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 SOUTER, concurring in the judgment in part and dissenting in part.

This case turns on the meaning of two clauses of 42 U. S. C. §1985(3) which render certain conspiracies civilly actionable. The first clause (the deprivation clause) covers conspiracies

> "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";

the second (the prevention clause), conspiracies

> "for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . ."

For liability in either instance the statute requires an "act in furtherance of the . . . conspiracy, whereby [a person] is injured in his person or property, or deprived of . . . any right or privilege of a citizen of the United States . . . ."

Prior cases giving the words "equal protection of the laws" in the deprivation clause an authoritative construction have limited liability under that clause by imposing two conditions not found in the terms of the text. An actionable conspiracy must have some racial or perhaps other class-based motivation, *Griffin* v. *Breckenridge*, 403 U. S. 88, 102 (1971), and, if it is "aimed at" the deprivation of a constitutional right, the right must be one secured not only against

official infringement, but against private action as well. *Carpenters* v. *Scott*, 463 U. S. 825, 833 (1983). The Court follows these cases in applying the deprivation clause today, and to this extent I take no exception to its conclusion. I know of no reason that would exempt us from the counsel of *stare decisis* in adhering to this settled statutory construction, see *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. —— (1991), which Congress is free to change if it should think our prior reading unsound.

The meaning of the prevention clause is not thus settled, however, and starting in Part IV I will give my reasons for reading it without any importation of these extratextual conditions from the deprivation clause. First, however, a word is in order to show that the prevention clause's construction is properly before us, and to explain why the Court is not in a position to cast doubt on that clause's arguable applicability to the facts indicated by the record, in light of the Court's refusal to allow respondents to address this very issue in the supplemental briefing that was otherwise permitted prior to the reargument of this case.

Respondents' complaint does not limit their theory of liability to the deprivation clause alone, for it alleges simply that petitioners "have conspired with each other and other parties presently unknown for the purpose of denying women seeking abortions at targeted facilities their right to privacy, in violation of 42 U. S. C. §1985(3)." App. 16.[1] Evidence presented at a hearing before the District Court addressed the

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[1]Contrary to the Court's interpretation, see *ante,* at 14, respondents made this very point at reargument:

"Q: And it wasn't — and it wasn't in the complaint, was it?

"Ms. Ellis: No, Your Honor. The complaint is *(sic)* alleged, though, a violation of section 1985(3) generally." Tr. of Reargument 33–34.

issue of prevention or hindrance, leading that court to note that the demonstrators so far outnumbered local police that "[e]ven though 240 rescuers were arrested, police were unable to prevent the closing of the clinic for more than six (6) hours." *National Organization for Women* v. *Operation Rescue*, 726 F. Supp. 1483, 1489, n. 4 (ED Va. 1989). The applicability of the prevention clause is fairly included within the questions presented, especially as restated by respondents, see Brief for Respondents i (first question presented);[2] Brief in Opposition i; *Holmes* v. *Securities Investor Protection Corp.,* 503 U. S. ——, 1317, n. 12 (1992) (respondent has the right under this Court's Rule 24.2 to restate the questions presented); see also Pet. for Cert. i (petitioners' fourth question presented).[3] The issue was briefed, albeit sparingly, by the parties prior to the first oral argument in this case, see Brief for Respondents 43–44; Reply Brief for Petitioners 14–15, and during that argument was the subject of a question from the bench. See Tr. of Oral Arg. 27–29.

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[2]"Whether a conspiracy to blockade medical clinics providing abortions and related services to women, substantial numbers of whom travel from other states, is a basis for a cause of action under 42 U. S. C. §1985(3)."

[3]"Are respondents' claims under 42 U. S. C. §1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?"

Just as it is therefore proper for me to address the interpretation of the prevention clause and the merits of respondents' position under its terms, it was reasonable for respondents themselves to seek leave to file a supplemental brief addressing that interpretation and those merits prior to the reargument. Their request was nonetheless denied, see 505 U. S. ____ (1992), though I voted to grant it, and three other Members of the Court dissented on the record from the Court's action to the contrary. Nonetheless, whatever may have been the better decision, denying respondents' request was at least consistent with leaving the consideration of the prevention clause for another day, and in no way barred respondents from pressing a claim under the clause at a later stage of this litigation. A vote to deny the request could, for example, simply have reflected a view that in the absence of more extensive trial court findings than those quoted above it was better to leave the prevention clause for further consideration on the remand that I agree is appropriate. Now, however, in expressing skepticism that the prevention clause could be a basis for relief, the Court begins to close the door that the earlier order left open, a move that is unfair to respondents after their request was denied. While the Court's opinion concentrates on the errors of my ways, it would be difficult not to read it as rejecting a construction of the prevention clause under which petitioners might succeed, and to that extent as barring their claim under a statutory provision on which they were not allowed to comment in the supplemental briefing that was otherwise permitted before reargument.

Because in my judgment the applicability of the

prevention clause was raised, and because there is neither unfairness to respondents in putting forward a statutory interpretation that does not bar their claim, nor unfairness to petitioners who sought no leave to address the issue further, I turn to my own views on the meaning of the prevention clause's terms.

Because this Court has not previously faced a prevention clause claim, the difficult question that arises on this first occasion is whether to import the two conditions imposed on the deprivation clause as limitations on the scope of the prevention clause as well. If we do not, we will be construing the phrase "equal protection of the laws" differently in neighboring provisions of the same statute, and our interpretation will seemingly be at odds with the "natural presumption that identical words used in different parts of the same act were intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932). But the presumption is defeasible, and in this instance giving the common phrase an independent reading is exactly what ought to be done.

This is so because the two conditions at issue almost certainly run counter to the intention of Congress, and whatever may have been the strength of this Court's reasons for construing the deprivation clause to include them, those reasons have no application to the prevention clause now before us. To extend the conditions to shorten the prevention clause's reach would, moreover, render that clause inoperative against a conspiracy to which its terms in their plain meaning clearly should apply, a conspiracy whose perpetrators plan to overwhelm available law enforcement officers, to the point of preventing them from providing a class of victims attempting to exercise a liberty guaranteed them by the Constitution with the police protection otherwise

extended to all persons going about their lawful business on streets and private premises. Lest we embrace such an unintended and untoward result, we are obliged to reject any limiting constructions that *stare decisis* does not require.

The amalgam of concepts reflected in 42 U. S. C. §1985(3) witness the statute's evolution, as §2 of the Civil Rights Act of 1871, from a bill that would have criminalized conspiracies "to do any act in violation of the rights, privileges, or immunities of any person . . .," Cong. Globe, 42d Cong., 1st Sess., App. 206 (Apr. 1, 1871) (statement of Rep. Blair), quoting H. R. 320, §2, 42d Cong., 1st Sess. (1871), to a statute including a civil cause of action against conspirators and those who "go in disguise" to violate certain constitutional guarantees. See 17 Stat. 13. The amendment of the original bill that concerns us occurred in the House, to calm fears that the statute's breadth would extend it to cover a vast field of traditional state jurisdiction, exceeding what some Members of Congress took to be the scope of congressional power under the Fourteenth Amendment. See Comment, A Construction of Section 1985(c) in Light of Its Original Purpose, 46 U. Chi. L. Rev. 402, 417 (1979). The principal curb placed on the statute's scope was the requirement that actionable conspiracies (not otherwise proscribed on the strength of their threats to voting rights, see §1985(3)) be motivated by a purpose to deny equal protection of the laws. The sponsor of the amendment, Representative Shellabarger, put it this way: "The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens . . . ." Cong. Globe, 42d Cong., 1st Sess., 478 (Apr. 5, 1871).

The effect of the equal protection requirement in thus limiting the deprivation clause has received the Court's careful attention, first in *Collins* v. *Hardyman*, 341 U. S. 651 (1951), then in a series of more recent cases, *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971), *Great American Federal Savings & Loan Assn.* v. *Novotny*, 442 U. S. 366 (1979), and *Carpenters* v.

Scott, 463 U. S. 825 (1983). For present purposes, *Griffin* and *Carpenters* stand out.

The *Griffin* Court sought to honor the restrictive intent of the 42d Congress by reading the "language requiring intent to deprive of equal protection, or equal privileges and immunities," *Griffin*, *supra,* at 102 (emphasis omitted), as demanding proof of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Ibid.* And while this treatment did, of course, effectively narrow the scope of the clause, it did so probably to the point of overkill, unsupported by any indication of an understanding on the part of Congress that the animus to deny equality of rights lying at the heart of an equal protection violation as the legislation's sponsors understood it would necessarily be an animus based on race or some like character. See *id.*, at 100; Cong. Globe, 42d Cong., 1st Sess., at App. 188 (remarks of Rep. Willard); Cong. Globe, 42d Cong., 1st Sess., at 478 (remarks of Rep. Shellabarger).

While the Congress did not explain its understanding of statutory equal protection to any fine degree, I am not aware of (and the *Griffin* Court did not address) any evidence that in using the phrase "equal protection" in a statute passed only three years after the ratification of the Fourteenth Amendment Congress intended that phrase to mean anything different from what the identical language meant in the Amendment itself. That is not to say, of course, that all Members of Congress in 1871, or all jurists, would have agreed on exactly what the phrase did mean, and certainly it is true that the conceptual development of equal protection could hardly have been outlined in advance by the Members of the 42d Congress. But equally is it true that we have no reason to suppose that they meant their statutory

equal protection provision to be read any more narrowly than its obvious cognate in the Amendment. *Griffin*, however, gave it just such a reading.

To be sure, there is some resonance between *Griffin*'s animus requirement and those constitutional equal protection cases that deal with classifications calling for strict or heightened scrutiny, as when official discriminations employ such characteristics as race, national origin, alienage, gender, or illegitimacy. See *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 440–441 (1985) (describing the jurisprudence).[4] But these categories of distinctions based on race or on qualities bearing a more or less close analogy to race do not by any means exhaust the scope of constitutional equal protection. All legislative classifications, whether or not they can be described as having "some racial or perhaps otherwise class-based invidiously discriminatory animus," are subject to review under the Equal Protection Clause, which contains no reference to race, and which has been understood to have this comprehensive scope since at least the late 19th century. See, e.g., *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293–294 (1898) (citing cases). A routine legislative classification is, of course, subject only to deferential scrutiny, passing constitutional muster if it bears a rational relationship to some legitimate governmental purpose. *E.g., Cleburne* v. *Cleburne Living Center, Inc., supra,* (describing the test); *Schweiker* v. *Wilson*, 450 U. S. 221, 230 (1981). But the point is that Fourteenth Amendment equal protection scrutiny is

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[4]Cf. *Carpenters* v. *Scott*, 463 U. S. 825, 835–839 (1983) (holding that animus against a class based upon its economic views, status or activities is beyond the reach of the deprivation clause, and reserving the question whether it reaches animus against any class other than "Negroes and those who championed their cause").

applied to such classifications, and if the scope of "equal protection" in the statute is to balance its constitutional counterpart, the statute ought to cover discriminations that would be impermissible under rational basis scrutiny.

There is, indeed, even some extratextual evidence of a positive congressional intent to provide just such a statutory reach beyond what *Griffin* would allow. Some of the legislative history of §2 of the 1871 Act suggests that the omission of any reference to race from the statutory text of equal protection was not the result of inadvertence, and that Congress understood that classifications infringing the statutory notion of equal protection were not to be limited to those based on race or some closely comparable personal quality. The most significant, and often quoted, evidence came from Senator Edmunds, who managed the bill on the Senate floor and 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.[5] These are not, of course, all examples of discrimination based on any class comparable to race, and the Senator's list counters any suggestion that the subject matter of statutory equal protection was meant to be so confined.[6]

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[5]*Carpenters* did leave open the question whether the deprivation clause might apply to a conspiracy "aimed at any class or organization on account of its political views or activities . . . ." See *Carpenters, supra,* at 837.

[6]Senator Edmunds' quoted language occurred in a discussion of both §§2 and 3 of the bill that became the Civil Rights Act of 1871. See Cong. Globe, 42d Cong., 1st Sess., at 567. That Senator Edmunds was referring to the statutory language at issue here is

Notwithstanding the *Griffin* Court's decision to read the deprivation clause's equal protection element as more restrictive than Fourteenth Amendment equal protection, the Court recognized that in a different respect the statute remained more expansive than its constitutional counterpart, in being aimed at deprivations of equal protection by purely private conspirators, 403 U. S., at 96–97. This very conclusion, in fact, prompted the further concern that the deprivation clause might by its terms apply to facts beyond Congress' constitutional reach. The Court nonetheless obviated the need to address the scope of congressional power at that time by confining itself to a holding that the statute was constitutional at least insofar as it implemented congressional power to enforce the Thirteenth Amendment and the right to travel freely, each of which was "assertable against private as well as governmental interference." *Id.,* at 105.[7]

The Court was then only one step away from putting the deprivation clause in its present shape, a step it took in *Carpenters*. Whereas *Griffin* had held that requiring a purpose to infringe a federal constitutional right guaranteed against private action

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unmistakable because he stated that he was describing the conditions required before a conspiracy could be actionable "under the provisions of all this bill." See *ibid.*

[7]This prudential step was presumably unnecessary in light of *United States* v. *Guest*, 383 U. S. 745, 762 (1966) (Clark, J., concurring); *id.*, at 782 (Brennan, J., concurring in part and dissenting in part), in which a majority of the Court concluded that §5 of the Fourteenth Amendment empowers Congress to enact laws punishing all conspiracies, with or without state action, that interfere with exercise of Fourteenth Amendment rights.

was sufficient to allay any fear that the deprivation clause was being applied with unconstitutional breadth, *Carpenters* turned this sufficient condition into a necessity insofar as conspiracies to deprive any person or class of persons of federal constitutional rights were concerned, by holding that in the case of such a conspiracy no cause of action could be stated without alleging such an ultimate object of depriving the plaintiff of a right protected against private action by the Federal Constitution. 463 U. S., at 833.

It was a most significant step. In going no further than to affirm the deprivation clause's constitutionality insofar as it applied to conspiracies to infringe federal constitutional rights guaranteed against private action, the *Griffin* Court had arguably acted with prudent reticence in avoiding a needless ruling on Congress' power to outlaw conspiracies aimed at other rights.[8] But in converting this indisputably constitutional object, of giving relief against private conspiracies to violate federal constitutional rights guaranteed against private action, into the exclusive subject matter of the clause with respect to conspiracies to deprive people of federal constitutional rights, the *Carpenters* Court almost certainly narrowed that clause from the scope Congress had intended. If indeed Congress had meant to confine the statute that narrowly, its application to federal constitutional deprivations in 1871 would not have gone beyond violations of the Thirteenth Amendment, adopted in 1865. (The next clear example of a constitutional guarantee against individual action would not emerge until *United States* v. *Guest*, 383 U. S. 745, 759–760, n. 17 (1966), recognizing a right of interstate travel good against individuals as well as governments.) But if Congress had meant to protect no federal constitutional rights outside those protected by the Thirteenth Amend-

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[8]But see n. 7, *supra*.

ment, it is hard to see why the drafters would not simply have said so, just as in the third and fourth clauses of §1985(3) they dealt expressly with infringements of voting rights, already guaranteed against abridgement by the Fifteenth Amendment adopted in 1870.

The *Carpenters* Court might have responded to this objection by suggesting that the textual breadth of the deprivation clause reflects its applicability to conspiracies aimed at violating rights guaranteed under state law or rights guaranteed against individual infringement by federal statutory law, since such possible applications were left open by the Court's opinion. See *Carpenters, supra,* at 833–834. But this answer would prompt the even more fundamental objection that there is no textual basis in the deprivation clause (or in the portions of subsection (3) common to all clauses) suggesting that any such individual-infringement limitation was intended at all.

Whether or not the concerns with constitutionality that prompted both the *Griffin* and *Carpenters* holdings were well raised or wisely allayed by those decisions, the solution reached most probably left a lesser deprivation clause than Congress intended. Just as probably, if that solution were imported into the prevention clause, it would work an equally unintended contraction.

The conclusion that the conditions placed on the deprivation clause narrow its intended scope prompts the question whether the reasons thought to argue in favor of placing such conditions on the deprivation clause apply to the prevention clause. They do not.

We may recall that in holding racial or other class-based animus a necessary element of the requisite purpose to deprive of equal protection, the *Griffin*

Court was mindful of the congressional apprehension that the statute might otherwise turn out to be "a general federal tort law." *Griffin*, 403 U. S., at 102. While the Court did not dwell on why it chose a requirement of racial or comparable class-based animus to restrict statutory equal protection, its readiness to read the statutory category more narrowly than its Fourteenth Amendment counterpart is at least understandable when one sees that the scope of conspiracies actionable under the deprivation clause has virtually no textual limit beyond the need to prove the equal protection element. Without the *Griffin* Court's self-imposed class-based animus requirement, any private conspiracy to deprive of equal protection would be actionable under §1985(3) so long as the conspirators took some action that produced some harm.

The prevention clause carries no such premonition of liability, however. Its most distinctive requirement, to prove a conspiratorial purpose to "preven[t] or hinde[r] the constituted authorities of any State or Territory from giving or securing . . . the equal protection of the laws," is both an additional element unknown to the deprivation clause, and a significantly limiting condition. Private conspiracies to injure according to class or classification are not enough here; they must be conspiracies to act with enough force, of whatever sort, to overwhelm the capacity of legal authority to act evenhandedly in administering the law.

The requirement that the very capacity of the law enforcement authorities must be affected is supported by a comparison of the statutory language of the prevention clause, which touches only those conspiracies with a purpose to "preven[t] or hinde[r] the constituted authorities" of any State or territory from giving or securing equal protection, with the text of §1985(1), which (among other things) prohibits conspiracies to prevent "any person" from

"discharging any duties" of an office under the United States. The contrast makes clear that the words of the prevention clause are not those that Congress used when it meant to deal with every situation in which a single government official was prevented from discharging his duties. To be sure, in an earlier day of scarce law enforcement personnel, rudimentary communication and slow transportation, in some situations it might have been possible to overthrow the capacity of government by overthrowing one official alone. But a more ambitious conspiratorial object would be required under normal modern conditions, and in order to satisfy the requirement of affecting the law enforcement system sufficiently, such a conspiracy would need to envision action capable of countering numbers of officers or injuring their responsive capacity (as by disabling their communication system, for example).

The requirement of an object to thwart the capacity of law enforcement authority to provide equal protection of the laws thus narrows the scope of conspiracies actionable under the prevention clause. It does so to such a degree that no reason appears for narrowing it even more by a view of equal protection more restrictive than that of the Fourteenth Amendment.

Equally inapposite to the prevention clause is the second *Griffin–Carpenter* deprivation clause limitation that where a conspiracy to deny equal protection would interfere with exercise of a federal constitutional right, it be a right "protected against private, as well as official encroachment," *Carpenters*, 463 U. S., at 833. The justification for the Court's initial enquiry concerning rights protected by the Constitution against private action lay in its stated concern about the constitutional limits of congressional power to regulate purely private action.

Griffin, 403 U. S., at 104. Once again, however, the reason that there is no arguable need to import the extratextual limitation from the deprivation clause into the prevention clause lies in the prevention clause's distinctive requirement that the purpose of a conspiracy actionable under its terms must include a purpose to accomplish its object by preventing or hindering officials in the discharge of their constitutional responsibilities. The conspirators' choice of this means to work their will on their victims would be significant here precisely because the act of frustrating or thwarting state officials in their exercise of the State's police power would amount simply to an extralegal way of determining how that state power would be exercised. It would, in real terms, be the exercise of state power itself. To the degree that private conspirators would arrogate the State's police power to themselves to thwart equal protection by imposing what amounts to a policy of discrimination in place of the Constitution's mandate, their action would be tantamount to state action and be subject as such to undoubted congressional authority to penalize any exercise of state police power that would abridge the equal protection guaranteed by the Fourteenth Amendment. That is to say, Congress is no less able to legislate against unconstitutional exercises of state authority by conspiratorial usurpation than it is to counter unconstitutional action taken by those formally vested with state authority.

This equation of actionable conspiracies with state action is indeed central to the reading given to the prevention clause by the *Griffin* Court. In reasoning that the deprivation clause contained no state action requirement, the Court contrasted the text of that clause with the language of three other provisions indicating, respectively, "three possible forms for a state action limitation on §1985(3)." *Griffin*, 403 U. S., at 98. One such limitation that might have

been read into the deprivation clause was "that there must be interference with or influence upon state authorities." *Ibid.* The Court declined to tack that requirement onto the deprivation clause because its inclusion in the prevention clause indicated that Congress intended it to apply there and nowhere else. The relevant point here is that the whole basis of the *Griffin* Court's analysis was that "interference with or influence on state authorities" was state action, and it follows from *Griffin*'s own premises that no guarantee-against-private-encroachment condition would have been needed even then to allay any apprehension that in reaching the private conspiracies described by the prevention clause, Congress might be exceeding its authority under §5 of the Fourteenth Amendment.

Accordingly, I conclude that the prevention clause may be applied to a conspiracy intended to hobble or overwhelm the capacity of duly constituted state police authorities to secure equal protection of the laws, even when the conspirators' animus is not based on race or a like class characteristic, and even when the ultimate object of the conspiracy is to violate a constitutional guarantee that applies solely against state action.

Turning now to the application of the prevention clause as I thus read it, I conclude that a conspiracy falls within the terms of the prevention clause when its purpose is to hinder or prevent law enforcement authorities from giving normal police protection to women attempting to exercise the right to abortion recognized in *Casey* v. *Planned Parenthood of Southeastern Pennsylvania*, 505 U. S. ____ (1992), and *Roe* v. *Wade*, 410 U. S. 113 (1973). My reason for this is not a view that a State's frustration of an individual's choice to obtain an abortion would, without more, violate equal protection, but that a

classification necessarily lacks any positive relationship to a legitimate state purpose, and consequently fails rational basis scrutiny, when it withdraws a general public benefit on account of the exercise of a right otherwise guaranteed by the Constitution. See *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972) (applying the Equal Protection Clause and finding no "appropriate governmental interest suitably furthered" by a discrimination that would independently violate the First Amendment). While such a discrimination, were it wrought by the State, could be treated as a burden on the exercise of a right protected by a substantive due process guarantee, see *Casey*, *supra*, and forbidden as such, the denial of generally available civic benefits to one group solely because its members seek what the Constitution guarantees would just as clearly be a classification for a forbidden purpose, which is to say, independently a violation of equal protection. See *Mosley*, *supra; Carey* v. *Brown*, 447 U. S. 455 (1980).[9] When private individuals conspire for the purpose of arrogating and, in effect, exercising the State's power in a way that would thus violate equal protection if so exercised by state officials, the conspiracy becomes actionable when implemented by an act ``whereby [a person] is injured in his person or property, or

[9]I emphasize the substantive due process guarantee at issue here because my analysis rests on the fact that, treating the conspirators as the State, the imposition of restrictions on abortion more strict than those permitted under the Constitution is not a legitimate public purpose. I do not reach the question whether and how the equal protection requirement in the prevention clause would be violated by a conspiracy which, if charged to the State, would amount to a denial of police protection to individuals who are not attempting to exercise a constitutional right.

deprived of . . . any right or privilege of a citizen of the United States.'' §1985(3).[10]

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[10]The scope of this construction of the prevention clause is limited. It certainly would not forbid any conduct, unlike that at issue here, protected by the First Amendment. Nor would it reach even demonstrations that have only the incidental effect of overwhelming local police authorities, for the statute by its terms requires a "purpose" to "preven[t] or hinde[r] 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." Indeed, it would not necessarily reach even most types of civil disobedience that may be intended to overwhelm police by inviting multiple arrests, because the purpose of these is not ordinarily to discriminate against individuals on the basis of their exercise of an independently protected constitutional right. See n. 9, *supra*.

As to the lunch counter sit-in protests of the early 1960's, to which the Court refers, see *ante*, at 17, and n. 14, if the cases that made it to this Court are representative, these normally were not "mass" demonstrations, but rather led to the arrests of small groups of orderly students who refused to leave segregated establishments when requested to do so. See, *e.g., Bouie* v. *City of Columbia*, 378 U. S. 347, 348 (1964) ("two Negro college students"); *Bell* v. *Maryland*, 378 U. S. 226, 227 (1964) ("12 Negro students"); *Robinson* v. *Florida*, 378 U. S. 153 (1964) (an integrated group of 18 blacks and whites); *Barr* v. *City of Columbia*, 378 U. S. 146, 147 (1964) ("five

The only remaining question is whether respondents have demonstrated, and the District Court has found, a conspiracy thus actionable under the prevention clause.[11] While I think that all of the requisite findings would be supportable on this record, one such finding has not been expressly made.

Negro college students"); *Griffin* v. *Maryland*, 378 U. S. 130, 132 (1964) ("five young Negroes"); *Lombard* v. *Louisiana*, 373 U. S. 267, 268 (1963) ("three Negro and one white college students" seeking service at a refreshment counter "designed to accommodate 24 persons"); *Peterson* v. *Greenville*, 373 U. S. 244, 245, 247 (1963) (10 "Negro boys and girls" seeking service at a lunch counter that "was designed to accommodate 59 persons").

In any event, under the construction I adopt today, a lunch counter sit-in would not have been actionable even if police had been overwhelmed because, for example, protesters arrested for trespass were immediately replaced by others who prevented police from barring integration of the lunch counter, leading to mass arrests. This is so because the protesters would not have deprived the owner of the segregated lunch counter of any independently protected constitutional right. See *Roberts* v. *United States Jaycees*, 468 U. S. 609, 618–622 (1984) (no associational right on the part of individual members to exclude women from the Jaycees); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 258–261 (1964) (Title II of the Civil Rights Act of 1964 prohibiting discrimination in places of public accommodation does not work a deprivation of liberty or property without due process of law, nor a taking of property without just compensation).

The Court correctly describes the holding of *Heart of Atlanta*, but then ignores the import of that holding

The District Court found that petitioners conspired to cause respondent clinics to cease operations by trespassing on their property and physically blocking entry into and exit from the clinics, see 726 F. Supp., at 1489, rendering existing and prospective patients, as well as physicians and medical staff, unable to enter the clinic to render or receive medical counseling or advice. *Ibid.* The District Court found

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in reaching its conclusion. It argues that government action that "would have been the equivalent of what those conducting the sit-ins did," *i.e.,* government action preventing restaurant owners from discriminating in provision of service against blacks, would have violated the Constitution by "physically occupy[ing the restaurant owners'] property without due process and without just compensation." See *ante*, at 17–18, n. 14. Whether the "property" to which the Court refers is the lunch counter itself, or the restaurant owners' "right to exclude blacks from their establishments" on the basis of race, *ibid.*, assuming that could even be described as one of that bundle of rights that made up such a restaurant owner's property (a dubious proposition, see, *e.g., Lane* v. *Cotton*, 12 Mod. 472, 484 (K.B. 1701) (common-law duty of innkeepers to serve potential patrons equally, without regard to personal preference, so long as they can be accommodated)), the Court does not explain how, if such government action would violate the Constitution, Title II of the Civil Rights Act could provide "legal warrant for the physical occupation," *ante*, at 18, n. 14, without similarly offending the Takings and Due Process Clauses.

There is, additionally, an independent reason apart from the absence of any constitutional right on the restaurant owner's part, that a sit-in demonstration would not be actionable under my construction of the prevention clause. Although the question was left

that petitioners' actions were characteristically undertaken without notice and typically overwhelmed local police officials invested with the law enforcement component of the State's police power, rendering them unable for a substantial period to give or secure the police protection otherwise extended to all persons going about their lawful business on the streets and on private premises. *Id.*, at 1489, 1490, and n. 4. The victims were chosen because they would be making choices falling within the scope of recognized substantive due process protection, *id.*, at 1489, choices that may not be made the basis for discriminatory state classifications applied to deny state services routinely made available to all persons. The District Court found that the effects of thus replacing constituted authority with a lawless regime would create a substantial risk of physical harm, *ibid.*, and of damage to respondents' property, *id.*, at 1489–1490, a conclusion amply supported by the record evidence

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open in the sit-in cases decided by this Court in 1963 and 1964, see Paulsen, The Sit-In Cases of 1964: ``But Answer Came There None,'' 1964 Sup. Ct. Rev. 137 (1964), and was then largely mooted by the adoption of the Civil Rights Act of 1964, government enforcement of private segregation by use of a state trespass law, rather than "securing to all persons . . . the equal protection of the laws," itself amounted to an unconstitutional act in violation of the Equal Protection Clause of the Fourteenth Amendment. Cf. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

[11]As the Court observes, *ante,* at 20, n. 16, I do not address the propriety of injunctive relief in this case even though it was addressed by the parties in supplemental briefs on reargument. Unlike the prevention clause question, it is not "fairly included" within the questions upon which certiorari was granted, and therefore its consideration by the Court would be inappropriate. See this Court's Rule 14.1(a).

of personal assaults and tortious restrictions on lawful movement, as well as damage to property, at petitioners' previous demonstrations. See, *e.g.,* Tr. A–25 (Nov. 20, 1989).

These facts would support a conclusion that petitioners' conspiracy had a "purpose of preventing or hindering the constituted authorities of [Virginia] from giving or securing to all persons within [Virginia] the equal protection of the laws," and it might be fair to read such a finding between the lines of the District Court's express conclusions. But the finding was not express, and the better course is to err on the side of seeking express clarification. Certainly that is true here, when other Members of the Court think it appropriate to remand for further proceedings. I conclude therefore that the decision of the Court of Appeals should be vacated and the case be remanded for consideration of purpose, and for a final determination whether implementation of this conspiracy was actionable under the prevention clause of 42 U. S. C. §1985(3).