitutionally only against state interference. This is a good argument, but it makes § 1985(3)'s hindrance provision redundant. In any case, Operation Rescue certainly

violate rights protected only against government denial might seem puzzling, it is not conceptually difficult to imagine § 1985(3) functioning as a prophylactic against private efforts to undermine the actual enjoyment of rights that have been recognized as protected against government deprivation.[120]

The second problem with interpreting § 1985(3) to reach all conspiracies to interfere with the exercise of any federal constitutional right is that the most natural reading of the statute's equality langnage seems to require that the conspiracy be directed at a violation of equal protection or privileges and immunities. In other words, by its terms, a conspiracy does not violate the statute unless its purpose was to violate those constitutional provisions mentioned in the text of the statute and not just any federal right.

While there is some legislative history that supports the view that the conspiracy must be directed at creating legal inequality for its victims,[121] the genesis of the statute's equality language supports a much narrower understanding of its import. As originally proposed, the statute did not contain any reference to equality, and used language that reached all conspiracies to deprive people of constitutional rights if the conspirators engaged in conduct that was criminal under state law.[122] This proposal caused concern in Congress that a great deal of state criminal and civil jurisdiction would be shifted to federal courts. This was condemned as beyond Congress's power in that it created a general criminal and tort law.[123] While the supporters of § 1985(3) denied that it would have that effect, or that it was beyond Congress's power to punish and provide redress against private conspiracies in derogation of constitutional rights, the "equal protection" and "equal privileges and

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meets this requirement, since one of its tactics is to close abortion clinics at least temporarily by overwhelming the local authorities who might otherwise attempt to preserve the right. And in at least one instance, the local authorities asked the abortion clinic to close during the Operation Rescue assault since the local authorities could not keep the clinic free of trespassers. See *Bray*, 113 S Ct at 780–82 (Stevens, J, dissenting).

[120] See Lawrence, 67 Tulane L Rev at 2213–18 (cited in note 8) (arguing for a similar intent test for civil rights crimes).

[121] See *Griffin*, 403 US at 100, quoting Cong Globe, 42d Cong, 1st Sess, App 188 (remarks of Rep. Willard), App 478 (remarks of Rep. Shellabarger "that he may not enjoy equality of rights as contrasted with his and other citizens' rights").

[122] See Cogan, 39 Rutgers L Rev at 557–58 (cited in note 81); Fockele, Comment, 46 U Chi L Rev at 412–14 (cited in note 88).

[123] See Cong Globe at App 153; Cogan, 39 Rutgers L Rev at 562–63 (cited in note 81); Gormley, 64 Tex L Rev at 537–38 (cited in note 24); Fockele, Comment, 46 U Chi L Rev at 417–18 (cited in note 88).

immunities" language was added to clarify that only conspiracies directed at federal rights were addressed by the statute.[124] Those that offered the amendment did not express the belief that the amendment made a substantive change.[125] Some Members of Congress adopted the state action interpretation and explained the statute as addressing conspiracies to use state instrumentalities to deny equal rights.[126] But it was not viewed that way by others, including a group in Congress that believed strongly in federal power to reach private conspiracies against constitutional rights. This group saw the equality language as merely providing a more explicit constitutional basis for the statute in the Equal Protection Clause.[127] But they did not think that by inserting the equality language the reach of the statute was being limited to a subset of constitutional rights or to conspiracies among public officials. Further, the framers of the statute had a different understanding of the meaning of equal protection and privileges and immunities than we have today, and the legislative history indicates that they used these phrases as shorthand for Fourteenth Amendment rights generally.[128] There is no indication, moreover, that the equality language was meant to limit the statute's application to conspiracies against blacks or other highly suspect classifications.

Insofar as the goal of preventing § 1985(3) from becoming a general federal tort law could be achieved by limiting the statute's reach to conspiracies motivated by a desire to prevent the exercise of federal rights, which is what the framers of the provision intended when they added the equality language, the fear of a general federal tort law is misplaced.[129] With § 1985(3) limited to cases in

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[124] HR 320, Cong Globe, 42d Cong, 1st Sess, 317 (1871). For an in-depth analysis of the legislative debates preceding the Ku Klux Klan Act, see Cogan, 39 Rutgers L Rev at 556–69 (cited in note 81). See also Avins, 11 St Louis U L J at 331–32 (cited in note 95).

[125] Cogan, 39 Rutgers L Rev at 563–64 (cited in note 81). These people thought that equality referred simply to the fact that people unaffected by the conspiracy were free to act in ways that victims of the conspiracy were not.

[126] Fockele, Comment, 46 U Chi L Rev at 418 (cited in note 88).

[127] Cogan, 39 Rutgers L Rev at 562–65 (cited in note 81); Fockele, Comment, 46 U Chi L Rev at 418–20 (cited in note 88). See generally Janis L McDonald, *Starting from Scratch: A Revisionist View of 42 USC § 1985(3) and Class-Based Animus*, 19 U Conn L Rev 471, 481–83 (1987).

[128] See Avins, 11 St Louis U L J at 411–25 (cited in note 95) (discussing "equal protection").

[129] As it is in other contexts in which it is invoked. See Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 BU L Rev 277, 326–29 (1988).

which federal rights are under attack, there would be no general federal tort law developed, and the class-based animus requirement could be abandoned.[130]

III

The Court in *Bray* rejected arguments that a conspiracy to prevent women from exercising their right to have an abortion was class-based animus against women, that animus against the class of women seeking abortions was sufficient for the purposes of § 1985(3), that interfering with women who had crossed state lines to seek their abortion violated the right to travel, and that the private conspiracy interfered with the Fourteenth Amendment right to choose abortion. The Court did, however, reaffirm its earlier holding in *Griffin v Breckenridge* that § 1985(3) reached a broader set of private conspiracies than those tending to dominate state government.[131] This section looks more closely at the Court's rejection of the plaintiffs' claims in *Bray* and discusses whether, under the reinterpretation of § 1985(3) discussed above, the Court in *Bray* should have recognized the plaintiffs' claims.

A

In *Bray*, the plaintiffs claimed that Operation Rescue's purpose to prevent abortions was animus against women generally and if not, then the class of women seeking abortions satisfied the class requirement. The Court rejected both these argnments, holding that opposition to abortion was not animus against women, that the class of women seeking abortions was not a proper class for § 1985(3) purposes, and that it was still unclear, in any case, that § 1985(3) applied beyond the racial context.

While I have argued above that the class-based animus requirement should be abandoned, the Court is unlikely to do so. How-

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[130] "Equal protection and equal privileges and immunities" would still have meaning in the statute. As expressed during the legislative debates, the equality language would refer to the fact that the victims of the conspiracy have unequal rights when compared to non-victims.

[131] See *Bray*, 113 S Ct at 758. In an uncharacteristically careless use of language, Justice Scalia stated that *Griffin*, "*reversing* a 20-year-old precedent" held that § 1985(3) reaches purely private conspiracies. Id. *Griffin* did not reverse *Collins*, nor did it overrule it. It did, however, state that it was no longer good law on the private conspiracy question.

ever, even with such a requirement, there is no good reason to confine § 1985(3) to conspiracies motivated by racial animus. Every indication is that Congress foresaw a broader reach for the statute.[132] Congress knew, when it used general, all-encompassing language, that it was not confining its Reconstruction-era civil rights statutes to protecting blacks, and it sometimes referred to race when it found it necessary or appropriate.[133] Further, the Equal Protection Clause itself has been extended far beyond race alone, and it would be ironic if a statute passed to enforce the Equal Protection Clause did not reach as broadly as the constitutional clause itself.

Under an only slightly expanded view of class-based animus, animus directed against women should satisfy the requirement, and preventing women from obtaining abortions should be viewed as animus directed at women. Only women can have abortions, and by targeting a right that only women can exercise, Operation Rescue is engaged in a conspiracy against women.

The Court relies on two justifications for rejecting the claim that Operation Rescue's efforts to prevent women from exercising the right to have abortions is class-based animus against women. First, the Court appears to rely on a definition of class-based animus that involves more than a decision to treat the victims unequally. Justice Scalia's opinion for the Court states that there are reasons for opposing abortion "other than hatred of or condescension toward . . . women as a class."[134] This view is further supported by the Court's observation that women are on both sides of the abortion issue—women opposing abortion, according to the Court, apparently could not be motivated by hatred or condescension toward women.

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[132] See Schatz, 27 BC L Rev at 928–33 (cited in note 88) (nothing in language of statute or historical materials supports proposition that class-based animus was thought to be exclusively racial animus or that animus directed at groups defined by their economic views, or other non-racial, non-political characteristics, was excluded from the statute's coverage); Fockele, Comment, 46 U Chi L Rev at 402–03 (cited in note 88); McDonald, 19 U Conn L Rev at 484–85 (cited in note 127).

[133] See, e.g., Civil Rights Act of 1875, ch 114, 18 Stat 335 (1875); Enforcement Act of 1870, ch 114, 16 Stat 140, *amended* by Act of Feb 28, 1871, ch 99, 16 Stat 433; Civil Rights Act (Enforcement Act) of 1866, ch 31, 14 Stat 27. Also contrast with civil rights statutes from the 1960s which singled out certain classes for special protection.

[134] *Bray*, 113 S Ct at 760. It is difficult to understand how Operation Rescue, by not allowing women to make the abortion decision themselves, is not motivated at least by condescension toward them. See Cohen, 3 Colum J Gender & Law (cited in note 2), arguing that abortion regulation interferes with women's decision-making autonomy.

The Court's discussion here implies that some sort of ill-will or spite is required to establish class-based animus under § 1985(3).

The *Bray* Court thus appears to have tightened up further on the availability of the § 1985(3) action by requiring, under the class-based animus requirement, even more than what would be required to establish a violation of the Equal Protection Clause. The Court is looking for evidence that the conspiracy was motivated by a dislike for the victimized group. The Equal Protection Clause, by contrast, is violated by an intent to treat a group differently without sufficient justification. Equal protection jurisprudence focuses not on motivation but merely on intent to treat differently.

Justice Scalia also relies on the Court's holdings that classifications based on pregnancy do not constitute discrimination based on sex in violation of the Equal Protection Clause.[135] Besides the fact that the Court's view that discrimination on the basis of pregnancy is not sex discrimination was quickly rebuffed by Congress,[136] it is unclear why the constitutional definition of discrimination applies here with full force, but does not apply either to determine what motivation is required under § 1985(3) or to determine what classes satisfy the requirement of class-based animus. Justice Scalia illustrates that opposition to abortion is not directed at women as a class since not all women seek abortions with the example of a tax on wearing yarmulkes, which he states is a tax on Jews.[137] But just as not all women seek abortions, not all Jews wear yarmulkes,[138] and the reason a tax on yarmulkes appears to be a tax on Jews is that only Jews wear yarmulkes, just as only women can have abortions. Either Justice Scalia's example is wrong, or the Court is wrong to hold that preventing the exercise

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[135] See *Bray*, 113 S Ct at 760, citing *Geduldig v Aiello*, 417 US 484 (1974). A growing scholarly opinion is that the best constitutional basis for protecting the right of women to have abortions lies in principles of equality. See Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech and Abortion)*, 70 BU L Rev 593 (1990); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v Wade*, 63 NC L Rev 375 (1985).

[136] See PL 95-555, The Pregnancy Discrimination Act of 1978, 92 Stat 2076, amending Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy and thereby overrule *General Electric v Gilbert*, 429 US 125 (1976).

[137] See 113 S Ct at 760.

[138] Some who wish to keep their heads covered wear other kinds of hats with or without a yarmulke underneath, and some Jews do not care about wearing a yarmulke at all.

of a right possessed by only a specific class of people is not discrimination against that group.

The *Bray* plaintiffs also argued that the group of women seeking abortions constituted a class under § 1985(3). The Court rejected this argument, based on the Court's rejection in *Carpenters* of the class of non-union workers who sued after they were assaulted by union members because of their lack of union membership. The *Carpenters* Court held that even if § 1985(3) were construed to reach a broad range of classes including political associations, it was not intended to reach discrimination based on economic views or status.[139] The *Bray* Court's analysis of this issue is as follows:

> Whatever may be the precise meaning of a "class" for purposes of *Griffin*'s speculative extension of § 1985(3) beyond race, the term unquestionably connotes something more that a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors. Otherwise, innumerable tort plaintiffs would be able to assert causes of action under § 1985(3) by simply defining the aggrieved class as those seeking to engage in the activity the defendant interfered with. This definitional ploy would convert the statute into the "general tort law" it was the very purpose of the animus requirement to avoid. As Justice Blackmun has cogently put it, the class "cannot be defined simply as the group of victims of the tortious action." *Carpenters*, *supra*, 463 U.S. at 850 (Blackmun, J. dissenting). "Women seeking abortion" is not a qualifying class.[140]

This reasoning is a significant extension of *Carpenters* because it appears to reject all classifications not based on immutable characteristics such as race. In *Carpenters*, the Court rejected only classifications based on economic views, status, or activities and left open the issue of whether § 1985(3) reaches political associations, religious groups, or state citizenship.[141] As noted above, there is support in the legislative history for holding that Congress intended for § 1985(3) to cover actions based on political associations and other non-immutable classifications.[142]

Contrary to Justice Scalia'a characterization, women seeking abortion are not a class defined merely because they wish to engage

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[139] See *Carpenters*, 463 US at 837–39.

[140] *Bray*, 113 S Ct at 759 (citation omitted).

[141] See *Carpenters*, 463 US at 836–37.

[142] See supra note 128.

in conduct that Operation Rescue disfavors. Rather, they are defined as a class by their attempt to exercise a right that has been recognized as constitutionally protected and fundamental. And their efforts to exercise this right are threatened in much the same way that the Ku Klux Klan threatened blacks who wished to work, associate, and vote as free citizens, in an atmosphere of violence in which local authorities are sometimes unable or unwilling to ensure that the rights can be acted upon.[143] Only strong hostility to the right to abortion could blind the Court to the difference between everyday tort victims and women seeking to exercise their fundamental right to choose abortion.

B

As noted, the *Bray* Court rejected the arguments that a private conspiracy could violate women's right to choose abortion and that preventing both in-staters and out-of-staters from having abortions violated the out-of-staters' right to travel. The rejection of the claim that Operation Rescue interfered with the plaintiffs' right to have abortions was premised on the *Carpenters* Court's categorical rejection of § 1985(3) claims against private conspiracies alleging violations of rights protected "only against state interference."[144] One faulty basis for the *Carpenters* Court's decision is discussed above—the Court equated *Griffin*'s holding that the Thirteenth Amendment and the right to travel, both protected against private conduct, provided a constitutional basis for § 1985(3) actions against private conspiracies with a holding that § 1985(3) reached private conspiracies only when they violated such rights. As applied in *Bray*, this reasoning led the Court to conclude that "the statute does not apply . . . to private conspiracies that are 'aimed at a right

[143] Some localities have been very effective at dealing with Operation Rescue and keeping abortion facilities open. See *Operation Rescue Suspends Protests in Buffalo*, Los Angeles Times (April 30, 1992), p 33; *Operation Rescue's Mission to Save Itself Legal Challenges . . .* , The Washington Post (Nov 24, 1991), p a01; *Clinics Poised to Combat Antiabortion Protesters*, The Washington Post (July 10, 1993), p a03. Other communities have not been so effective, mainly because they are overwhelmed by the numbers and tactics of anti-abortion protesters. See *Bray*, 113 S Ct, at 781–82 (Stevens, J, dissenting); *Anti Abortion Group Shuts Down Delaware Clinic*, Philadelphia Inquirer (July 11, 1993), p A01; *Operation Rescue Rally Closes Santa Ana Clinic*, Los Angeles Times (Dec 9, 1990), p 48. Since the right to abortion is imposed on the states from above, the Court's working assumption should be hostility to the right on the part of the local authorities, just as Congress and some members of the Court have remained hostile to the right.

[144] *Carpenters*, 463 US at 831–34.

that is by definition a right only against state interference.' . . . The right to abortion is not among them."[145]

The Court in *Carpenters* had also relied on the fact that under its jurisprudence, § 1985(3) does not create any rights but rather is designed merely to enforce the Fourteenth Amendment; the rights asserted in the § 1985(3) action must be found in the amendment itself, which does not protect against private conduct. The Court rejected equating § 1985(3) to statutes passed under the Commerce Clause that create rights.

The Court has not seriously considered the possibility of a middle position under which, while § 1985(3) does not create any new substantive rights, it does provide an action against private conspiracies to prevent its victims from exercising recognized constitutional rights. There is no logical fallacy in the idea that a private conspiracy might prevent people from enjoying rights protected only against the state. For example, when a person is lynched while awaiting trial, it is accurate to state that the victim was prevented from exercising the right to trial. While it is true that the right to a fair trial is protected constitutionally only against state deprivation, it does not seem strange to state that the action of the private lynch party interfered with that right. The vision of rights is not merely that the state does not interfere with certain actions, it is that people are generally free to exercise their freedoms.

It is easier to conceive of private interference with some constitutional rights than with others. It is more difficult, for example, to imagine private interference with the right to be indicted before being put on trial than to imagine private interference with the right to speak. The former is a procedural right that arises only in the context of one's relationship to the government, while the latter involves freedom of action that need not implicate government.[146] The right to abortion, like speech, involves an activity that is wholly separate from government, and it makes sense to say that

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[145] *Bray*, 113 S Ct at 764, quoting *Carpenters*, 463 US at 833.

[146] Because the First Amendment right itself may be susceptible of violation only by government, this analysis goes against our usual Hohfeldian way of thinking about rights. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L J 16 (1913). Put succinctly, the argument is that a private person or group can interfere with a right that does not run against them in the sense of creating a duty to honor the right in the strictest sense. See id. See also Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wisc L Rev 975.

a person is not fully able to enjoy the right to abortion if private parties prevent abortions from taking place.

This view of the role of remedial provisions in vindicating constitutional rights was adopted by the Supreme Court in construing a portion of the Civil Rights Act of 1866 that guarantees equal rights in the purchase of real property. In *Jones v Alfred H. Mayer Co.*,[147] the defendants argued that the statute's guarantee of equal rights did not apply to private discrimination, since only state actors could actually affect the "right" to own property. The Court rejected this argument and held that the statute prohibited private discrimination in transactions involving real property. The Court reasoned, as Members of Congress argued in support of the provision, that private interference could prevent blacks from enjoying the benefits of equal rights, and that this was a legitimate target of legislation.[148] The Reconstruction Congress recognized that the enjoyment of equal rights depended both on elimination of government discrimination and private interference.[149]

Thus, it makes sense to state that Operation Rescue interferes with women's right to have abortions. The problem that led to the passage of § 1985(3) was not state denial of rights, it was private interference with the ability of people to exercise their rights. Congress saw a significant risk that private resistance would frustrate full enjoyment of federally protected rights, especially for the newly freed slaves, fears that with hindsight we can say were justified. The Reconstruction-era Congress repeatedly acted against private conduct that interfered with the exercise of rights or discriminated against blacks, because the Congress recognized that full enjoyment of constitutional rights required that both public and private conduct be regulated. The Court's rejection of these efforts, based mainly on a narrow view of Congress's Fourteenth Amendment powers and more recently on crabbed readings of the Reconstruction-era statutes, has been a substantial barrier to fulfillment

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[147] 392 US 409 (1968).

[148] See id at 432–44.

[149] See also *United States v Guest*, 383 US at 778–78 (Brennan, J, concurring). It may seem odd that private individuals' conduct in a situation not involving state action could raise concerns relating to rights protected only against government interference. But unless one adopts a very narrow view both of the nature of rights and of Congress's power under the Fourreenth Amendment, it should not seem strange that Congress would be concerned with the actual exercise of Fourteenth Amendment rights, especially in a period of intense private resistance to the recognition and exercise of those rights.

of Congress's vision and implementation of the plan of full enjoyment of rights for all. Once the Court recognized that § 1985(3) was plainly intended to reach private conspiracies, it should have given more thought to the universe of rights that Congress intended to protect.

The *Bray* plaintiffs, aware that the courts were unlikely to abandon the bar against actions challenging private conspiracies to vindicate rights constitutionally protected only against public deprivation, raised, in addition to the right to abortion, the right to travel, which the Supreme Court has held is subject to private deprivation. The lower courts accepted the plaintiffs' argument that the right to travel was violated by Operation Rescue since many people seeking abortions in the area that was the subject of the suit traveled from out of state to do so.

The Supreme Court rejected this argument on the ground that there was no indication that in-staters seeking abortion were treated better than out-of-staters seeking abortion. This conclusion makes sense in light of the Court's jurisprudence on the right to travel and also in light of the concern that otherwise the right to travel would be violated any time a tort or crime was committed against someone from out of state, or at least any time an out-of-stater was prevented from accomplishing the purpose of the interstate trip.[150] However, while there are hints to this effect in the *Griffin* opinion, that opinion could also be read to hold that the right to travel was violated as long as the plaintiffs were attempting to travel interstate, and the conspirators prevented them from doing so because of their status as blacks, or because they wished to associate with civil rights workers from out of state. There is no explicit statement in *Griffin* that the right to travel is not implicated unless the victims or white civil rights workers were chosen because the civil rights worker they associated with was from another state, that is, that had the civil rights worker been from the same state there would have been no assault.

The issues regarding the right to travel are not clear cut, and I do not pretend to resolve them here. The claims against Operation Rescue, in *Bray* and other cases, were brought under the right to travel only because founding the claim on the right to abortion was a lost cause. It is important for present purposes to note that the

[150] See *United States v Guest*, 383 US 745 (1966); *Zobel v Williams*, 457 US 55 (1982).

Court's decision in *Bray* to require a specific purpose to target victims because they traveled from out of state is similar in operation to the more general requirement proposed in this article that the requirement of a conspiracy to deprive the victim of equal protection or privileges and immunities be met whenever the plaintiff's purpose is to prevent or punish the exercise of constitutional rights. Just as a plaintiff in a right-to-travel case must prove that she was chosen because she had traveled interstate, so to should a plaintiff prevail if he shows that he was chosen because he was exercising a constitutional right.

c

The purpose requirement proposed above would preserve § 1985(3)'s effectiveness as a tool to ensure complete enjoyment of constitutional rights, would not displace a great deal of state authority over torts or crimes appropriately within state control, and would make more sense out of Congress's intent to reach private conspiracies with § 1985(3). The *Bray* plaintiffs would have to prove that Operation Rescue acted for the purpose of preventing them from exercising their constitutional right to have abortions, a showing that would be easy given the facts of the case. This purpose requirement would distinguish proper § 1985(3) actions from ordinary torts that happen to interfere with constitutionally protected interests. For example, a conspiracy to assault a person on the way to the voting booth would violate § 1985(3) only if it could be shown that the conspirators' purpose was to prevent the victim from voting, even if in either case the effect was to prevent the victim from voting.

Because the class-based animus requirement was created to avoid creating "a general federal tort law,"[151] it should be abandoned in favor of Congress's intent that a much broader class of plaintiffs than racial groups be able to use § 1985(3). The purpose requirement takes care of the "federal tort law" problem. In *Bray*, this would mean that it would be of no moment that discrimination against women is not racially motivated, or that discrimination against women seeking abortions might not be discrimination based

[151] See *Griffin*, 403 US at 101 (imposing class-based animus requirement to avoid creating a general federal tort law).

an immutable classification. Even if the Court adheres to its requirement of class-based animus, it should not confine the statute to racial classes, and should recognize that regulation of abortion is directed at women and that women seeking abortions are the sort of class that the 1871 Congress intended to protect.

It is unlikely, however, that the Court will take these steps. The Court is likely to perpetuate its Civil War ancestors' determination to prevent Congress from effectively dealing with state and private resistance to the full enjoyment of constitutional rights, and appears prepared even to resist more recent congressional efforts to address the continuing practice of discrimination.[152]

IV

The primary focus of this article has been the treatment of § 1985(3) by the Supreme Court, and has proceeded largely by examining the important cases and criticizing them on doctrinal grounds. The main point that has been arrived at through this analysis is that the federalism and other reasons the Court has given for its narrow readings of § 1985(3) do not sufficiently justify those readings. Specifically, if § 1985(3) plaintiffs were required to prove that the conspirators' purpose was to prevent them from exercising a recognized constitutional right, there would be no danger that § 1985(3) would become a general tort law and displace state authority over relations among private individuals. Such a purpose requirement would confine § 1985(3) actions to the sphere in which Congress has legitimate interest—ensuring that federal constitutional rights can actually be enjoyed, and that private resistance does not frustrate the goals of federal law.

Of course, there is plenty of room for disagreement about the desirability of the class-based animus requirement and the requirement that § 1985(3) actions against private parties involve a constitutional right that is capable of violation by private action. Section 1985(3)'s equality language and the references in the legislative history even support the notion that some group-based motivation must lie behind the conspirators' actions, although there is little support for limiting the statute to racial groups. However, it seems very unlikely that the explanation for the requirements the Court

[152] See notes 154–57.

has imposed that render § 1985(3) almost useless against private conspiracies lies in competing understandings of the language, history, or social context of § 1985(3).

The Court's treatment of § 1985(3) is part of a familiar pattern, dating back to the Reconstruction era, of resisting the aims and operation of civil rights legislation. The Reconstruction-era Congress, and Congresses during the more recent civil rights movement, attempted to work great changes in the legal aspects of civil rights, and their efforts have been thwarted at almost every turn by a Court that has either held their efforts unconstitutional or construed statutory language as narrowly as possible.

In fact, even under a narrow view of Congress's authority to reach private conduct, Congress might have wanted to legislate against both public and private threats to constitutional rights, and should have the authority to do so. Without such legislation, actual Fourteenth Amendment violations might go unremedied if state resistance to Fourteenth Amendment rights hides behind, or acts in concert with, private conduct. In addition, Congress might conclude that prohibiting private threats to rights protected only against government interference would safeguard those rights by creating a buffer zone around them.

It is perhaps understandable that the modern Court would be reluctant to apply nineteenth-century civil rights statutes broadly, since they represented a political consensus from the distant past and were written under a narrower understanding of the scope of rights upon which civil rights actions might be predicated.[153] And for a time, it appeared that the Court was much more receptive to more recent civil rights legislation, applying statutes like Title VII broadly to achieve their goals.[154] However, in recent years, the Court has repeatedly interpreted Title VII against plaintiffs, not only on new issues but also by retreating on prior, pro-plaintiff, decisions.[155] And even after Congress in 1991 sent the Court a

[153] For a theory on how to interpret old statutes in light of current conditions, see William Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U Pa L Rev 1479 (1987).

[154] See *Griggs v Duke Power Co.*, 401 US 424 (1971); *McDonnell Douglas Corp. v Green*, 411 US 792 (1973); *Texas Dept. of Community Affairs v Burdine*, 450 US 248 (1981) (burdens in Title VII). But see *St. Mary's Honor Center v Hicks*, 113 S Ct 2742 (1993). Compare treatment of § 1983 as not overruling the Eleventh Amendment in *Edelman v Jordan*, 415 US 651 (1974) with the Court's allowing Congress to override the Eleventh Amendment in the amendments to Title VII in *Fitzpatrick v Bitzer*, 427 US 445 (1976).

[155] The Civil Rights Act of 1991, PL 102-166, was designed to restore and strengthen civil rights laws that ban discrimination in employment. The bill was offered to specifieally overrule aspects of the Supreme Court's decisions in *Patterson v McLean Credit Union*, 491

resounding message that it was out of touch with Congress's views on employment discrimination,[156] the Court has continued to chart its own, more conservative, course on Title VII.[157]

It is a strength of the separation of powers and judicial independence in the United States that allows a century-long pattern in the Supreme Court of resistance to civil rights to continue. It is a political reality, however, that judicial independence at the Supreme Court has not overall served the cause of civil rights well. I do not mean to suggest that the Court has never acted as a progressive force on civil rights or that all of its recent decisions have gone against civil rights plaintiffs or others asserting constitutional rights. But there is a pattern of unwillingness on the part of the Court to reach out to protect unpopular rights, and the Court seems to be at its most active when the rights of white men are at stake.[158] Rather than be part of the Reconstruction-era and later Congress's solution to the problem of civil rights, the Court has been part of the problem.

US 164 (1989); *Wards Cove Packing Co. v Antonio*, 490 US 642 (1989); *Price Waterhouse v Hopkins*, 490 US 228 (1989); *Martin v Wilks*, 490 US 755 (1989); *Lorance v AT&T Technologies*, 490 US 900 (1989); *Crawford Fitting Co. v J.T. Gibbons, Inc.*, 482 US 437 (1987); *Library of Congress v Shaw*, 478 US 310 (1986); *Evans v Jeff D.*, 475 US 717 (1986); *Marek v Chesny* 473 US 1 (1985). See also the Civil Rights Restoration Act of 1987, PL 100-259, designed to overturn the Court's decision in *Grove City College v Bell*, 465 US 555 (1984).

[156] See Civil Rights Act of 1991, PL 102-166.

[157] *St. Mary's Honor Center v Hicks*, 113 S Ct 2742 (1993) (burden of proof in Title VII cases).

[158] This could be thought to date back to the fact that the first case in which heightened scrutiny was applied to an equal protection challenge to a gender-based classification was a case involving discrimination against men. See *Craig v Boren*, 429 US 190 (1976). More recently, the Court has been at its most creative in creating new equal protection doctrine to protect white contractors discriminated against by minority set-aside plans and extending standing to white contractors in such cases who did not allege that the plan had actually caused them to lose any contracts. See *City of Richmond v Croson*, 488 US 469 (1989); *Associated General Contractors of America v City of Jacksonville*, 113 S Ct 2297 (1993) (standing). See also *Shaw v Reno*, 113 S Ct 2816 (1993) (white voters' challenge to redistricting). The federalism concerns that the Court relies on to justify its narrow reading of civil rights statutes do not appear to deter the Court from striking down state and local efforts to deal with the legacy of racial discrimination against blacks and other minority groups. See also Jack Beermann, Barbara Melamed, and Hugh Hall, *The Supreme Court's Tilt to the Property Right: Procedural Due Process Protections of Liberty and Property Interests*, 3 BU Pub Int L J 9, 29 nn 105–6 (1993) and accompanying text (comparing Supreme Court decision in which women were held to have sued too late to challenge a seniority system because they waited until it was applied to them when they could have sued when it was enacted, with decisions under which white firefighters who could have challenged an affirmative action plan when it was written were held to have a due process right to challenge it when it was applied to them).