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Remedies for Statutory Violations Under Sections 1983 and 1985©

REMEDIES FOR STATUTORY VIOLATIONS UNDER SECTIONS 1983 AND 1985(C)

The growing number of federal claims[1] based on the remedial statutes[2] of the Civil Rights Act of 1871[3] (1871 Act) is forcing the federal court system to reexamine the intended scope of the statutes.[4] The Reconstruction-era Congress passed the 1871 Act pursuant to the fourteenth amendment[5] to guarantee a forum in which newly freed slaves could secure their federal rights. The federal courts now must determine whether the Congress of 1871 intended to protect only constitutional rights or statu-

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[1] The 1964 U.S.C.A. notes only 19 decisions based upon § 1983 of Title 42 of the United States Code for the first 65 years of the statute's existence. The 1976 edition of the U.S.C.A., however, cites over 700 § 1983 cases. *See* Comment, *Section 1983 and the New Supreme Court: Cutting the Civil Rights Act Down to Size,* 15 DUQ. L. REV. 49, 49-54 (1976) [hereinafter cited as *Section 1983*]; Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1486 (1969) [hereinafter cited as *Limiting the Section 1983 Action*].

[2] 42 U.S.C. §§ 1983 & 1985(c) (1976). Sections 1983 and 1985(c) originated in §§ 1 & 2 of the Civil Rights Act of 1871. *See* Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. The Supreme Court has held that these statutes provide no substantive rights but rather provide a cause of action for the violation of federal rights created by the Constitution. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617-20 (1979). Thus, §§ 1983 & 1985(c) provide a remedy rather than create rights. *Id.*; Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 99 S. Ct. 2345, 2349 (1979).

[3] Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. The full title of the Civil Rights Act of 1871 is one indication of the congressional intent behind its passage: "An Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." *Id.* The original purpose of the 1871 Act was to provide a remedy for the violation of all federal rights existing in 1871. CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871). Congress passed the Act to preclude the southern states from denying newly freed slaves their federal rights, especially those rights created by the fourteenth amendment. *See* Note, *The Proper Scope of the Civil Rights Act,* 66 HARV. L. REV. 1285, 1285-86 (1953). The goal of the fourteenth amendment was to guarantee that no person be denied his civil rights on the basis of race. *See generally* Lippe, *The Uneasy Partnership: The Balance of Power Between Congress and the Supreme Court in Interpretation of the Civil War Amendments,* 7 AKRON L. REV. 49, 49-66 (1973) [hereinafter cited as Lippe].

[4] Currently, petitioners bring actions under the 1871 Act for the violation of federal rights having no relation to the civil rights which the Act originally sought to protect. *See* note 3 *supra; see, e.g.,* Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979) (suit seeking to challenge state welfare regulation allegedly violative of Social Security Act). Claimants have also asserted causes of action under § 1985(c) for the violation of rights created by subsequent civil rights legislation. *See, e.g.,* Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 99 S. Ct. 2345 (1979) (plaintiff asserted cause of action under § 1985(c) for alleged violation of Title VII of the Civil Rights Act of 1964). *See generally* Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload,* 1973 LAW & SOC. ORD. 55 [hereinafter cited as Aldisert]; Note, *Developments—Section 1983,* 90 HARV. L. REV. 1133 (1977).

[5] U.S. CONST. amend. XIV, § 5. Section 5 of the fourteenth amendment gives Congress the power to pass legislation to prevent denial of equal rights on the basis of race, color or previous condition of servitude. *See* Lippe, *supra* note 3, at 49.

tory rights as well.[6] Since the early 1950's, courts steadily have expanded both the constitutional and statutory rights protected by the 1871 Act,[7] now codified at sections 1983 and 1985(c) of Title 42 of the United States Code.[8] In the 1978-79 Term, the Supreme Court declined two opportunities to define the specific federal rights which come within the protection of the current statutes derived from the 1871 Act.[9]

The discrepancy in language between the 1871 Act and the current codification has complicated the interpretation of section 1983,[10] which was derived from section 1 of the 1871 Act.[11] Section 1 of the 1871 Act provided a cause of action for the deprivation by state action[12] of any right created by the Constitution and granted concurrent original jurisdiction over the cause of action to the federal courts.[13] Section 1 of the 1871 Act did not explicitly provide a cause of action for the deprivation of statutorily created rights.[14] In 1874, Congress codified existing federal laws into the Re-

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[6] The original drafters of the Civil Rights Act of 1871 sought to provide a federal remedy where a state law or regulation violated a federal right and in circumstances where no adequate state remedy existed or where a theoretically adequate state remedy was unavailable. *See* Monroe v. Pape, 365 U.S. 167, 173-74 (1961). *See generally Limiting the Section 1983 Action, supra* note 1, at 1486-94; note 3 *supra.*

[7] The Court has removed restrictions on § 1983 actions which previously limited the scope of the statute. In Monroe v. Pape, 365 U.S. 167 (1961), the Supreme Court held that § 1983 provides a remedy supplemental to any state judicial remedy. *Id.* at 173-76. The *Monroe* opinion implied that a plaintiff need not exhaust the state judicial remedies available to him before seeking redress under § 1983. *Id.*; *accord,* McNeese v. Board of Educ., 373 U.S. 668, 672 (1963). The *Monroe* Court established the immunity of municipalities and certain government officials and thus limited the scope of remedies available under § 1983. *See Limiting the Section 1983 Action, supra* note 1, at 1486-88. Recently, however, the Supreme Court overruled *Monroe* to the extent that *Monroe* held that municipalities were immune from suit under § 1983. By denying immunity to a municipality in a § 1983 suit, the Court expanded the scope of defendants subject to § 1983, holding that the Civil Rights Act of 1871 extended to local as well as state governments. Monell v. Department of Social Serv. of New York, 436 U.S. 658, 689 (1978). *See* Schnapper, *Civil Rights Litigation After Monell,* 79 COLUM. L. REV. 213, 214-15 (1979).

[8] 42 U.S.C. §§ 1983 & 1985(c) (1976). Section 1983 provides that any person who, under color of state law, deprives another of any "rights, privileges or immunities secured by the Constitution and laws" is liable to the person deprived for the resulting injury. 42 U.S.C. § 1983 (1976). 1985(c) provides that any person involved in a conspiracy to deny equal protection of the laws to any person or class of persons is liable for the damages resulting from the conspiracy. 42 U.S.C. § 1985(c) (1976); *see* note 3 *supra.*

[9] The Supreme Court decided Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979) and Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 99 S. Ct. 2345 (1979), on narrow grounds and thus avoided defining the scope of §§ 1983 & 1985(c), respectively. *See also* Tongol v. Usery, 601 F.2d 1091, 1099 (9th Cir. 1979); note 35 *infra.*

[10] *See, e.g.,* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608-11 (1979); text accompanying notes 25-32 *infra.*

[11] *See* text accompanying note 13 *infra.*

[12] *See* United States v. Price, 383 U.S. 787, 794 n.7 (1966) (Court construed color of state law language of § 1983 identically with state action language of fourteenth amendment); *Section 1983, supra* note 1, at 51 n.16.

[13] Act of Apr. 20, 1871, ch. 22, 1, 17 Stat. 13.

[14] 441 U.S. at 608.

vised Statutes.[15] The drafters of the Revised Statutes divided section 1 of the 1871 Act into one substantive and two jurisdictional sections.[16] At the same time, the drafters added the language "and laws" to the substantive section[17] and to the section granting jurisdiction to the district courts.[18] To the section granting jurisdiction to the circuit courts the drafters added the more precise language of "and laws providing for equal rights."[19] In the Judicial Code of 1911[20] Congress retained the "equal rights" language of the former circuit court jurisdictional statute.[21] The language of current section 1983 and its jurisdictional counterpart, section 1343(3) of Title 28,[22] is identical to that of the corresponding Revised Statutes, sections 1979 and 629.[23] Although section 1985(c), derived from section 2 of the 1871 Act, underwent the same series of codifications, the language of the current statute is not significantly different from that of the 1871 Act.[24]

The plain language of section 1983 provides a cause of action for a deprivation by state action of any right created by the Constitution or federal law.[25] The purpose and history of the 1871 Act,[26] as well as the

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[15] 18 Stat., No. 1, 1, 94, 109, 348 (1874).

[16] *See* Dwan & Feidler, *The Federal Statutes—Their History and Use,* 22 MINN. L. REV. 1008, 1012-15 (1938).

[17] The substantive section, § 1979, of the Revised Statutes contains the added "and laws" language and corresponds exactly with § 1983 of the current United States Code. *See* 42 U.S.C. § 1983 (1976); note 8 *supra.*

[18] REV. STAT. § 563 (1874) (current version at 28 U.S.C. § 1343(3) (1976)).

[19] REV. STAT. § 629 (1874) (current version at 28 U.S.C. § 1343(3) (1976)).

[20] Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087.

[21] REV. STAT. § 629 (1874) (current version at 28 U.S.C. § 1343(3) (1976)). Justice Powell suggested that the circuit court jurisdictional statute was more carefully drafted and, thus, more accurate than the district court jurisdictional statute. Justice Powell contended that Congress intentionally chose to retain the more precise language when the Judicial Code of 1911 consolidated the district and circuit courts. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 624-29 (1979) (Powell, J., concurring). The organization of the judiciary initially provided for two types of trial courts—district and circuit courts. The circuit courts had original as well as appellate jurisdiction in civil, admiralty and maritime cases. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 33-41 (2d ed. 1973). The Judicial Code of 1911 abolished these circuit courts and consolidated their jurisdiction in the district courts. Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1167.

[22] 28 U.S.C. § 1343(3) (1976). Section 1343(3) grants original jurisdiction to the district courts over any civil action authorized by law for the deprivation by state action of any right secured by the Constitution or any law "providing for equal rights." *Id.*

[23] Section 1343(3) corresponds with the language of Revised Statute § 629. *Compare* 28 U.S.C. § 1343(3) (1976) *with* REV. STAT. § 629 (1874). *See generally* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608-09 (1979).

[24] In the Revised Statutes, current § 1985(c) appeared as § 1980. Section 2 of the Civil Rights Act of 1871 originally contained the equal protection language of § 1985(c) and the drafters of the Revised Statutes made no language changes from that of the original Act. Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13; *see* note 8 *supra.*

[25] 42 U.S.C. § 1983 (1976). A straightforward reading of § 1983 arguably results in the statute providing a remedy for violation of any federal right, constitutional or statutory. This interpretation rests upon the belief that Congress intended a literal reading of the statute. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 649-50 (1979) (White, J., concur-

language of the jurisidictional counterpart[27] to section 1983, however, suggest interpreting section 1983 to encompass only constitutionally created rights.[28] Concurring in *Chapman v. Houston Welfare Rights Organization*,[29] Justice Powell viewed the restrictive "equal rights" language of section 1343(3) as an attempt by the drafters of the Revised Statutes to limit the scope of the remedy to violations of the equal protection clause of the fourteenth amendment.[30] Section 1985(c) provides a cause of action against any person involved in a conspiracy designed to deny "any person or class of persons of the equal protection of the law."[31] Unlike section 1343(3), the equal protection language of section 1985(c) has been a part of the statute since its inception in 1871.[32] Although no language discrepancy exists between the 1871 Act and the current codification, problems remain in interpreting the language to ascertain the scope of protection. The equal protection language of section 1985(c) and the close relationship in origin and purpose between the 1871 Act and the fourteenth amendment[33] suggest that only constitutional violations give rise to a cause of action under section 1985(c).[34] The Supreme Court must therefore determine which statutory rights, if any, give rise to causes of action under sections 1983 and 1985(c).[35]

In *Chapman*,[36] the Supreme Court failed to resolve whether the viola-

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ring); text accompanying notes 87-96 *infra*.

[26] *See* note 3 *supra*.

[27] 28 U.S.C. § 1343(3) (1976). *See* note 22 *supra*. The Supreme Court has recognized § 1343(3) as the historical counterpart to § 1983. *See* Lynch v. Household Finance Corp., 405 U.S. 538, 540, 543 (1971).

[28] *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 627 (1979) (Powell, J., concurring). Throughout the codifications, Congress never intended to change the literal meaning of the original act. *Id.* at 627 n.5 (Powell, J., concurring). The notes of the drafters of the Revised Statutes evidence no intent to effect a change in the meaning of the statute. *See* 1 *Revision of the United States Statutes as Drafted by the Commissioners Approved for that Purpose* 361 (1872), *cited in* 441 U.S. 600, 631 n.11 (1979) (Powell, J., concurring). Thus the congressional purpose in passing the 1871 Act was to secure fourteenth amendment rights by providing a means to redress deprivations of constitutional rights by the states. *Id.* at 627-37 (Powell, J., concurring). *See* text accompanying notes 63-72 *infra*.

[29] 441 U.S. 600 (1979).

[30] *Id.* at 643 (Powell, J., concurring); *accord*, McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part I*, 60 VA. L. REV. 1 (1974) [hereinafter cited as McCormack].

[31] 42 U.S.C. § 1985(c) (1976).

[32] *See* note 24 *supra*.

[33] *See* text accompanying note 5 *supra*.

[34] *See* text accompanying notes 73-86 *infra*. Justices Powell and Stevens, in their concurring opinions in Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 99 S. Ct. 2345 (1979), stated that, based upon the legislative history and the language of the statute, § 1985(c) should provide remedies solely for the violations of fundamental constitutional rights. *Id.* at 2352 (Powell, J., concurring), 2355 (Stevens, J., concurring).

[35] *See, e.g.*, Tongol v. Usery, 601 F.2d 1091, 1099 (9th Cir. 1979) (citing *Chapman* Court's failure to define extent to which § 1983 provides cause of action for violation of federal statutory rights). *See also* text accompanying notes 97-100 *infra*.

[36] 441 U.S. 600 (1979). In *Chapman*, the Supreme Court consolidated cases from the

tion of a purely statutory federal right gives rise to a section 1983 suit.[37] The *Chapman* petitioners asserted a cause of action under section 1983 for alleged violations of the Social Security Act[38] by state welfare regulations. The state regulations[39] were promulgated pursuant to the authority of the states to develop guidelines to administer the Social Security program providing Aid to Families with Dependent Children.[40] Writing for the Court, Justice Stevens acknowledged that a section 1983 action might not be appropriate to redress the violation of the Social Security Act.[41] The Supreme Court, however, assuming the existence of a valid section 1983 action, held that the district courts lacked original jurisdiction over the action when the right allegedly violated was not created by the Constitution or a law providing for equal or civil rights.[42] Thus the Court made a

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Third and Fifth Circuits. The petitioners in both cases claimed that the state had administered the Aid to Families with Dependent Children program according to regulations which were more restrictive than required by the Social Security Act. The petitioners therefore claimed that these state regulations violated 42 U.S.C. §§ 606 (e)(1) & 602 (a)(7) (1976) respectively. 441 U.S. 600, 602-07 (1979). The decisions of the circuits conflicted on the issue of whether federal district courts had original jurisdiction over such claims. *Id.* at 605-07. *See* Houston Welfare Rights Org., Inc. v. Vowell, 555 F.2d 1219, 1221 (5th Cir. 1977), *rev'd sub nom.* Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979); Gonzalez v. Young, 560 F.2d 164, 167-68 (3d Cir. 1977), *aff'd sub nom.* Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979).

[37] 42 U.S.C. § 1983 (1976). *See* note 8 *supra.*

[38] 441 U.S. 600, 603-07 (1979); 42 U.S.C. §§ 602 (a)(7) & 606 (e)(1) (1976). The Supreme Court has held that the Social Security Act does not provide equal rights but only governs the dispensation of federal funds. *See* Townsend v. Swank, 404 U.S. 282, 292 (1971) (Burger, C.J., concurring). Therefore, if § 1983 is restrictively interpreted to protect only constitutional rights and rights created by laws providing for equal rights, the petitioners in *Chapman* would not have a valid cause of action under § 1983.

[39] N.J.A.C. § 10.82-5.12 (1976); Texas Dept. of Public Welfare, FINANCIAL SERVICES HANDBOOK, Rev. 23 §§ 3122 & 3122.2, *cited in* Houston Welfare Rights, Org., Inc. v. Vowell, 555 F.2d at 1222 nn.4 & 5.

[40] 42 U.S.C. §§ 601-610 (1976). Aid to Families with Dependent Children is a program of public welfare established under Part A of the Social Security Act and administered through federally approved state plans. The purpose of the program is to encourage family unity. *Id.* at § 601 (1976).

[41] 441 U.S. at 611-12. Following a lengthy discussion of §§ 1983 & 1343(3), the majority concluded that the intent and policy of the legislation was ambiguous and offered little guidance to resolving the issue of the proper scope of § 1983. *Id.* at 607-12; *see* note 38 *supra*; text accompanying notes 63-72 *infra.*

[42] 441 U.S. at 623. The Court reasoned that a supremacy clause claim was not a sufficient constitutional basis to grant jurisdiction under § 1343(3). *Id.* at 618. Further, jurisdiction could not be granted pursuant to § 1343(3) or (4). Section 1343(4) grants jurisdiction to the district courts over any civil action authorized by law for the deprivation of any right created by any law protecting civil rights. 28 U.S.C. § 1343(4) (1976). The violation of the Social Security Act or § 1983 does not fulfill the requirements of the language of § 1343(3) & (4) since neither the Social Security Act nor § 1983 provides for equal or civil rights. 441 U.S. at 616-18. Thus, the *Chapman* Court rejected all grounds of jurisdiction alleged by the petitioners.

Both the Fourth and Fifth Circuits, however, have granted jurisdiction over welfare claims pursuant to § 1343(3) & (4). In Blue v. Craig, 505 F.2d 830 (4th Cir. 1974), the Fourth Circuit held that the district court had jurisdiction over a challenge to state welfare laws

jurisdictional determination to limit access to the federal courts but stopped short of denying access to all litigants attempting to vindicate a federal statutory right.[43]

The Court came closer to confronting the issue of the proper scope of section 1985(c)[44] in *Great American Federal Savings & Loan Association v. Novotny*.[45] Novotny, an employee of Great American Federal (GAF), claimed damages under section 1985(c) asserting that GAF had conspired to deprive him of equal protection of the laws. Petitioner's suit was based upon a right-to-sue letter obtained under Title VII of the Civil Rights Act of 1964[46] (1964 Act). Petitioner alleged that GAF had terminated his employment because of his opposition to GAF employment practices which violated Title VII of the 1964 Act.[47] The Court held that section 1985(c)

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pursuant to § 1343(3). The court based its decision on the fact that §§ 1983 & 1343(3) have identical origins and should have the same scope. Further, the court reasoned that Congress intended to retain the coextensive nature of the two statutes in the Revised Statutes and, thus, §§ 1983 & 1343(3) should be broadly interpreted. *Id.* at 836-37. Having found jurisdiction on a statutory basis, the Fourth Circuit did not reach the issue of whether a supremacy clause claim was a valid basis for jurisdiction under § 1343(3). The court noted, however, that the supremacy clause negates state laws inconsistent with federal law and therefore federal law is "secured by the Constitution". The Fourth Circuit indicated that a supremacy clause claim would be sufficient grounds for invoking § 1343(3) jurisdiction. *Id.* at 843-44. *See generally* Note, *The Propriety of Granting a Federal Hearing for Statutorily Based Actions Under the Reconstruction-Era Civil Rights Act*: Blue v. Craig, 43 GEO. WASH. L. REV. 1343 (1975) [hereinafter cited as *Statutorily Based Actions*].

In Gomez v. Florida State Employment Service, 417 F.2d 569 (5th Cir. 1969), the Fifth Circuit based a finding of jurisdiction on § 1343(4) for a cause of action arising under § 1983. The claim arose over an alleged deprivation of laborers' rights provided by the Wagner-Peyser Act of 1933. 29 U.S.C. § 49 (1976). This act protects migratory workers from unfair wages and working conditions. The court concluded that the rights violated were personal and thus protected under § 1983. 417 F.2d at 579. Since § 1343(4) grants jurisdiction over any deprivation of rights created by a law protecting civil rights and § 1983 is such a law, jurisdiction was found to flow naturally from § 1343(4). 417 F.2d at 580 n.39. *See generally* Herzer, *Federal Jurisdiction Over Statutorily-Based Welfare Claims*, 6 HARV. C.R.—C.L. L. REV. 1 (1970) [hereinafter cited as Herzer].

[43] *See* text accompanying notes 63-72 *infra*.

[44] 42 U.S.C. § 1985(c) (1976); *see* text accompanying note 31 *supra*.

[45] 99 S. Ct. 2345 (1979).

[46] 42 U.S.C. §§ 2000e to 2000e-17 (1976). Congress enacted Title VII as part of the Civil Rights Act of 1964 in order to eliminate discriminatory employment practices based on race, color, religion, national origin or sex. H.R. REP. No. 914, 88th Cong., 1st Sess. 26, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2401. In order to administer the provisions of Title VII, the 1964 Act created the Equal Employment Opportunity Commission (EEOC). The EEOC is authorized to investigate charges of discrimination, to attempt to conciliate the parties involved, and to bring civil actions against the employer, if necessary. *See* Comment, *The Permissible Scope of Title VII Actions*, 8 SETON HALL L. REV. 493, 493-94 (1977). To institute a private suit under Title VII the injured party must first file a charge with the EEOC and obtain a "right-to-sue" letter from the commission. 42 U.S.C. § 2000e-5(f)(1) (1976).

[47] 99 S. Ct. at 2347. The petitioner alleged that Great American Federal deliberately followed policies which effectively denied female employees equal employment opportunities. *Id.*

does not provide a cause of action for rights created by Title VII because of Title VII's explicit administrative scheme.[48] The Court did not expand its holding to define the federal rights protected by section 1985(c).[49]

The *Novotny* opinion addressed the narrowest issue possible in order to resolve the case.[50] While determining that a violation of Title VII would not give rise to a section 1985(c) cause of action, the Court failed to resolve the issue of the validity of a section 1985(c) action to redress the violation of any statutorily created right.[51] The federal courts must define what federal rights section 1985(c) protects in order to achieve a certainty and unity in the federal court system.[52] Although the *Novotny* opinion discussed both the legislative and judicial history of the 1871 Act,[53] the Court primarily relied on the notion that allowing a section 1985(c) action to redress a violation of Title VII would nullify the administrative restraints of Title VII.[54] Although six Justices joined in the *Novotny* opinion, at least two of these Justices, along with the three dissenting Justices, advocated that the Court define the scope of section 1985(c).[55] The *Novotny* majority recognized the issue and attempted to provide a partial solution to the problem by holding that section 1985(c) does not protect the rights provided by Title VII.[56] By basing its conclusion solely on the unique characteristics of Title VII and the facts of the case,[57] the *Novotny* Court neglected to take advantage of the opportunity to eliminate the confusion which surrounds the post-Civil War civil rights legislation.[58]

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[48] *Id.* at 2352. The circuit court had concluded that Title VII does not preclude a claim under § 1985(c). Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 584 F.2d 1235, 1252-53 (3d Cir. 1978). The court based this conclusion in part upon the legislative history of Title VII that explicitly stated that Congress did not intend to repeal existing civil rights laws by enacting Title VII. *Id.* at 1252; *see* 118 CONG. REC. 3371 (1972); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-49 (1974) (Congress rejected amendment to 1964 Act making Title VII exclusive remedy for unlawful employment practices). The *Novotny* Court attempted to distinguish *Alexander* on the basis that the petitioner in *Alexander* had two independent claims, whereas Novotny had only one. 99 S. Ct. at 2349, 2352. *See also* note 93 *infra.*

[49] *See* text accompanying notes 50-58 *infra.*

[50] *See* note 48 *supra.*

[51] 99 S. Ct. at 2352 (Powell, J., concurring).

[52] *See* text accompanying notes 101-113 *infra.*

[53] Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. *See* text accompanying notes 3-6 *supra.*

[54] 99 S. Ct. at 2351. Title VII provides for a very short and precise statute of limitations, no right to a jury trial, and a very limited amount of damages. 42 U.S.C. § 2000e-5 (1976). Plaintiffs under § 1985(c) actions are entitled to a jury trial and to compensatory damages. 42 U.S.C. § 1985(c) (1976). *See* Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 99 S. Ct. 2345, 2350-51 (1979).

[55] In *Novotny,* Chief Justice Burger and Justices Blackmun, Powell, Rhenquist and Stevens joined in Justice Stewart's decision. Justices Powell and Stevens each filed concurring opinions criticizing the Court's failure to address the scope of § 1985(c). 99 S. Ct. at 2352 (Powell, J., concurring), 2353 (Stevens, J., concurring). Justice White, joined by Justices Brennan and Marshall, wrote a dissenting opinion disagreeing with both the result reached by the Court and the issue addressed. *Id.* at 2356 (White, J., dissenting).

[56] *Id.* at 2352.

[57] *See* note 93 *infra.*

[58] 99 S. Ct. at 2352-53 (Powell, J., concurring), 2353-56 (Stevens, J., concurring), 2358-

The Supreme Court's definition of the scope of the 1871 Act will depend upon the degree of access to the federal courts desired by the Supreme Court. The trend of the Burger Court has been to limit general access to the federal courts.[59] The *Chapman* and *Novotny* decisions[60] have perpetuated the trend, but the reluctance to deny access indicates a split in the Court over the underlying policy.[61] The concurring and dissenting opinions in *Chapman* and *Novotny* revealed the results sought by and the philosophies of the individual Justices.[62] A careful analysis of the alternatives suggested by these opinions may help predict which course the Court eventually will take when confronting the scope of the 1871 Act.

Justice Powell's approach characterizes the trend toward restricting access to the federal courts through narrow application of sections 1983 and 1985(c).[63] This restrictive approach, illustrated by Justice Powell's con-

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61 (White, J., dissenting). *See* text accompanying notes 74-96 *infra.*

[59] The Burger Court generally disaaproves of federal courts' interference in state matters. *See* Landever, *Perceptions of Judicial Responsibility—The Views of the Nine United States Supreme Court Justices As They Consider Claims in Fourteenth Amendment Noncriminal Cases: A Post-Bakke Evaluation,* 14 WAKE FOREST L. REV. 1097, 1151-52 (1978) [hereinafter cited as Landever]. The Court tends to defer to the state courts in cases in which the federal and state courts have jurisdiction and to deny access to the federal courts when feasible. *See* Paul v. Davis, 424 U.S. 693, 697-99 (1976). *See generally* Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights,* 30 RUTGERS L. REV. 841 (1977). The Court thus may be expected to interpret the statutes derived from the Civil Rights Act of 1871 as narrowly as possible. *See* text accompanying notes 60-83 *infra. But see* Monell v. Department of Social Serv. of New York, 436 U.S. 658, 701 (1978) (Court broadened applicability of § 1983 by stripping municipalities of immunity from suit).

[60] The Court did not completely deny the welfare litigant access to the federal courts in *Chapman* but merely required that the litigant allege a constitutional claim to which the court could attach pendant jurisdiction over the statutory claim. 441 U.S. at 612-21. *See also* Hagans v. Lavine, 415 U.S. 528, 538-39 (1974) (district court has original jurisdiction over statutory claim pendent to not wholly insubstantial constitutional claim).

[61] In *Chapman,* Justice Stevens wrote the opinion of the Court, with Chief Justice Burger and Justices Blackmun, Powell and Rhenquist joining in the opinion. Justice White concurred in the judgment but filed a separate opinion. Justice White asserted that the Court could not resolve the issue of jurisdiction until it resolved the issue of the validity of a § 1983 cause of action. *Id.* at 647 (White, J., concurring). Justice Powell, criticized Justice White's analysis of the scope of the Civil Rights Act of 1871 as unnecessary to the case and unable to "stand the test of time". *Id.* at 624 (Powell, J., concurring). Implicit in Justice Powell's concern with Justice White's analysis is the idea that the majority's refusal to define the scope of the Act is also unsatisfactory. Justice Stewart, joined by Justices Brennan and Marshall, not only disagreed with the result the Court reached, but also with the majority's refusal to determine whether a cause of action existed. *Id.* at 672-76 (Stewart, J., dissenting).

[62] *See* text accompanying notes 63-96 *infra.*

[63] *See* note 59 *supra.* Justice Powell touches lightly on the policy and pragmatic reasons for his position in *Chapman. See* 441 U.S. at 645 (Powell, J., concurring). Proponents of the policy of federalism favor allowing state courts to settle controversies such as those involved in *Chapman* without interference from the federal government. *See* McCormack, *supra* note 30, at 1-4.

Judge Aldisert of the Third Circuit who initially denied jurisdiction to one of the petitioners in *Chapman* espoused a similar policy. *See* Gonzalez v. Young, 560 F.2d 160, 167 (3d Cir.

currence in *Chapman*, depends primarily upon the history of the drafting of the Revised Statutes[64] to reach the conclusion that the discrepancy in language was merely an oversight and that the added language in both sections 1983 and 1343(3) should be interpreted as a reference to laws providing for equality of civil rights.[65] The 1871 Act granted the circuit and district courts concurrent jurisdiction over causes of action under section 1983.[66] In order to compensate for the states' inability or refusal to enforce federal rights, the revised jurisdictional statutes[67] must have had identical scope.[68] The drafters of the Revised Statutes added the equal rights language to the jurisdictional section to avoid too narrow an interpretation by the courts and to ensure application of the statutes to deprivations of equal rights.[69] Proponents of the restrictive approach argue that the "and laws" language of section 1979,[70] the revised substantive statute, must receive the same narrow reading as the identical language in the district court jurisdictional statute.[71] Thus, the restrictive approach would allow a section 1979 cause of action for the deprivation of a constitutional right or a right created by a federal law providing for equal rights.[72]

The restrictive approach, advocated by Justices Powell and Stevens concurring in *Novotny*, next assesses the scope of section 1985(c), which contains equal rights language analogous to that of the jurisdictional statute.[73] Justice Powell agreed with the majority in *Novotny* that a violation of Title VII does not give rise to a cause of action under section 1985(c).[74] Justice Powell expressed dissatisfaction, however, with the Court's refusal

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1977). *See generally* Aldisert, *supra* note 4, at 562. *But see* Chapman v. Houston Welfare Rights Org., 441 U.S. at 672-76 (Stewart, J., dissenting). The dissenting Justices in *Chapman* favor an interpretation of §§ 1983 & 1343(3) which would afford litigants attempting to vindicate their federal rights liberal access to the federal court system. *Id. See also* Houston Welfare Rights Org., Inc. v. Vowell, 555 F.2d 1219, 1220 n.1 (5th Cir. 1977).

[64] *See* text accompanying notes 16-24 *supra.*

[65] 441 U.S. at 634-35 (Powell, J., concurring); *cf.* Board of Engineers v. Flores de Otero, 426 U.S. 572, 583-84 (1976) (§§1983 & 1343(3) intended to have identical scopes).

[66] *See* text accompanying notes 13-24 *supra.*

[67] *See* notes 18 & 19 *supra.*

[68] *See* note 21 *supra.*

[69] The drafters of the Revised Statutes clearly explained the intent of the language modification in the circuit court jurisdictional statute. REV. STAT. § 629 (1874). *See* note 28 *supra.* Thus the language of REV. STAT. § 563 should be construed identically with § 629 since both jurisdictional sections were intended to be identical in scope. 441 U.S. 600, 634-35 (Powell, J., concurring).

[70] *See* note 17 *supra.*

[71] 441 U.S. at 633-34 (Powell, J., concurring).

[72] *Id.* at 640 (Powell, J., concurring). Agreeing with the *Chapman* majority's conclusion that the Social Security Act is not a law providing for equal rights, Justice Powell would have been forced by his restrictive interpretatin of § 1983 to conclude that the petitioners in *Chapman* had no valid cause of action under § 1983.

[73] *See* text accompanying notes 24 & 30-32 *supra.*

[74] 99 S. Ct. at 2352-53 (Powell, J., concurring). Justice Powell argued that only a violation of a fundamental constitutional right gives rise to a cause of action under § 1985(c). *Id.* A violation of Title VII does not create a cognizable § 1985(c) claim. *Id. See also* note 8 *supra.*

to define whether section 1985(c) protects any statutory rights.[75] Although the language of the statute is clear,[76] the restrictive approach would limit the statute to provide a remedy solely for the violation of constitutional rights.[77] Justice Powell supported limiting the scope of the statute to constitutional rights by relying on the rationale of the Supreme Court in *Griffin v. Breckenridge.*[78] The *Griffin* Court, holding that section 1985(c) protects the constitutional right to interstate travel,[79] justified congressional authority to enact sections 1983 and 1985(c) by identifying Congress' power to protect specific constitutional rights.[80] The *Griffin* Court's reasoning that section 1985(c) is constitutional because it protects "basic rights" compelled Powell's conclusion that section 1985(c) protects only constitutional rights.[81]

Justice Stevens' concurrence in *Novotny* supported the restrictive approach by relying primarily on an analysis of congressional intent.[82] Justice Stevens reasoned that regardless of the slightly different language of sections 1983 and 1985(c), Congress intended the sections to have identical scope.[83] Congress passed the 1871 Act to provide federal remedies for deprivations of constitutional rights, especially those protected by the fourteenth amendment.[84] Justice Stevens distinguished section 1983 from section 1985(c) by noting that section 1983 creates a remedy for a deprivation by state action whereas section 1985(c) creates a remedy for a deprivation by a private conspiracy.[85] Justice Stevens' interpretation of the two statutes providing remedies solely for the protection of constitutional rights[86]

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[75] *See* 99 S. Ct. at 2352 (Powell, J., concurring); text accompanying note 97 *infra.*

[76] *See* text accompanying notes 31-34 *supra.*

[77] 99 S. Ct. at 2352 (Powell, J., concurring).

[78] 403 U.S. 88 (1971). In *Griffin,* the victim of a conspiracy against civil rights workers asserted a claim under § 1985(c). The Supreme Court granted the claimant relief based on the violation of his right to interstate travel, identified by the Court as among the rights and privileges of national citizenship. *Id.* at 105-06. Justice Powell based his conclusion that § 1985(c) reaches only constitutional rights on the somewhat vague constitutional language of *Griffin.* 99 S. Ct. at 2353 (Powell, J., concurring).

[79] Griffin v. Breckenridge, 403 U.S. at 105-06.

[80] *Id.* at 106.

[81] 99 S. Ct. at 2352-53 (Powell, J., concurring).

[82] *See* Great Am. Sav. & Loan Ass'n v. Novotny, 99 S. Ct. 2345, 2354-55 (1979) (Stevens, J., concurring).

[83] *Id.* at 2354 (Stevens, J., concurring). Justice Stevens criticized the Court for not resolving the basic issue of the scope of § 1985(c). Justice Stevens concluded that § 1985(c) only protects fundamental constitutional rights and that § 1983 should also be restrictively interpreted. *Id.* Justice Stevens, writing for the Court in *Chapman,* did not resolve the scope of § 1983. 441 U.S. at 616. However, in his concurrence in *Novotny,* Justice Stevens indicated that he would adopt Justice Powell's approach in *Chapman* and would interpret both statutes to protect constitutional rights, including those protected by the fourteenth amendment. 99 S. Ct. at 2354 (Stevens, J., concurring). *See* Landever, *supra* note 59, at 1142 (Justice Stevens' reluctance to loosely interpret post-civil war legislation).

[84] *See* note 3 *supra.*

[85] 99 S. Ct. at 2354 (Stevens, J., concurring).

[86] *Id.* at 2355 (Stevens, J., concurring). *See generally* McCormack, *supra* note 30, at 2-4.

would limit access to the federal courts to the greatest extent possible.

Justice White's policy of giving literal effect to the most recent language enacted by Congress[87] exemplifies a less result-oriented approach. Concurring in *Chapman,* Justice White examined the history of the enactment of the 1871 Act and the subsequent codifications, and concluded that Congress, in adopting the Revised Statutes, meant to include all federal statutory rights under the protection of the predecessor to section 1983.[88] Under the literal approach, past Court decisions have supported extension of section 1983 to both constitutional and statutory rights.[89] Justice White, finding no basis for looking beyond the clear meaning of the statute, rejected the contention that section 1983 should encompass only laws which provide for equal rights.[90]

Dissenting in *Novotny,* Justice White favored a broad, literal reading of section 1985(c) to allow statutory protection to encompass all federal rights including those rights statutorily created subsequent to passage of the 1871 Act.[91] This literal approach would interpret the explicit equal protection language of section 1985(c) as evincing a congressional intent that the alleged conspiracy have an invidiously discriminatory motive.[92] Since an alleged wrong would not always give rise to overlapping remedies under section 1985(c) and Title VII,[93] the Court should not exclude statu-

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[87] 441 U.S. at 649 (1979) (White, J., concurring). The *Chapman* opinion acknowledged that the most recent language of §§ 1983 & 1343(3) adopted by Congress should not be ignored. The Court pointed out that coextensive interpretation of §§ 1983 & 1343(3) would require ignoring the actual language of one of the sections. *Id.* at 616. Justice Stewart argued, however, that failure to interpret §§ 1983 & 1343(3) coextensively would require ignoring congressional intent and the common origin of the statutes. *Id.* at 674 (Stewart,J., dissenting).

[88] *Id.* at 658 (White, J., concurring). Agreeing with the majority's literal interpretation of § 1343(3), Justice White argued that the legislative history provides no basis for ignoring the plain language of § 1983. *Id.* at 658-59 (White, J., concurring). Congress enacted the present language of both §§ 1983 & 1343(3) in the Revised Statutes and that language remained unchanged throughout subsequent enactments of the United States Code. *Id.* at 657-58 (White, J., concurring). *See* text accompanying notes 15-19 *supra.*

[89] 441 U.S. at 658-60 (White, J., concurring). The Suprme Court has granted relief in the past for violation of a statutory right under § 1983. The statutes in issue were not laws securing equal rights. *See, e.g.,* Rosado v. Wyman, 397 U.S. 397, 420 (1970) (suit to secure compliance with Social Security Act proper under § 1983); City of Greenwood v. Peacock, 384 U.S. 808, 829-30 (1966) (state government officials liable under § 1983 for damages resulting from violation of federal statutory rights).

[90] 441 U.S. at 665-72 (White, J., concurring). Justice White rejected as irrelevant any consideration of the intent of the drafters in interpreting § 1983 or § 1343(3) so long as the meaning of the statute is clear on its face. Thus, in the absence of any ambiguity and in light of a confusing and contradictory history, the statute should be given a literal interpretation. *Id. Contra,* Levi, *An Introduction to Legal Reasoning,* 15 U. CHI. L. REV. 501, 520-23 (1948) (consideration of intent essential to statutory interpretation).

[91] 99 S. Ct. at 2358 (White, J., dissenting).

[92] *Id.* at 2360-61 (White, J., dissenting).

[93] *Id.* at 2357-58 (White, J., dissenting). Only the unique fact situation of *Novotny* resulted in the petitioner having valid causes of action under both Title VII and § 1985(c). Novotny was deprived of his Title VII right not to be discriminated against due to his aiding

tory rights from section 1985(c) protection. Furthermore, the damages recoverable by a plaintiff under section 1985(c) and Title VII would be different.[94] Finally, Justice White cited the Court's basic policy disfavoring the implied repeal of a statute by a later statute.[95] Extending the protection of section 1985(c) to Title VII rather than implying that Title VII preempts the alternative means of redress under section 1985(c), would advance the policy against implied repeal.[96]

Justice Powell expressed his concern in *Novotny* that the Supreme Court, by avoiding the issue of the proper scope of sections 1983 and 1985(c), has not provided sufficient guidance to the federal courts.[97] A Ninth Circuit case, *Tongol v. Usery,*[98] illustrates the quandary of the lower courts. Attempting to determine whether the petitioners had asserted a valid claim under section 1983, the Ninth Circuit looked to the Supreme Court for guidance concerning what federal rights are protected by section 1983. Citing *Chapman,* the Ninth Circuit concluded that the Supreme Court had not yet resolved the question.[99] The *Tongol* court had to predict

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women employees in asserting their Title VII rights. Thus, Novotny had a valid Title VII action. *Id.* at 2357. Additionally, Novotny asserted a cause of action under § 1985(c) since he had been injured as a result of the GAF conspiracy to violate the women employees' Title VII rights. Novotny would have no cause of action under Title VII for the damage caused by the conspiracy unless, as in this case, the damage was caused by retaliatory discrimination. 42 U.S.C. § 2000e-3(a) (1976). 99 S. Ct. at 2356-57 (White, J., dissenting).

[94] A plaintiff may seek compensatory and punitive damages from parties who have allegedly violated his rights under § 1985(c). *See* 99 S. Ct. at 2351. A claim under Title VII entitles the plaintiff to equitable relief which includes back pay for a period of up to two years. 42 U.S.C. § 2000e-5(g) (1976). Justice White argued that these two types of relief are supplemental to one another rather than exclusive. 99 S. Ct. at 2359 (White, J., dissenting). *Contra,* Brown v. GSA, 425 U.S. 820, 833 (1976) (Title VII remedy held exclusive because of express legislative intent).

[95] 99 S. Ct. at 2358-59 (White, J., dissenting). When a statute irreconcilably conflicts with a prior statute the question of whether the former statute repeals the latter statute arises. Runyon v. McCrary, 427 U.S. 160, 173 n.10 (1976). A court will attempt to interpret the statutes so that an irreconcilable conflict does not arise. If a court cannot reconcile the statutes it will attempt to determine how Congress intended the two statutes to interrelate. *See* Note, *Section 1981 and the Thirteenth Amendment After* Runyon v. McCrary*—On the Doorsteps of Discriminatory Private Clubs,* 29 STAN. L. REV. 747, 777-82 (1977). Thus courts follow a policy which favors reconciling statutes rather than allowing a statute to repeal a former statute without an express provision to that effect. *See* Radzanower v. Touche Ross & Co., 426 U.S. 148, 154-55 (1976); United States v. United Continental Tuna Corp., 425 U.S. 164, 168 (1976).

[96] 99 S. Ct. at 2358-60 (White, J., dissenting). Justice White urged the Court to eliminate the possibility of an implied repeal of § 1985(c) by Title VII by interpreting § 1985(c) compatibly with Title VII. *Id.* at 2360 (White, J., dissenting).

[97] *See* text accompanying note 7 *supra. See generally* Baum, *Lower Court Response to Supreme Court Decisions: Reconsidering a Negative Picture,* 3 JUST. SYS. J. 208 (1978).

[98] 601 F.2d 1091 (9th Cir. 1979). In *Tongol,* the court decided that a petitioner's successful challenge of a federal regulation dealing with unemployment benefits gave rise to a cause of action under § 1983. *Id.* at 1100. A valid cause of action under § 1983 is necessary to entitle a petitioner to recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976. 42 U.S.C. § 1988 (1976).

[99] 601 F.2d at 1099.

which approach to the issue the Supreme Court would ultimately adopt.[100] The division among the Justices in *Chapman* and *Novotny* and the resulting uncertainty of the circuit courts should have served to alert the Supreme Court that the federal courts need guidance if the federal judicial system is to retain the desired uniformity.

In determining which interpretation of the statutes to adopt, the Supreme Court must consider whether to give effect solely to the language of the statutes or, more completely to the language, intent and purpose of the legislation.[101] The restrictive interpretation of the statute recognizes the common origin of sections 1983, 1343(3) and 1985(c).[102] The literal approach, on the other hand, lacks this depth and stability of analysis by interpreting section 1983 to provide causes of action for which section 1343(3) does not provide original jurisdiction in the district courts.[103] Proponents of a broad interpretation of the statute, as well as those favoring the restrictive approach, recognize that an examination of the legislative history dictates that the statutes be interpreted coextensively.[104] Additionally, limiting the rights protected by the statutes to constitutional rights and equal rights[105] accomplishes the purpose of the 1871 Act. The Reconstruction Congress enacted the 1871 Act, not to create rights of action against the state or private conspiracies for the violation of all federal rights, but to ensure that citizens would have a federal forum in which to secure their constitutional rights including the rights secured by the fourteenth amendment's equal protection clause.[106]

Adoption of the restrictive approach advocated by Justices Powell and

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[100] *Id.* After reviewing the legislative history of § 1983, the Ninth Circuit concluded that Justice White's literal interpretation is correct. *Id.* The Ninth Circuit, holding that § 1983 provides a cause of action for the violation of the Emergency Unemployment Compensation Act of 1974, based this conclusion on the rationale that the history of § 1983 is so contradictory that the clearest indication of the proper scope of the section is the language itself. *Id.* Thus, the Ninth Circuit probably would interpret § 1983 to provide a cause of action for the violation of any constitutional or statutory right. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. at 646-50 (White, J., concurring).

[101] *See* note 90 *supra. See generally* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 527-34, 538-45 (1947).

[102] *See* text accompanying notes 64-72 *supra.*

[103] 441 U.S. at 624 (Powell, J., concurring). The literal approach would interpret § 1983 as authorizing suits for violations of any federal right while interpreting § 1343(3) to provide original jurisdiction in the district courts only for suits to redress violations for rights created by the Constitution or any law providing for equal rights. *See* note 61 *supra. But see* note 100 *supra.*

[104] *See* Herzer, *supra* note 42, at 7-9; *Statutorily Based Actions, supra* note 42, at 1371-73; Note, *Federal Jurisdiction Over Challenges to State Welfare Programs,* 72 COLUM. L. REV. 1404, 1425-26 (1972).

[105] Justice Powell noted that his definition of the scope of § 1983 leaves unresolved the issue of what is meant by a law providing for equal rights. The opinion of the Court, holding that the Social Security Act is not such a law, developed no guidelines for determining what constitutes a law providing for equal rights. 441 U.S. at 637 n.20 (Powell, J., concurring).

[106] *See* text accompanying notes 3-4 *supra.*

Stevens would advance favorable policy considerations.[107] The practical interest of the Court in restricting the case load borne by the federal court system[108] favors the restrictive analysis of the scope of the statutes.[109] Limiting the scope of sections 1983 and 1985(c) would decrease the potential number of cases which could be brought in federal court under the authority of these statutes. The restrictive approach also finds support in the basic concept of federalism which favors limited regulation of states by the federal government.[110] A literal interpretation of the statutes would provide a federal cause of action for the violation, either by the state or by a conspiracy, of any federal right. Proponents of federalism would prefer to limit federal causes of action to those in which the federal government has a unique interest.[111] Restricting the application of the statutes to violations of equal and constitutional rights would protect the federal government's interest in securing basic human rights while recognizing the general competence of the state court systems.

To ensure that the federal judiciary treats all petitioners equally, the Supreme Court must define the precise rights giving rise to valid causes of action under sections 1983 and 1985(c).[112] Defining the rights protected by the statutes as constitutional and equal rights[113] would give effect to the language and purpose of the drafters as well as advancing federalism and relieving the burden on the federal court system.

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[107] *See* text accompanying notes 63-72 *supra.*

[108] *See* Aldisert, *supra* note 4, at 559. 87,000 cases were filed in federal district courts in 1972. *Id.*

[109] *See* text accompanying notes 63-86 *supra.*

[110] 441 U.S. at 645 (Powell, J., concurring). *See also* McCormack, *supra* note 30, at 1; text accompanying note 63 *supra.*

[111] *See* McCormack, *supra* note 30, at 2-4.

[112] *See* notes 58 & 61 *supra.*

[113] *See* note 105 *supra.*