Federal Civil Rights Laws

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THE FEDERAL CIVIL RIGHTS LAWS¹
By Osmond K. Fraenkel*

President Truman has recently appointed a commission to study the possible expansion of the Federal Civil Rights law. Why, one may ask, should a survey of this sort be necessary, more than eighty years after the Emancipation Proclamation? The answer is that the Negro still suffers in the United States from grave disabilities, as do Mexicans and other "colored" people and, in lesser respects, Jews, Catholics, Jehovah's Witnesses and Communists. The Negro remains the chief sufferer and his conditions are, of course, at their worst in the South.

His disabilities cover a wide range.² "Jim Crow" segregation laws and practices still compel Negroes to travel separately from whites and use different waiting rooms in stations, to go to different (and usually inferior) schools and to live in crowded ghettos with poor housing at exorbitant rents. Not all these practices have been established by law. Segregation in housing results almost entirely from private agreements between land owners not to allow Negroes into certain areas. Most hotels and privately-owned places of amusement exclude them, and not only in the South. They are barred in many communities from public parks and benches. Until recently, practically no provision for Negroes existed in Southern law and medical schools. Whole areas of employment remain closed, often because labor unions bar Negroes from membership or admit them on an inferior basis only.

This pattern of differentiation (to avoid for the moment, the

¹Associated with the firm of Hays, St. John, Abramson & Schulman, New York City; author of Our Civil Liberties and numerous articles dealing with that subject.
²See Konvitz, The Constitution and Civil Rights (1947) for a more extensive discussion of certain aspects of the problem.
²See Myrdal, An American Dilemma (1944).
legally significant term "discrimination") carries over into the political scene. Negroes have had a constant struggle to be permitted to serve on juries and to vote. As rapidly as the Supreme Court has struck down devices designed so to restrict, new devices have sprung up. When it became clear that Negroes would have to be allowed to vote in the general elections in the South, they were denied the right to participate in the Democratic primaries, the only election which mattered. As poll taxes proved less of a barrier, due to increased prosperity and greater political consciousness, educational requirements were so administered as to keep Negroes from voting. And when all this fails, we see a Bilbo openly calling on the white citizens to keep Negroes from the polls. Whether or not, as Bilbo claims, he meant that this be done by legal means only, makes no real difference. There should be no legal means by which any group can be kept from voting.

Many other disabilities exist, aimed, of course, at the poor and lowly of every description. But they, too, operate with especial force to harass the Negro. It is common practice to round up a lot of Negroes, charge them with vagrancy, fine them, and, with complete legality, make them work out their fines on the highways. In many states, a share-cropper can be forced to work out a debt he owes his landlord. And debt is seldom absent. Moreover, in some states it is a crime to "entice labor," so that an outside employer cannot come to localities where living standards are low and offer opportunity to the oppressed. If he comes from another state, he can solicit employees only after getting a license at an exorbitant fee. Thus, unless he breaks away from the South altogether, as hundreds of thousands have done in recent decades, the Negro is still held to the soil.

There is little need to speak here of lynching and police brutality, so well are these American specialties known. White supremacy remains the official slogan of most Southern politicians. This is, of course, an attitude fostered by bad economic conditions which have led poor white groups to look on their Negro neighbors as the enemy, instead of realizing that both could make common cause against the ruling oligarchy.

What can be done about all this? If the states are unwilling to correct these abuses, and many of them are, can the federal government step in? How far has it tried to do so in the past? What

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3 See Williams v. Fears, (1900) 179 U. S. 270, 21 S. Ct. 128, 45 L. Ed. 186.
4 See Raper, The Tragedy of Lynching (1933)
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have the courts ruled, what changes may the future bring? Can Uncle Sam himself see to it that Negroes get the same education as whites and that they vote freely? Can Congress put an end to segregation on trains and buses, and discrimination by hotels and theatres, employers and labor unions? Can the federal government outlaw agreements which keep Negroes from housing? Can the federal courts punish state officials or private citizens who deprive Negroes of their constitutional rights and sometimes even lynch them?

Not all these questions can be definitely answered. We shall consider the way past attempts made by Congress to solve some of these problems have been often emasculated by the courts, speculating on the possibility that the Supreme Court may perhaps come to repudiate some of its decisions. But we cannot ignore the fact that political considerations may prevent Congress from exercising its powers for good.

Before the Civil War the Federal Government had practically no supervision over state interference with individual liberties. The Constitution contained numerous restrictions on state action in the commercial field, but it affected it in the realm of personal freedom in only two respects. Article I, Section 10, prohibits a state from passing ex post facto laws and bills of attainder. Article IV, Section 2, provides that the citizens of one state shall be entitled to all privileges and immunities enjoyed by those of the others. Since the Supreme Court limited the character of the privileges involved and ruled, further, that the Constitution afforded no protection against action taken by a person’s own state, this provision has had very little application.

When the Bill of Rights came up for adoption, the Senate rejected an amendment which would have prevented states from infringing on freedom of religion, speech and the press and from denying jury trial in criminal cases. Partly on this account, partly due to the history and wording of the Bill of Rights, the Supreme Court uniformly held that its provisions did not affect the states.

The Civil War amendments entirely altered this constitutional situation, although in some respects the expectations of those who

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5 Bradwell v. Illinois, (1873) 16 Wall. 130, 21 L. Ed. 442.
6 Brown v. Mayor, etc. of Baltimore, (1833) 7 Pet. 243, 8 L. Ed. 672; Livingston v. Moore, (1833) 7 Pet. 469, 8 L. Ed. 751 (trial by jury), Pernoll v. New Orleans, (1845) 3 How. 589, 11 L. Ed. 739 (religious liberty), Fox v. Ohio, (1847) 5 How. 410, 12 L. Ed. 213 (double jeopardy), Smith v. Maryland, (1855) 18 How. 71, 15 L. Ed. 269 (searches and seizures).
fathered them have never been completely fulfilled. The three amendments then adopted accomplished at least this much. Slavery was prohibited, equal protection of the laws was guaranteed and the suffrage was insured against discrimination based on race, color or previous condition of servitude. The first of the amendments was binding not only on the states but on individuals, the other two were made binding on the states only. And Congress was authorized to implement them by legislation.

From time to time, the Congress has passed laws seeking to accomplish this objective. Some of them remain on the books, some have been repealed, some have been declared unconstitutional. They dealt with three main subjects: denial of rights guaranteed by the Constitution, discrimination by private persons and interference with the suffrage.

Actually, the first of the civil rights law was enacted before the adoption of the 14th Amendment and after the ratification of the 13th. In effect it foreshadowed the 14th, by guaranteeing to all, in every state and territory, “the full and equal benefit of all laws, * * * as is enjoyed by white citizens” and the equal right to make contracts and hold property. These provisions, re-enacted after the adoption of the 14th Amendment, remain in force today. Their constitutionality has been upheld as amplification of both the 13th and the 14th Amendment. Yet the importance of the provisions is slight, since they add nothing to the language of the 14th Amendment itself and prescribe no penalties.

In 1870, however, Congress passed the Enforcement Act. This imposed criminal penalties for certain acts perpetrated against citizens and, although most of its provisions were repealed either in 1894 or 1909, several sections still remain. One of these punishes as a crime any conspiracy to deprive a citizen of rights or privileges secured by the Constitution or laws of the United

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14 Stat. 27 (1866).
16 U. S. C. Tit. 8, sec. 41, 42, 8 U. S. C. A. 41, 42, 2 F. C. A. Tit. 8, sec. 41, 42.
18 Ex parte Virginia, (1879) 100 U. S. 339, 25 L. Ed. 676.
21 Ex parte Virginia, (1879) 100 U. S. 339, 25 L. Ed. 676.
24 28 Stat. 36 (1894).
States. It protects citizens only and applies only to conspiracies. But it is not limited to actions by state officers. Another provision still in force protects all persons and is not restricted to conspiracies, but it can be invoked only when the accused acted "under color" of a state law or custom. Yet both these provisions touch only rights guaranteed by federal power and judicial decisions have greatly narrowed their scope. A third, also extant, prohibits interference with the right to vote because of race or color.

In 1871 Congress added to the Enforcement Act provisions which permitted civil actions for most of the things previously made criminal. Some of these are still the law. The Civil Rights Act of 1875 prohibited discrimination by innkeepers, carriers and places of public amusement as well as in the selection of jurors. The Supreme Court upheld the last provision and it exists in the law today. But the Court declared the remaining parts of the Act unconstitutional, since they were directed at private persons and not at state action.

From these provisions a number of important legal questions have emerged.

1. What are federally secured rights?
2. What difference in treatment amounts to inequality?
3. To what extent are private persons restricted?
4. What action is under color of state law?

1. Federal Rights

The question of what constitutes rights secured by the Federal Constitution had received some judicial consideration before the Civil War, in connection with the privileges and immunities clause of the original constitution. For, in an early circuit decision, a distinction was made between rights guaranteed by the state, such
as the ordinary right to live at peace, and those guaranteed by the
federal power, such as that to petition the Federal Government for
redress of grievances.

The 14th Amendment added to the privileges and immunities
clause of the original Constitution a prohibition of any state action
which might abridge the privileges or immunities of citizens of
the United States. The Civil Rights Acts also speak of privileges
and immunities secured by the United States Constitution or its
laws.

The meaning of these provisions under the 14th Amendment
was first considered in the Slaughter House cases. These cases,
involved, however, not civil liberties but business monopolies. The
majority of the Court declared it was not the purpose of the 14th
Amendment to bring within federal control the entire domain of
civil rights. It indicated, by way of example only, that the Consti-
tution did protect the right of access to the seat of government,
its offices and courts, and to the use of the navigable waters and
harbors of the country. The four dissenting judges, (Field, Swayne,
Bradley and Chief Justice Chase) were of the opinion that the
privileges guaranteed include all “which by right belong to the
citizens of all free governments.” At the same sitting, the Court
upheld a state’s refusal to allow a married woman to practice
law, on the ground that this right was given by state, not federal
law.

The basic rule then established has never been deviated from.
But considerable discussion has arisen as to what privileges were
federally secured. In the Cruikshank case the Supreme Court
held an indictment bad because the rights interfered with were
given, not by the Federal, but by the state government. The indict-
ment charged a conspiracy interfering with the rights to assemble
peaceably, to bear arms, to be secure in life and liberty, to enjoy
the equal benefit of the laws and to vote. Chief Justice Waite
noted it had been charged neither that the assembly interfered
with was one to petition the Federal Government nor that the
wrongs charged to the defendants had been committed by them
due to the race or color of the persons they had interfered with.
Although some counts of the indictment did allege such racial
discrimination, these were considered objectionable in that they

20Slaughter House Cases, (1872) 16 Wall. 36, 83 U. S. 36, 21 L. Ed. 394.
21Id. 97
22Bradwell v. Illinois, (1873) 16 Wall. 130, 21 L. Ed. 442.
lumped together rights constitutionally protected against discrimination (like the right to vote) and rights which were not, (like that of assembly).

Another important decision made at that time held that the right to jury trial in state cases was not federally secured. While this case involved a civil trial, its doctrine was later applied in criminal cases. Not even the expanded meaning recently given the due process clause has resulted in federal protection against state denial of trial by jury.

On the other hand, the Supreme Court has upheld the power of Congress to punish interference with the right of suffrage even if not motivated by racial discrimination, when the voting has been for federal offices only. Congress’ power to deal with the subject derives from the provisions of the original Constitution, which authorize it to “make or alter” regulations for holding a Congressional election. The first case on the subject arose before the 14th Amendment applied, but it was followed in later decisions under the various civil rights laws we have discussed. The Supreme Court has made it clear, however, that the power of Congress to regulate suffrage did not extend to state elections, except where discrimination was involved.

The exact scope of federal supervision over state officials who may have acted wrongfully in connection with federal elections for a long time remained uncertain on account of the repeal of many provisions of the Enforcement Act which dealt particularly with the suffrage. It was argued on the one hand that the statutes which remained on the books authorized prosecution only for direct interference with an individual’s right to vote, on the other, that

34 Art. I, Section 4.
35 Ex parte Siebold, (1879) 100 U. S. 371, 25 L. Ed. 717
all interference with the voting process itself remained a federal offense. In the *Moseley* case the Supreme Court, by a divided vote, ruled that the remaining provisions of the law made it an offense to disregard votes lawfully cast. In the *Bathgate* case the Court held, however, that bribery of voters was no longer a federal offense. In the recent *Saylor* case a majority ruled that ballot stuffing did remain such. The minority, (Justices Douglas, Black and Reed), believed that the *Moseley* case should be confined to its precise facts and that the 1894 repeal was intended to restore control over election offenses to the states. Yet, the majority decision makes it clear that any state election official can be federally punished for denying an individual the right to vote or for failing to give effect to his vote by not counting it or diluting its value through improper counting.

For a long time there was uncertainty as to whether federal jurisdiction extended at all to primary elections. This matter was set at rest in *United States v. Classic*, at least in those states where the primary election was authorized by express provision of law or where it actually determined the result.

Other rights federally protected include those to enter public lands, to be protected from violence while in custody of a federal official, to give information concerning federal offenses and to travel from state to state. The last subject has never been directly passed on by the Supreme Court. In the *Wheeler* case an indictment was held bad, both because the persons charged were private individuals and because the threats involved had been made against complainant in the state of his normal residence. The Court indicated that while the right to travel from state to state was federally protected, that to remain peaceably in one's own, was not. In the

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42 28 Stat. 36 (1894)
44 *United States v. Waddell*, (1884) 112 U. S. 76, 5 S. Ct. 35, 28 L. Ed. 673.
47 *Crandell v. Nevada*, (1868) 6 Wall 35, 18 L. Ed. 745.
recent Edwards case a minority of the Court held a state law void because it restricted the free movement of indigent persons, the majority reaching the same result on the ground that the law constituted an interference with interstate commerce.

The privileges and immunities clause became the basis of the decision by a minority of the Court in Hague v. C.I.O Justices Roberts, Black and Chief Justice Hughes concluded that the right to discuss the National Labor Relations Act was a privilege of federal citizenship. Justice Stone, however, said explicitly that freedom of speech and of assembly did not fall within the protection of the privileges and immunities clause. He believed the record in the case did not show that discussion of the National Labor Relations Act was involved. He pointed out, however, that the Civil Rights Act permitted the suit because it challenged the validity of Jersey City ordinances on due process grounds. Both majority groups were of the opinion that in cases of this kind it is not necessary for a plaintiff to show that his damages exceed the $3,000 generally required to permit suit in a federal court.

The rule of the Hague case was expanded in Douglas v. Jeannette. This was a suit by members of Jehovah's Witnesses to restrain enforcement of a municipal ordinance requiring payment of a license tax for the privilege of distributing leaflets on the public streets, when accompanied by solicitation of funds. The Supreme Court held that the suit had been properly brought under the Civil Rights Act of 1871, on the ground that the right to free speech was secured against state action by the due process clause of the 14th Amendment. Chief Justice Stone said:

"Allegations of fact sufficient to show deprivation of the right to free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth, and to state a cause of action under the Civil Rights Act, whenever it appears that the abridgment of the right is effected under color of a state statute or ordinance."

Thus it is clear that, whatever may be the limitations of the

51 Id. 519.
52 Id. 525.
privileges and immunities clause alone, the Civil Rights laws, as now interpreted, permit an attack on any state regulation which interferes with one of the basic freedoms specified in the Bill of Rights, since these have been siphoned into the due process clause of the 14th Amendment.

Yet neither the right to vote nor the right to be a candidate for state office is federally secured. This is why attempts to outlaw state poll tax laws have failed. And in Snowden v Hughes the Supreme Court refused to entertain a complaint that state officials had refused to certify the correct results of a primary election. Even Justices Douglas and Murphy dissented only on the narrow ground that the record in the case showed discrimination.

In Screws v United States however, the majority of the Court rejected the contention of defense counsel that the Civil Rights Law was too vague for enforcement because it did not specify the rights which were federally guaranteed. These, said Mr Justice Douglas, had become defined by successive decisions of the Court. It had been settled that for a state officer to maltreat a person after his arrest was a denial of due process. Therefore, any state officer who committed such an act in the knowledge it was wrong, could be punished. But it was necessary to establish that the violation of right had been wilful. The majority, therefore, reversed the conviction, since they believed the jury had been insufficiently instructed. This decision became possible under unusual circumstances. Three of the justices (Roberts, Frankfurter and Jackson) thought that the indictment should have been dismissed altogether, both because the statute was too vague and because the acts complained of had not been committed under color of state law. Justices Rutledge and Murphy thought that the conviction should have been affirmed, but Justice Rutledge concurred with the decision of the four justices who thought there should be a new trial only because, otherwise, the case would remain undisposed of. Both these justices maintained there could be no doubt the state officials knew they had no right to do what they did. Mr. Justice Murphy pointed out that the question of the sufficiency of the judge’s charge had not been raised in the lower

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56 See note 32 supra.
58 Snowden v. Hughes, (1944) 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497
60 As had been held in Culp v. United States, (C.C.A. 8th 1942) 131 Fed. (2d) 93, Catlette v. United States, (C.C.A. 4th 1943) 132 F (2d) 902.
courts and that there was no need for any explicit charge on the subject of wilfulness. He said.\footnote{325 U. S. at 137}

"It is an illusion to say that the real issue in this case is the alleged failure of §20 fully to warn the state officials that their actions were illegal. The Constitution, §20 and their own consciences told them that. They knew that they lacked any mandate or authority to take human life unnecessarily or without due process of law in the course of their duties. They knew that their excessive and abusive use of authority would only subvert the ends of justice. The significant question, rather, is whether law enforcement officers and those entrusted with authority shall be allowed to violate with impunity the clear constitutional rights of the inarticulate and the friendless. Too often unpopular minorities, such as Negroes, are unable to find effective refuge from the cruelties of bigoted and ruthless authority. States are undoubtedly capable of punishing their officers who commit such outrages. But where, as here, the states are unwilling for some reason to prosecute such crimes the federal government must step in unless constitutional guarantees are to become atrophied."

The effect of the majority decision has been unfortunate, because the stress on the necessity for wilful violation of constitutional rights makes it easy for a judge unsympathetic to the prosecution to induce a jury to acquit. This is what actually happened on the retrial of the \textit{Screws} case.

The lower federal courts have had recent occasion to consider various problems in this field. For an example, an indictment which alleged conspiracy on the part of private persons to interfere with free speech was held bad, since no state action was involved and no federal right affected.\footnote{Love v. Chandler, (C.C.A. 8th 1942) 124 F (2d) 785.} It was also held that no basis existed for a suit claiming conspiracy to prevent employment in the W.P.A., because plaintiff had no "absolute right" to such employment.\footnote{Pickling v. Pennsylvania R. R. Co. (C.C.A. 3d 1945) 151 F (2d) 240, 152 id. 753.} On the other hand, a Circuit Court of Appeals sustained a complaint which sought damages for unlawful arrest, on the ground that an arrest had been made under color of the Uniform Criminal Extradition Act.\footnote{Stapleton v. Mitchell, (D. Kans. 1945) 60 F Supp. 51, app. dis. by stip. (1945) 326 U. S. 690.} Also, jurisdiction has been accepted to enjoin enforcement of a state labor law,\footnote{Alston v. School Board, (C.C.A. 4th 1940) 112 F (2d) 992; Thompson v. Gibbes, (E.D.S.C. 1945) 60 F Supp. 872.} as well as to entertain suits against discrimination in the payment of school salaries.\footnote{Pow v. United States, (C.C.A. 5th 1940) 109 F (2d) 147, cert. denied (1940) 309 U. S. 679.} And a suit for damages was held proper, based on the
denial to a Negro of the right to train as librarian in a school maintained by a municipality \(^6^7\)

2. Differences in Treatment

The civil rights law, of course, includes claims based on the equal protection clause of the 14th amendment. Most of the questions arising under that clause have, however, been decided in prosecutions under the challenged state laws, rather than in actions for damages under the civil rights laws. They will be briefly reviewed here because of their importance as background to the subject.

While the 14th Amendment guarantees equal protection of the laws, it does not require that all people be treated alike. Thus segregation is not necessarily prohibited. In 1896, the Supreme Court\(^6^8\) upheld a state law which compelled separate railroad accommodations for Negroes and whites, pointing out that, if there was any feeling of exclusion as the result of the law, this came from the consciousness of the Negro, not from the law itself. Mr Justice Harlan wrote an eloquent dissent which has not been heeded. On the other hand, the Supreme Court voided a state law which permitted a railroad to provide dining and sleeping accommodations for white persons only, on the ground that this constituted a clear denial of equality \(^6^9\)

The question in these cases remains always, therefore, whether or not the facilities awarded, although separate, are equal. The principle was recently applied to a public housing project where a lower federal court refused to interfere with proposed segregation.\(^7^0\) It has been applied also to laws compelling separate schools.\(^7^1\)

There the assumption of equal accommodations is wholly unrealistic, because the authorities have not devoted to the Negro schools the same amount of money as to schools for white children. This has been true particularly with regard to teacher's salaries, attempts to correct the scale of which have caused recent litigation.\(^7^2\)

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\(^6^7\) McCabe v. Atchison T. & S. F Ry., (1914) 235 U. S. 151, 35 S. Ct. 69, 59 L. Ed. 169.

\(^6^8\) Plessy v. Ferguson, (1896) 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256.


In a case coming from Missouri the Supreme Court\textsuperscript{18} put a stop to a curious form of discrimination. A Negro had been denied admission to the law school maintained by the State University. Missouri offered to pay the cost of his tuition in a law school in a neighboring state. The majority of the Supreme Court held this to constitute an improper condition and ruled that Missouri must either set up a law school for Negroes or let them enter the school already in existence.

On the other hand, laws prohibiting inter-marriage between different races have been upheld, on the ground that they bear equally on both races.\textsuperscript{74}

A more consistent recognition of the command to equality has existed in the field of jury service. When Southern states passed laws expressly excluding Negroes, the Supreme Court declared them to be unconstitutional.\textsuperscript{75} The state authorities then simply did not put Negroes on the jury lists. Although the convictions of some Negroes were reversed soon after that practice started,\textsuperscript{76} it remained difficult to establish discrimination until the technique for doing so was developed at the second Scottsboro trial, in 1933. In that case, counsel for the accused actually brought qualified Negroes to court and convinced the United States Supreme Court\textsuperscript{77} that the denial of intended discrimination by the jury commissioners was worthless in the face of their long failure to place Negroes on the lists. And the Court has since made it clear that mere lip service to the Constitution is not enough and that convictions will not be sustained where Negroes have been placed on lists under such circumstances that they will practically never be called for service.\textsuperscript{78} Recently the Supreme Court has given consideration to the whole problem of the basis for the selection of jurors.\textsuperscript{79} Since, however, these cases affect the federal judicial system, they need no further discussion here.


\textsuperscript{74}Pace v. Alabama, (1883) 106 U. S. 583, 1 S. Ct. 637, 27 L. Ed. 207, Stevens v. United States, (C.C.C. 10th 1944) 146 F. (2d) 120.


\textsuperscript{78}Smith v. Texas, (1940) 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84.

Discrimination may result from administrative action in fields other than that of jury service also. The leading case is that of Yick Wo. A conviction under a San Francisco laundry licensing ordinance was reversed, on the ground that it had been used in such a way as to discriminate against Chinese laundrymen.

While the equal protection clause constitutes the chief source of protection against discrimination, Congress can also deal with the subject as the result of some of the powers granted it under the original Constitution. Thus, under the interstate commerce clause, Congress can regulate practices of interstate carriers. It has actually forbidden discrimination by such carriers, but has not yet gone so far as to prohibit segregation.

3. PRIVATE PERSONS

As we have noted, the 13th Amendment prohibits slavery and is not, in its application, restricted to state action alone. Therefore it directly affects individuals. And Congress has accordingly passed laws aimed at the continuation of slavery. These have generally been sustained by the Supreme Court. The Court has also struck down various state laws seeking in one way or another to legalize peonage.

Further, although the 14th Amendment by its terms protects against state action only, Congress has provided for the punishment of individuals, whether or not state officers, who act in concert either with each other or with state officers, under color of state law. Yet, as we have seen these provisions are surely

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82 The decision in Morgan v. Virginia, (1946) 328 U. S. 373, 66 S. Ct. 1050, was only to the effect that no state could compel segregation in interstate traffic because this would destroy the uniformity required by the commerce clause. It is possible that segregation under regulations voluntarily established by a carrier cannot be upset until Congress amends the law.
constitutional only insofar as they affect rights guaranteed by the federal government other than those specified in the 14th or 15th Amendments, the latter being limited to state action.

This basic rule was announced in the *Civil Rights* cases,\(^8\) shortly after the enactment of the last in the series of Civil Rights laws.\(^9\) That law had declared all persons in the United States entitled to the equal enjoyment of all facilities offered by inns, common carriers and places of public amusement. It gave the person discriminated against the right to sue for a penalty and also made the offense a crime. Five test cases came to the Supreme Court, four arising out of criminal prosecutions and one out of an action for damages. They involved theatres, hotels and railroad service.

The majority of the Court, by Mr. Justice Bradley, held that the 14th Amendment compelled only governmental action and that the discrimination the various private persons had practiced did not come within that category. Mr. Justice Harlan, in solitary dissent, believed that the law could be sustained under either the 13th or 14th Amendments. He thought that Congress could now implement the prohibition against slavery by making freedom mean something, just as it had, before the Civil War, implemented slavery by enacting the Fugitive Slave laws.\(^9\) He also expounded the view that the privileges and immunities clause of the original Constitution covered the freed slaves and was not limited to state action as such. Justice Harlan also supported the law under the 14th Amendment on the theory that the businesses reached by the Civil Rights Act were in effect state agencies, since charged with duties to the public and amenable to governmental regulation. He said:\(^9\)

"The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment of privileges—belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained. At every step, in this direction, the nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, 'for it is ubiquitous in its operation, and weighs, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot.' Today, it is the colored race which

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\(^8\) *Civil Rights Cases* (1883) 109 U S. 3, 3 S. Ct. 18, 27 L. Ed. 835.
\(^9\) 18 Stat. (Part III) 335 (1875).
\(^9\) *Civil Rights Cases*, (1883) 109 U. S. 3, 61, 3 S. Ct. 18, 27 L. Ed. 835.
is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant."

This dissent has produced no following. The Supreme Court has consistently adhered to the view of the majority. The only indication of a possible deviation is to be found in the recent Texas White Primary case, *Smith v. Allwright*.

Whether or not the exclusion of Negroes from participation in primary elections in the Southern States (where such elections actually dominate the final choice) violated the 14th Amendment has been under consideration by the Supreme Court over a period of years. At first, Texas disqualified Negroes from participation in the primaries, by express provision of law. After the Supreme Court unanimously condemned this law in *Nixon v. Herndon*, Texas amended its election laws and gave to the state executive committee of the Democratic party the right to prescribe qualifications for voting in the primaries. When the new law came before the Supreme Court, it adhered to its earlier view (but this time by a five to four decision) on the ground that the resulting discrimination was still caused by state action. Thereafter the state convention of the party itself made the decision to disqualify. Thus, said a unanimous Court, in *Grovey v. Townsend*, no longer constituted state action. It seemed, therefore, that the Democratic party had found a way of effectively disfranchising the Negro in the South.

Some years after the decision in the *Grovey* case, the Supreme Court decided, in the *Classic* case, that Congress had power to regulate the primary where it was an integral part of the election machinery or where it actually determined the final result. The

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92 Hodges v. United States, (1906) 203 U. S. 1, 27 S. Ct. 6, 51 L. Ed.
1422 Wheeler v. United States, (1920) 254 U. S. 281, 41 S. Ct. 133, 65 L.
Ed. 270.
1292.
97 United States v Classic, (1941) 313 U. S. 299, 61 S. Ct. 1031, 85
L. Ed. 1368
Smith case was then brought from Texas to the Supreme Court, with the result that the Supreme Court overruled the Grovey case, on the ground that in Texas the primary was part of the approved election machinery established by the State. Only Mr. Justice Roberts dissented. In that case, however, the Supreme Court did not refer to the second basis for federal concern with primaries which had been referred to in the Classic case. the controlling influence of the primary in the final election. Whether the Court intended by its silence to overrule the Classic case to that extent may soon be evident, since South Carolina and Georgia have repealed all their laws regarding primary elections. In consequence, Negroes will in these states be prevented from voting in the primaries. Since the primary controls the result in these, as in most of the Southern states, the Supreme Court may use this fact as a basis for upholding Negroes’ rights. It can be argued, moreover, that the repealing laws were themselves unconstitutional, since directly aimed at producing discrimination against Negroes and, therefore, constituting discrimination by the states as clearly as if the laws directly barred Negroes from the primaries.

There is another aspect to these primary cases. Whether or not a primary election controls the result or is regulated by the state, it should be within the power of Congress to prohibit any interference with voting, when only federal offices are involved. Certainly Congress could punish a private person who, by force, prevents a citizen from voting in a primary held for the selection of a member of Congress. The argument that the primary was the private act of a political party should make no difference here. And the result should be the same when the denial of the vote is not by force, but by a disqualification based on race. It may be that the existing civil rights law are not adequate to reach all aspects of primary elections. Perhaps specific legislation by Congress is necessary more fully to extend federal control over primary elections. And, while the Supreme Court has given no hint that it would approve such legislation, the statement of Mr. Justice Reed in the Smith case may lead the way.

“The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimina-

ution in the election. Constitutional rights would be of little value if they could be thus indirectly denied."

Despite rulings in particular cases to the effect that the agency whose action is complained of was an agency of the state, the rule remains firmly established that Congress has no power to prohibit discrimination by private persons, except as an incident to one of the powers granted by the original constitution, such as the power to regulate interstate commerce, or the power of taxation or the appropriation of funds.

In one field, nevertheless, the power of Congress to deal with offenses committed entirely by private persons may be upheld by the Supreme Court. That is when persons accused of crime are deprived by a lynching of their opportunity for a trial. It has been urged that lynchings in which no state officials take part are punishable only under state law, because no wrong has been done under color of state authority. As against this, there is the argument that, since lynchings are possible only when the state has failed in its duty of protection, these have resulted from state action within the intendment of the 14th Amendment. It can be further urged that, since it is of the essence of due process that a person accused of a crime be given a judicial trial, a denial of this opportunity through lynching constitutes the deprivation of a right secured by the federal Constitution. Indictments based on that theory have been upheld in district courts, but until now the question has not been passed upon in the higher courts since no convictions have been obtained. This argument would not apply to a lynching which took place before the suspect had been formally charged with crime, nor would it perhaps apply to a lynching after a suspect had been released on bail. However, the Department of Justice has deemed this latter situation to be sufficiently within its jurisdiction to have investigated the circumstances of the lynching in Monroe, Georgia, unfortunately, without any practical results.

100United States v. Harris, (1883) 106 U. S. 629, 1 S. Ct. 601, 27 L. Ed. 290, is generally cited in support of this view. This, however, is not decisive, since the prosecution involved only the equal protection and not the due process clause of the 14th Amendment.
There are two other fields in which attempts have been made to induce the Courts to depart from the general rule that private action is not subject to the restrictions of the 14th Amendment. As we have noted, there are many localities in which Negroes are denied the right to live on account of restrictive covenants entered into between land owners. In *Corrigan v. Buckley*103 the Supreme Court dismissed an appeal brought to review a District of Columbia decision enforcing such a covenant. Mr. Justice Sanford stated that neither the 13th nor the 14th Amendment had any application to contracts of this character and that it could not be said the action of the courts themselves violated the amendments.104 This case has105 been interpreted as holding only that the equal protection clause has no application to the District of Columbia. Whether this is true or not may soon be decided, since the question has recently been litigated in a number of states.

Discrimination by labor unions has also resulted in a considerable amount of recent litigation. The United States Supreme Court has given Negroes limited protection, although not on constitutional grounds, in holding that a union which has been certified as the collective bargaining agent under the Railway Labor Act, is bound to protect equally all workers for whom it bargains.106 Those cases did not have to do with admission to membership, but only with a discriminatory use of bargaining power.

However, in *Betts v. Easley*,107 the Kansas Supreme Court held that a union bargaining under the Railway Labor Act was, in effect, a governmental agency and, therefore, bound to refrain from discrimination in membership. Other cases have held that

104Judical action can, of course, violate the 14th Amendment, as when a judge conducts an unfair trial, or arbitrarily discriminates on the ground of race. Judicial action has also been held to be a violation of due process when it interferes with freedom of speech. See Bridges v. California, (1941) 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192; Swing v. A. F. L., (1941) 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855. It has been argued that the enforcement of a restrictive covenant constitutes judicial denial of equal protection. McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstituutional. (1945) 33 California Law Review 5.
unions with closed shop contracts could not at the same time en-
force the contracts and exclude Negroes. Until now, however, no
court has protected Negroes against discrimination by unions
certified under a State Labor Law, on the ground that such unions
have thereby become state agencies.

Some possible basis for the extension of constitutional pro-
tection into these fields may be derived from the recent decision in
Marsh v. Alabama. Members of Jehovah's Witnesses were
ordered off the streets of a company-owned town. This was held
to be a denial of freedom of speech. Mr. Justice Black pointed out
that the company was performing a public function. Of course, it
must be borne in mind that the case came to the Court as a result
of a conviction under a state law, so that what was directly in
issue was state action.

There are possibilities, therefore, that the rights guaranteed
by the 14th Amendment may be extended over areas previously
considered wholly private, even if the Supreme Court adheres to
its original basic position.

4. "Color of State Law"

One of the provisions of the Enforcement Act which still is
law punishes any deprivation of federally secured rights, if per-
petrated under color of a state law or a custom. The Federal
Judicial Code permits suits to be brought for the vindication of such
wrongs as these, regardless of the amount in controversy. No
difficulty has arisen in applying the provisions, where an attack
has been made directly on the validity of some state or municipal
law under which state officers have acted. Such attacks were the
basis for federal jurisdiction in several of the cases already dis-
cussed.

The difficulty in applying the law has arisen where state offi-
cials acted in violation of state law, rather than in obedience to its
commands. The Supreme Court recently considered the problem
in the Classic case. There state election commissioners were
charged with having falsely counted ballots cast in a primary elec-

tion. Obviously, the state law did not contemplate that ballots should be improperly counted. Mr. Justice Stone said113

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

The matter was more fully reviewed in the Screws case.114 The majority of the Court rejected the argument that, since the acts complained of were criminal under state law, they could not have been under color of that law. Mr. Justice Douglas said:115

"It is clear that under 'color' of law means under 'pretense' of law Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it."

From this decision Justices Roberts, Frankfurter and Jackson dissented on the ground that the legislation was intended to prevent defiance of the Constitution and was not, therefore, applicable where the state obeyed the Constitution, although its officers had flouted the law116 The minority considered the view expressed in the Classic case as unnecessary to that decision and that it should be overruled.

5. Proposed Changes

There is one thing which the federal government can do to alleviate the conditions described in the introduction to the present article without raising any question of constitutional power. To be sure, this would affect only a very limited area, the District of Columbia. For Congress has the same great and plenary power in the District of Columbia that the various state legislatures possess over their own territories. Without fear of judicial nullification it could enact a comprehensive civil rights law abolishing all remnants of Jim Crowism, prohibiting discrimination in employment, and outlawing restrictive covenants, and could so show the country and the world that racism must vanish in the nation's capital. Until Congress is willing to do at least this much, speculation regarding the extent to which it can extend control in these matters over the states remains largely academic.

A few changes can be made in existing law, without encounter-

113Id. 326.
115Id. 111.
116Id. 142.
ing constitutional objection. One, is the simple enactment that all interferences with federally secured rights are criminal, and not as now, that only those resulting from conspiracy or under color of state law are. This change would not, of course, be very far reaching. But there is no reason for not making it. Congress could also strengthen the present laws dealing with the suffrage, particularly by making it an offense to interfere in any way with presidential elections, to overcome a lower court ruling\textsuperscript{117} that existing laws do not cover these. Specific legislation may also be desirable in order to broaden the base for dealing with primary elections, a base now somewhat limited by the Supreme Court, in the \textit{Classic} case.\textsuperscript{118}

Congress might further use the commerce power both by prohibiting segregation by inter-state carriers and by prohibiting discrimination by labor unions or employers engaged in inter-state commerce. Finally, Congress could make clear that none of its agencies may either practice or tolerate discrimination or segregation. This would put an end to the actual encouragement of restrictive covenants now given by some government-lending institutions. It might also use its power of appropriation by conditioning aid to local areas, for such needs as education and highways, on abolition of racial discrimination and segregation. The difficulty is that aid so conditioned might be refused, leaving the people worse off than before. No such objection can be advanced, however, against a similar use of the taxing power. There is no reason why educational or charitable institutions which discriminate or segregate should have the privilege of tax exemption.

Beyond these simple things there seems no scope for change which does not raise constitutional questions. So we should consider whether the Supreme Court can be induced to overrule the most restrictive of its holdings that the privileges and immunities protected by the 14th Amendment are limited in scope, that segregation is not denial of equal protection, and that Congress has no power to prevent even discrimination by private persons, except in the limited field of inter-state commerce.

There is, in my opinion, no likelihood that the Supreme Court will withdraw from the interpretation it has consistently placed upon the privileges and immunities clause. But such withdrawal


is no longer as important as it once was. For, by holding that most of the basic privileges are protected against state action by the due process clause of the 14th Amendment, the Supreme Court has, in effect, accomplished the same result as though it had given a broad meaning to the privileges and immunities clause itself.

Nor can it be expected of the Supreme Court that it will abandon the ruling that the 14th Amendment does not reach private persons. For it is undeniable that the equal protection clause, by its express terms, is a limitation on the states alone. And it can hardly be stretched to cover every kind of private discrimination. On the other hand, Justice Harlan's dissent in the Civil Rights cases has great force. This can best be summed up by the statement that discrimination in the use of facilities available to the general public is both a badge of slavery which the 13th Amendment was designed to eliminate and a use of state power because of state control over such facilities. That argument becomes particularly persuasive when the facilities involved are those of state created monopolies, such as means of transportation. And there is recent judicial authority to support this view with respect to labor unions exercising functions created by law and the attempt by a company town to keep propagandists off its streets. A new attempt by Congress to outlaw discrimination in all such quasi public enterprises might well be sustained by the present Supreme Court.

As to segregation, we have learned much of its motivation and consequences in the half century since the Supreme Court decided that, if the Negro feels aggrieved, his consciousness and not the law, is at fault. We have come to understand that inferiority complexes are no better for society than for the individual. It seems reasonable, therefore, that the Court can be shown the lack of realism in its former view, provided all the facts of segregation be properly presented to it. Such a presentation will require a Brandeis-like brief, one which would draw on history and sociology on a world scale. Against a background so fully presented, certainly it must at least become clear that no equality exists under the law, when one group of citizens is treated differently on account of its color. The pretense that there can be separate, but equal, facilities is a hollow sham. It is time the Supreme Court struck it down.

Despite the argument which has been advanced that the framers of the 14th Amendment intended private persons to be subject to its restraints: Flack, The Adoption of the 14th Amendment (1906), Boudin, Truth and Fiction about the 14th Amendment (1938), 16 N. Y. U. L. Q. R. 19. Civil Rights Cases, (1883) 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835. See cases cited in notes 106, 107, and 108 supra.
Should these prognostications prove sound, then the area for Congressional action would, of course, be immensely extended. There might be real hope that the disabilities suffered by the Negro were en route to extinction, Congress would be able to outlaw all forms of Jim Crowism in railroads, buses and other forms of transportation, perhaps also in theatres, hotels and any public places licensed by the state, segregation by state law would come to an end, and Negroes would not be relegated to separate schools, colleges, parks and playgrounds.

These possible reversals by the Supreme Court would not, of course, touch the power of Congress to deal with lynching by private individuals. We have already discussed the legal problems here involved. Whatever their ultimate solution by the Supreme Court, Congress might well remove any doubts regarding the applicability of existing law by passing one of the many bills on the subject which have, from time to time, been proposed.

Nor would Supreme Court reversal affect the suffrage. In this field Congress can perhaps do little, directly. Three devices are at present used to restrict the vote and particularly, to exclude Negroes: the white primary, the poll tax and educational requirements. The Supreme Court has struck down the first of these in its most universal form and will probably deal the same way with recent attempts to overcome that ruling. The poll tax is so old, it has never been successfully attacked in the courts. Bills to outlaw it have been blocked by filibusters in the Senate. Their constitutionality has been questioned on the ground that the qualifications of voters are left entirely to the states, except as these have been restricted by the 15th and 19th Amendments which prohibit discrimination on grounds of race or sex. On the other hand, it has been urged that Congress can outlaw the poll tax because of its control over the manner of holding elections for federal offices. The argument is that the tax tends to produce fraud, since it is often paid as an inducement to voting a particular way. Since Congress can prevent fraud, it should have the power to outlaw what leads to fraud.

No argument such as this can be advanced in support of

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123 Art. I, sec. 2.

124 The constitutionality of such a measure is said to be "clear," 47 Col. Law Rev. 94.
gressional power to supervise state educational requirements. On their face, these are not improper. They become so only when used so as to keep out certain groups. The fault is one of administration. It is common to ask simple questions of those in favor, difficult ones of Negroes and other "undesirables." Relief from this abuse can probably be had only in the courts. That may prove difficult to accomplish, just as it was for a long time difficult to establish discrimination in the selection of jurors. But a determined campaign, particularly if supported by local citizens of courage and standing, would be effective. Ultimately that question must come to the Supreme Court so that it can lay down some rules of general application.

There is a way, however, in which Congress can reach these restrictions on the suffrage. Section 2 of the 14th Amendment provides that the basis of representation of any state shall be reduced in the proportion which the number of male citizens over 21 denied the right to vote for reasons except participation in rebellion or crime bears to the total number of male citizens over 21. It has been enacted as a statute. Although there is little doubt that the facts in many states would justify invoking this provision, political considerations have heretofore prevented its ever being used.

But it has been suggested that the provision refers only to unconstitutional deprivations of the right to vote and does not, therefore, apply where the voting lists are reduced by poll tax or educational requirements. Such interpretation of the amendment disregards its express exception permitting a denial of the vote for crime. It also ignores the fact that, when the 14th Amendment was adopted, the Constitution contained no restrictions on the right to vote. These were adopted later, in the 15th and 19th Amendments. It seems unreasonable, therefore, to accept this restrictive interpretation of the meaning of the second section of the 14th Amendment. And it can hardly be doubted that Congress

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126 See discussion in 47 Col. Law Rev. 95, 96.
if it would, could discourage state laws restrictive of the suffrage by holding hearings in a first move to implement the 14th Amendment. The political considerations which have prevented this in the past may not always remain potent. It is clear, however, that only Congress can take this action. The courts will not themselves enforce this provision of the 14th Amendment.\textsuperscript{120}

Entirely apart from all changes in the laws themselves is the question of their administration. This depends both upon a vigorous attitude in the Department of Justice and a cooperative one in the communities affected. To some extent the question of crime enforcement is involved in the question of jury service. Juries from which Negroes are systematically excluded tend to be less sympathetic to the enforcement of the civil rights laws than do mixed juries. The very experience of serving on juries with Negroes should make the white members of such juries more tolerant. The question has also been raised whether the local prosecutors are always adequate, because of their reluctance to antagonize politically powerful interests. We are here dealing with a subtle problem in community relationships which it will take time and education to improve.

It has been suggested that it might be easier to obtain convictions if the law were amended so as to avoid the necessity of persuading juries that the defendants had wilfully sought to invade constitutional rights. This could be accomplished in two ways by simply deleting the word wilful from the statute, by replacing the present law with a new one making it a crime to violate certain specific rights. The opinions in the \textit{Screws} case\textsuperscript{13a} cast grave doubt upon the constitutionality of the first proposal. The second would no doubt remove the argument that the law is too vague to be enforceable, an argument which led the majority of the Supreme Court to insist the offense must be a wilful one. Such an amendment would specify precisely those federally secured rights, interference with which would constitute a crime. The suggestion is persuasive, but not, I think sound. For, while specific laws might produce more convictions for the particular offenses described, necessarily there would be others left out, either because Congress had not thought of them at the time or due to the difficulty of obtaining Congressional agreement that they should be included.

\textsuperscript{120}See Saunders v Wilkins, (C.C.A. 4th 1945) 152 F (2d) 235, cert. denied (1945) 66 Sup. Ct. 1362.

\textsuperscript{13a}Screws v. United States, (1945) 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495.
It must be remembered also that the conventional methods of law enforcement by criminal or civil action have proved ineffective in this field, even in relatively enlightened states, such as New York. When the New York Legislature planned a large scale attack on discrimination in employment, it used administrative procedure found valuable in dealing with labor relations under the Wagner Act. Perhaps, therefore, better results can be obtained through extending the area of administrative activity than by changing existing criminal law.

Improvement in this field must, therefore, result from general community action, implemented by Congress and supported by the Supreme Court. There is no present excuse for Congress to refuse to exercise its constitutional powers to the full. There is every reasonable hope that the Supreme Court, repudiating some ancient doctrines, will considerably extend Congressional power. All decent elements in every community should, therefore, cooperate in accomplishing these results and in seeing to it that the laws are vigorously enforced. Only in that way can the blots of lynching and other denials of civil rights be obliterated.