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# The Scope of Section 1985 (3) in Light of *Great American Federal Savings and Loan Association v. Novotny*: Too Little Too Late?

By TAUNYA LOVELL BANKS\*

## Introduction

After the close of the Civil War and the legal end of slavery, Congress began to redefine the legal status of approximately four million newly emancipated blacks. At this time, most blacks resided in the eleven Southern states that comprised the Confederacy.<sup>1</sup> During the fall and winter of 1865-66, these states enacted so-called "Black Codes" which placed varying degrees of political, social, and economic restrictions on blacks.<sup>2</sup> In response to these codes, Congress enacted the Civil Rights Act of 1866.<sup>3</sup>

Section 1 of the 1866 Act extended all rights of citizenship to former slaves.<sup>4</sup> The Act also provided former slaves alleging discrimina-

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1. The confederate states were Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. D. BELL, *RACE, RACISM AND AMERICAN LAW* 3-24 (2d ed. 1980); J.H. FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* *passim* (1961); Grossman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1324-25 (1951).

2. The Black Codes were designed generally to take the place of the defunct Slave Codes. The Black Codes differed slightly from the Slave Codes in that under the Black Codes, blacks were granted some rights: to own property, to make contracts, to sue and be sued, to legally marry, and to testify in court. Nevertheless, the Black Codes prohibited blacks from obtaining certain types of employment, possessing firearms, and joining the militia, and they often subjected blacks to vagrancy laws that were inapplicable to whites. B. QUARLES, *THE NEGRO IN THE MAKING OF AMERICA* 129-30 (1964). See also J. FRANK & R. MURRO, *The Original Understanding of Equal Protection of the Laws*, in *ONE HUNDRED YEARS OF THE FOURTEENTH AMENDMENT: IMPLICATIONS FOR THE FUTURE* 67 (1973).

3. Ch. 31, 14 Stat. 27 (1866).

4. "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and

tion access to federal courts.<sup>5</sup> Congress had based its authority for this legislation on the Thirteenth Amendment;<sup>6</sup> however, continuing doubts as to the Act's constitutionality prompted the Joint Committee on Reconstruction to recommend, in its April, 1866 report to Congress, the proposed Fourteenth Amendment.<sup>7</sup>

During this period, several counter-Reconstruction organizations were formed in the South by reactionaries who believed that the Reconstruction efforts threatened the political and social structure of their states.<sup>8</sup> These organizations opposed equality between blacks and whites, often punishing "offenders" of either race. The most notorious group of counter-Reconstructionists was the Ku Klux Klan, which used a variety of techniques to preserve white supremacy, including threats,

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such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

5. "That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts of judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act . . ." *Id.* at § 3.

6. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. This amendment, adopted in February 1865 and ratified in December 1865, 13 Stat. 567, 774-75 (1865), simply extended to the entire country the principle of President Lincoln's proclamation of September 22, 1862. G. GUNTHER, CONSTITUTIONAL LAW 974 (10th ed. 1980).

7. See opening remarks of Senator Stevens in support of the Fourteenth Amendment, CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). The proposed Fourteenth Amendment was adopted by Congress in June 1866 and was ratified by the states in 1868. 14 Stat. 358-59 (1866); 15 Stat. 708-11 (1868). The Fifteenth Amendment was adopted in February 1869 and was ratified in 1870 to secure the franchise for blacks and to preserve the rapidly disintegrating Republican Party in the South. 16 Stat. 1131-32 (1870).

Section one of the Fourteenth Amendment reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

8. L. BENNETT, JR., BEFORE THE MAYFLOWER 196-97 (1966); J.H. FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR 156-58 (1961); R. LOGAN, THE NEGRO IN THE UNITED STATES 27 (1957).

destruction of property, and physical violence. By the spring of 1867, the Klan had highly organized spin-offs in all the Southern states.<sup>9</sup> Congress subsequently enacted a series of laws, commonly referred to as the Force Acts, which were designed to enforce the provisions of the Fourteenth and Fifteenth Amendments. The first Force Act, the Civil Rights Act of 1870,<sup>10</sup> was essentially a re-enactment of the Civil Rights Act of 1866, and was amended a year later by the second Force Act.<sup>11</sup> The third Force Act, known as the Ku Klux Act,<sup>12</sup> was directed at secret and conspiratorial terrorist groups like the Klan.<sup>13</sup> Section 1 of that Act, now codified in part as 42 U.S.C. section 1983, provided civil remedies for interferences with federal rights "under color" of law.<sup>14</sup> Section 2, now codified as 42 U.S.C. section 1985(3), provided civil remedies for private conspiracies directed at interferences with federal rights.<sup>15</sup>

Both provisions of the Act lay dormant for almost ninety years,<sup>16</sup> in part because of a series of Supreme Court cases that weakened the protection provided by these post-Civil War amendments and statutes.<sup>17</sup> The Court restricted the reach of these provisions, not only be-

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9. J.H. FRANKLIN, *supra* note 8, at 156-58.

10. Act of May 31, 1870, ch. 114, 16 Stat. 140.

11. Act of Feb. 28, 1871, ch. 99, 16 Stat. 433.

12. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

13. CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871).

14. "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1976).

15. "[I]f 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; . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U.S.C. § 1985(3) (Supp. III 1979). Although the language of the section has remained the same, it was codified in the 1970 United States Code as § 1985(3), in the 1976 United States Code as § 1985(c), and in the 1979 Supplement to the United States Code as § 1985(3). This article will use the designation § 1985(3).

16. *Collins v. Hardyman*, 341 U.S. 651 (1951), was the first United States Supreme Court decision to interpret § 1985(3). The Court's conclusion that the statute reached only conspiracies conducted under state law in effect prohibited the use of § 1985(3) to remedy private discrimination. This part of the *Collins* opinion was overruled in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), which held that no state action was necessary to recover under § 1985(3).

17. The Civil Rights Cases, 109 U.S. 3 (1883), held the public accommodations provision of the Civil Rights Act of 1875 unconstitutional because the Fourteenth Amendment does not apply to the wrongful acts of private individuals in the absence of some state sup-

cause it felt the tremendous pressure exerted by Southern conservatives on the race question, but also because it was concerned about the extent to which the federal government should be allowed to regulate areas that traditionally rested within the states' domain.<sup>18</sup> The Court thus restricted what it felt to be excessive federal power in an attempt to balance the powers between the federal and state governments. In the last two decades, sections 1983 and 1985(3) have been reactivated by litigants combating racial and other class-based invidious discrimination,<sup>19</sup> who have found that the scope of protection and relief available under these statutes is often broader than that accorded by modern federal statutes such as the Civil Rights Act of 1964.<sup>20</sup> The utility of section 1985(3) was limited, however, by *Great American Federal Savings & Loan Association v. Novotny*,<sup>21</sup> in which it was found that the scope of section 1985(3) is not coextensive with the scope of section 1983.

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port. See also *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Louisville, New Orleans and Tex. Ry. Co. v. Mississippi*, 133 U.S. 587 (1890); *Bush v. Kentucky*, 107 U.S. 110 (1882); *Neal v. Delaware*, 103 U.S. 370 (1880); *Virginia v. Rives*, 100 U.S. 313 (1879); *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Hall v. DeCuir*, 95 U.S. 485 (1877); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). Except for the *Slaughter-House Cases*, all these decisions were handed down after the 1877 Hayes/Tilden compromise which signaled the end of the Reconstruction era. For the effect of the 1877 compromise, see generally *THE CIVIL RIGHTS RECORD: BLACK AMERICA AND THE LAW 1849-1970*, at 26 (R. Burdolph ed. 1970). See also D. BELL, *RACE, RACISM AND AMERICAN LAW* 26-28 (2d ed. 1980).

18. J.H. FRANKLIN, *supra* note 8, at 203-07. See also *The Civil Rights Cases*, 109 U.S. 3, 18-19 (1883).

19. *Griffin v. Breckenridge*, 403 U.S. 88 (1971), required that the conspiracy actionable under § 1985(3) (1) involve "racial, or perhaps otherwise class-based, invidiously discriminatory animus" behind the conspirator's action which is (2) "aim[ed] at a deprivation of the equal enjoyment of rights secured by the law to all." *Id.* at 102. Courts have found rights subject to protection under § 1985(3) to include: the right to vote, *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1973); the right to cast a ballot in a state election, *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973); the rights to worship and to assemble, *Marlowe v. Fisher Body*, 489 F.2d 1057 (6th Cir. 1973) and *Action v. Shannon*, 450 F.2d 1227 (8th Cir. 1971) (en banc); the right to equal pay, *Hodgin v. Jefferson*, 447 F. Supp. 804 (D. Md. 1978); the right to file for bankruptcy, *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc); the right to be free from state zoning law violations, *Harrison v. Brooks*, 446 F.2d 404 (1st Cir. 1971); and the right to be free from state civil rights deprivations, *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499 (9th Cir. 1979). See also Note, *The Effects of the Thirteenth Amendment on 42 U.S.C. § 1985(c)*—*Fisher v. Shamburg*, 12 TOLEDO L. REV. 959, 973-74 (1981).

20. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964), as amended by Pub. L. No. 92-261, 86 Stat. 103-13 (1972), Pub. L. No. 92-318, 86 Stat. 375 (1972), Pub. L. No. 93-608, 88 Stat. 1972 (1975), Pub. L. No. 94-273, 90 Stat. 377 (1976) (codified as amended in scattered sections of 42 U.S.C.). For example, under Title VII of the Civil Rights Act of 1964, litigants are not entitled to a jury trial, cannot seek punitive or full compensatory relief, and are bound by a statute of limitations that is shorter than those applicable to the older statutes. *Great Am. Fed. Sav. and Loan Ass'n v. Novotny*, 442 U.S. 366, 372-75 (1979).

21. 442 U.S. 366 (1979).

In that case, respondent John R. Novotny, a loan officer and a member of the board of directors of Great American Federal Savings and Loan Association, alleged that the Association intentionally engaged in a course of conduct the effect of which was to deny its women employees equal employment opportunity. Novotny was fired after he expressed support for the women employees at a board of directors meeting. He alleged that his employment was terminated because of his support for the women employees. Novotny filed a complaint with the Equal Employment Opportunity Commission under Title VII,<sup>22</sup> received a right-to-sue letter,<sup>23</sup> and sued the Association and its directors in district court. He claimed damages under section 1985(3), asserting that he had been injured as a result of a conspiracy to deprive him of equal protection and equal privileges and immunities under the laws. The district court granted defendants' motion to dismiss on the grounds that the directors of a single corporation could not engage in a conspiracy, and thus section 1985(3) could not be invoked.<sup>24</sup> On appeal, the Third Circuit, sitting *en banc*, unanimously reversed the district court. The court of appeals ruled, *inter alia*, that Title VII could be the source of a right asserted under section 1985(3)<sup>25</sup> and that intracorporate conspiracies come within the intent of the section.<sup>26</sup>

The Supreme Court reversed, holding that Title VII cannot be used as the source of the substantive right asserted in an action under section 1985(3).<sup>27</sup> The Court justified the difference in the scope of sections 1985(3) and 1983 by referring to the difference in statutory language<sup>28</sup> and by noting the inherent constitutional limitations on the authority of Congress to regulate purely private discrimination.<sup>29</sup> The majority opinion, however, failed to address the broader question: whether section 1985(3) can be used to remedy a violation of any federal statutory right. In concluding that section 1985(3), like section

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22. 42 U.S.C. § 2000e (1976).

23. *Id.* at § 2000e-5(f)(1).

24. *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 430 F. Supp. 227, 230 (W.D. Pa. 1977).

25. For a discussion of the debate surrounding the scope of protection provided by § 1985(3), see Judge Adams' opinion, speaking for the Third Circuit Court of Appeal, *en banc*, *Novotny v. Great Am. Fed. Sav. & Loan Ass'n* 584 F.2d 1235, 1247-48 (3d Cir. 1978), and authorities cited therein.

26. *Id.* at 1251-53.

27. *Novotny*, 442 U.S. at 378.

28. "§ 1 of the 1871 Act, the predecessor to § 1983, referred to 'rights, privileges, or immunities secured by the Constitution of the United States,' whereas § 2, the predecessor to § 1985(3), referred to 'equal protection of the laws,' and 'equal privileges and immunities under the laws.'" *Id.* at 382 (Stevens, J., concurring).

29. *Id.* at 383.

1983, is a remedial, rather than a substantive, statute,<sup>30</sup> the majority opinion provides little, if any, insight into whether the substantive rights secured by section 1985(3) are limited to the rights secured by the Constitution<sup>31</sup> or include rights created by statutes. This silence is significant, given the concurring opinions by Justices Powell and Stevens, which posit that section 1985(3) does not redress any federal statutory right,<sup>32</sup> and Justice White's dissenting opinion, which argues that section 1985(3) "encompasses all rights guaranteed in federal statutes as well as those rights guaranteed directly by the Constitution."<sup>33</sup>

Section 1985(3), given a broad application, could be used as one of the few vehicles to combat purely private discrimination and to remedy the type of private invasions of individual rights complained of in the *Civil Rights Cases*.<sup>34</sup> Of course, for such a broad application of section 1985(3) to withstand constitutional attack, the Court would have to define more clearly the "constitutional periphery"<sup>35</sup> of section 1985(3) and to determine the extent of congressional authority to regulate purely private discrimination. Thus far the Court has refused to do so.

This article discusses whether section 1985(3) creates a cause of action for violations of any federal statutory rights. Part I will examine the legislative history and statutory language of section 1985(3) to determine whether Congress intended section 1985(3) to apply either as a remedial or as a substantive statute. Part II will explore the extent of congressional power to regulate private discrimination. The final part of this article will examine the positions of the present members of the

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30. *Id.* at 372. See notes 38-39 and accompanying text *infra*.

31. *But see* *Maine v. Thiboutot*, 448 U.S. 1 (1980). In that case, respondents alleged that the State of Maine and its Commissioner of Human Services violated § 1983 by depriving them of Aid to Families with Dependent Children benefits to which they were entitled under the Social Security Act. Again focusing on statutory language, the Court concluded that the phrase "and laws" in § 1983 "means what it says," that the plain language encompassed respondents' claim under the Social Security Act, and that § 1983's remedy encompasses violations of federal statutory as well as constitutional law. *Id.* at 4-8.

32. Justice Powell found that the reach of § 1985(3) is limited to conspiracies to violate "those fundamental rights derived from the Constitution." *Novotny*, 442 U.S. at 379 (Powell, J., concurring).

Justice Stevens concluded that section 1985(3) was not "intended to provide a remedy for the violation of statutory rights—let alone rights created by statutes that had not yet been enacted [at the time of 1871] . . ." *Id.* at 385 (Stevens, J., concurring).

33. *Id.* at 389 n.5 (White, J., dissenting).

34. 109 U.S. 3 (1883).

35. This language comes from *Griffin v. Breckenridge*, 403 U.S. 88 (1971), in which the Court held that the Thirteenth Amendment empowered Congress to legislate against private, racially based conspiracies that interfered with the right to interstate travel, but refused to determine the "constitutionally permissible periphery" of § 1985. *Id.* at 107.

Court in an attempt to predict how the Court might rule on future section 1985(3) claims that allege deprivation of a federal statutory right.

### I. Section 1985(3): Remedial or Substantive?

The majority in *Novotny* concluded that 1985(3) is a remedial statute and that an action under it must therefore be based on a conspiracy to violate some otherwise defined, independent federal substantive right to equal protection of the laws or of equal privileges and immunities under the laws. The majority opinion fails, however, to cite any authority in support of this conclusion.<sup>36</sup> In his concurring opinion, Justice Stevens inferred that the legislative history of the Civil Rights Act of 1871 supports the majority's conclusion.<sup>37</sup> In so doing, he quoted Senator Edmunds, the Senate manager of the bill,<sup>38</sup> as saying in the 1871 congressional debates that "[a]ll civil suits, as every lawyer understands, which this act authorizes, are not based upon it; they are based upon the right of the citizen. The act only gives a remedy."<sup>39</sup>

Justice Stevens' analysis of the legislative history is misleading. First, this quotation is taken out of context. It was part of Senator Edmunds' remarks about section 6 of the 1871 Act,<sup>40</sup> providing for an inquiry into the character and conduct of the persons who may be summoned to sit on juries in cases arising under the Act.<sup>41</sup> Furthermore, a review of Senator Edmunds' full comments on section 6 indicates that he was not concerned about the scope of the section, which is delineated in section 2, but about a semantic technicality that would bar

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36. The Court merely asserted that § 1985(3) "creates no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section." 442 U.S. at 376 (emphasis in the original).

37. Justice Stevens first cited *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979), as holding that § 1983 is a remedial statute. He continued by quoting Senator Edmunds' comments as to the scope of the Act during the 1871 debates in such a manner as to imply that the authorities cited in *Chapman* are supportive of the majority's holding that § 1985 is also remedial. 442 U.S. at 382 n.1 (Stevens, J., concurring).

38. The Sixth Circuit Court of Appeals, in *Browden v. Tipton*, 630 F.2d 1149, 1151-52 (6th Cir. 1980), refers to Senator Edmunds as the floor manager of the bill. Senator George Edmunds, a Republican from Vermont, was one of the most outstanding radical New England constitutionalists. His legal ability and integrity were well respected. J. FRANK & R. MURRO, *supra* note 2, at 81, 86.

39. *Novotny*, 442 U.S. at 382 n.1 (citing CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871) (remarks of Sen. Edmunds)).

40. CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871) (remarks of Sen. Edmunds).

41. *Id.*



plaintiffs who sued under the Act from challenging the jury.<sup>42</sup> Specifically, he was explaining that an amendment to section 6 would enable the aggrieved party to challenge the jury and thereby insure a "pure and uncontaminated jury."<sup>43</sup>

The point at which these statements appear is also significant. Because these statements pertain to section 6 of the Act, they cannot be indicative of the legislative intent of the scope of section 1985(3); it is section 2, not section 6, of the 1871 Act that is now codified as section 1985(3). Senator Edmunds separately addressed section 2 during the 1871 debate:

The second section . . . only provides for the punishment of a conspiracy. It does not provide for the punishment of any act done in pursuance of the conspiracy, but only a conspiracy to deprive citizens of the United States, in the various ways named, of the rights which the Constitution *and the laws* of the United States made pursuant to it give to them; that is to say . . . conspiracies to deprive people of the equal protection of the laws, *whatever those laws may be* . . . . It punishes the conspiracy alone, leaving the States, if they see fit, to punish the acts and crimes which may be committed in pursuance of the conspiracy.<sup>44</sup>

These comments indicate that section 1985(3) was designed to create a separate and independent cause of action that would not preclude existing state remedies, but that would provide a right of action to anyone who was injured by the conspiracy alone. Furthermore, in response to Senator Edmunds, Senator Ames contended that the 1871 Act was unnecessary because the states had adequate remedies to address the concerns that gave rise to the 1871 Act.<sup>45</sup> Because the 1871 Act was

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42. *Id.* After the comment quoted by Justice Stevens, Senator Edmunds had added, "This suit, therefore, in the technical sense, instead of being based upon the statute, as it would be if it were debt for a penalty, is a suit arising under the statute, and the consequence would be when you come to get before a judge and undertake to challenge a jury, without inserting the words 'arising under' the provisions of this act, as well as based upon it, any private party would find himself debarred of having this inquiry made for his protection at all, and it would be only in criminal prosecutions based upon the provisions of the statute that this challenging of the jurors could occur. We thought it important, therefore, to use words which would enable a judge in all the cases of civil redress to see that the party aggrieved should have a pure and uncontaminated jury." *Id.*

43. *Id.*

44. *Id.* (emphasis added).

45. *Id.* at 569-70 (remarks of Sen. Ames). Adelbert Ames, a federal general from Maine, served briefly as a United State Senator from Mississippi and as Mississippi's provisional governor and military commander. V. WHARTON, *THE NEGRO IN MISSISSIPPI 1865-1890*, at 138-39 (1965). Senator Ames' comments are given some significance when considered in light of Representative Fernando Wood's remarks. New York Representative Wood, by reading into the record letters from the individual Southern governors, indicated

enacted despite Senator Ames' contention, his remarks also support the notion that the 1871 Congress intended to create an independent substantive remedy for injuries not adequately redressed by existing state law.

In order for the majority's conclusion in *Novotny* to withstand a logical analysis, state civil conspiracy actions would have had to exist as substantive rights prior to the Act. A brief survey of conspiracy laws in 1871 reveals, however, that an action for civil conspiracy was virtually unknown; formal recognition of such an action by a substantial number of states did not occur until the early part of the twentieth century.<sup>46</sup> Thus, conspiracy, as understood by the 1871 legislature, was criminal, not civil, in nature. Moreover, in 1871, even criminal conspiracy was viewed as a separate, substantive crime that did not merge with any crime perpetrated by the conspirators.<sup>47</sup> Since modern civil conspiracy statutes are an outgrowth of the criminal conspiracy laws, Senator Edmunds' remarks evidence an intent by Congress to create a separate substantive federal civil conspiracy statute that was designed to punish, in his words, "a conspiracy to deprive citizens . . . of the rights which the Constitution and the laws of the United States made pursuant to it give to them."<sup>48</sup> Senator Edmunds' remarks indicate that Congress was mindful of the distinction between the conspiracy and any act done in pursuance thereof, and that state laws only provided remedies for injuries caused by the latter but not for injuries caused by the conspiracy itself. Thus, the conclusion in *Novotny* that section 1985(3) creates only a remedy cannot be supported by legislative history; to the extent that civil conspiracy did not exist in 1871, the Civil Rights Act of 1871 created a new substantive federal right.

In the seminal case of *Griffin v. Breckenridge*,<sup>49</sup> the Court never refers to section 1985(3) as a remedial statute—in fact, there is language in the unanimous opinion indicating the contrary. The Court declared

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the states' ability to handle any problems that might arise. He made this argument in an attempt to convince his fellow representatives that the 1871 Act was not needed. CONG. GLOBE, 42d Cong., 1st Sess. 74 (1871) (remarks of Rep. Wood).

46. See Burdick, *Conspiracy as a Crime, and as a Tort*, 7 COLUM. L. REV. 229, 232 (1907) [hereinafter cited as Burdick, *Conspiracy as a Crime*]; Burdick, *The Tort of Conspiracy*, 8 COLUM. L. REV. 117 (1908); Charlesworth, *Conspiracy as a Ground of Liability in Tort*, 36 L. Q. REV. 38 (1920). Some states had a writ of conspiracy, but it was limited to providing a statutory remedy for malicious prosecution. Burdick, *Conspiracy as a Crime, supra*, at 232. See also *Mott v. Danforth*, 6 Watts 304 (Pa. 1837).

47. Further, once civil conspiracy was recognized as an action, it was assumed to be substantive in nature. Burdick, *Conspiracy as a Crime, supra* note 46, at 229.

48. CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871) (remarks of Sen. Edmunds) (emphasis added).

49. 403 U.S. 88 (1971).

that section 1985(3) is not a general tort conspiracy statute, but rather is a federal tort law designed to punish conspiracies having some kind of invidious discriminatory animus.<sup>50</sup> The abrupt<sup>51</sup> and virtually unsupported contention by the majority in *Novotny* that section 1985(3) is a remedial statute cannot be seen as anything other than a blatant attempt by the Burger Court to limit access to the federal courts by restricting the use of the post-Civil War civil rights statutes.

Perhaps the reasoning behind the Court's insistence on a remedial interpretation of section 1985(3), despite the questionable support of the legislative history of the 1871 Act, can be explained by examining two circuit court opinions interpreting the statute.<sup>52</sup> These lower courts claim that there is no constitutional basis for Congress' power to enact section 1985(3) as a substantive statute.<sup>53</sup> Further, they contend that

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50. *Id.* at 101-02. Note also the language Justice Stevens used in his majority opinion in *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979). "Section 1985 of title 42, United States Code, often referred to as the Ku Klux Act, provides a civil remedy in damages to a person damaged as a result of conspiracies to deprive one of certain civil rights." *Id.* at 619 n.37 (citing H.R. REP. No. 291, 85th Cong., 1st Sess. 10 (1957)). This revealing language does not appear either in the *Novotny* majority opinion or in Justice Stevens' concurring opinion.

51. Until *Novotny*, the Supreme Court had not considered the scope of § 1985(3) since *Griffin*, eight years earlier.

52. *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974); *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972). See generally Note, *The Scope of 1985(3) Since Griffin v. Breckenridge*, 45 GEO. WASH. L. REV. 239 (1976) [hereinafter cited as Note, *The Scope of 1985(3)*].

53. *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), involved a § 1985(3) claim by a criminal attorney that a corporate landlord and its agents conspired arbitrarily and discriminatorily to deny him rental space because of the nature of his clientele. The Seventh Circuit, while recognizing that the "breadth of the statute's coverage is yet to be determined," *id.* at 195, found three categories of rights identified as protected under § 1985(3): the Thirteenth Amendment right to be free from the badges and incidents of slavery, the federal right to interstate travel, as identified by *Griffin*, and the rights protected by the Fourteenth Amendment. *Id.* Because the plaintiff did not claim discrimination based on the Thirteenth Amendment or the right to travel, the court addressed the effect of § 1985(3) on private conspiracies to deprive rights protected under the Fourteenth Amendment. The court interpreted § 5 of the Fourteenth Amendment as not empowering Congress to create additional substantive rights, thereby rendering § 1985(3) remedial. The court reasoned that while § 1985(3) does not have the "under color of" state law requirement, § 1983 does; that omission is "directed at the prosecuted conduct of the defendants rather than the nature of the plaintiffs' rights which are protected by the statute." *Id.* at 194.

Recognizing that "*Griffin* did not purport to delineate the scope of the rights secured by [1985(3)]," *id.*, the court in *Dombrowski* found the coverage of §§ 1983 and 1985(3) to be coextensive. It held that the type of protected interest covered by § 1983, *i.e.*, deprivation of a right secured by the "Constitution and laws," must also be found in 1985(3) actions. *Id.* at 194-96.

In *Bellamy v. Mason's Stores Inc.*, 508 F.2d 504 (4th Cir. 1974), the court held that § 1985(3) gives no relief to a private employee who was fired as a result of his membership in the Ku Klux Klan. The court reasoned that because the language of the statute, which

the basic concept of federalism underlying the Court's reluctance in *Griffin* to make section 1985(3) a general tort law justifies treating the statute as a remedial right. Since state civil conspiracy statutes are now common,<sup>54</sup> applying 1985(3) as a substantive right could pose federalism problems that were nonexistent at the time the 1871 Act was passed, namely, by creating federal tort actions that mirror state tort actions and thereby interfering with an area traditionally left to state jurisdiction.<sup>55</sup> Given the current Court's deferential attitude regarding federal intervention,<sup>56</sup> it is highly unlikely that a majority would be amenable to arguments contending that section 1985(3) is a substantive rather than a remedial right. The following section of this article will therefore examine the implications of section 1985(3) as a remedial statute.

## II. The Constitutional Periphery of Section 1985(3): The Extent to Which Congress Can Regulate Purely Private Discrimination

In determining the type of interests that section 1985(3) may protect, it is significant that a year after *Novotny* was decided, the Court in *Maine v. Thiboutot*<sup>57</sup> held that section 1983 provides a remedy for all deprivations under color of state law of rights secured not only by the Constitution but also by federal statutes.<sup>58</sup> This interpretation of section 1983 is supported by the plain language of the section, which is directed at state action resulting in "deprivation of any rights, privi-

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protects against conspiracies to deny "equal protection of the laws" and "equal privileges and immunities under the laws," tracks the language of the Fourteenth Amendment, the statute requires state action—it does not create its own cause of action that can circumvent the state action requirement of the Fourteenth Amendment. The court also refused to apply the First Amendment without this state action requirement. It reasoned that "the right of association derives from the first amendment—itsself framed as a protection against the federal government and not against private persons . . . the incorporation doctrine has never been extended by the Supreme Court to extend to private persons." *Id.* at 506-07.

54. A review of state laws indicates that civil conspiracy is recognized in most states either by statute or by common law as either a separate substantive tort or as a tort that merges with the tort that is the object of the conspiracy.

55. See also *Collins v. Hardyman*, 341 U.S. 651, 659 (1951), in which the Court feared that a broad interpretation of § 1985(3) would raise grave constitutional questions concerning the dilution of powers reserved to the states under the Tenth Amendment.

56. A recent example of this attitude, in the context of Civil Rights litigation, is the Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), in which the Court found that the negligent loss of inmate property by prison officials was not cognizable under § 1983 if the state had an adequate judicial or administrative remedy to cover the loss.

57. 448 U.S. 1 (1980).

58. *Id.* at 4-8.

leges or immunities secured by the Constitution *and laws*.”<sup>59</sup> The “under color of law” language of section 1983 has been construed to require some state action. Section 1985(3), on the other hand, contains no similar language. It is directed at private conspiracies to deprive individuals of “equal protection of the laws or of equal privileges and immunities under the laws.”<sup>60</sup>

The question arises whether or not the statutory language in section 1985(3) provides for the same broad remedial powers as does section 1983. To determine the extent to which section 1985(3) can be used to remedy injuries from violations of federal statutory rights, the source of the congressional power to regulate purely private discrimination must first be examined.

#### A. The Fourteenth Amendment as the Source for Congressional Regulation of Private Discrimination

The legislative history of the 1871 Act cites the Fourteenth Amendment as the basis for congressional authority to regulate private discrimination.<sup>61</sup> Supreme Court decisions immediately following the adoption of the Fourteenth Amendment, however, substantially emasculated the scope of the Amendment by interpreting it to authorize only congressional legislation addressing state action and, consequently, left the modern Court with a questionable constitutional basis for section 1985(3).<sup>62</sup>

The Court in the *Civil Rights Cases*<sup>63</sup> suggested that there might be some constitutional basis for congressional regulation of purely private discrimination.<sup>64</sup> Nevertheless, it found that the Fourteenth Amend-

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59. 42 U.S.C. § 1983 (1976) (emphasis added).

60. 42 U.S.C. § 1985(3) (Supp. III 1979).

61. CONG. GLOBE, 42d Cong., 1st Sess. 335 (1871).

62. See note 17 *supra*. See also F. BIDDLE, *Civil Rights and the Federal Law*, in *SAFEGUARDING CIVIL LIBERTY TODAY* 109, 116 (1945); C. MANGUM, *THE LEGAL STATUS OF THE NEGRO* 26-27 (1940); J. TENBROEK, *THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 163 (1951); H.D. Hamilton, *The Legislative and Judicial History of the Thirteenth Amendment*, 9 NAT'L B. J. 26, 61-62 (1951).

63. 109 U.S. 3 (1883).

64. The Court queried, “Can the act of a mere individual, the owner of the inn, the public conveyance, or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?” *Id.* at 24. It further stated, “[W]e are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may

ment did not provide such a basis, because section 5 of the Amendment limited congressional lawmaking powers to legislation designed solely to remedy state discriminatory action.<sup>65</sup> Eighty-three years later, in *United States v. Guest*,<sup>66</sup> the Court said that in order to create rights under the equal protection clause of the Fourteenth Amendment, state involvement need not be direct.<sup>67</sup> Six justices in *Guest* believed in varying degrees that section 5 of the Fourteenth Amendment could be the basis for legislation regulating private discrimination.<sup>68</sup>

Thus, in *Collins v. Hardyman*,<sup>69</sup> the Court, relying on the reasoning of the *Civil Rights Cases*<sup>70</sup> that a private person cannot deprive another of "equal protection of the laws,"<sup>71</sup> required some state action before a section 1985(3) suit could be maintained.<sup>72</sup> Consequently, in *Griffin v. Breckenridge*,<sup>73</sup> which overruled the requirement of *Hardy-*

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adopt, for counteracting the effect of State laws, or State action prohibited by the Fourteenth Amendment." *Id.*

65. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. . . . It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States . . . . [T]he last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment." *Id.* at 11.

66. 383 U.S. 745 (1966).

67. *Id.* at 755-56. See also *United States v. Price*, 383 U.S. 787, 795-96 (1966); *United States v. Williams*, 341 U.S. 70 (1951).

68. "[T]here now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." 383 U.S. at 762 (Clark, J., concurring). "I can find no principle of federalism nor word of the Constitution that denies Congress 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 misguided purpose." *Id.* at 784 (Brennan, J., concurring).

69. 341 U.S. 651 (1951).

70. 109 U.S. 3 (1883).

71. *Id.* at 17.

72. 341 U.S. at 661.

73. 403 U.S. 88 (1971). In *Griffin*, black citizens of Mississippi filed a damages action under 42 U.S.C. § 1985(3), charging that respondents, white citizens of Mississippi, had conspired to assault petitioners and to prevent them, through force, violence, and intimidation, from freely traveling upon federal, state, and local highways. The Court held that § 1985(3) does not require state action but reaches private conspiracies that are aimed at invidiously

*man* that a section 1985(3) suit requires state action, the Court was forced to find other constitutional sources—the Thirteenth Amendment and the right to travel—to justify congressional regulation of private discrimination.

The Court in *Griffin* did not consider the scope of congressional power under section 5 when it discussed the constitutional basis of section 1985(3), and the Fourteenth Amendment has not been ruled out as a constitutional basis for a section 1985(3) claim. To require state action under section 1985(3), however, would merely duplicate the protections already available under section 1983. Nonetheless, there is some lower court authority and language in *Novotny*<sup>74</sup> and in lower court decisions<sup>75</sup> to support the notion that some state connection must be shown before section 5 of the Fourteenth Amendment can be used successfully as a constitutional basis for attacking private discrimination.

A resolution of the state action requirement is necessary in order to determine the type of federal statute section 1985(3) may remedy pursuant to section 5 of the Fourteenth Amendment. Justice Stevens, in his concurring opinion in *Novotny*, suggested that the degree of state involvement is something less than traditional state action and does not have to be part of the conspiracy itself.<sup>76</sup> Circuit court decisions are

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discriminatory deprivation of the equal enjoyment of rights secured to all by law. 403 U.S. at 95-103.

74. 442 U.S. at 384 (1979) (Stevens, J., concurring). The majority opinion did not have to reach the issue of state action because it found that the completeness of the Title VII statutory scheme precluded § 1985(3) from providing a remedy. Justice Stevens argued, however, that the section does not provide a remedy for any federal statutory right. He used the state action requirement to bolster his argument: "[R]equirement of state action, in this context, is more than a requirement that there be a constitutional violation." *Id.* at 385 (Stevens, J., concurring). Justice Stevens cited *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), and *Shelley v. Kraemer*, 334 U.S. 1 (1948), to support his position that litigants under 1985(3) must show some state connection before recovering for a private violation of the right to equal protection. For a full discussion of this question, see Note, *The Scope of 1985(3)*, *supra* note 52. See also *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818, 829-30 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Murphy v. Mt. Carmel High School* 543 F.2d 1189 (7th Cir. 1976).

75. *Doski v. M. Goldseker Co.*, 539 F.2d 1326, 1333 (4th Cir. 1976); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818, 828 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Lopez v. Arrowhead Ranches*, 523 F.2d 924, 927 n.2 (9th Cir. 1975); *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504, 507 (4th Cir. 1974); *Sykes v. California*, 497 F.2d 197, 200 (9th Cir. 1974); *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972).

76. 442 U.S. at 384-85 (Stevens, J., concurring). Note also that Justice Stevens conceded that no state involvement is required for private conspiracies to deprive individuals of either their right to travel or their right to be free of badges and incidents of slavery, but argued that recovery for equal protection violations occurs only when state action is present. *Id.* at 383-85.

split on both the degree and the nature of state action required. The Seventh Circuit, for instance, takes Justice Stevens' position. In *Dombrowski v. Dowling*,<sup>77</sup> that court agreed that some state action is required before a section 1985(3) claim of deprivation of a right protected by the Fourteenth Amendment may be brought. The degree of state involvement that court thought necessary before an action under section 1985(3) based on section 5 of the Fourteenth Amendment could be maintained stopped short of state action and seemed to go to the nature of the right asserted.<sup>78</sup>

Two other views have been expressed by the federal courts. The Fourth Circuit requires traditional state action,<sup>79</sup> but the Fifth and Eighth Circuits do not. Instead, these latter two courts read *Griffin* as construing section 1985(3) to reach both public and private deprivations of constitutional rights. The Fifth Circuit finds that a deprivation of equal protection by private persons occurs not as a result of state action, but where there has been a conspiracy to "deprive another of the enjoyment of legal rights by independently unlawful conduct."<sup>80</sup> The Eighth Circuit holds that the Fourteenth Amendment protects certain rights from both state and private infringement.<sup>81</sup> The Eighth Cir-

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77. 459 F.2d 190 (7th Cir. 1972).

78. For example, Justice Stevens (then a member of the Court of Appeals for the Seventh Circuit) in two separate opinions wrote of the type of state involvement required under 1985(3): "For there is no statutory requirement for state participation or support for the conduct of the individual conspirators proscribed by 1985(3). There is, however, a requirement that the conspiracy deprive the plaintiff of a federally protected right." *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818, 828 (1975). "It is clear that a private conspiracy to cause the plaintiff to receive unequal treatment from the state, or a state agency, would violate 1985(3)." *Id.* at 828 n.27 (citing *United States v. Guest*, 383 U.S. 745 (1966)). Three years earlier, in *Dombrowski*, Justice Stevens wrote that the state involvement required under 1985(3) goes to the "nature of the plaintiff's rights" being asserted since only some rights are protected from state infringement. 459 F.2d 190, 194 (1972).

79. *Doski v. M. Goldseker Co.*, 539 F.2d 1326 (4th Cir. 1976); *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974).

80. *Scott v. Moore*, 640 F.2d 708, 717-18 (5th Cir. 1981). *See also* *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc). In *McLellan*, the court considered whether or not § 1985(3) could provide relief for the plaintiff's claim that he was discharged from his job because he sought voluntary bankruptcy. The court, in construing the "equal protection of the laws" language in the section, found that a private person could deprive another of "equal protection of the laws" only when the defendant acted in violation of a state or federal provision. *Id.* at 927. Finding that it was not unlawful to terminate employment of an employee on the ground that he filed for bankruptcy, the court denied relief under § 1985(3). *Id.* at 933. *See also* *Britt v. Suckle*, 453 F. Supp. 987, 1001-02 (E.D. Tex. 1978), in which the plaintiffs claimed that their employer and others conspired to prevent them from pursuing legal action to vindicate their rights, and the court found the action cognizable under § 1985(3).

81. *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971). *Action* involved a suit by church members to enjoin picketing and other protest actions by members of the Black Liberation



cuit cases, however, are limited to instances in which the substantive right asserted is a fundamental constitutional right.

Adoption of the Fifth Circuit's view would allow the broadest application of section 1985(3) as a remedial provision because the requirement of state involvement would be satisfied by showing that the object of the conspiracy was the deprivation of some federal or state law. Thus, if the intent of the conspiracy was to deny the litigant some legal right provided by federal or state law due to some invidious class-based animus,<sup>82</sup> it would be a denial of equal protection of the laws as required by section 1985(3). This view would be consistent with the legislative background of the Ku Klux Act, because at the time section 1985(3) was enacted, Congress felt that the Southern states' governments were either unwilling or unable to protect the rights of black citizens adequately.<sup>83</sup> If a state fails to provide the litigant or his class with rights and remedies available to other citizens and if the alleged discriminatory action violates a federal statutory right, then, using the Fifth Circuit's rationale, section 1985(3) could be used successfully to challenge such action. Although this interpretation would place a heavy burden of proof on the litigant, it conceivably would allow the litigant to use a federal statute as the substantive basis of a section 1985(3) action, provided that the litigant could show that the federal statute was designed to protect rights that Congress felt states either could not or would not adequately protect. As the language in *Novotny* and *Thiboutot* suggests, however, only federal statutes that do not have

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Front because the protest activities interfered with church services. Relying on the Fourteenth Amendment as a constitutional basis for vindicating the deprivation of church members' First Amendment rights by a private conspiracy, the court found that § 5 of the Fourteenth Amendment empowers Congress "to enforce rights guaranteed by the Amendment against private conspiracies." *Id.* at 1235. The court also found that its notion of the scope of § 5 of the Fourteenth Amendment is consistent with *United States v. Guest*, 383 U.S. 745 (1966), in that it does not necessarily require state action. *See* note 68 *supra*. The court also found its notion consistent with the Supreme Court's "expansion of the concept of state action." 450 F.2d at 1236 (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 229 (1969), and *United States v. Johnson*, 390 U.S. 563 (1968)). Four years later, in *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), the Eighth Circuit added the right to vote in tribal elections to those types of interferences by private individuals that constitute a denial of equal privileges and immunities under § 1985(3). *Means* involved a candidate for tribal council president who alleged that certain election irregularities deprived the plaintiff and others of their right to a fundamentally fair election. The Eighth Circuit cited a Sixth Circuit case, *Cameron v. Brock*, 473 F.2d 610 (6th Cir. 1973), as holding that § 1985(3) protected the right to vote against private conspiracies.

82. It is clear from the cases that § 1985(3) requires the litigant to show some class-based invidiously discriminatory motive for the conspiracy. *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 370-78 (1979), and cases cited therein.

83. *See* notes 1-15 and accompanying text *supra*.

their own separate enforcement provisions can be used as the substantive basis of an action brought under the remedial statutes of the 1871 Act.<sup>84</sup> Therefore, even if one successfully argued that section 5 of the Fourteenth Amendment provides a constitutional basis for section 1985(3), the litigant still faces two major hurdles: showing some state involvement, however defined, and finding a substantive federal statute without a built-in remedial scheme.<sup>85</sup>

### B. The Thirteenth Amendment as a Constitutional Basis

Given the state action requirement of the Fourteenth Amendment, the Thirteenth Amendment would, at first blush, seem to permit a broader application of section 1985(3); however, relying on the Thirteenth Amendment as a constitutional source will limit the type of discrimination to that which is racially motivated. Since the Thirteenth Amendment itself makes slavery illegal, any statute prohibiting some activity as a badge or incident of slavery can be remedied under section 1985(3). The inquiry under the Thirteenth Amendment, therefore, is what acts constitute badges and incidents of slavery.

In the *Civil Rights Cases*, the Court conceded that Congress might have the power under the Thirteenth Amendment to regulate private acts if those acts in some way constituted badges or incidents of slavery.<sup>86</sup> The Court, however, failed to define what these acts were, indicating only that mere discrimination on the basis of race or color was not considered a badge of slavery.<sup>87</sup> Eighty-five years later, in determining whether or not Congress had the power under section 1982<sup>88</sup> to prohibit all racial discrimination, public and private, in the sale or rental of property, the Court held that Congress has the power to determine what constitutes badges or incidents of slavery and to pass any laws necessary to eliminate those badges or incidents.<sup>89</sup>

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84. *Maine v. Thiboutot*, 448 U.S. 1, 2-8 (1980); *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 370-78 (1979).

85. The class protected under the Fourteenth Amendment would include all persons discriminated against in such a way as to deprive them of equal protection.

86. 109 U.S. at 20.

87. *Id.* at 25.

88. "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1976).

89. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Justices Harlan and White both dissented, claiming that the history of the Thirteenth Amendment does not clearly indicate that Congress has the power to reach purely private discrimination. *Id.* at 473. See also *Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that 42 U.S.C. § 1981 prohibits private, commercially operated nonsectarian schools from denying admission to blacks); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (white person expelled from a nonstock corpo-

Although the Court in *Griffin* found that the Thirteenth Amendment provides one constitutional basis for a section 1985(3) action,<sup>90</sup> reliance on the Thirteenth Amendment places limitations both on the persons to whom section 1985(3) relief would be available and on the nature of rights that could be remedied under section 1985(3). The scope of the Thirteenth Amendment has never been squarely addressed by the Court, but that Amendment clearly does not protect all individuals against all forms of discrimination,<sup>91</sup> and almost certainly not the gender-based discrimination at issue in *Novotny*. In addition, the federal statutory right to be remedied would have to be one that Congress had determined was necessary to eliminate badges or incidents of slavery.<sup>92</sup>

This determination may be limited by First Amendment privacy and right to association concerns. For example, in *Runyon v. McCrary*,<sup>93</sup> the Court held that racially discriminatory admissions policies of private, commercially operated nonsectarian schools violate section 1981,<sup>94</sup> which prohibits racial discrimination in the making and enforcing of private contracts. In ruling that the application of section 1981 does not abridge the parents' constitutional rights of free association

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ration community recreational association because he assigned his membership share to a black allowed to sue under § 1982).

90. 403 U.S. at 105.

91. *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). *But see* *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), which held that 42 U.S.C. § 1981 applies to white victims of discrimination in private employment. *Id.* at 295-96. The Court noted, "[T]he congressional design to protect individuals of all races is further emphasized by re-enactment of the 1866 Act as part of the Enforcement Act of 1870, following ratification of the Fourteenth Amendment." *Id.* at 289 n.19.

92. This limitation on the scope of the Thirteenth Amendment could be avoided if the Court decided that the self-executing nature of § 1 of the Thirteenth Amendment is capable of providing a remedy in the absence of congressional legislation defining involuntary servitude. Arguably, the self-executing force of § 1 of the Thirteenth Amendment is as extensive as the power of Congress under § 2 to enforce the Amendment by appropriate legislation. Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 499 (1974). In the *Civil Rights Cases*, the Court acknowledged the self-executing force of the Amendment, declaring the Amendment's prohibitions "undoubtedly self-executing." 109 U.S. at 20. Even assuming this to be the case, the Court has invoked its power under § 1 of the Thirteenth Amendment in only a limited number of instances, specifically those cases involving involuntary slavery. *Pollock v. Williams*, 322 U.S. 4 (1944); *Bailey v. Alabama*, 219 U.S. 219 (1911). Furthermore, the Court has expressed its hesitancy to declare new laws pursuant to § 1 of the Thirteenth Amendment as it "would grant it a lawmaking power far beyond the imagination of the Amendment's authors." *Palmer v. Thompson*, 403 U.S. 217, 227 (1971). The Court has preferred to leave the task of defining the badges and incidents of slavery to Congress.

93. 427 U.S. 160 (1976).

94. *See* note 89 *supra*.

and privacy, the Court noted that no governmental intrusion into the privacy of the home or "similarly intimate setting" was involved, because the private schools appealed to a public constituency.<sup>95</sup> This holding implies that, absent a finding of some public character to the alleged private discriminatory act, Thirteenth Amendment considerations must give way to competing constitutional considerations.<sup>96</sup>

Dicta in several cases indicate that there is a constitutional right to discriminate when competing rights are involved.<sup>97</sup> When discriminatory acts occur in purely private settings, the Court must determine whether or not a governmental interest is sufficiently compelling to override the right to discriminate.<sup>98</sup> It is doubtful that the Court will find a sufficiently compelling governmental interest to override the right of the individual to discriminate in such purely private settings as the home. The difficulty in distinguishing between purely private acts and acts characterized as private but with a public character perhaps explains the Court's reluctance to determine the constitutional periphery of section 1985(3).<sup>99</sup> Nevertheless, it does not appear that First Amendment privacy and right to association concerns will be major obstacles to section 1985(3) actions relying on the Thirteenth Amendment. Most right to privacy decisions have involved extremely per-

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95. 427 U.S. at 170 n.10, 178.

96. *Id.* at 186 (Powell, J., concurring), 189 (Stevens, J., concurring).

97. In *Norwood v. Harrison*, 413 U.S. 455, 463, 469-70 (1973), the Court indicated that, in some circumstances, private racial discrimination might be characterized as an exercise of freedom of association and therefore be protected by the First Amendment. *See also* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Evans v. Newton*, 382 U.S. 296, 298-301 (1966); *Bell v. Maryland*, 378 U.S. 226, 313 (1964). For a general discussion of the right of association as a constitutional right to discrimination, see Note, *supra* note 92, at 520-24; Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom From Discrimination*, 84 YALE L.J. 1441, 1455-64 (1975).

98. This balancing-of-interests formula is reminiscent of the compelling state interest test in equal protection cases, *see, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 634-38 (1969), and probably involves similar problems in application. For a criticism of the compelling state interest test in equal protection cases, see Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

99. *See* text accompanying note 95 *supra*. This reluctance also extends to Fourteenth Amendment cases. The Burger Court continues to cite the *Civil Rights Cases* for the proposition that the Fourteenth Amendment's self-executing impact extends only to state action and consequently does not reach private discrimination, even though notions of what constitutes state action have expanded considerably since 1883. *See, e.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 229 (1969); *United States v. Johnson*, 390 U.S. 563 (1968). Nevertheless, the Court has yet to hold that the Fourteenth Amendment mandates social, as opposed to political, equality between racial minorities and the majority race. It is doubtful that the Court ever will, because of the difficulties inherent in any attempt by government at prosecuting social morality.

sonal invasions of the body,<sup>100</sup> marital relations,<sup>101</sup> or solitude of the home,<sup>102</sup> and it is doubtful that these types of privacy allegations could be successfully used to challenge invidiously discriminatory private conspiracies. Further, although the Court in *Runyon* suggested that any associational rights protected by the First Amendment are designed to promote "the advancement of beliefs and ideas," it recognized that invidiously discriminatory private practices are not afforded "affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under section 2 of the Thirteenth Amendment . . . ." <sup>103</sup>

A litigant relying upon the Thirteenth Amendment as the constitutional basis of a section 1985(3) action therefore must plead and prove that the alleged discrimination was not purely private and that it violated a statute which Congress enacted to eliminate badges or incidents of slavery. The language of the *Thiboutot* and *Novotny* opinions suggests, however, that even if such a statute were found, an action under section 1985(3) would still be foreclosed if the statute had its own enforcement provisions.<sup>104</sup> Finding a substantive federal statute that was intended to eliminate badges or incidents of slavery and is without its own enforcement provisions may be an impossible task.

### C. Other Sources: The Rights and Privileges of National Citizenship

The Court in *Griffin* also referred to the constitutionally protected right of interstate travel as one of the "rights and privileges of National citizenship" that is "assertable against private as well as governmental interference. . . . That right, like other rights of National citizenship, is within the power of Congress to protect by appropriate legislation."<sup>105</sup> Despite these promising statements, the Court has been reluctant to define, with any degree of clarity, what rights are included under national citizenship and whether or not any or all of such rights are protected from interferences both by government and by private individuals.<sup>106</sup> Arguably, congressional power to protect these rights of national citizenship includes the authority to determine what these

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100. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

101. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

102. See, e.g., *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970).

103. 427 U.S. at 175-76 (citing *NAACP v. Alabama ex rel. Patterson*, 354 U.S. 449, 460 (1958)).

104. See note 84 and accompanying text *supra*.

105. 403 U.S. at 105-06.

106. See *Twining v. New Jersey*, 211 U.S. 78 (1908). Note that reliance on this constitutional provision would preclude aliens from suing under § 1985(3). In the past, aliens have used other Reconstruction era civil rights statutes to protect their rights. See *Fiallo v. Bell*,

rights are. If Congress has this authority, then it creates another right or privilege of national citizenship whenever it enacts legislation designed to provide statutory rights for citizens. Thus, the interference with these statutory rights by private individuals would be actionable under section 1985(3), provided that the litigant can show some invidiously discriminatory class-based animus. It is doubtful, however, that the Court would be receptive to this argument, since it would greatly broaden the scope of section 1985(3).<sup>107</sup> The recent trend in federal courts has been to restrict the scope of section 1983;<sup>108</sup> it is highly unlikely that the Supreme Court will interpret the scope of section 1985(3) in a manner inconsistent with this trend.

### III. The Future of Section 1985(3): Positions of the Present Members of the Court

It appears that the development of section 1985(3) will be circumscribed by the development of section 1983. First, sections 1983 and 1985(3) are both modern-day codifications of the 1871 Civil Rights Act and thus have common historical ties. Second, the Court's perceived problems caused by an expansive interpretation of the scope of section 1983 will surely influence it in developing the scope of section 1985(3).<sup>109</sup> A study of the Burger Court's treatment of section 1983 actions is thus critical in predicting future section 1985(3) decisions. By examining the opinions in two section 1983 cases, *Chapman v. Houston Welfare Rights Organization*<sup>110</sup> and *Maine v. Thiboutot*,<sup>111</sup> as well as the opinions in *Novotny*, it is possible to predict what the positions of the present Supreme Court justices will be if directly confronted with determining the constitutional periphery of section 1985(3).

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430 U.S. 787 (1977); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Mathews v. Diaz*, 426 U.S. 67 (1976).

107. Similarly, Justice White's suggestion in his dissenting opinion in *Novotny* that the commerce clause provides a constitutional basis for a § 1985(3) action to remedy invidiously discriminatory conspiracies to deny Title VII rights, 442 U.S. at 396 n.20, will probably not be embraced by the Court because it would provide an expansive use of § 1985(3). Use of the commerce clause would give broader application to § 1985(3) than either the Thirteenth or Fourteenth Amendments because it would not require state action and it would apply to discrimination based on something other than race. Finally, use of the commerce clause as a basis for a § 1985(3) action would be inconsistent with the 1871 Congress' understanding of that clause. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253-58 (1964).

108. For a discussion of the Court's dissatisfaction with § 1983 actions, see generally Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980).

109. *Novotny*, 442 U.S. at 382-83 (Stevens, J., concurring).

110. 441 U.S. 600 (1979).

111. 448 U.S. 1 (1980).

In *Chapman v. Houston Welfare Rights Organization*, the Supreme Court held that jurisdiction under 28 U.S.C. subsections 1343(3) and (4)<sup>112</sup> does not encompass a claim that a state welfare regulation is invalid because it conflicts with the federal Social Security Act. *Chapman* involved two cases challenging the actions of state officials and regulations that allegedly violated provisions of the Social Security Act. The petitioner in one action brought suit in federal district court under section 1983, claiming that New Jersey officials, by denying her emergency assistance funds because she was not "in a state of homelessness" as required by the relevant New Jersey regulations,<sup>113</sup> had deprived her of a right to such assistance "necessary to avoid destitution" within the meaning of section 406(c)(1) of the federal Social Security Act.<sup>114</sup> In the other action, respondents, recipients of Aid to Families with Dependent Children (AFDC) who shared living quarters with a nondependent relative, brought a class action in federal district court, claiming that Texas regulations requiring that AFDC benefits be reduced to recipients with such living arrangements violated section 402(a)(7) of the Social Security Act<sup>115</sup> and the federal regulations promulgated pursuant thereto.<sup>116</sup>

Although the Court in *Chapman* avoided a specific pronouncement on the extent to which section 1983 covers violations of federal statutes, the four separate opinions in the case provide some clues. Justice Stevens, writing for the majority but joined only by Justice Blackmun, took the most restrictive view of the scope of section 1983. He argued that section 1983 was intended to apply only to those federal statutes designed to enforce Fourteenth Amendment guarantees.<sup>117</sup> Further, he contended that it is preferable to limit section 1983 to the federal statutes that are designed to insure equal rights and that are comparable in nature to the Civil Rights Act of 1866. He concluded that a federal district court lacked jurisdiction to adjudicate the

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112. "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." 28 U.S.C. § 1343(3)-(4) (1976).

113. N.J. ADMIN. CODE 10:82-5.12 (1969) (current version at N.J. ADMIN. CODE 10:82-5.10 (1977)).

114. 42 U.S.C. § 606(e)(1) (1976).

115. 42 U.S.C. § 602(a)(7) (1976).

116. 45 C.F.R. §§ 233.20(a)(3)(ii)(C), 233.90(a) (1974).

117. 441 U.S. at 615-18.

claim.<sup>118</sup>

Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, wrote a concurring opinion. After an exhaustive review of the legislative history of section 1983, including the work of the commissioners who drafted the revised statute of 1874, Justice Powell basically agreed with Justice Stevens' view that section 1983 is limited to remedying violations of federal statutes designed to provide for equal rights.<sup>119</sup> Justice White, in his concurring opinion, argued that section 1983 applies to all rights secured by federal statutes, "unless there is clear indication in a particular statute that its remedial provisions are exclusive or that for various other reasons a § 1983 action is inconsistent with congressional intention."<sup>120</sup>

Justice Stewart, joined by Justices Brennan and Marshall, agreed with Justice White regarding the scope of section 1983, but he dissented from the majority's holding on federal jurisdiction, contending that federal courts have jurisdiction under section 1343(3) to hear any claim cognizable under section 1983.<sup>121</sup> Justice Stewart also argued that section 1983 actions are barred where the federal statute challenged has its own enforcement process;<sup>122</sup> however, Justices Brennan and Marshall did not join this part of his opinion.

In light of *Chapman*, it is not surprising that Justices White, Stewart, Marshall, and Brennan formed part of the majority in *Maine v. Thiboutot*.<sup>123</sup> *Thiboutot* held that section 1983 did provide a remedy for all state deprivations of rights secured by the Constitution and federal statutes.<sup>124</sup> It also held that an attorney's fees provision is applicable in statutory section 1983 actions<sup>125</sup> and is part of the section 1983 remedy, whether the action is brought in federal or in state court.<sup>126</sup> Interestingly, Justices Stevens and Blackmun also voted with the majority. Of course, since *Thiboutot* originated in the state courts, the federal jurisdiction question raised in *Chapman* was not present.<sup>127</sup> Further, the state trial court had allowed the action and had ruled against the state.<sup>128</sup> Thus, *Thiboutot* presented no real federalism issue.

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118. *Id.*

119. *Id.* at 627-40 (Powell, J., concurring).

120. *Id.* at 672 (White, J., concurring).

121. *Id.* (Stewart, J., dissenting).

122. *Id.* at 673 n.2.

123. 448 U.S. 1 (1980).

124. *Id.* at 4-8.

125. *Id.* at 9.

126. *Id.* at 10-11.

127. *Id.* at 3.

128. *Id.*



Perhaps the restrictive interpretation of section 1983 in *Chapman* by Justices Stevens and Blackmun was prompted, at least in part, by federalism concerns. As the Maine Supreme Court pointed out in its *Thiboutot* opinion, allowing concurrent jurisdiction in section 1983 actions lessens the friction in federal-state relations and is consistent with the concepts of federalism expounded in *Younger v. Harris*.<sup>129</sup> In addition, although inconsistent with the legislative intent of the 1871 Act,<sup>130</sup> allowing concurrent jurisdiction provides a vehicle for challenging state violations of a federal statute that does not provide a private right of action, without increasing the potential caseload of federal courts.

The dissenters in *Thiboutot*, Justice Powell, Chief Justice Burger, and Justice Rehnquist, disputed the majority's interpretation of the "plain" language of section 1983 and once again reviewed the historical evidence on the enactment of the legislation,<sup>131</sup> finding that section 1983 protects only equal rights legislation. They further considered the "practical consequences" of the decision—the potential increase in section 1983 litigation on both federal and state levels<sup>132</sup> and the potential federalism problems<sup>133</sup>—before concluding that the majority decision "creates a major new intrusion into state sovereignty under our federal system."<sup>134</sup>

It appears, then, that concerns about increased litigation and intrusions into state sovereignty have influenced at least some Court members' treatment of section 1983 actions. Similar concerns, will be evident in the Court's treatment of suits brought under section 1985(3). A successful argument for expansion of section 1985(3) must therefore demonstrate that (1) any federal-state conflicts would be minimal and (2) any increase in the caseload of federal courts would be negligible and justifiable because no other remedy exists.

An examination of the four opinions in *Novotny* reveals that the majority, Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist, believed that allowing a section 1985(3) action would result in some impermissible overlapping with an existing federal statute—

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129. 405 A.2d 230, 235 (Me. 1979) (citing *Younger v. Harris*, 401 U.S. 37 (1971)).

130. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. app. 313 (remarks of Rep. Burchard); *id.* at 485 (remarks of Rep. Cook), 514 (remarks of Rep. Poland), 112 (remarks of Rep. Moore).

131. 448 U.S. at 12-19 (Powell, J., dissenting).

132. *Id.* at 22-26. "No one can predict the extent to which litigation arising from today's decision will harass state and local officials; nor can one foresee the number of new filings in our already overburdened courts. But no one can doubt that these consequences will be substantial." *Id.* at 23.

133. *Id.* at 26-34 (Powell, J., dissenting).

134. *Id.* at 33.

Title VII of the Civil Rights Act of 1964.<sup>135</sup> The majority opinion, however, was limited to a very narrow issue and avoided addressing two important questions: first, whether or not a section 1985(3) action would have been allowed had the defendant in *Novotny* not been subject to suit under Title VII, and second, whether or not section 1985(3) creates a remedy for any federal statutory right.

Justices Powell and Stevens, who addressed these issues in their concurring opinions, concluded that section 1985(3) should be "limited to conspiracies to violate those fundamental rights derived from the Constitution."<sup>136</sup> Justice Stevens suggested that section 1985(3), if constitutionally based on the Thirteenth Amendment, could remedy private conspiracies to deprive the litigant of the right to engage in interstate travel and the right to be free from badges of slavery.<sup>137</sup> Based on his perception of the intent of the 1871 Congress, he added,

Other privileges and immunities of citizenship such as the right to due process of law and the right to equal protection of the laws are protected by the Constitution only against state action. . . . [I]f private persons take conspiratorial action that prevents or hinders the constituted authorities of any State from giving or securing equal treatment, . . . the private persons would then have violated [§ 1985(3)].

If, however, private persons engage in purely private acts of discrimination . . . they do not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>138</sup>

Thus, it appears that both Justices Powell and Stevens do not favor an expansion of section 1985(3), as it would be extremely difficult to conceive of a case in which a private conspiracy would violate fundamental constitutional rights since most of these rights do not apply to private action.<sup>139</sup>

Justices White, Brennan, and Marshall dissented in *Novotny* on several grounds.<sup>140</sup> First, they argued that section 1985(3) is not a remedial statute but is a substantive statute designed to punish the conspiracy itself.<sup>141</sup> Second, they contended that any overlap between section 1985(3) and Title VII is permissible, since the former merely

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135. See 442 U.S. at 377-78.

136. *Id.* at 379 (Powell, J., concurring).

137. *Id.* at 381-85 (Stevens, J., concurring).

138. *Id.* at 384.

139. The exceptions are some of the privileges and immunities of citizenship. *Id.* at 381-85.

140. *Id.* at 385 (White, J., dissenting).

141. *Id.* at 388-91.

supplements the latter.<sup>142</sup> Finally, they contended that section 1985(3) should apply to violations of all rights guaranteed by federal statutes.<sup>143</sup>

Thus, three members of the Court strongly favor expansion of section 1985(3) to encompass federal statutory rights, and two members strongly oppose such expansion. Justice Stewart, the author of the majority opinions in both *Griffin* and *Novotny*, has retired, and Justice O'Connor's views are virtually unknown; the attitudes of Chief Justice Burger, and of Justices Blackmun and Rehnquist, are therefore pivotal in determining the future course of section 1985(3).

Clearly, since five members of the Court—Chief Justice Burger and Justices Powell, Stevens, Blackmun, and Rehnquist—view section 1985(3) as remedial, it is unlikely that the Court will change this position in the near future. Further, the voting pattern of Chief Justice Burger and Justice Rehnquist in *Chapman* and *Thiboutot* indicates that they hold a restrictive view of the post-Civil War civil rights statutes and are unlikely to vote in favor of any expansion in scope of section 1985(3). Justice Blackmun, however, is more of an enigma. He sided with the majority in *Chapman*, *Novotny*, and *Thiboutot*. Assuming he fully accepted the reasoning of the majority opinion in each of these cases, Justice Blackmun might be amenable to some limited expansion of the scope of section 1985(3). His position in *Chapman* as well as in *Novotny* seems to suggest that he is concerned with minimizing overlapping remedies on either the state or the federal level. His agreement with the majority in *Thiboutot*, however, suggests that he is only concerned with overlapping remedies when the issue appears at the federal level. Thus, it appears that no more than four members of the Court might be amenable to some expansion of the scope of section 1985(3), while four Justices probably would not favor such an expansion. Justice O'Connor's vote therefore may be critical to a resolution of this question.

Justice O'Connor's brief tenure as a judge on the Arizona Court of Appeals provides little insight into her judicial philosophy.<sup>144</sup> In a recent law review article, however, she expressed her concern about the increased caseload caused by section 1983 cases and by the failure of Congress to limit, either directly or indirectly, the use of section 1983 in

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142. *Id.* at 391-96.

143. *Id.*

144. Justice O'Connor served approximately one and one-half years on the Arizona Court of Appeals.

federal courts.<sup>145</sup> She apparently believes that federal court intervention threatens the viability of our bifurcated judicial system.<sup>146</sup> The general tenor of the article suggests that federal courts should defer more often to state courts in cases involving federal constitutional questions.<sup>147</sup> If this view is expressed in her decisions as a Supreme Court Justice, then it is probable that Justice O'Connor will cast her vote with those of the Chief Justice and of Justices Powell, Stevens, and Rehnquist, favoring a restrictive scope to section 1985(3).<sup>148</sup>

## Conclusion

It appears that section 1985(3) is doomed to remain a relatively obscure remnant of the Reconstruction era, in large part because of a conservative Court and an extremely heavy federal caseload. Development of section 1985(3) during the less restrictive era of the Warren Court was hindered by the requirement of state action imposed by *Collins v. Hardyman*. By the time this barrier was removed in *Griffin v. Breckenridge*, the mood of the Court had changed; efforts to expand the scope of section 1985(3) had come too late. Given the atypical facts of *Novotny* and its very narrow holding, there is a remote possibility that a majority of the Court might be willing to allow the expansion of section 1985(3) in a limited number of cases, particularly those in which the claimed injury more closely resembles the type of injuries that the drafters of the 1871 Act intended to remedy. Thus, the litigant

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145. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 810 (1981). Justice O'Connor suggested limiting or disallowing attorneys' fees in § 1983 cases as one possible way Congress might limit the use of § 1983. She stated, "Such a move would be welcomed by state courts," and also questioned the impact of the Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369, which eliminated the \$10,000 amount in controversy requirement for federal jurisdiction under 28 U.S.C. § 1331. O'Connor, *supra*.

146. *Id.* at 814-15.

147. *Id.*

148. A recent statement by Justice O'Connor appears to be consistent with the views expressed in her law review article. In particular, on March 9, 1982, Justice O'Connor, while testifying on the Supreme Court's budget before the United States House of Representatives Appropriation Subcommittee, suggested that Congress should enact legislation that would limit the number of § 1983 cases reaching the Court because of its heavy caseload. *Justice O'Connor Breaks Silence "Rule" in House Testimony*, Houston Chron., March 10, 1982, § 1, at 9. Her statement, when taken in conjunction with the Court's recent decision in *Polk County v. Dodson*, 102 S. Ct. 445 (1981), seems to suggest that absent some binding precedent to the contrary, Justice O'Connor is willing to limit access to the Court by way of § 1983 and, by implication, § 1985(3). In *Polk County*, the Court held that § 1983 does not cover acts by a state-employed public defender because the public defender serves the public, not the state, by performing an essentially private function. *Id.* at 449-50, 453.

would probably have to be a member of a class which is subject to invidious class-based discrimination—a limiting factor. The most difficult task facing potential section 1985(3) litigants is to find some substantive right, either constitutional or statutory, that can be remedied by section 1985(3). Indeed, the extent to which the section can remedy statutory rights is still unclear. Nevertheless, it is hoped that *Novotny* will not discourage others from attempting to persuade the Court that expansion of section 1985(3) is necessary to insure full civil rights for all citizens.