SUPREME COURT OF THE UNITED STATES

No. 90–985

JAYNE BRAY, ET AL., PETITIONERS *v.* ALEXANDRIA WOMEN'S HEALTH CLINIC ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[January 13, 1993]

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN joins, dissenting.

Petitioners act in organized groups to overwhelm local police forces and physically blockade the entrances to respondents' clinics with the purpose of preventing women from exercising their legal rights. Title 42 U. S. C. §1985(3) provides a federal remedy against private conspiracies aimed at depriving any person or class of persons of the ``equal protection of the laws,'' or of ``equal privileges and immunities under the laws.'' In my view, respondents' injuries and petitioners' activities fall squarely within the ambit of this statute.

The Reconstruction Congress enacted the Civil Rights Act of 1871, also known as the Ku Klux Act (Act), 17 Stat. 13, to combat the chaos that paralyzed the post-War South. *Wilson* v. *Garcia*, 471 U. S. 261, 276–279 (1985); *Briscoe* v. *LaHue*, 460 U. S. 325, 336–339 (1983). Section 2 of the Act extended the protection of federal courts to those who effectively were prevented from exercising their civil rights by the threat of mob violence. Although the immediate purpose of §1985(3) was to combat animosity against blacks and their supporters, *Carpenters* v. *Scott*, 463 U. S. 825, 836 (1983), the language of the Act, like that of many Recon-

struction statutes, is more expansive than the historical circumstances that inspired it. The civil-remedy component of §2, codified at 42 U. S. C. §1985(3), speaks in general terms, and provides a federal cause of action to any person injured or deprived of a legal right by

> ``two or more persons in any State or Territory [who] conspire or go in disguise on the highway or on the premises of another, [first] 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 [second] 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 Court's approach to Reconstruction Era civil rights statutes has been to ``accord [them] a sweep as broad as [their] language.'' *United States* v. *Price*, 383 U. S. 787, 801 (1966); accord, *Griffin* v. *Breckenridge*, 403 U. S. 88, 97 (1971); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 437 (1968). Today, the Court does just the opposite, precluding application of the statute to a situation that its language clearly covers. There is no dispute that petitioners have ``conspired'' through their concerted and unlawful activities. The record shows that petitioners' ``purpose'' is ``directly'' to ``depriv[e]'' women of their ability to obtain the clinics' services, see *National Organization for Women* v. *Operation Rescue*, 726 F. Supp. 1483, 1488 (ED Va. 1989), as well as ``indirectly'' to infringe on their constitutional privilege to travel interstate in seeking those services. *Id.*, at 1489. The record also shows that petitioners accomplish their goals by purposefully ``preventing or hindering'' local law enforcement authorities from maintaining open access to the clinics. See *ibid.*, and n. 4. In sum, petitioners'

activities fit precisely within the language of both clauses of §1985(3).

Yet the Court holds otherwise, and it does so primarily on the basis of an ``element'' of the §1985(3) cause of action that does not appear on the face of the statute. Adhering adamantly to our choice of words in *Griffin* v. *Breckenridge*, *supra*, the Court holds that petitioners did not exhibit a ``class-based, invidiously discriminatory animus'' against the clinics or the women they serve. I would not parse *Griffin* so finely as to focus on that phrase to the exclusion of our reasons for adopting it as an element of a §1985(3) civil action.

As the Court explained in *Griffin*, §1985(3)'s ``class-based animus'' requirement is derived from the statute's legislative history. That case recounted that §2 of the original Civil Rights bill had proposed criminal punishment for private individuals who conspired with intent "`to do any act in violation of the rights, privileges, or immunities of another person.'" 403 U. S., at 99–100 (quoting Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)). The bill was amended to placate those who believed the proposed language was too sweeping. *Id.*, at 100. Accordingly, the amendment narrowed the criminal provision to reach only conspiracies that deprived ``any person or class of persons of the *equal* protection of the laws, or of *equal* privileges and immunities under the laws. . . .'' Cong. Globe, 42d Cong., 1st Sess., at 477 (emphasis supplied). The amendment also added a civil remedy for those harmed by such conspiracies, which is now codified at §1985(3). Looking to the ``congressional purpose'' the statute's legislative history exhibited, the Court concluded that ``there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of

rights secured by the law to all.'' *Griffin*, 403 U. S., at 102 (footnotes omitted).

Griffin's narrowing construction of §1985(3) was a rational effort to honor the language of the statute without providing a federal cause of action for ``all tortious, conspiratorial interferences with the right of others.'' *Id.*, at 101. The ``class-based animus'' requirement avoids the constitutional difficulties of federalizing every crime or tort committed by two or more persons, while giving effect to the enacting Congress' condemnation of private action against individuals on account of their group affiliation. Perhaps the clearest expression of this intent is found in the statement of Senator Edmunds, who managed the bill on the floor of the Senate, when he explained to his colleagues that Congress did not ``undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud . . . [but, if] it should appear that this conspiracy was formed against this man 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. Indeed, Senator Edmunds' comment on the scope of §2 of the Act is illustrative of a more general concern in the 42nd Congress for extending federal protection to diverse classes nationwide. See, *e.g.*, *id.*, at App. 153–154 (Rep. Garfield) (legislation protects ``particular classes of citizens'' and ``certain classes of individuals''); *id.*, at App. 267 (Rep. Barry) (``white or black, native or adopted citizens''); *id.*, at App. 376 (Rep. Lowe) (``all classes in all States; to persons of every complexion and of whatever politics''); *id.*, at App. 190 (Rep. Buckley) (``yes, even women'').

Griffin's requirement of class-based animus is a reasonable shorthand description of the type of actions the 42d Congress was attempting to address. Beginning with *Carpenters* v. *Scott*, 463 U. S. 825

(1983), however, that shorthand description began to take on a life of its own. In that case, a majority of the Court held that conspiracies motivated by bias toward others on account of their economic views or activities did not constitute class-based discrimination within the reach of the statute. *Id.*, at 837–839. I agreed with the dissent, however, that ``[i]nstead of contemplating a list of actionable class traits, . . . Congress had in mind a functional definition of the scope of [§1985(3)],'' and intended to ``provide a federal remedy for all classes that seek to exercise their legal rights in unprotected circumstances similar to those of the victims of Klan violence.'' *Id.*, at 851 (BLACKMUN, J., dissenting) (emphasis deleted). Accordingly, I would have found that §1985(3) provided a remedy to nonunion employees injured by mob violence in a ``self-professed union town'' whose residents resented nonunion activities. *Id.*, at 854.

For the same reason, I would find in this case that the statute covers petitioners' conspiracy against the clinics and their clients. Like the Klan conspiracies Congress tried to reach in enacting §1985(3), ``[p]etitioners intended to hinder a particular group in the exercise of their legal rights because of their membership in a specific class.'' *Ibid.* The controversy associated with the exercise of those rights, although legitimate, makes the clinics and the women they serve especially vulnerable to the threat of mob violence. The women seeking the clinics' services are not simply ``the group of victims of the tortious action,'' *id.*, at 850; as was the case in *Carpenters*, petitioners' intended targets are clearly identifiable—by virtue of their affiliation and activities—before any tortious action occurs.

Even if I had I not dissented in *Carpenters*, I would still find in today's case that §1985(3) reaches conspiracies targeted at a gender-based class and that petitioners' actions fall within that category. I

agree with JUSTICE STEVENS that ``[t]he text of the statute provides no basis for excluding from its coverage any cognizable class of persons who are entitled to the equal protection of the laws.'' *Ante*, at 13 (dissenting opinion). At the very least, the classes protected by §1985(3) must encompass those classifications that we have determined merit a heightened scrutiny of state action under the Equal Protection Clause of the Fourteenth Amendment. Classifications based on gender fall within that narrow category of protected classes. *E.g.*, *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 723–726 (1982); *Craig* v. *Boren*, 429 U. S. 190, 197 (1976). Not surprisingly, the seven federal courts of appeals to have addressed the question have all reached the conclusion that the class of ``women'' falls within the protection of the statute. *Stathos* v. *Bowden*, 728 F. 2d 15, 20 (CA1 1984); *New York State National Organization for Women* v. *Terry*, 886 F. 2d 1339, 1359 (CA2 1989), cert. denied, 495 U. S. 947 (1990); *Novotny* v. *Great American Fed. Sav. & Loan Assn.*, 584 F. 2d 1235, 1244 (CA3 1978) (en banc), vacated on other grounds, 442 U. S. 366 (1979); *National Organization for Women* v. *Operation Rescue*, 914 F. 2d 582, 585 (CA4 1990); *Volk* v. *Coler*, 845 F. 2d 1422, 1434 (CA7 1988); *Conroy* v. *Conroy*, 575 F. 2d 175, 177 (CA8 1978); *Life Ins. Co. of North America* v. *Reichardt*, 591 F. 2d 499, 505 (CA9 1979). As JUSTICE WHITE has observed, ``[i]t is clear that sex discrimination may be sufficiently invidious to come within the prohibition of §1985(3).'' *Great American Fed. Sav. & Loan Assn.* v. *Novotny*, 442 U. S. 366, 389, n. 6 (1979) (dissenting opinion).

If women are a protected class under §1985(3), and I think they are, then the statute must reach conspiracies whose motivation is directly related to characteristics unique to that class. The victims of petitioners' tortious actions are linked by their ability to become pregnant and by their ability to terminate

their pregnancies, characteristics unique to the class of women. Petitioners' activities are directly related to those class characteristics and therefore, I believe, are appropriately described as class based within the meaning of our holding in *Griffin*.

Petitioners assert that, even if their activities are class based, they are not motivated by any *discriminatory* animus but only by their profound opposition to the practice of abortion. I do not doubt the sincerity of that opposition. But in assessing the motivation behind petitioners' actions, the sincerity of their opposition cannot surmount the manner in which they have chosen to express it. Petitioners are free to express their views in a variety of ways, including lobbying, counseling, and disseminating information. Instead, they have chosen to target women seeking abortions and to prevent them from exercising their equal rights under law. Even without relying on the federally protected right to abortion, petitioners' activities infringe on a number of state-protected interests, including the state laws that make abortion legal, Va. Code Ann. §§18.2–72, 18.2–73 (1988), and the state laws that protect against force, intimidation, and violence, *e.g.*, Va. Code Ann. §18.2–119 (Supp. 1992) (trespassing), §18.2–120 (1988) (instigating trespass to prevent the rendering of services to persons lawfully on the premises), §18.2–404 (obstructing free passage of others), §18.2–499 (conspiring to injure another in his business or profession). It is undeniably petitioners' purpose to target a protected class, on account of their class characteristics, and to prevent them from the equal enjoyment of these personal and property rights under law. The element of class-based discrimination that *Griffin* read into §1985(3) should require no further showing.

I cannot agree with the Court that the use of unlawful means to achieve one's goal ``is not relevant to [the] discussion of animus.'' *Ante*, at 8.

To the contrary, the deliberate decision to isolate members of a vulnerable group and physically prevent them from conducting legitimate activities cannot be irrelevant in assessing motivation. Cf. *Maher* v. *Roe*, 432 U. S. 464, 475 (1977) (noting the ``basic difference,'' in constitutional Equal Protection analysis, between ``direct . . . interference with a protected activity'' and ``encouragement of an alternative activity''). The clinics at issue are lawful operations; the women who seek their services do so lawfully. In my opinion, petitioners' unlawful conspiracy to prevent the clinics from serving those women, who are targeted by petitioners by virtue of their class characteristics, is a group-based, private deprivation of the ``equal protection of the laws'' within the reach of §1985(3). The Court finds an absence of discriminatory animus by reference to our decisions construing the scope of the Equal Protection Clause, and reinforces its conclusion by recourse to the dictionary definition of the word ``invidious.'' See *ante*, at 6–8. The first step would be fitting if respondents were challenging state action; they do not. The second would be proper if the word ``invidious'' appeared in the statute we are construing; it does not. As noted above, *Griffin*'s requirement of ``class-based, invidiously discriminatory animus'' was a shorthand description of the congressional purpose behind the legislation that became §1985(3). Microscopic examination of the language we chose in *Griffin* should not now substitute for giving effect to Congress' intent in enacting the relevant legislative language, *i.e.*, ``that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he [or she] may not enjoy equality of rights as contrasted with . . . other citizens' rights, shall be within the scope of the remedies of this section.'' Cong. Globe, 42d Cong., 1st Sess. 478 (1871) (Rep. Shellabarger).

Because §1985(3) is a statute that was designed to address deprivations caused by *private* actors, the Court's invocation of our cases construing the reach of the Equal Protection Clause of the Fourteenth Amendment is misplaced. The Court relies on *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), in which we maintained that, for purposes of the Fourteenth Amendment, ``not . . . every legislative classification concerning pregnancy is a sex-based classification.'' *Id.*, at 496, n. 20. But that case construed a constitutional provision governing state action, which is far different than determining the scope of a statute aimed at rectifying harms inflicted by private actors. In fact, in stark contrast to our constitutional holding in *Geduldig*, Congress has declared that, for purposes of interpreting a more recent antidiscrimination statute, a classification based on pregnancy is considered a classification ``on the basis of sex.'' See Pregnancy Discrimination Act, Pub. L. 95–555, 92 Stat. 2076, codified at 42 U. S. C. §2000e(k); *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 678 (1983). Similarly, although we have determined that a successful constitutional challenge to a regulation that disproportionately affects women must show that the legislature ``selected or reaffirmed a particular course of action at least in part `because of,' not merely `in spite of,'' its adverse effects upon an identifiable group,'' *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279 (1979), Congress recently has made clear its position that showing subjective intent to discriminate is not always necessary to prove statutory discrimination. See Civil Rights Act of 1991, Pub. L. 102–166, §105(a), 105 Stat. 1074.

In today's case, I see no reason to hold a §1985(3) plaintiff to the constitutional standard of invidious discrimination that we have employed in our Fourteenth Amendment jurisprudence. To be sure, the language of that Amendment's Equal Protection

Clause and §1985(3) are similar, and ``[a] century of Fourteenth Amendment adjudication has . . . made it understandably difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons.'' *Griffin*, 403 U. S., at 97. The Court resolves that difficulty by construing the two provisions in tandem, although there surely is no requirement that we do so. Cf. *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 378–379 (1959) (explaining that statutory grant of ``arising under'' jurisdiction need not mirror the reach of Art. III ``arising under'' jurisdiction).

I would focus not on the similarities of the two provisions, but on their differences. The Equal Protection Clause guarantees that no State shall ``*deny* to any person within its jurisdiction the equal protection of the laws.'' U. S. Const., Amdt. 14, §1 (emphasis added). In my view, §1985(3) does not simply repeat that guarantee, but provides a complement to it: no private actor may conspire with the purpose of ``*depriving* . . . any person or class of persons of the equal protection of the laws.'' (Emphasis added.) Unlike ``deny,'' which connotes a withholding, the word ``deprive'' indicates an intent to prevent private actors from taking away what the State has seen fit to bestow.

The distinction in choice of words is significant in light of the interrelated objectives of the two provisions. The Fourteenth Amendment protects against state action, but it ``erects no shield against merely private conduct, however discriminatory or wrongful.'' *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948). Section 1985(3), by contrast, was ``meant to reach private action.'' *Griffin*, *supra*, at 101. Given that difference in focus, I would not interpret ``discriminatory animus'' under the statute to establish the same high threshold that must be met before this Court will find that a State has engaged in invidious discrimination in violation of the

Constitution. As the 42d Congress well appreciated, private actors acting in groups can be as devastating to the exercise of civil rights as hostile state actors, and they pose an even greater danger because they operate in an unregulated realm divorced from the responsibilities and checking functions of government. In recognition of that danger, I would hold that *Griffin*'s element of class-based discrimination is met whenever private conspirators target their actions at members of a protected class, by virtue of their class characteristics, and deprive them of their equal enjoyment of the rights accorded them under law.

This case is not about abortion. It most assuredly is not about ``the disfavoring of abortions'' by state legislatures. *Ante*, at 7 (discussing *Maher* v. *Roe*, 432 U. S. 464 (1977); *Harris* v. *McRae*, 448 U. S. 297 (1980)). Rather, this case is about whether a private conspiracy to deprive members of a protected class of legally protected interests gives rise to a federal cause of action. In my view, it does, because that is precisely the sort of conduct that the 42d Congress sought to address in the legislation now codified at §1985(3). Our precedents construing the scope of gender discrimination under the Fourteenth Amendment should not distract us from properly interpreting the scope of the statutory remedy.

The second reason the majority offers for reversing the decision below is that petitioners' activities did not intentionally deprive the clinics and their clients of a right guaranteed against private impairment, a requirement that the Court previously has grafted onto the *first* clause of §1985(3). See *Carpenters*, 463 U. S., at 833. I find it unnecessary to address the merits of this argument, however, as I am content to rest my analysis solely on the basis that respondents are entitled to invoke the protections of a federal court under the *second* clause of §1985(3). Whereas

the first clause of the statute speaks of conspiracies whose purpose is to ``depriv[e], either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws,'' the second clause address conspiracies aimed at ``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.''

Respondents attempted to brief the issue for the Court in a supplemental brief on reargument, but the effort was rejected by a majority of the Court. See 505 U. S. ___ (1992). Although the issue is open to be decided on remand, I agree with JUSTICE STEVENS that "[r]espondents have unquestionably established a claim under the second clause of §1985(3), the state hindrance provision." *Ante*, at 33 (dissenting opinion). We have not previously had occasion to consider the scope of the statute's ``prevention or hin-drance'' provision, but it is clear that the second clause does not require that actionable conspiracies be ``aimed at inter-fering with rights'' that are ``protected against private, as well as official, encroachment.'' *Carpenters*, *supra*, at 833. Rather, it covers conspiracies aimed at obstructing local law enforcement. See *Griffin*, 403 U. S., at 98–99 (second clause of §1985(3) prohibits "interference with state officials"); *Great American Fed. Sav. & Loan Assn.* v. *Novotny*, 442 U. S., at 384 (STEVENS, J., concurring). Like JUSTICE STEVENS, I am satisfied by my review of the record that the District Court made findings that adequately support a conclusion that petitioners' activities are class based and intentionally designed to impede local law enforcement from securing ``the equal protection of the laws'' to the clinics and the women they serve. See 726 F. Supp., at 1489, and n. 4, and 1496.

In *Griffin*, this Court ``resurrect[ed]'' §1985(3) ``from its interment under *Collins* v. *Hardyman*, 341 U. S. 651 (1951),'' to hold that the statute provided a federal remedy for those injured by purely private conspiracies. *Novotny*, *supra*, at 395, n. 19 (WHITE, J., dissenting). That resurrection proved a false hope indeed. The statute was intended to provide a federal means of redress to the targets of private conspiracies seeking to accomplish their political and social goals through unlawful means. Today the Court takes yet another step in restricting the scope of the statute, to the point where it now cannot be applied to a modern-day paradigm of the situation the statute was meant to address. I respectfully dissent.