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Civil Rights- Employment Discrimination-Section 1985(c) Unavailable to Vindicate Title VII Rights

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RECENT DEVELOPMENT

Civil Rights—Employment Discrimination—SECTION 1985(c) UNAVAILABLE TO VINDICATE TITLE VII RIGHTS

Great American Federal Savings & Loan Association v. Novotny, 99 S. Ct. 2345 (1979)

In *Great American Federal Savings & Loan Association v. Novotny*,[1] the Supreme Court held that the deprivation of a right created by Title VII[2] cannot be the basis for a cause of action under 42 U.S.C. § 1985(c).[3] The decision is significant because it will prevent many victims of employment discrimination from

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[1] 99 S. Ct. 2345 (1979).

[2] 42 U.S.C. §§ 2000e to 2000e-17 (1976). This statute provides in part:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a)(1) (1976) [hereinafter cited as § 703(a)].

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (1976) [hereinafter cited as § 704(a)].

[3] 42 U.S.C. § 1985(c) (1976). This section provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The 1970 codification of § 1985 was subdivided (1)-(3), instead of (a)-(c). All references in this Note to § 1985(3), including those in quotations. have been changed without further indication to § 1985(c) to avoid confusion.

seeking redress directly in the federal courts. In addition, *Novotny* may have sounded the death knell for section 1985(c) as a remedy for the vindication of federal rights in other instances.

I

HISTORICAL PERSPECTIVE

Congress enacted section 2 of the Civil Rights Act of 1871, the source of section 1985(c), to enforce newly created fourteenth amendment rights.[4] In the first eighty years following its enactment, the Supreme Court rarely examined what is now section 1985(c).[5] Then, in *Collins v. Hardyman*,[6] the Court concluded that the statute protected an individual only against state action depriving him of his federal rights.[7] In 1971, however, the Court in *Griffin v. Breckenridge*,[8] without expressly overruling *Collins*, ex-

[4] Section 1985(c) originated in the Act of April 20, 1871 (Ku Klux Klan Act), ch. 22, § 2, 17 Stat. 13 (originally codified in Rev. Stat. of 1874, § 1980). For discussions of the legislative history and relevant background of this statute, see Comment, *A Construction of Section 1985(c) in Light of its Original Purpose*, 46 U. CHI. L. REV. 402 (1979); Note, *The Reach of 42 U.S.C. § 1985(3); Sex Discrimination as a Gauge*, 25 CLEV. ST. L. REV. 331, 332-39 (1976). *See generally* Note. *The Scope of Section 1985(3) Since Griffin v. Breckenridge*, 45 GEO. WASH. L. REV. 239, 242 (1977); Note, *Section 1985(3): A Viable Alternative to Title VII for Sex-Based Employment Discrimination*, 1978 WASH. U. L.Q. 367, 377-79.

[5] The Court heard at least two cases involving the precursors of § 1985(c) during this time but did not construe that section. 99 S. Ct. at 2348 n.8. *See* Snowden v. Hughes, 321 U.S. 1 (1944) (violations of §§ 1983, 1985(c) alleged but not considered where plaintiff had not shown constitutional violation); Hague v. CIO, 307 U.S. 496 (1939) (discussing § 1983 claim but not § 1985(c) claim).

[6] 341 U.S. 651 (1951).

[7] There, plaintiffs alleged that the defendants conspired to deprive them of "equal privileges and immunities under the laws" in a manner contemplated by the statute by infringing upon their right to assemble peaceably "for the purpose of discussing and communicating upon national public issues." *Id.* at 654. Plaintiffs also claimed that defendants interfered with their right "to petition the government for redress of grievances." *Id.* They did not contend, however, that their claim arose under the fourteenth amendment or that there was any state involvement whatsoever. *Id.* Citing potentially complex constitutional problems it was unwilling to resolve, the Court held that the plaintiffs had failed to state a claim under the statute; the facts alleged fell short of showing "a conspiracy to alter, impair or deny equality of rights under the law . . . ." *Id.* at 662, *Collins*, therefore, established the rule that § 1985(c) applied only to conspiracies involving state action. Under this restrictive interpretation, § 1985(c) offered little assistance to prospective litigants injured by private conduct.

[8] 403 U.S. 88 (1971). The complaint in *Griffin* alleged that black plaintiffs riding with a white driver on public roads in Mississippi were stopped, assaulted, and beaten by white defendants who mistook the driver for a civil rights worker. *Id.* at 89-91. Plaintiffs alleged deprivations of their first amendment rights to freedom of speech, association, and assembly as well as their right to interstate travel. *Id.* at 89-91. *See generally* Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 495-500 (1974); Note, *supra* note 4, 45 GEO. WASH. L.

tended section 1985(c) to reach private acts of discrimination in some situations.[9] The *Griffin* Court found "nothing inherent in the phrase [equal protection] that requires the action working the deprivation to come from the State."[10] It read "equal protection" and "equal privileges and immunities under the laws" as used in section 1985(c) to mean "equal enjoyment of rights secured by law to all."[11] Mindful that such a broad interpretation might effectively create a general federal tort law, the Court harnessed this potential expansion of section 1985(c) by requiring that there be some "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions."[12]

The *Griffin* Court did not clearly indicate whether section 1985(c) created new substantive rights, or merely provided a remedy for pre-existing rights. The majority held that Congress was empowered to enact this section under the enforcement clause of the thirteenth amendment.[13] Alternatively, the Court upheld the statute, on the facts of *Griffin*, as an exercise of congressional power to protect the right of interstate travel.[14] By holding that section 1985(c) could be invoked to protect an individual against deprivation of equal enjoyment of a pre-existing "legal right"—the

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REV. at 240; *The Supreme Court, 1975 Term,* 90 HARV. L. REV. 56, 240 (1976). *Griffin* is noted in Note, *The Resurrection of the Civil Rights Act of 1866: Its Effect upon Modern Legislation and Current Litigation,* 23 BAYLOR L. REV. 277 (1971); *The Supreme Court, 1970 Term,* 85 HARV. L. REV. 38, 95-104 (1971); 40 FORDHAM L. REV. 635 (1972); 1972 U. ILL. L.F. 199; 47 WASH. L. REV. 353 (1971).

[9] 403 U.S at 101-02.

[10] *Id.* at 97.

[11] *Id.* at 101.

[12] *Id.* at 102. For a plaintiff to present a valid claim under § 1985(c), he must, according to the *Griffin* Court, satisfy a four-part test:

> [The] complaint must allege that the defendants did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "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." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

Id. at 102-03.

[13] *Id.* at 105. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[14] 403 U.S. at 105-06. The Court indicated that the potentially limitless scope of the right to travel might, in effect, permit a general tort law despite the discrimination animus requirement. *See id.* at 106; *The Supreme Court, 1970 Term,* 85 HARV. L. REV. 38, 95, 102-03 (1971).

right to interstate travel—the Court emphasized the section's remedial aspect.[15]

At the same time, however, the Court intimated that section 1985(c) has substantive content as well.[16] It suggested that the plaintiffs stated a cause of action under section 1985(c) when they alleged that the individual defendants had deprived them of first amendment rights.[17] If section 1985(c) was purely remedial, such a deprivation could not trigger it because the Constitution prohibits only *governmental* infringement of first amendment rights.[18]

If a private deprivation was actionable in *Griffin*, section 1985(c) must create substantive rights.[19] Moreover, when the Court identified the thirteenth amendment as the source of congressional power to enact the section, it hinted that section 1985(c) was a substantive statute designed to eliminate badges and incidents of slavery.[20]

Not surprisingly, in the wake of *Griffin* lower courts disagreed as to whether section 1985(c) is substantive or purely remedial.[21]

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[15] A remedial statute provides a remedy for violation of the rights it designates, whereas a substantive statute creates rights itself. 99 S. Ct. at 2349. *See The Supreme Court, 1970 Term,* 85 HARV. L. REV. 38, 99-100 (1971).

[16] *Id.*

[17] 403 U.S. at 103.

[18] *See* Note, *Civil Rights—State Action is a Requirement for the Application of Section 1985(3) to First Amendment Rights,* 54 N.C.L. REV. 38, 99-100 (1971).

[19] *See The Supreme Court, 1970 Term,* 85 HARV. L. REV. 38, 99-100 (1971).

[20] 403 U.S. at 405. The Court relied heavily on Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), a case involving a *substantive* statute, 42 U.S.C. § 1982. 403 U.S. at 105. *See The Supreme Court, 1970 Term,* 85 HARV. L. REV. 38, 99-100 (1971). In his separate concurrence, Justice Harlan went even further. He refused to rely at all on the deprivation of the right to interstate travel to trigger § 1985(c). 403 U.S. at 107. This stance probably stemmed from Justice Harlan's view that the right to interstate travel was not assertable against private persons. *See* United States v. Guest, 383 U.S. 745, 763 (1966). Yet the right to interstate travel was the only existing legal right which could have been violated in *Griffin.* Thus Justice Harlan must have believed § 1985(c) to be substantive.

[21] The courts essentially disagreed as to whether state action is required when a plaintiff claims a deprivation of a fourteenth amendment right. If a § 1985(c) claim is assertable notwithstanding the absence of state action, § 1985(c) is substantive. The Fifth and Eight Circuits generally did not require state action. *See* Westberry v. Gilman Paper Co., 507 F.2d 206, *vacated as moot,* 507 F.2d 215 (5th Cir. 1975); Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971). The Fourth and Seventh Circuits usually required state action. *See* Murphy v. Mt. Carmel High School, 543 F.2d 1189 (7th Cir. 1976); Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976); Cohen v. Illinois Inst. of Tech., 524 F.2d 818 (7th Cir. 1975); Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972); Flores v. Yeska, 372 F. Supp. 35 (E.D. Wis. 1974). *See also* Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971); Pendrell v. Chatham College, 370 F. Supp. 494 (W.D. Pa. 1974); Brown v. Villanova Univ., 378 F. Supp. 342 (E.D. Pa. 1974); Stern v. Mass. Indem. & Life Ins. Co., 365 F. Supp. 433 (E.D. Pa. 1973).

Courts have struggled with two other questions *Griffin* left unanswered: what classes are protected by section 1985(c),[22] and, more importantly, what rights can be vindicated through section 1985(c).[23]

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[22] 403 U.S. at 103. This determination involves the second element of the four-part test fashioned in *Griffin*. *See* Note, *supra* note 4, 25 CLEV. ST. L. REV. at 356; *see generally* note 12 *supra*. Most courts treat this as the threshold requirement of a § 1985(c) claim. Note, *supra* note 18, at 680. *See also* Note, *supra* note 4, 45 GEO. WASH. L. REV. at 256. In this manner courts are often able to avoid the more difficult question of whether the right involved is within the statute. *See* Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1241 n.19 (3d Cir. 1978). In application, the cases show a lack of clear understanding of what constitutes class-based discrimination. 90 HARV. L. REV. 1721, 1728 (1977). Generally, when the defendant's conduct was motivated by characteristics peculiar to the plaintiff, many courts dismiss § 1985(c) claims. *Id.* at 1728. *See, e.g.*, Dacey v. Dorsey, 568 F.2d 275 (2d Cir. 1978); Lesser v. Braniff Airways, Inc., 518 F.2d 538 (7th Cir. 1975). *But see* Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972) (family harassed by neighbor qualified as class).

Some courts have held that discrimination against women satisfies the class-based animus requirement. *See* Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975); Reichardt v. Payne, 396 F. Supp. 1010 (N.D. Cal. 1975); Pendrell v. Chatham College, 370 F. Supp. 494 (W.D. Pa. 1974). *But see* Cohen v. Illinois Inst. of Technology, 524 F.2d 818 (7th Cir. 1973). *cert. denied*, 425 U.S. 943 (1976). *See generally* 90 HARV. L. REV. 1721, 1728 (1977).

[23] The language of § 1985(c) requires that the conspiracy seek a deprivation of "equal protection of the laws, or equal privileges and immunities under the laws." Courts approach this phrase differently. Some consider only rights derived from the Constitution in determining whether § 1985(c) was violated. *See* Cohen v. Illinois Inst. of Tech., 524 F.2d 818, 828 (7th Cir. 1975) (Stevens, J.), *cert. denied*, 425 U.S. 943 (1976); Dombrowski v. Dowling, 459 F.2d 190, 195 (7th Cir. 1974) (Stevens, J.); Silkwood v. Kerr-McGee Corp., 460 F. Supp. 399, 407-11 (W.D. Okla. 1978); Rehbock v. Dixon, 458 F. Supp. 1056, 1063 n.5 (N.D. Ill. 1978); Abbott v. Moore Business Forms, Inc., 439 F. Supp. 643 (D.N.H. 1977) (stating that courts interpret *Griffin* to require rights protected by one of three sources, citing *Dombrowski:* thirteenth amendment, right to interstate travel, or the fourteenth amendment); Hohensee v. Dailey, 383 F. Supp. 6, 10 (M.D. Pa. 1974) (citing *Dombrowski* and stating "§ 1985(c) only recognizes a right of action against private individuals conspiring to deprive a person of his rights under the equal protection clause of the Constitution."). *Cf.* Reichardt v. Payne, 396 F. Supp. 1010 (N.D. Cal. 1975) (explaining that *Dombrowski* limited *Griffin* to its particular factual situation thus holding that § 1985(c) only extends to conspiracies premised on constitutional rights that have not traditionally required state action). Other courts suggest that § 1985(c) protects statutory rights. *See* Life Ins. Co. of North America v. Reichardt, 591 F.2d 499 (9th Cir. 1979) (§ 1985 requires deprivation of "any legally protected right"); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235 (3d Cir. 1978); McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 927 (5th Cir. 1977) (right protected by § 1985(c) is the right not to be victimized by another's illegal behavior); Means v. Wilson, 522 F.2d 833, 838-39 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976) (statutory right to vote in Indian tribal elections is protected by § 1985(c)); Hodgin v. Jefferson, 447 F. Supp. 804, 808 (D. Md. 1978) (violation of Equal Pay Act, 29 U.S.C. § 206); Local Teamsters Union v. Int'l Bhd. of Teamsters, 419 F. Supp. 263 (E.D. Pa. 1976) (§ 101 of Labor Management Reporting & Disclosure Act of 1959, 29 U.S.C. § 411(a)(2)).

Courts have often addressed the latter issue in employment discrimination cases.[24] Plaintiffs have argued that the conspiratorial deprivation of a right guaranteed by Title VII of the Civil Rights Act of 1964 is a denial of "equal privileges and immunities under the laws" within the meaning of section 1985(c).[25] Courts faced with such claims have reached conflicting results. Some have taken the view that statutory rights, such as those created by Title VII, cannot form the basis of a section 1985(c) claim.[26] Others have held that section 1985(c) provides a remedy for violations of statutory rights, but that Title VII preempts section 1985(c) in employment discrimination cases.[27] Still others have maintained that Title VII creates rights which can be vindicated through the remedial framework of section 1985(c).[28]

II

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION V. NOVOTNY

Novotny filed suit in federal district court against Great American Federal Savings & Loan Association, his former employer. He alleged that the Association fired him because he charged management with discrimination against female

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[24] The determination of which classes § 1985(c) protects (described in note 22 *supra*) carries much less significance in employment discrimination cases than in other contexts. Title VII, the statute creating the right sought to be asserted through § 1985(c) in *Novotny* also contains a legislative determination of classes of victims subjected to discrimination in employment. *See* 42 U.S.C. § 2000e-2(a) (1976). These classes include race, color, religion, sex, and national origin. *Id.*

[25] *See, e.g.*, Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235 (3d Cir. 1978); *see generally* Brooks, *Use of the Civil Rights Act of 1866 and 1871 to Redress Employment Discrimination*, 62 CORNELL L. REV. 258 (1977); 1978 WASH. U. L.Q. 367, 369.

[26] Dombrowski v. Dowling, 459 F.2d 190, 195 (7th Cir. 1974). *See* 99 S. Ct. at 2355 (concurring opinion, Stevens, J.); note 23 *supra*.

[27] Doski v. M. Goldseker Co., 539 F.2d 1326, 1333-34 (4th Cir. 1976); Hodgin v. Jefferson, 477 F. Supp. 804, 808 (D. Md. 1978). *Cf.* Schatte v. International Alliance, 182 F.2d 158, 166-67 (9th Cir. 1950) (§ 1983 precluded from remedying rights protected by NLRA; NLRA remedies held exclusive).

[28] Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1251-53 (3d Cir. 1978); Marlowe v. Fischer Body, 489 F.2d 1057 (6th Cir. 1973); Beamon v. W.B. Saunders Co., 413 F. Supp. 1167, 1176-77 (E.D. Pa. 1976); Milner v. National School of Health Tech., 409 F. Supp. 1389, 1394-95 (E.D. Pa. 1976); Fannie v. Chamberlain Mfg. Corp., Perry Div., 445 F. Supp. 65 (W.D. Pa. 1977); Pendrell v. Chatham College, 386 F. Supp. 341, 348 (W.D. Pa. 1974).

employees.[29] Novotny claimed violations of section 1985(c) and of section 704[30] of Title VII of the Civil Rights Act of 1964.[31] The remedies of Title VII were available to him, but he sought redress through section 1985(c) which allows plaintiffs to recover compensatory and punitive damages. Title VII only provides for reinstatement and a maximum of two years' back pay.[32]

The district court dismissed Novotny's complaint,[33] but the Third Circuit, sitting *en banc*, unanimously reversed.[34] In a lengthy and well-reasoned opinion, the court of appeals concluded, *inter alia*, that a male plaintiff injured by collusive action to deprive women of equal employment opportunities resulting in a violation of Title VII could assert a claim under section 1985(c).[35] The court also held that Title VII did not preempt the use of section 1985(c) as a remedy for the violation of rights created by Title VII.[36]

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[29] Novotny was secretary of the Association, and a member of its Board of Directors. 584 F. 2d at 1237. He was discharged after he expressed support for a female employee who accused the Association of sex discrimination. 584 F.2d at 1238. The only unique aspect of this case is that Novotny was injured as a male advocate rather than as the direct victim against whom the discrimination was focused. *See* 584 F.2d at 1237. Nothing in this case turned upon that distinction, however.

[30] 42 U.S.C. § 2000e-3(a) (1976).

[31] 584 F.2d at 1238.

[32] 99 S. Ct. at 2350 n.16. *See* 42 U.S.C. § 2000e-5(g) (1976).

[33] 430 F. Supp. 227 (W.D. Pa. 1977). On the § 1985(c) claim, the court ruled that Novotny had individually suffered only a single act of "business entity" discrimination and this failed to constitute a conspiracy. *Id.* at 230. On the Title VII claim, the court ruled that Novotny had not opposed "a practice made unlawful by Title VII." *Id.* at 231.

[34] 584 F.2d 1235 (3d Cir. 1978).

[35] *Id.* at 1251. The court's analysis began with the words of § 1985(c). *Id.* at 1246. Judge Adams reasoned that the language " 'equal protection *of the laws,* or of equal privileges and immunities *under the laws,*' connotes the existence of laws outside of § 1985(c) which define the 'protection' and 'privileges and immunities' that are guaranteed against invasion." *Id.* at 1247 (emphasis in original, footnotes deleted). The court's reading of the congressional debates on the adoption of the statute supported this constrnction. *Id.* at 1247. The court admitted that the 1871 Congress could not have specifically anticipated a federal statute enacted far in the future. *Id.* at 1249. Still, "as a matter of ordinary language the words of § 1985(c) clearly embrace a statutorily provided right of equal employment opportunity within the rubric 'equal privileges and immunities under the laws.' " *Id.* at 1249. *But see* Comment, *supra* note 4, 46 U. CHI. L. REV. at 432-36, 438 (concluding that § 1985(c) was not intended to protect statutory rights).

[36] *Id.* at 1252-53. The court of appeals specifically addressed the issue of whether § 1985(c) conflicts with Title VII. The defendants argued that the rule of Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976), should apply. In *Doski*, the Fourth Circuit held that Title VII mechanisms precluded a § 1985(c) remedy because otherwise plaintiffs could bypass those administrative procedures by bringing a § 1985(c) action. The Third Circuit rejected this preemption argument. 584 F.2d at 1251. In the court's view, it could only exclude § 1985(c) as a remedy if Title VII worked a partial repeal of that section. *Id.* at 1252. But, as the court noted, repeals by implication are not favored and only occur

The Supreme Court granted certiorari to consider whether section 1985(c) applied to the facts alleged in Novotny's complaint.[37] Without attempting to explain the ambiguities arising from *Griffin*, a six to three majority concluded that the provision was purely remedial.[38] The Court thus avoided implied repeal of any existing rights; under its view of section 1985(c) the right asserted by Novotny did not exist prior to the passage of Title VII. The Court then inferred from Title VII's complex administrative scheme that Congress had intended Title VII to be the exclusive remedy in cases where it created the right allegedly violated.[39]

The facts of *Novotny* presented the Court with the opportunity to determine what types of rights a plaintiff can assert through section 1985(c). The Court could have discussed the distinction between federal rights created by statute and constitutional rights,[40] but it explicitly avoided this issue.[41] Instead it held that Title VII provides the exclusive remedy for the violations that Novotny alleged.

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where two statutes are in irreconcilable conflict. *Id.* at 1252. *See* Runyon v. McCrary, 427 U.S. 160, 173 n.10 (1976). The court could discern no such conflict in *Novotny*. 584 F.2d at 1252.

[37] 99 S. Ct. at 2348.

[38] *Id.* at 2349. This determination was crucial to the *Novotny* holding. It allowed the Court to follow the congressional policy against implied repeal and to avoid conflicting with precedent. *See* notes 42-45 and accompanying text *infra*. If § 1985(c) creates no rights there is no chance of contravening such policy. In light of the confusion surrounding *Griffin* (*see* notes 15-21 and accompanying text *supra*), it is disturbing that the Court offered no explanation for this holding. In any case, Justice White, in his dissent, made a strong argument supporting the substantive nature of § 1985(c). He assumed the majority's broad holding that the "deprivation of a right created by Title VII cannot be a basis for a cause of action under § 1985(c)" was aimed at Novotny's § 703(a) claim; his § 704(a) claim was merely a peculiarity of the case. *See* note 2 *supra*. Justice White then argued that because on its face § 1985(c) provides a remedy for *any person* injured as a result of a conspiracy which has as its object the deprivation of a federal right, § 1985(c) thus creates "rights in persons other than those [to] whom the underlying federal right extends." 99 S. Ct. at 2358. Novotny sought to redress his own injury, an injury distinct from his § 704(a) claim, caused by a conspiracy to deny others of their § 703(a) rights. Thus, the language of § 1985(c) suggests the creation of a new substantive right, the right not to be injured by a conspiracy to deprive others of their federally guaranteed rights. *Id.* at 2359.

[39] 99 S. Ct. at 2352.

[40] Although the language of § 1985(c) itself seems to suggest that statutory rights would fall within the ambit of its remedial structure (*but see* Comment, *supra* note 4, 46 U. CHI. L. REV. at 432-36, 438), the Supreme Court has never so held. *See* note 3 *supra*.

[41] The majority explicitly stated that there is no need to reach the issue of whether "section 1985(c) creates a remedy for statutory rights other than those fundamental rights derived from the Constitution." 99 S. Ct. at 2348 n.6. In separate concurrences, Justices Powell and Stevens both argued that § 1985(c) should be limited to remedying deprivations of constitutional rights. *Id.* at 2352-55. Justice White, on the other hand, in his dissent said that "§ 1985(c) encompasses all rights guaranteed in federal statutes as well as rights guaranteed direcly by the Constitution." *Id.* at 2357 n.5.

At first glance, this holding seems to depart from precedent. *Alexander v. Gardner-Denver Co.*[42] established that "the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes."[43] The Court reiterated this position in *Johnson v. Railway Express Agency*,[44] holding that Congress intended Title VII and 42 U.S.C. § 1981 to "augment each other."[45]

The *Novotny* Court distinguished these cases, however, by holding that section 1985(c) lacks substantive content. Unlike the plaintiffs in *Alexander* and *Johnson*, Novotny simply had no rights independent of Title VII. The Court expressed the distinction by suggesting that the earlier cases involved "two 'independent' rights" each with its own remedy, instead of one right with overlapping remedies.[46] Thus, untroubled by *Alexander* and *Johnson*, the Court was free to find that the integrated complexity of Title VII's remedial scheme indicated a congressional intent to bar plaintiffs in Novotny's position from seeking a remedy through section 1985(c).[47]

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[42] 415 U.S. 36 (1974).

[43] *Id.* at 48.

[44] 421 U.S. 454 (1975).

> While encouragement of private settlement to avoid unnecessary litigation under Title VII and the preservation of an independent § 1981 action may appear somewhat at odds, the two themes are reconciled in the context of their joint remedial purpose: devising a flexible network of remedies to guarantee equal employment opportunities.

Id. at 472.

[45] *Id.* at 459 (quoting H.R. REP. No. 238, 92d Cong., 1st Sess. 79 (1972)). 42 U.S.C. § 1981 (1976), traceable to § I of the Act of Apr. 9, 1866, states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[46] 99 S. Ct. at 2352.

[47] *Id.* at 2349-51. Brown v. GSA, 425 U.S. 820 (1976), which the *Novotny* Court relied on for support, followed an analogous line of reasoning. There the Court was dealing with § 717, which Congress added to Title VII when it passed the Equal Employment Opportunity Act of 1972, § 11, 42 U.S.C. § 2000e-16 (1976). Section 717 extends the protection of Title VII to federal employees. The *Brown* Court found that Congress made this amendment with the understanding that it provided federal employees their first right of action for employment discrimination. 425 U.S. at 838. The Court inferred that because Congress thought there were no other remedies, it intended § 717 to be exclusive. *Id.* at 828-29, 833-34.

In making this inference the *Brown* Court stated that "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its percep-

III

IMPLICATIONS OF NOVOTNY

Although the Court sought to confine *Novotny* to narrow grounds,[48] its approach does not apply solely to Title VII. Instead, *Novotny* represents the addition of a significant restriction upon the test fashioned in *Griffin* whenever a statutory right is accompanied by a "comprehensive scheme."[49] The validity of a plaintiff's assertion of a substantive statutory right through section 1985(c) seemingly turns upon whether the congressional policy demonstrated by the "balance, completeness, and structural integrity"[50] of the statutory remedial scheme would be impaired by providing a section 1985(c) remedy.

Collateral issues associated with this restriction remain obscured. For example, in rejecting a section 1985(c) action to redress conspiracies to violate Title VII rights by finding a "comprehensive scheme," the majority did not address the possibility of

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tion of the state of the law was." *Id.* at 828. If Congress overlooked any pre-existing rights when it considered the 1972 amendments, the *Brown* rationale would extinguish them. According to the Court, however, Congress had previously been solicitious of pre-existing rights in this context. *See* notes 42-44 and accompanying text *supra*. Thus, the *Brown* Court's inference that Congress intended to extinguish all pre-existing rights that escaped its notice is unconvincing. Nevertheless, this inference allowed the Court to avoid conflict with *Alexander* and *Johnson*. *See* notes 42-45 and accompanying text *supra*. The Court cited the complexity of Title VII's remedial scheme as an additional justification for its holding. 425 U.S. at 829-33.

One commentator suggests that the Court decided *Brown* on policy grounds, reaching a result contrary to congressional intent. Perhaps the adverse fiscal consequences of affording a remedy that threatened large damage awards against the federal government motivated the Court to confine aggrieved federal employees to Title VII. *See* Brooks, *supra* note 25. Whatever motivated the Court, its reading of congressional intent is suspect. The Senate Committee that drafted the 1972 amendments to title VII commented that "neither the 'provisions regarding the individual's right to sue under Title VII, nor any of the other provisions of this bill, are meant to affect existing rights granted under other laws.'" Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 n.9 (1974) (quoting S. REP. No. 415, 92d Cong., 1st Sess. 24 (1971)).

[48] The Court did not decide, although it had the opportunity, that § 1985(c) remedied *only* those fundamental rights derived from the Constitution. *See* 99 S. Ct. at 2348 n.6. On the other hand, the majority provided no analytical framework describing the nature of the rights and privileges within the purview of § 1985(c). In concurring opinions, Justices Powell and Stevens took the position that only constitutional rights were within the ambit of § 1985(c). *See* note 41 *supra*.

[49] Conceivably, if the Court had reconciled § 1985(c) with Title VII, the way would be paved for extending that section to remedy a deprivation of every federal statutory right where Congress had not expressly provided an exclusive statutory remedy.

[50] *See* 99 S. Ct. at 2351 (quoting Brown v. General Servs. Adm'n, 425 U.S. 820, 832 (1976)).

accommodating the statutes.[51] Instead, largely for policy reasons, the Court simply denied the compatibility of section 1985(c) with the administrative mechanism of Title VII.[52]

This approach is unfortunate. The failure to investigate the compatibility of the statutes ignores section 1985(c). Instead of balancing the congressional policies underlying both Title VII and section 1985(c),[53] the Court promoted the former at the expense of the latter. Arguably, it should have sought to accommodate both,[54] by requiring that any potential plaintiff pursue in good faith the Title VII remedial scheme with its procedural intricacies before filing suit under section 1985(c).[55] In cases where a plaintiff asserts a statutory right, accompanied by detailed procedures, as the basis of a section 1985(c) claim, it is unclear whether courts should attempt to accommodate the overlapping statutes.

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[51] The failure to attempt an accommodation of the two statutes must be attributed to the plurality since the concurring justices contended that only fundamental constitutional rights may be remedied through § 1985(c).

As an alternative solution to the problem faced in *Novotny*, an attempt at accommodation might have allowed the Court to integrate § 1985(c) and Title VII into a coherent scheme. In this context, one commentator has stated

> only the specific exemptions and the procedural requirements that express [national social policy] determinations need be recognized in the accommodation process. Areas of non-coverage that reflect limitations in the congressional basis of power or concern over the difficulties of administrative enforcement . . . need be given no effect in limiting the scope of the earlier statute.

Note, *supra* note 8, 74 COLUM. L. REV. at 475 (footnote omitted).

In *Novotny*, as the dissent points out (99 S. Ct. at 2361), incorporating an exhaustion of administrative remedies requirement would reconcile the policies of the two statutes. Although such an approach could conceivably shift the "balance of power" at the conciliation stage, the trial judge would retain considerable discretion to ensure that any potential plaintiff proceeded through the administrative process in good faith. Thus, the possibility of an administrative exhaustion requirement undermines the argument that allowing a § 1985(c) claim could permit the Title VII scheme to be completely bypassed. The majority relied heavily on this argument. 99 S. Ct. at 2351. Consequently, the majority's failure to address this issue is significant.

[52] 99 S. Ct. at 2351-52. For example, the Court reasoned that "[u]nimpaired effectiveness can be given to the plan put together by Congress in Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(c)." *Id.* at 2352.

[53] Section 1985(c) is directed at a particularly dangerous and disfavored form of discrimination; that "posed by persons acting with invidious animus and acting in concert—thereby compounding their power and resources—to deny federal rights." 99 S. Ct. at 2360 (dissenting opinion, White, J.).

[54] 99 S. Ct. at 2361 (dissenting opinion, White, J.). This is the fundamental rationale underlying the doctrine of implied repeal. *See* Posadas v. National City Bank, 296 U.S. 497 (1936). *See generally* Note, *supra* note 8, 74 COLUM. L. REV. at 480-85.

[55] *See* note 51 *supra*.

In addition, by failing to address the larger question of what types of rights section 1985(c) vindicates, the Court promoted uncertainty in the lower courts. Some may attempt to limit *Novotny* to its facts, according it no precedental effect in cases that do not involve Title VII. The logic of *Novotny,* however, extends to all statutes with comprehensive remedial schemes. Such statutes should be the exclusive remedies for any rights they create, thus preempting section 1985(c).

Novotny signalled a retreat from *Griffin*'s expansive interpretation of this provision. The Court did stop short of declaring that section 1985(c) remedies only deprivations of fundamental constitutional rights. But if a comprehensive remedial scheme preempts vindication of a statutory right by section 1985(c), the section is effectively neutralized with respect to statutory rights; plaintiffs usually invoke section 1985(c) only to circumvent complex or disadvantageous remedial mechanisms.[56]

The weight of *Novotny* is likely to fall most heavily on potential plaintiffs who would assert claims alleging sex-based discrimination in employment. Victims of racial discrimination[57] in employment can conceivably still assert a deprivation of section 1981 rights to circumvent the restrictions of Title VII.[58] But for other employment discrimination victims and for the victims of private, nonracial discrimination in general, there may be no statutory right which can support a section 1985(c) claim. Unless these victims can claim a deprivation of their right to interstate travel, which seems unlikely in most employment discrimination cases, section 1985(c) will be useless to them.

A vitally important issue which *Novotny* may generate is whether section 1983,[59] which remedies state infringement of

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[56] *See generally* Lopataka, *A 1977 Primer on the Federal Regulation of Employment Discrimination,* 1977 U. ILL. L.F. 69, 117.

[57] Classifications based on race or alienage would fall under the rubric of racial discrimination, but § 1981 would not extend to classifications based on sex, religion, or national origin. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[58] In addition to the remedy available under § 1981 which was held not excluded by Title VII in *Johnson,* theoretically a victim of nonracial employment discrimination can attempt to establish that § 1985(c) provides a remedy for the right created by § 1981. There is, however, little practical reason to vindicate such rights indirectly through section 1985(c), since § 1981 provides a right of action and a remedy in these situations directly.

[59] 42 U.S.C § 1983 (1976). Section 1983 provides:

> 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

fourteenth amendment rights, survives the Court's "comprehensive scheme" rationale. Lower courts may construe *Novotny* to preclude a state employee victimized by discrimination from asserting a section 1983 claim in lieu of, or in addition to, a Title VII claim. But since such a plaintiff must assert a violation of section 1 of the fourteenth amendment as a component of his section 1983 claim,[60] a right independent from Title VII is present. The "two independent rights," "one right, two remedies" distinction and the *Novotny* Court's emphasis on the exclusiveness of Title VII only as to rights created solely by Title VII suggest that *Novotny* should not affect section 1983.[61] Although *Novotny* severely restricts the scope of section 1985(c), it probably will not adversely affect other existing alternatives to Title VII.[62]

CONCLUSION

In *Great American Federal Savings & Loan Association v. Novotny*, the Supreme Court withdrew section 1985(c) as a remedy for deprivations of rights created by Title VII. The *Novotny* rationale necessarily extends to statutes other than Title VII; courts should read *Novotny* to preclude the use of section 1985(c) as a remedy for deprivations of rights created by statutes accompanied by a comprehensive administrative scheme. Since plaintiffs invoked section 1985(c) to circumvent such administrative machinery, *Novotny* has virtually eliminated the practical utility of that statute.

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and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In Chapman v. Houston Welfare Rights Org., 99 S. Ct. 1905 (1979), the Supreme Court determined that § 1983 was solely remedial. *Id.* at 1915-17.

[60] *See* Dombrowski v. Dowling, 459 F.2d 190, 194 (7th Cir. 1972) (discussing requirements of § 1985 claim).

[61] In the *Novotny* opinion itself, the Court noted that during the legislative debates when the view was consistently expressed that earlier statutes would not be impliedly repealed, specific references were made to §§ 1981 and 1983 whereas § 1985 was not mentioned. 99 S. Ct. at 2351, n.21.

[62] But the Court's holding that section 1985(c) is purely remedial has a paradoxical implication. If the Ku Klux Klan attacked a group of blacks, the victims would have no claim under section 1985(c) unless they could allege deprivations of their right to interstate travel. After *Novotny*, section 1985(c) may not even remedy the wrongs which motivated the Reconstruction Congress to enact it.