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THE UNHAPPY HISTORY OF CIVIL RIGHTS LEGISLATION

Eugene Gressman*

The enforcement by federal legislation of the constitutional rights of individuals is a story written largely in terms of confusion, distortion and frustration. Seldom, if ever, have the power and the purposes of legislation been rendered so impotent. Indeed, this story constitutes one of the saddest chapters in the historic struggle to effectuate the American ideal of freedom and equality for all.

Act I—The Legislative Prelude

Congressional implementation of the constitutional promises of freedom encompasses but a brief span of nine years, 1866 to 1875. Prior to that period the Constitution protected fundamental personal rights only against infringement by the federal government. This protection, embodied primarily in the first ten amendments, was not designed to be a sword or a shield against infringement either by the states or by individuals. And it was a protection essentially negative in character, permitting individuals to assert their rights only as a defense to some sort of governmental action. Such limited guarantees reflected the early fears of a powerful central government and the early reliance on the states as the protectors of the individual's rights and liberties.

The Civil War and its aftermath, however, wrought great changes in the constitutional framework of civil rights. The victory of the northern armies meant the effective end of slavery as a legalized institution. The slavery debate, which had so long embroiled the halls of Congress, receded into nothingness. In its place came a vigorous controversy over the federalist or nationalist tendencies of the abolitionists as they moved to consolidate their victory. This great controversy resulted in three new constitutional amendments and five congressional statutes supplementary thereto, all of which went beyond the immediate problems created by the emancipation of the Negro and caused a most profound shift in the status of the federal government relative to the civil rights of all inhabitants. The abolitionists and the Republican party reacted violently to the feeling of anti-federalism which had so long marked this area of human freedom. The states' rights doctrine suffered a complete albeit temporary eclipse. The national government no longer was viewed as the prime threat to civil liberties. Rather it

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was looked upon as the defender of the individual from assaults on his freedom stemming from state or private action. The nationalistic implications of the abolitionist movement came to their full fruition.

The first episode in this constitutional upheaval was the adoption and ratification of the Thirteenth Amendment, ratification occurring on December 18, 1865.¹ This amendment abolished both slavery and involuntary servitude throughout the nation and gave Congress the power to make its provisions effective by appropriate legislation. Here for the first time was a constitutional command respecting individual freedom which was not confined in its reach to the federal government. It was also directed to the states. And, most significantly, it was directed to private individuals. As the Supreme Court noted, this amendment was "not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”²

The opponents of the Thirteenth Amendment attacked it as an unjustifiable invasion of the rights of the states and an undue extension of the power of the federal government. Indeed, it was argued that the amendment was so drastic in this respect as to destroy the federal character of the government and to be inconsistent with the whole spirit of the Constitution.³ These opponents assumed, as did the proponents, that the amendment was of a sweeping nature, that it went beyond the outlawry of personal bondage and guaranteed the emancipated Negro certain minimum rights, and that Congress would be enabled to safeguard and protect those rights by legislation. The guaranteed rights

¹ But see Hamilton, "The Legislative and Judicial History of the Thirteenth Amendment," 9 NAT. BAR J. 26 at 47-48 (1951), contending that December 9 rather than December 18, 1865, is the correct date of ratification.

² Civil Rights Cases, 109 U.S. 3 at 20, 3 S.Ct. 18 (1883). It has also been pointed out that: "The Amendment nullified two parts of the Constitution: the fugitive slave and the three-fifths provisions. The former (Article IV, Section 2) provided for the rendition of 'any person held to service or labor' who should flee to another state. The much controverted fugitive slave act of 1850 had been repealed in 1864. The three-fifths provision (Article 1, Section 2), one of the famous compromises of 1787, stated that in apportioning direct taxes and representation in the House of Representatives the respective numbers should include three-fifths of all 'other persons,' that is, slaves. Thus a consequence of the Amendment was an increase in the southern representation by about twenty seats. This prospect worried the Republicans, quickened their interest in Negro suffrage, and produced the section in the Fourteenth Amendment penalizing by a reduction in representation any state denying suffrage to Negroes." Hamilton, "The Legislative and Judicial History of the Thirteenth Amendment," 9 NAT. BAR J. 26 at 56 (1951). See, in general, Tenbroek, "The Thirteenth Amendment to the Constitution of the United States—Consummation to Abolition and Key to the Fourteenth Amendment," 39 CALIF. L. REV. 171 (1951).

³ See, for example, the remarks of Rep. Fernando Wood, Democrat of New York, CONG. GLOBE, 38th Cong., 1st sess., p. 2941 (1864).
were thought to include equality before the law, protection in life and
person, and free opportunity to live, work and move about. And the
slavery to be abolished by the amendment was to include the incidents
of the system which impaired and destroyed the civil rights of white
persons. White citizens residing in the South and sympathizing with
the Negro or the North were to be freed of the kidnapping, imprison-
ing, mobbing and murdering which the slavery system had spawned.

Thus, in the eyes of its supporters and opponents, the Thirteenth
Amendment was the final step in the long campaign to end slavery and
all its incidents. Not only were the Negro and his white friends to be
protected in their privileges and civil liberties but the federal govern-
ment was to be the effective means for achieving and perpetuating those
ends through appropriate legislation.

But the need for legislative appendages to the Thirteenth Amend-
ment became almost immediately apparent. Something more than
the idealistic words of the amendment was essential. Widespread atroc-
ities against the free Negroes and their white friends continued in the
South. Most southern legislatures enacted Black Codes, the many
restrictions of which resulted in forcing Negroes to work for their
former masters or other white men. The Negro in effect remained a
slave in all but the constitutional sense. By virtue of these codes, he
was "socially an outcast, industrially a serf, legally a separate and op-
pressed class."

The Reconstruction politicians became aroused at this resurgence
of the Dred Scott philosophy, a philosophy which declared that Ne-
groes were not citizens of the United States and had no rights which the
white man was bound to respect. The 39th Congress, convening in
December 1865, witnessed a variety of proposals, all designed to strike
down the offensive Black Codes. The preceding Congress had estab-
lished the Freedmen's Bureau to guard the general welfare and inter-
ests of former slaves; some of the proposals looked toward a strengthening
of the bureau, which had proved weak and ineffective. But the

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4 TENBROEK, THE ANTSALVERY ORIGINS OF THE FOURTEENTH AMENDMENT 142-143
(1951).
5 Id. at 149-150.
6 MANGUM, THE LEGAL STATUS OF THE NEGRO 26-27 (1940); Biddle, "Civil Rights
and the Federal Law," in SAFEGUARDING CIVIL LIBERTY TODAY 109 at 116 (1945); Hamil-
ton, "The Legislative and Judicial History of the Thirteenth Amendment," 9 NAT. BAR J.
26 at 61-62 (1951).
7 TENBROEK, THE ANTSALVERY ORIGINS OF THE FOURTEENTH AMENDMENT 163
(1951).
8 See Dred Scott v. Sanford, 60 U.S. 393 (1856).
Republican program for the new Congress was broader in its civil rights conception than these various proposals. It went beyond a mere nullification of the Black Codes and a buttressing of the bureau. It was a program rooted in the new Thirteenth Amendment and was made applicable to all people, though immediately and primarily of aid to the freedmen. The time had come to exercise the congressional power to effectuate the amendment, with all its broad aspirations, by appropriate legislation.

The heart of this legislative program was a civil rights bill and a proposed amendment to the Freedmen’s Bureau Act. These two bills represented the efforts of the amendment’s framers, acting almost simultaneously with its ratification, to implement the intentions of the amendment.9 These two proposals were essentially the same, seeking to effectuate the amendment by protecting the civil rights and immunities of all people directly through the federal government. Section 1 of the civil rights bill and section 7 of the Freedmen’s Bureau bill had identical lists of the civil rights to be guaranteed by the national government:

1. The right to make and enforce contracts;
2. The right to buy, sell and own realty and personalty;
3. The right to sue, be parties and give evidence; and
4. The right to full and equal benefit of all laws and proceedings for the security of persons and property.

Neither bill was designed exclusively for the benefit of Negroes. The Freedmen’s Bureau bill extended the services of the bureau in protecting these rights to “refugees and freedmen in all parts of the United States,” while the civil rights bill covered “the inhabitants of any state or territory of the United States.” Moreover, both state action and state inaction fell within the ambit of these bills. And so did private, individual action. The evidence before Congress at this time was replete with instances of private individuals committing outrages and atrocities on freedmen and their white sympathizers.10

Together, these bills effectively nationalized the civil rights of all inhabitants of the United States, white or colored. They culminated the abolitionist concept of the federal government as the protector of the essential principles of liberty. But then a strange thing happened.

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The opponents of these bills, the same persons who had opposed adoption of the Thirteenth Amendment on the assumption that it incorporated the broad abolitionist doctrines, grounded their attack on a strict construction of the amendment. In their revised view, the amendment did no more than eliminate the relationship of master and slave; hence the bills, in revolutionizing the federal-state relationship as to civil rights, were unauthorized by the Thirteenth Amendment or by any other provision of the Constitution. 11

Those favoring the two proposals, of course, were consistent in their broad interpretation of the Thirteenth Amendment. The rights specified in these bills were said to be merely those guaranteed by the Amendment—the natural rights of man as set forth in the Declaration of Independence and the privileges and immunities of citizens flowing from the comity clause of the Constitution (art. IV, sec. 2). They argued that the opposite of slavery is freedom, that the Thirteenth Amendment established that freedom by abolishing slavery, and that the freedom so established consisted of the rights which had been denied the slaves and which were now spelled out in the two bills. And to them the concept of equal protection of the laws, which was so prominent in their philosophy and in their framing of the proposals, meant an affirmative, full protection of all the laws rather than a mere comparative equality. 12

In the words of Senator Trumbull, the principal draftsman of the Thirteenth Amendment and the civil rights bill, under that amendment "Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person and property; and any legislation or any public sentiment which deprived any human being in the land of those great rights of liberty will be in defiance of the Constitution; and if the states and local authorities, by legislation or otherwise, deny those rights, it is incumbent on us to see that they are secured." 13

11 Id. at 164-165.
12 Fairman and Morrison, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 STAN. L. REV. 5 at 16-18 (1949).
13 CONG. GLOBE, 39th Cong., 1st sess., p. 77 (1866). Senator Lane stated: "They [the Negroes] are free by the constitutional amendment lately enacted and entitled to all the privileges and immunities of other free citizens of the United States. It is made your special duty by the second section of that amendment, by appropriate legislation, to carry out that emancipation. If that second section were not embraced in the amendment at all your duty would be as strong, the duty would be paramount, to protect them in all rights as free and manumitted people. I do not consider that the second section of that amendment does anything but declare what is the duty of Congress, after having passed such amendment to the Constitution of the United States, to secure them in all their rights and
The civil rights bill became the Act of April 9, 1866, being enacted over the veto of President Johnson. It wrote into law that persons born in the United States and not subject to any foreign power were citizens of the United States, thereby overruling the *Dred Scott* decision. It further provided that such citizens, without regard to color, were entitled in every state and territory to the same right to contract, sue, give evidence, and take, hold and convey property, and to the equal benefit of all laws for the security of person and property, as was enjoyed by white citizens; and any person who under color of law caused any such civil right to be denied would be guilty of a federal offense.

The Thirteenth Amendment also provided the basis for another important though less controversial statute, the Anti-peonage Act of March 2, 1867. This law "resulted from practices found to prevail in the Territory of New Mexico and inherited from the days of Spanish rule, but went beyond the particular evil involved and prohibited the holding of anyone in involuntary servitude anywhere in the United States. This is still a living law, used to eliminate the various indirect methods by which many persons of low economic status in many of the states have been forced to labor for a particular employer against their will." The validity of this statute has never been in serious question and it has on occasion been used in conjunction with the Thirteenth Amendment to strike down offending state laws.

Litigation under the Civil Rights Act of 1866 found most courts willing to accept its constitutionality, although there were a few decisions to the contrary. But the doubts raised by the congressional opponents had a telling effect and many of the advocates of nationalization of civil rights felt none too secure Constitution-wise. Moreover, some of these advocates concluded that the rights secured by the 1866

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14 14 Stat. L. 27. President Johnson’s veto of the Freedmen’s Bureau was sustained by the Senate.
15 *Dred Scott v. Sanford*, 60 U.S. 393 (1856).
19 *Bowlin v. Commonwealth*, 65 Ky. 5 (1867); *People v. Brady*, 40 Cal. 198 (1870).
act should be placed beyond the possibility of repeal by any later Congress. They felt that the centralizing of civil rights authority in the federal government should be made a permanent part of our constitutional way of life rather than remain dependent upon the fluctuating discretion of succeeding Congresses.20

These doubts as to the adequacy of the Thirteenth Amendment and the 1866 act became so acute that it was soon deemed advisable to recast the provisions in a more detailed mold of a new constitutional amendment. Such was the motivating factor that led to the birth of the Fourteenth Amendment. Its proponents, fresh from the legislative battles of the Thirteenth Amendment, the 1866 Civil Rights Act and the Freedmen's Bureau bill, desired to solidify their intentions. They wished, by virtue of a new constitutional provision, to make certain that civil rights would be truly nationalized, that the federal government would inject itself into this realm that had hitherto been exclusively reserved to the states, and that all individuals would be protected in the full and equal enjoyment of the rights of person and property. More specifically, the provisions and implications of the 1866 act were meant to be incorporated into the Fourteenth Amendment.

It was also evident from the start that the framers of the Fourteenth Amendment had in mind more than the outlawing of state action which abused civil rights. The amendment sprang from the efforts of the congressional Joint Committee on Reconstruction.21 This committee studied the various suggestions made as to wording the new provision and also held formal hearings on the conditions then existing in the South. These hearings were significant in that they revealed that most of the abuses still being suffered by the Negro were at the hands of individual white persons rather than state governments or those acting under color of state law. Such private invasions of civil liberties were testified to by the vast majority of the 125 witnesses appearing before the committee.22 These hearings further demonstrated that the Negro was not alone in his tribulations; white persons who had supported the Union cause or who were bold enough to advocate civil rights for the

21 For the full story of the legislative developments and debates leading to the adoption of the Fourteenth Amendment, see FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); WARSOFF, EQUALITY AND THE LAW (1938); JAMES, FRAMING OF THE FOURTEENTH AMENDMENT (1939); Fairman and Morrison, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 Stan. L. Rev. 5 (1949). See also KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1914).
Negro were also the victims of terrorism in the South.\textsuperscript{23} These factors were thus clearly in the minds of the committee members when they drafted the all-important first section of the Fourteenth Amendment. The demonstrated fact that violations of civil rights were primarily the product of individual rather than state action made it unreasonable for the committee to limit the scope of the amendment to state action. In fact, the committee's report,\textsuperscript{24} recommending "such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic," made plain the universal scope of the amendment. The subsequent debates in Congress implicitly assumed that individual action, not just state action, was covered by the amendment.

The various proposals for wording the Fourteenth Amendment ran from a simple prohibition of discrimination in state or national laws on account of race or color to a granting of power to Congress to secure to all persons "full protection in the enjoyment of life, liberty, and property."\textsuperscript{25} The contrast here was between a flat constitutional prohibition and a broad grant of power to Congress. But the basic idea of equal or full protection of the laws was present in all proposals. The final draft, as presented to the states for ratification, was something of a compromise. It contained both a constitutional prohibition and an allocation of power to Congress. The first section contained but eighty words, all of them designed to give national protection to persons or citizens in their natural rights:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This section was intended to be read in connection with the fifth section of the amendment, which gave Congress the power to enforce the amendment "by appropriate legislation."

The remarks in Congress concerning the first section, while meager, revealed the consistently broad intentions of the amendment's support-

\textsuperscript{23} See Flack, The Adoption of the Fourteenth Amendment 72 (1908).
\textsuperscript{24} Report of the Joint Committee on Reconstruction, p. xxi (1866).
\textsuperscript{25} The various forms of the proposed amendment are set forth by Tenbrook, The Antislavery Origins of the Fourteenth Amendment 187-190 (1951).
ers. The early drafts had been in a more positive form in which Congress was directly authorized to secure to all persons the equal protection of the laws and to all citizens their privileges and immunities. Repeated statements on the floor of Congress revealed that this form of the equal protection clause related to the obligation of government to protect men in their natural rights and that such protection, when supplied, must be equal to all. But the final draft was much more negative in form. The prohibitions were made primarily on the states, with power being granted Congress to make such prohibitions effective by appropriate legislation. Just what was the purpose of this shift?

Congressional speakers made plain that section 1 of the final draft was designed to make certain that the Civil Rights Act of 1866 was constitutionally valid, a proposition which naturally drew forth the old charge that an undue amount of power was being concentrated in the federal government. But more than this was essential to the promoters of nationalized civil rights. Some future Congress might repeal the 1866 act and leave these rights shorn of federal protection. To eliminate that possibility required that the provisions of the act in some way be inserted into the new amendment itself. To do that entailed

26 This form of the proposed amendment was said to give "the power to Congress to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship. It is intended to enable Congress by its enactment when necessary to give to a citizen of the United States, in whatever state he may be, those privileges and immunities which are guaranteed to him under the Constitution of the United States. It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and to every citizen in whatever state he may be that protection to his property which is extended to the other citizens of the state." Statement of Rep. Woodbridge, Cong. Globe, 39th Cong., 1st sess., p. 1088 (1866).

27 Rep. Eliot stated: "I support the first section because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred. I voted for the civil rights bill, and I did so under a conviction that we have ample power to enact into law the provisions of that bill. But I shall gladly do what I may to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon that question." Cong. Globe, 39th Cong., 1st sess., p. 2511 (1866).

28 See statement of Rep. Garfield, 39th Cong., 1st sess., p. 2462 (1866): "The civil rights bill is now a part of the law of the land. But every gentleman knows that it will cease to be a part of the law whenever the sad moment arrives when that gentleman's party [the Democratic] comes into power. It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here."
more than a simple grant of power to Congress to secure civil rights, which was what the early drafts of the amendment had done. So an outright prohibition was framed. Since Congress was already prohibited by other sections of the Constitution from encroaching upon these rights, the new prohibition was addressed to the states, combined with a grant of enforcement power to Congress. Such a prohibition was believed to be effective as to individual action, for if the state did not act to curb or punish the individual violators there would be state inaction of the type comprehended by the amendment, and Congress could then provide adequate remedies.

The first sentence of the amendment, making all persons born or naturalized in the United States "citizens of the United States and of the State wherein they reside," was added in the final stages of the amendment's development and was drawn from the 1866 act. It was feared that without such a definition of citizenship there might be an effort some day to take away from the Negro the protection of the amendment by declaring him not be a citizen, as the Dred Scott decision had done. And so the definition was added. National citizenship was thereby made primary and independent, while state citizenship was relegated to a secondary, derivative status. Such a concept of a paramount national citizenship to which fundamental rights adhered had been the basis of the 1866 act and had been implicit in the whole movement to nationalize civil rights. It was the necessary premise of all the remainder of the first section of the amendment, especially the privileges and immunities clause. The latter clause, forbidding the states from abridging the privileges or immunities of citizens of the United States, has real meaning only against a background of national citizenship accompanied by the basic rights of the individual. The promoters of the Fourteenth Amendment were not interested in prohibiting the states from interfering with the narrow, technical relationships of a citizen to the federal government. They were desirous of precluding the states from impinging upon the rights to life, liberty and the pursuit of happiness. And they thought of those rights as necessarily belonging to national citizenship, rights which they labelled privileges and immunities.

In light of subsequent developments, it is unfortunate that the framers of the amendment did not give a more definite indication as

to the privileges and immunities which were intended to be placed under the protective umbrella of the federal government. The phrase "privileges or immunities" referred plainly enough, in the framers' minds, to the fundamental rights of man, enumerated at least in part in the provisions of the 1866 act. They felt that the Declaration of Independence and the Constitution itself had made self-evident the great rights which attached to those in allegiance to the federal government. And they knew that as long ago as 1823 the phrase "privileges and immunities of citizens," as used in article IV, section 2, of the Constitution had been judicially interpreted to include all fundamental rights. Moreover, they may have feared that to enumerate the rights once again in the Fourteenth Amendment was not only redundant but might close the list and prevent subsequent recognition and protection of additional rights.

In any event, it was the privileges and immunities clause which the framers regarded as the core of section 1 of the amendment. The equal protection and due process clauses were treated by them as of secondary importance, as appendages to the protection afforded the privileges and immunities or the fundamental rights of national citizenship. Those clauses simply meant that in guaranteeing the basic human rights covered by the privileges and immunities clause, the federal government was to see to it that these rights were recognized and effectuated by the states on an equal basis and that any necessary deprivation of those rights by the states was in accordance with basic principles of procedural due process.

Such was the intended nature of the Fourteenth Amendment upon its ratification on July 28, 1868. Less than two years later, on March 30, 1870, the Fifteenth Amendment was ratified. This constitutional addition stated that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," with power being given Congress to enforce the amendment by appropriate legislation.

Congress then made several bold efforts to enforce the Fourteenth and Fifteenth Amendments "by appropriate legislation." On May 31, 1870, a new Civil Rights Act was passed. This statute reenacted the 1866 act under the belief that whatever doubts may have previously

32 16 Stat. L. 433. On February 28, 1871, an amendment to the 1870 act was adopted, making a variety of additions. 16 Stat. L. 453.
existed as to constitutional validity were now removed by the Fourteenth Amendment. It also added criminal penalties for depriving anyone of the rights enumerated in the earlier law. In addition, the 1870 act made elaborate provisions to effectuate the right of free suffrage without distinction as to race, color or previous condition of servitude. Criminal sanctions were attached to any interference with an inhabitant's right to qualify as a voter, to register or to vote. A conspiracy section was added, punishing as a felony conspiracies to violate the statute or to injure, oppress, threaten or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States.

On April 20, 1871, Congress passed another statute "to enforce the provisions of the Fourteenth Amendment to the Constitution." Known as the Ku Klux Klan Act, this statute was the indignant reaction of Congress to conditions in the southern states wherein the Klan and other lawless elements were rendering life and property insecure. Both civil and criminal penalties were established for the deprivation of rights under color of law. The pith of the act was section 2, making it an offense to "conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose . . . of depriving any person or any class of persons of the equal protection of the laws, or equal privileges or immunities under the laws." If state authorities were unable or unwilling to prevent the deprivation of a constitutional right, and violence resulted, the President was empowered to take appropriate measures to suppress the violence. Moreover, the person whose civil rights were injured was given a civil cause of action against the officer who should have but did not protect him, a provision which was specifically directed against lynching and other forms of mob violence.

The capstone of the congressional civil rights program came on March 1, 1875, with the adoption of "An act to protect all citizens in their civil and legal rights." The preamble stated that it was essential to just government that "we recognize the equality of all men before the law, and hold that it is the duty of government in all its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political," and that it was "the appropriate object of legislation to enact great fundamental

34 18 Stat. L. 335.
principles into law.” Section 1 of the new law required all inns, public conveyances, theaters, and other places of public amusement to open their accommodations and privileges to “all persons within the jurisdiction of the United States,” subject only to legal conditions applicable alike to citizens of every race and color, regardless of any previous condition of servitude. Section 2 made a violation of this provision a misdemeanor and gave the injured person the right to recover a $500 penalty for each offense. Federal courts were given exclusive jurisdiction over cases arising under this statute, with all cases being reviewable by the Supreme Court regardless of the sum of money involved.

Here was the most penetrating of all the civil rights statutes. It was confirmatory of the principles which motivated the adoption of the Thirteenth and Fourteenth Amendments. The Thirteenth Amendment, it will be recalled, was designed to do more than illegalize personal bondage. The intention was also to remove the badges and incidents of slavery and involuntary servitude. Freedom from slavery meant freedom to exercise civil rights without discrimination based upon race or previous condition of servitude. The 1875 statute was molded so as to effectuate that principle where discrimination was practiced by individuals in the exercise of public or quasi-public functions. Public conveyances, inns, theaters and other places of public amusement fell into the public or quasi-public category by their very nature and by virtue of the various governmental controls traditionally exercised over them. To be deprived of their services because of race or previous condition of servitude was truly thought to be a badge of slavery which could be eradicated. The 1875 law was also framed in accordance with the idealistic formula of the Fourteenth Amendment. Negroes were undeniably citizens of the United States and of the states wherein they resided by virtue of the first sentence of that amendment. Hence they were entitled to all the fundamental rights which national citizenship was thought to entail. And they were also entitled to the benefits of the comity clause (art. IV, sec. 2), providing that “the citizens of each state shall be entitled to all the privileges and immunities

35 “... the essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances and theatres; but that such enjoyment shall not be subject to conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. The effect of the statute ... is, that colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white citizens; and vice versa.” Civil Rights Cases, 109 U.S. 3 at 27, 3 S.Ct. 18 (1883).
of citizens in the several states." Viewed either as national citizens or state citizens, Negroes possessed the right to be free from race discrimination with respect to civil rights enjoyed by white citizens. And Congress had power, given it by the fifth section of the amendment, to enforce that right. The 1875 act was an exercise of that power.

Such were the congressional efforts from 1866 to 1875 to make secure the constitutional ideals of freedom and equality for all. Never before or since has there been so much important federal legislation regarding civil rights. The changes made by this series of enactments and constitutional additions were of a most significant nature, altering substantially the balance between state and federal power. Civil rights were conceived of as inherent ingredients of national citizenship and as such were entitled to federal protection. And that protection was to be accorded in an affirmative fashion. Congress made what "was probably the first attempt in the history of mankind to destroy the branches of slavery after its root had been destroyed." The federal government was given effective weapons to combat and defend against all who would deprive inhabitants of the United States of their rights to be free of inequalities and distinctions based on race, color and previous condition of servitude. These weapons were usable against both private individuals and those acting under color of state law.

As stated in Justice Swayne's dissent in the Slaughterhouse Cases, the Thirteenth, Fourteenth and Fifteenth Amendments, in the light of their true purposes, "are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven. Fairly construed, these amendments may be said to rise to the dignity of a new Magna Charta."

Act II—The Judicial Coup d'Etat

But even before 1875, when Congress finished building this comprehensive structure of nationalized civil rights, corrosive elements were fast at work, elements which were eventually to leave the structure in ruins. The builders, fired with the combined zeal of the abolitionist movement, the post-war hatreds and the Reconstruction politics, had unfortunately left gaping structural weaknesses in their handiwork.
They meant well. But their minds moved faster and more precisely than their hands.\(^{37}\) The result was that the loose, unprecise language that had been written into the constitutional additions, particularly the Fourteenth Amendment, permitted the enemies of nationalized civil rights to persuade the strict constructionists of the judiciary that the amendments did not say what the framers had meant them to say. Soon the bold motives and the brave arguments of the architects of the constitutional revolution in civil rights were forgotten under the din of a judicial rewriting of their efforts.

The most far-reaching incident of this counter-revolution came in 1873 in the *Slaughterhouse Cases*. By the narrow margin of five votes to four, the Supreme Court twisted beyond recognition the intended meaning of the crucial privileges and immunities clause of the Fourteenth Amendment. The effect was that the broad application of that amendment that was necessary to sustain the civil rights program of Congress was rendered impossible.

The *Slaughterhouse Cases* did not directly involve any of the civil rights statutes. But the construction there given the privileges and immunities clause went to the very constitutional heart of those statutes. At immediate stake was a Louisiana law creating a monopoly in a single corporation for slaughtering animals. The Court upheld the validity of the monopoly grant on the ground that it was an appropriate exercise of the state’s police power to protect the health of the community. In so doing, the Court was met with the argument that the Fourteenth Amendment had given primary national citizenship to Louisiana citizens and had provided that no state could abridge their privileges and immunities, among which was the privilege of engaging in the lawful business of slaughtering animals. The majority of the Court refused to accept this argument.

Justice Miller, speaking for the majority, said that only national citizenship received any protection from the privileges and immunities clause and that such national citizenship did not comprehend any of the fundamental rights of the individual. Those rights adhered only to state citizenship. To bring civil rights under the concept of national citizenship, as the framers intended, would in the Court’s opinion be “so great a departure from the structure and spirit of our institution”

\(^{37}\) The recent words of Justice Frankfurter are apposite in this connection: “The dominant conditions of the Reconstruction Period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feelings caused inadequate deliberation and led to loose and careless phrasing of laws related to the new political issues.” United States v. Williams, 341 U.S. 70 at 74, 71 S.Ct. 581 (1951).
and would so "fetter and degrade the State governments" that it would not be permitted "in the absence of language which expresses such purpose too clearly to admit of doubt."

National citizenship, as construed by the Court, included only those few rights which were beyond the possible reach of state citizenship and which grew out of "the relationship between the citizen and the national government, created by the Constitution and federal laws." Included were such as the right to travel to the national capitol, the right to sue in federal courts, the right to free access to the subtreasuries and the right to protection abroad and on the high seas. But these were rights that had no practical relationship to the cruel violence which marked the infringements of civil rights in the South and which gave rise to the amendment. They were rights that were already constitutionally protected from state infringement by virtue of the supremacy clause (art. IV, clause 2). In short, as Justice Field stated in his dissent, the privileges and immunities clause was rendered "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."

The decision in the Slaughterhouse Cases has never been reversed. The Fourteenth Amendment to this day has never recovered its life blood which the Court there extracted from it. Completely shattered was the privileges and immunities clause upon which rested the intricate pattern of nationally protected civil rights. The criminal sections of the civil rights statutes that relied on that clause to put teeth into such national protection were doomed. For all practical purposes the privileges and immunities clause passed into the realm of historical oddities. In case after case the Supreme Court adhered to its stuifying interpretation, save for an abortive attempt in 1935 to utilize a pale shadow of the clause's intended power. Efforts were made in

38 16 Wall. (83 U.S.) 36 at 96. For a critical analysis of this case, see Boudin, Government by Judiciary, c. 23 (1932).


40 Colgate v. Harvey, 296 U.S. 404, 56 S.Ct. 252 (1935), surprisingly used the privileges and immunities clause to outlaw a Vermont statute imposing a discriminatory tax on loans made outside the state. The precise nature of that decision has never been clear, but the doubts were soon thereafter made moot by an express overruling of the case in Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406 (1940), noted in 38 Mich. L. Rev. 720 (1940). Justice Roberts' opinion in Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954 (1939), stated that the right to assemble to discuss the National Labor Relations Act and benefits thereunder was a privilege of national citizenship guaranteed by the Constitution, but these views were not adopted by the Court.
vain to secure the Court's approval of the clause to protect the rights mentioned in the first eight amendments.41

The judicially directed perversion of what the abolitionists tried to write into the Constitution did not stop with the Slaughterhouse Cases. Hard on the heels of that decision came United States v. Cruikshank.42 The Court there applied the Slaughterhouse doctrine directly to an alleged violation of a Negro's fundamental right to assemble. It held that an indictment under the conspiracy section of the 1870 act was defective in failing to allege that the right claimed to have been violated was one growing out of the Negro's relationship to the federal government. Unless an assemblage of Negroes were "for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government," a conspiracy to interfere with their right to assemble could not constitutionally come within the statutory scheme. In other words, the right to assemble peaceably is not a necessary attribute of national citizenship unless it is directly related in some way with the functions of the federal government. What the Court had done to the Fourteenth Amendment in the Slaughterhouse Cases it had now done to the civil rights legislation of Congress. In exercise of its power to enforce the amendment by appropriate legislation Congress was allowed to legislate only on the limited relationship between the citizen and the federal government.

But the Cruikshank case did even more damage to the civil rights program. The Court also announced that the first section of the Fourteenth Amendment consisted exclusively of restrictions upon the states and that it does not "add anything to the rights which one citizen has under the Constitution against another." The only obligation resting upon the United States, said the Court, was to see that the states did not deny their citizens the enjoyment of an equality of rights. "This the Amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty."43 Pursuing this thought still further in Virginia v. Rives,44 the Court restated the proposition: "The provisions of the Fourteenth Amendment of the Constitution . . . all have reference to State action exclusively, and not to any action of private individuals."45

42 2 Otto (92 U.S.) 542 (1876).
43 Id. at 555.
44 100 U.S. 313 (1879).
45 Id. at 318. See also Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836 (1948).
Knocked asunder thereby were all the high hopes of the amendment’s framers that private action could be reached by federal legislation. It was private action, not state action, that had caused so much of the post-war bloodshed and atrocities in the South. It was private action, not state action, that had been the prime motivation for all the toil and debates that produced the Fourteenth Amendment and the surrounding legislation. Yet the framers had assumed too much and incorporated too little when they drafted the amendment. They failed to anticipate the judicial process of interpretation with its ever-present possibility of strict constructionism.

The elimination of private action from the reach of the Fourteenth Amendment meant the effective elimination of many of the provisions enacted by Congress pursuant to the fifth section. In United States v. Harris, for example, the Supreme Court declared void the important criminal conspiracy section of the Ku Klux Klan Act of 1871, which made it an offense to conspire to deprive any person of the equal protection of the laws or equal privileges or immunities under the laws. This was a provision aimed at lynchings and other mob actions of an individual or private nature. Since the Fourteenth Amendment was construed to concern only state action, it could not be used to sustain such a statutory proscription of private action. Nor could the Thirteenth Amendment be called upon to provide validity. That amendment, while applicable to private action, "simply abolished slavery and involuntary servitude."

The high point in the judicial negation of the abolitionists’ labors came in 1883 in the celebrated Civil Rights Cases. At stake was the validity of the first two sections of the Civil Rights Act of 1875, which attempted to outlaw discrimination on grounds of race or color in the enjoyment of accommodations and privileges of public conveyances, inns, theaters and other places of public amusement. Those two sections were declared unconstitutional. Again it was pointed out that the Fourteenth Amendment affected only action by states and their agents and instrumentalities. A contrary interpretation "would be to make Congress take the place of State legislatures and to supersede them." Hence the Court majority could find no warrant for a statute such as this, since it was directed to individual owners of conveyances, inns, theaters, and the like who were found not to be agents of the states. Such proprietors were free to discriminate so long as their dis-

46 106 U.S. 629, 1 S.Ct. 601 (1882).
47 109 U.S. 3, 3 S.Ct. 18 (1883).
criminatory actions had not been affirmatively authorized or permitted by state law.

The fifth section of the amendment, designed to be the deep well of needed legislative protection of basic civil rights, was held to give Congress nothing more than the power "to adopt appropriate legislation for correcting the effects" of the state laws and actions prohibited in the first section "and thus to render them effectually null, void and innocuous." The Court continued: "This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation."

The validity of the 1875 act under the Thirteenth Amendment fared no better. The Court conceded that the amendment was applicable to private individuals and it was willing to assume that Congress had power thereunder to outlaw all badges and incidents of slavery in the United States. But the Court was unable to say that the denial of admission to an inn or theater because of one's color or race subjected one to a form of servitude or fastened upon one any badge of slavery. Not even the 1866 act, enacted under the Thirteenth Amendment exclusively, attempted to cover the "social rights of man and races in the community" as the 1875 act was said to do.

Justice Harlan was alone in his brilliant but unavailing dissent. He met the majority opinion at each and every point. But he could conclude only "that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. . . . Constitutional provisions, adopted in the interests of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law. . . .[T]he court has departed from the familiar rule requiring, in the interpretation of constitutional provisions, that full effect be

48 Id. at 26. The report of the President's Committee on Civil Rights, To Secure These Rights 105 (1947), stated of Justice Harlan's dissent: "So powerful a dissent remains a living force in constitutional law and is bound to be thoughtfully considered by any later Supreme Court when the validity of new civil rights laws comes before it for decision." It has also been described as deserving "a high place among the writings of American statesmen marking progress in the development of democratic thought." Konvitz, The Constitution and Civil Rights 13 (1947). Konvitz also gives a thorough summary and analysis of the Civil Rights Cases, id. at 8-27.
given to the intent with which they were adopted.” No more fitting description could be made of the Supreme Court’s treatment of the civil rights amendments and legislation.

The pattern of narrow, debilitating construction was thus established. The scope and effectiveness of the civil rights statutes became progressively smaller as they were increasingly subjected to the cold water of the judicial process. Additional sections and provisions fell under the axe of unconstitutionality. All that the judiciary would recognize as valid were those provisions dealing with situations wherein state officials acted or misused their power or wherein rights were directly granted to private persons and guaranteed against individual infringement by the Constitution or federal laws.

The inevitable effect of these decisions was to transfer back to the states the prime responsibility for the protection of basic civil rights, a result which the legislators of 1866 to 1875 had expressly sought to prevent. The South was thereby enabled to create and perpetuate its rigid rules of segregation. Lynchings, race riots and other forms of unequal treatment were permitted to abound in the South and elsewhere without power in the federal government to intercede. The nation in fact entered upon an era of constitutional law, which Justice Harlan had feared, “when the rights of freedom and American citizenship cannot receive from the Nation that efficient protection which heretofore was unhesitatingly accorded to slavery and the rights of the master.”

These unhappy results cannot be ascribed solely to the judiciary: The legislative branch also played a leading role in the drama of frustration. The civil rights statutes, even before the process of judicial de-

49 In United States v. Reese, 2 Otto (92 U.S.) 214 (1876), the Court held that the third and fourth sections of the 1870 act, not being confined in their operation to unlawful discrimination on account of race, color or previous condition of servitude, were beyond the permissible limits of the Fifteenth Amendment. That amendment, while protecting the right to vote in both federal and state elections against state interference, was said to authorize Congress to provide such protection only against interferences based on the voter’s race, color or previous condition of servitude.

In Baldwin v. Franks, 120 U.S. 678, 7 S.Ct. 656 (1887), the Court followed its decision in United States v. Harris, 106 U.S. 629, 1 S.Ct. 601 (1882), and reiterated the invalidity of the criminal conspiracy section of the 1871 act.

The Court in James v. Bowman, 190 U.S. 127, 23 S.Ct. 678 (1903), struck down §5 of the 1870 act, under which the defendants had been indicted for preventing Negroes from voting in a congressional election, because it went beyond the fringe of the Fifteenth Amendment and attempted to reach private persons as well as state officers.

Finally, in Hodges v. United States, 203 U.S. 1, 27 S.Ct. 6 (1906), the Court outlawed §16 of the 1870 act, which purported to establish certain rights of Negro citizens, including the right to make contracts, and to protect them against interference. Since the attempt to protect these rights was directed against private action, the Fourteenth Amendment afforded no justification; and it was unsustainable under the Thirteenth Amendment since interference with a man’s right to contract did not force him into slavery or involuntary servitude.
bilitation had run its course, underwent a major legislative operation in 1873 when all federal laws were recodified and published as the Revised Statutes. The provisions of the civil right statutes were separated under unrelated chapters of these Revised Statutes and thus lost their distinctive, coherent character. Then in 1894, when the Democrats first won the presidency and both houses of Congress, most of the provisions protecting suffrage were repealed. Still other provisions were dropped in 1909 when the federal criminal laws were recodified.

No effort has ever been made by subsequent Congresses to pick up and repair the broken pieces of civil rights legislation remaining after these wild judicial and legislative forays. All that is left today are a few scattered remnants of a once grandiose scheme to nationalize the fundamental rights of the individual. Some of these fragments have continued in existence only by virtue of long disuse or ineffectiveness, thereby creating no pressure for their formal burial. Others have suffered from poor draftsmanship. And the judiciary, burdened by precedents which deny the constitutional premises on which these provisions were originally written, has reduced still further the usefulness of the laws by unreal, mechanistic interpretations. Small wonder, then, that President Truman was forced to say in 1946 that “in its discharge of the obligations placed on it by the Constitution, the Federal Government is hampered by inadequate civil rights statutes.”

Act III—The Executive and Private Renaissance

On February 3, 1939, the Civil Rights Section of the Department of Justice was created by the then Attorney General Frank Murphy. In his order establishing this Section, Murphy said:

“The function and purpose of this unit will be to make a study of the provisions of the Constitution of the United States and Acts of Congress relating to civil rights with reference to present condi-

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52 35 Stat. L. 1092.
54 Statement of December 5, 1946, accompanying Executive Order 9808, which established the President’s Committee on Civil Rights. This statement is quoted in the Committee’s report, To Secure These Rights vii (1947).
55 Order of the Attorney General No. 3204, Feb. 3, 1939, quoted in Putzel, “Federal Civil Rights Enforcement: A Current Appraisal,” 99 U. Pa. L. Rev. 439 at 442 (1951). The Civil Rights Section was originally called the Civil Rights Unit, but the name was changed in 1941 to avoid confusion in the public mind with the American Civil Liberties Union. Id. at 442, note 16.
tions, to make appropriate recommendations in respect thereto, and to direct, supervise and conduct prosecutions of violations of the provisions of the Constitution or Acts of Congress guaranteeing civil rights to individuals.”

Prior to the establishment of this governmental unit, no coordinated program had ever been developed to make as effective and full use as possible of the minute legacy of the federal government’s civil rights powers. The Civil Rights Section, primarily concerned with the enforcement of criminal sanctions, has concentrated the energies of its woefully inadequate staff to that end. That its record “is by no means a perfect one,”

57 even within the limited range of its powers, is not a surprising fact in the political atmosphere of the present day. The basic difficulty, of course, is the explicit and implicit weaknesses of the statutory tools, a difficulty that can be eradicated only by the unlikely passage of new civil rights laws by Congress.

The important federal criminal laws which are presently available to the Civil Rights Section in its efforts to promote the civil rights of indi-

56 “At the present time the Civil Rights Section has a complement of seven lawyers, all stationed in Washington. . . . Although other resources of the Department of Justice are available to supplement the Civil Rights Section staff, the Section is the only agency in the Department with specialized experience in civil rights work. This small staff is inadequate either for maximum enforcement of existing civil rights statutes, or for enforcement of additional legislation such as that recommended by this Committee.” To Secure These Rights 119-120 (1947). As of 1951, the staff still numbered but seven lawyers, the original number. Putzel, “Federal Civil Rights Enforcement: A Current Appraisal,” 99 Univ. Pa. L. Rev. 439 at 441, note 15 (1951). In addition to the civil rights statutes, the Civil Rights Section also administers the criminal provisions of the Fair Labor Standards Act, the Safety Appliance Act, the Hatch Act, the Railway Labor Act, and certain other statutes.

57 To Secure These Rights 114 (1947). This report of the President’s Committee on Civil Rights points out six major imperfections in the federal civil rights enforcement machinery (pp. 114-125): (1) weak statutory tools; (2) insufficient personnel in the Civil Rights Section; (3) inadequate cooperation at times by United States Attorneys in the field; (4) the Section’s dependence, for its investigative work, on the Federal Bureau of Investigation, which has many other assignments; (5) hostility of local officers and local communities; and (6) the subordinate position of the Section in the Department of Justice and the resulting lack of prestige and authority. At the present time not all preliminary investigations are at the request of the Section since “the Federal Bureau of Investigation may in appropriate cases also conduct preliminary investigations either upon its own motion or at the request of the United States Attorney. Full-scale investigations or prosecutive action are not made without prior clearance through the Civil Rights Section.” Putzel, “Federal Civil Rights Enforcement: A Current Appraisal,” 99 Univ. Pa. L. Rev. 439 at 446 (1951).

58 As noted in Justice Roberts’ dissent in Screws v. United States, 325 U.S. 91 at 159, 65 S.Ct. 1031 (1945), the Attorney General has stated: “The Department of Justice has established a policy of strict self-limitation with regard to prosecutions under the civil rights acts. When violations of such statutes are reported, the Department requires that efforts be made to encourage state officials to take appropriate action under state law.” Statistics quoted in the Attorney General’s statement show that less than one per cent of the complaints received by the Civil Rights Section are ever fully investigated and a still smaller percentage ever reach the prosecution stage.
Individuals are sections 241 and 242 of Title 18 of the United States Code and the provisions outlawing peonage and involuntary servitude.

Section 241

Section 241, a conspiracy law, makes it a crime for two or more persons to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same." Persons convicted can be fined up to $5,000 or imprisoned up to ten years, or both. This section is derived from section 6 of the Act of May 31, 1870, and is aimed at private individuals who deprive citizens of their rights under the Constitution or federal laws. Dealing only with such rights, it has escaped the constitutional condemnation meted out to the conspiracy section of the 1871 act dealing with the deprivation of equal protection of the laws or equal privileges or immunities under the laws.

Section 241 was originally adopted in 1870, among other reasons, to give sanction to the right to vote, which was guaranteed by the then recently enacted Fifteenth Amendment. But the rights within the
scope of this provision, even in its original form, are not confined to voting rights. Those comprehended by the section are denominated as those "secured" by the Constitution or laws of the United States. Thus arises the ancient issue as to what rights are meant to be or constitutionally can be included in such a description.

Certainly included within the rights covered by section 241 are all of the Slaughterhouse privileges and immunities—"that miserable bundle of bromides and irrelevancies" which may be said to appertain to United States citizens as such. Thus in United States v. Cruikshank, the earliest and leading case on section 241, the right to assemble to petition Congress for a redress of grievances "or for anything else connected with the power or the duties of the national government" was held by the Supreme Court to be within the constitutional reach of the section, inasmuch as "the very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." Significantly, the Court made it clear that the rights protected by section 241 need not be expressly "secured" by the Constitution but may be implied from "the very idea of a government, republican in form."

But the Court has gone beyond the attributes of national citizenship in delineating the rights "secured" by the Constitution and federal laws and hence within the meaning of section 241. Also included have been rights best described as those arising out of some relationship between the individual aggrieved citizen and the federal government, a relationship which does not necessarily characterize the narrow concept of national citizenship. Thus section 241 has been held applicable to the right to vote in federal elections, the right of a voter in a federal election to have his ballot counted fairly, the right to be free from mob violence while in the custody of a federal officer, and the right to inform on violations of federal laws. In United States v. Waddell, moreover, the section was applied to an interference with the right to

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68 2 Otto (92 U.S.) 542 (1876).
69 Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152 (1884).
71 Logan v. United States, 144 U.S. 263, 12 S.Ct. 617 (1892).
72 In re Quarles, 158 U.S. 532, 15 S.Ct. 959 (1895); Motes v. United States, 178 U.S. 458, 20 S.Ct. 993 (1900).
73 112 U.S. 76, 5 S.Ct. 35 (1884).
establish a claim under the Homestead Acts; this right was admittedly not one pertaining to United States citizenship but, since it was "wholly dependent upon the act of Congress," obstructing its exercise came "within the purview of the statute and of the constitutional power of Congress to make such statute."\(^7\)

On the other hand, section 241 has been held unavailable where conspiracies have been directed toward forcing citizens to give up their jobs or to compel them to move out of a state.\(^7\) Equally unsuccessful has been an attempt to invoke the section to participants in a mob which seized a Negro from the custody of a local sheriff and lynched him.\(^7\)

The central issue as to section 241 comes down to the question of whether it applies to anything more than the rights arising from the relation of the victim and the federal government. Can it also apply to rights secured by the Fourteenth Amendment against state action, rights such as those under the due process or equal protection clauses which do not depend upon any connection between the victim and the federal government?\(^7\) An affirmative answer to that question would indeed give vital substance to section 241 and give great impetus to the efforts

\(^{74}\) Id. at 79-80. The implications of this holding have not been authoritatively pursued or determined. The Waddell decision and cases following it have been explained by the Department of Justice (Circular 3356, Supp. 2, April 4, 1942, p. 4) as follows:

"The homestead laws, although they provide a machinery for obtaining title to land in the public domain on compliance with statutory conditions, do not contain specific criminal provisions penalizing interference with homesteaders. The theory of these cases is that the homesteader has a federal statutory right to acquire title on compliance with conditions including the residence requirement, and that running him off the homestead deprives him of this right, and hence falls within section 51."

If carried to its logical conclusion, this theory can mean that a conspiracy to deprive a person of his rights secured or acquired under any federal statute, such as the Social Security Act or the Labor Management Relations Act, constitutes a violation of section 241. No reported case seems to have applied this theory to rights acquired under modern statutes, though there is an implication to that effect in Pennsylvania R. System v. Pennsylvania R. Co., 267 U.S. 203, 45 S.Ct. 307 (1925). See comment, "Federal Courts—Jurisdiction over Violations of Civil Liberties by State Governments and by Private Individuals," 39 MicH. L. Rev. 284 at 296-297 (1940); Rogge, "Justice and Civil Liberties," 25 A.B.A.J. 1030 (1939); Konvitz, THE CONSTITUTION AND CIVIL RIGHTS 44-45 (1947).

\(^{76}\) Hodges v. United States, 203 U.S. 1, 27 S.Ct. 6 (1906); United States v. Wheeler, 254 U.S. 281, 41 S.Ct. 133 (1921).

\(^{77}\) In Powe v. United States, (5th Cir. 1940) 109 F. (2d) 147, it was held that a conspiracy to injure and oppress a newspaper editor in the exercise of his right to write and print editorials exposing local crime did not fall within section 241 since the right to speak and print about such matters is not "secured by the Constitution and laws of the United States." These matters concerned the local community, not the United States, said the court. The Supreme Court denied review of the case, 309 U.S. 679, 60 S.Ct. 717 (1940), on a petition alleging that the writing of the editorials might lead to a revelation of violations of federal laws.
of the Civil Rights Section to effectuate the original aims of the framers. That would be true even though the weight of precedent would prevent the application of the section to anything but state action, which is said to be the sole type of action affected by the Fourteenth Amendment.

This important question recently came before the Supreme Court in *United States v. Williams*. In that case the defendants were acting under color of state law in obtaining confessions from theft suspects by physical force and brutality. They were indicted under section 241 for having conspired to injure each victim "in the free exercise and enjoyment of the rights and privileges secured to him and protected by the Fourteenth Amendment." Their conviction by a jury was reversed by the Court of Appeals for the Fifth Circuit, which held that in enacting section 241 "the Congress had in mind the federal rights and privileges which appertain to citizens as such and not the general rights extended to all persons by the [due process] clause of the Fourteenth Amendment." In view of the past decisions applying the section to rights beyond those characteristic of national citizenship, this narrow view of the court of appeals is surprising. Fortunately that view was not sustained by the Supreme Court, even though the judgment was affirmed by a five to four vote. The Supreme Court found itself unable to muster a definitive opinion as to whether section 241 was meant to cover rights secured by the Fourteenth Amendment against state action. It split evenly, four to four, on this critical question, the decisive ninth vote of Justice Black being cast for affirmance on the independent ground of res judicata. But even the four Justices who agreed that section 241 did not reach Fourteenth Amendment rights did so on grounds differing from those advanced by the court of appeals.

Thus the Supreme Court in the *Williams* case did no more than pose the crucial issue as to section 241 and state the opposing arguments, leaving it to a later day to render an authoritative opinion. The

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79 Williams v. United States, (5th Cir. 1950) 179 F. (2d) 644 at 648.
80 Chief Justice Vinson, Justices Jackson and Minton joined Justice Frankfurter in holding that section 241 did not reach Fourteenth Amendment rights. Justices Reed, Burton and Clark joined Justice Douglas in holding to the contrary.
81 Justice Frankfurter's opinion stated, 341 U.S. 70 at 72-73: "... we agree that §241 ... does not reach the conduct laid as an offense in the prosecution here. This is not because we deny the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment; nor is it because we fully accept the course of reasoning of the court below. We base our decision on the history of §241, its text and context, the statutory framework in which it stands, its practical and judicial application—controlling elements in construing a federal criminal provision that affects the wise adjustment between State responsibility and national control of essentially local affairs."
narrow view of the statute, as espoused by Justice Frankfurter, and the
broad view, as stated by Justice Douglas, may be summarized as
follows:

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<th>Narrow View</th>
<th>Broad View</th>
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<td>1. Interference with civil rights by state officers was dealt with by section 17 of the 1870 act, now 18 U.S.C. (1950) Sec. 242, together with the general conspiracy statute enacted in 1867, now 18 U.S.C. (1950) Sec. 371. Hence there was no need to include conspiracies by state officers within section 241.</td>
<td>1. If the rights &quot;secured or protected by the Constitution or laws of the United States,&quot; as used in section 242, are not restricted to rights which the government can secure against interference by private persons, it is hard to understand why rights &quot;secured to him by the Constitution or laws of the United States,&quot; as used in section 241, are so restricted.</td>
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<td>2. Section 241 was designed to reach only private action, not action by state officers. The history of the times, especially the activities of the Klan, shows that private lawlessness was a major evil and hence bears out this interpretation.</td>
<td>2. The 1870 act, of which section 241 was a part, was framed to enforce both the Fourteenth and the Fifteenth Amendments, thus including rights protected by the Fourteenth Amendment against state infringement.</td>
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<td>3. Prior decisions, starting with United States v. Cruikshank, 2 Otto (92 U.S.) 542 (1876), have interpreted section 241 so as to protect only those rights arising from the relation of the victim and the federal government.</td>
<td>3. Prior decisions which have refused to apply section 241 to Fourteenth Amendment rights have done so only because the action complained of was individual rather than state action. They did not hold that Fourteenth Amendment rights were outside the scope of section 241.</td>
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<td>4. To construe section 241 to reach Fourteenth Amendment rights would raise needless constitutional issues as to vagueness, since it does not contain the word &quot;willfully,&quot; which was all that rendered section 242 constitutional. Screws v. United States, 325 U.S. 91 (1945).</td>
<td>4. The vagueness problem does not arise where, as here, the jury is instructed that conspiracy requires specific intent and since an &quot;intent to accomplish an object cannot be alleged more clearly than by stating that parties conspired to accomplish it.&quot;</td>
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There the matter now rests. The choice is between an interpretation of section 241 which confines it to strictly private conspiracies or one which expands it to include conspiracies by those acting under color of state authority. The former would include only those rights arising out of some relationship between the victim and the federal government, while the latter would reach all the due process and equal protection rights which do not depend upon such a relationship. The former interpretation also reads section 241 as though it had been written in 1870 with all the subsequent judicial perversions of the Fourteenth Amendment in mind, whereas the latter interpretation is more consistent with what the framers clearly had in mind. Section 241 thus awaits further adjudication.

Section 242

Section 242 makes it a misdemeanor for anyone, under color of law, "willfully" to subject any inhabitant of any state "to the deprivation...
of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens.” Punishment is fixed at fines up to $1,000 or imprisonment up to one year, or both.

This section is derived from section 2 of the Civil Rights Act of 1866,83 a provision designed primarily at that time to protect Negroes.84 It extends its protection to “inhabitants,” in contrast to section 241’s confinement to “citizens.” Two separate offenses are created: (1) willfully subjecting any inhabitant to the deprivation of rights secured or protected by the Constitution or federal laws; (2) willfully subjecting any inhabitant to different punishments because of his alienage, color or race. A violation of either part of section 242 must be both “willful” and “under color of law.” And unlike section 241, this statute may be violated by a single individual; it is not a conspiracy statute. But, as Justice Rutledge noted in Screws v. United States,85 in spite of these differences in wording between sections 241 and 242, there are “no differences in the basic rights guarded. Each protects in a different way the rights and privileges secured to individuals by the Constitution.”

Prosecutions under section 242 are probably the most important work of the Civil Rights Section of the Department of Justice,86 which has undertaken to revitalize and develop that statute to the limits of its capabilities. Prior to the establishment of this unit in 1939, section 242 had lain virtually dormant for many years, being involved in only two reported cases.87

One of the first cases arising under the renaissance of section 242 resulted in a Supreme Court decision validating the application of the statute to an interference with the right to vote in federal elections.88 The interference involved the willful alteration and false counting

87 United States v. Buntin, 10 F. 730 (1882); United States v. Stone, 188 F. 836 (1911).
and certification of ballots cast in a Louisiana primary election for Democratic candidates for representative in Congress. The Court held that the right of the people to choose their representatives in Congress, as provided for by article I, section 2, of the Constitution, includes the right of qualified voters within a state to cast their ballots and have them fairly counted. That right, the Court said, extends to primary elections. And even though primary elections were unknown at the time of original enactment, both sections 241 and 242 were held to be constitutionally applicable to the situation. Thus much of the federal government's power to punish election frauds, seemingly lost in 1894 when many of the franchise sections of the civil rights statutes were repealed, seems to have been recovered by this latter day restoration of section 242. 89

But the most important development affecting section 242 has been the recent emphasis on the word "willfully." The resulting limitations on the effectiveness of the statute have been both extensive and alarming. This development, coming a few years after the use of section 242 had been revived, marked the Supreme Court's decision in Screws v. United States. The very constitutionality of section 242 was there made to turn upon the requirement of "willfulness." The case involved several state police officers who indulged in "a shocking and revolting episode in law enforcement"; they beat a Negro to death in the course of arresting him on a warrant charging him with the theft of a tire. They were indicted under section 242 for having "willfully" caused the Negro to be deprived of certain rights secured or protected by the Fourteenth Amendment: (1) the right not to be deprived of life without due process of law; and (2) the right to be tried by due process of law and, if found guilty, to be punished in accordance with the laws of the state. The jury returned a verdict of guilty and the judgment was affirmed by the circuit court of appeals. 90

89 Other cases bearing upon the application of sections 241 and 242 in federal elections prior to the Classic case are: Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152 (1884); United States v. Mosley, 238 U.S. 383, 35 S.Ct. 904 (1915); United States v. Gradwell, 243 U.S. 476, 37 S.Ct. 407 (1917); United States v. Bathgate, 246 U.S. 220, 38 S.Ct. 269 (1918); Newberry v. United States, 256 U.S. 232, 41 S.Ct. 469 (1921). A decision subsequent to Classic case is United States v. Saylor, 322 U.S. 385, 64 S.Ct. 1101 (1944), where the Court sanctioned the use of section 241 to a situation where there had been wholesale ballot box stuffing; this was held to amount to interference with the right to have one's vote counted as cast. See Rotnem, "Clarifications of the Civil Rights' Statutes," 2 BILL OF RIGHTS REV. 252 (1942).

90 Screws v. United States, (5th Cir. 1944) 140 F. (2d) 662.
The arguments before the Supreme Court centered upon the validity of section 242 in making criminal those activities which are in violation of the due process clause of the Fourteenth Amendment. It was urged that no ascertainable standard of guilt was provided, that the broad and varying interpretations of the due process clause made it impossible for a state officer to know or guess when he might be violating that clause, and that section 242 was therefore unconstitutional on grounds of vagueness.

The Supreme Court, however, was unable to arrive at any clear-cut decision apart from agreeing as to the basic constitutionality of section 242. Six of the Justices took the view that the statute was constitutionally valid. But four\(^1\) of these six were deeply troubled by the vagueness argument and thought the statute could be saved only by interpreting the word “willfully” to require “a specific intent to deprive a person of a federal right made definite by decision or other rule of law” or “made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them.” Examples given were “a local officer who persists in enforcing a type of ordinance which the Court has held invalid,” or one who “continues to select juries in a manner which flies in the teeth of decisions of the Court.”\(^2\) These four Justices concluded that a new trial was necessary so that the jury might properly be instructed as to this requirement of willfulness, so newly-found to be the constitutional crutch of section 242.

The other two Justices believing the statute valid were Justices Murphy and Rutledge. Neither was impressed by the vagueness argument; they were both willing to sustain the conviction as it stood. Justice Rutledge, however, voted with the four who favored reversal and retrial so that there might be an effective disposition of the case. The other three Justices,\(^3\) speaking through Justice Roberts, felt that the statute was unconstitutionally vague, that the 1909 addition of the word “willfully” did not save it, and that in any event it was intended to be applied only to unconstitutional conduct of state officers unauthorized by state law. As to this latter point, the other members of the Court thought that the statutory phrase “under color of law” was designed to cover misuse of power granted police officers by the state, not just action under an unconstitutional state statute.\(^4\)

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\(^1\) Chief Justice Stone, Justices Black, Reed, and Douglas, with the latter writing the opinion.

\(^2\) 325 U.S. 91 at 103-104.

\(^3\) Justices Roberts, Frankfurter, and Jackson.

This requirement of willfulness has proved a major obstacle in the way of effective use of section 242. It is difficult to convince a jury that the defendant police officer knew of a specific federal right as spelled out by a badly-split Supreme Court decision and willfully intended to deprive his victim of that right. That difficulty was demonstrated by the acquittal that the retrial in the *Screws* case produced. Some of the hardship, though, was removed by a later decision of the Court of Appeals for the Fifth Circuit holding that evidence that a police officer mistreated a prisoner out of personal malice or spite is not inconsistent with the conclusion that the officer also willfully intended to deprive his victim of constitutional rights.95

The constitutionality of section 242 and its requirement of willfulness were recently reaffirmed by the Supreme Court in *Williams v. United States*,96 this time by a close but definitive vote of five to four. The defendant in this case, a state police officer, had coerced a confession from a suspect by the use of third-degree methods. A verdict of guilty was rendered by the jury, after being properly instructed on the issue of willfulness. Repeating the arguments advanced in the *Screws* case, the defendant urged that the numerous split decisions of the Court in cases involving allegedly coerced confessions made it impossible to ascertain any definite standard of guilt. The Court dismissed this contention by saying, "It is as plain as a pikestaff that the present confessions would not be allowed in evidence whatever the school of thought concerning the scope and meaning of the Due Process Clause."97

The central problem as to section 242—its constitutional validity in relation to vindication of due process rights—thus has been authoritatively answered, though by the uncomfortable margin of one vote. By the slender margin of that vote, the victim of police brutality has some chance of having the federal government punish the evil-doers where the state declines to take action against them. It is a chance complicated by the requirement of willfulness on the part of the police officers to violate the specific right involved. But it is nonetheless an important and desirable chance. Whether it can survive future personnel changes on the Supreme Court remains to be seen.

Section 242 has also been applied to police brutality resulting in the infringement by state officers of freedom of speech, freedom of press,

95 Crews v. United States, (5th Cir. 1947) 160 F. (2d) 746.
97 Id. at 101.
freedom of religion and the right to equal protection of the laws. It was said that the right to equal protection could be violated by a police officer who merely failed to discharge his duty to protect the victims of mob violence and to arrest the perpetrators. In other words, a state may violate the Fourteenth Amendment by failing to give effective enforcement to its own laws and an officer may thereby violate section 242. Such a doctrine, if followed and developed, would effectuate one of the original aims of the amendment's framers and would give substance to the hope that section 242 can give effective vindication to the constitutional rights of individuals.

**Private Remedies**

In addition to the few criminal sanctions inherited from the civil rights statutes of yesteryear, two provisions for civil damages for violations of civil rights remain from the Reconstruction program.

Section 41 of Title 8 of the United States Code, derived from the 1866 and 1870 acts, does no more than make a general statement of constitutional policy and carries with it no civil or criminal sanctions. It states merely that all persons within the jurisdiction of the United States shall have the same right in every state to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings as is enjoyed by white citizens; moreover, all such persons shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. As was said by Justice Strong in *Strauder v. West Virginia*, this section puts in the form of a statute what was substantially ordained in the Fourteenth Amendment. It contains a partial list of the rights which the amendment’s framers thought they were protecting when they placed the privileges and immunities clause into the amendment. The only purpose now served by section 41 is as an incomplete compendium of rights the violation of which may give rise to civil suit under other sections of Title 8.

Of far greater utility is section 43 of Title 8. It provides that every person who, under color of state law, subjects any person within the jurisdiction of the United States to the deprivation of any “rights, privileges, or immunities secured by the Constitution and laws” shall be liable to the injured party in an action at law or equity. Derived from

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98 *Carlette v. United States*, (4th Cir. 1943) 132 F. (2d) 902.
100 100 U.S. 303 (1879).
the 1871 act, this section concerns state action only. It is the civil counterpart of section 242 of Title 18, the criminal sanction directed at the deprivation of such rights. But unlike section 242, section 43 is not burdened with a statutory or constitutional requirement of willfulness. The sole problem here relates to the rights, privileges and immunities which may be said to be secured by the Constitution and federal laws.\textsuperscript{101}

As stated by Justice Stone in *Hague v. C.I.O.*,\textsuperscript{102} section 43 “extends broadly to deprivation by state action of the rights, privileges and immunities secured to persons by the Constitution. It thus includes the Fourteenth Amendment and such privileges and immunities as are secured by the due process and equal protection clauses, as well as by the privileges and immunities clause of that Amendment. It will also be observed that they are those rights secured to persons, whether citizens of the United States or not, to whom the Amendment in terms extends the benefit of the due process and equal protection clauses.”

Section 47(3) of Title 8 gives a civil damage remedy to anyone who is the victim of a conspiracy to deprive him of “the equal protection of the laws, or of equal privileges and immunities under the laws. . . .” This provision is roughly analogous to the present criminal conspiracy section (section 241 of Title 18). It owes its origin to the 1871 act, the Ku Klux Klan Act, which was designed to give relief against outrages perpetrated by such private organizations as the Klan.

For many years section 47(3) lay dormant, probably suffering from the effects of the Supreme Court’s decision in *United States v. Harris*.\textsuperscript{103} The Court there held unconstitutional the criminal conspiracy provision of the 1871 act. That provision, which was the companion of the present section 47(3), described criminal conspiracies in language indistinguishable from that used in section 47(3) to describe civil conspiracies. The Fourteenth Amendment having been construed to affect state action only and the 1871 act having been enacted to effectuate that amendment, the Court held that criminal sanctions imposed on private conspiracies were without constitutional warrant.

\textsuperscript{101} In *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783 (1951), the Supreme Court had before it a suit for damages under both sections 43 and 47(3) against members of the California Senate Fact-Finding Committee on Un-American Activities, known as the Tenney Committee. It was alleged that these members had conspired to abuse their powers to intimidate and silence the plaintiff, without any legislative purpose. The Court held that from the allegations of the complaint it appeared that the members were acting within their legitimate legislative field and that they were entitled to the traditional legislative immunity from civil liability.

\textsuperscript{102} 307 U.S. 496 at 526, 59 S.Ct. 954 (1939).

\textsuperscript{103} 106 U.S. 629, 1 S.Ct. 601 (1882).
Recently, however, section 47(3) has come to life in a series of decisions\(^{104}\) culminating if not ending in the Supreme Court's opinion in Collins v. Hardyman.\(^{105}\) It was there alleged that the defendants had conspired to deprive the plaintiffs of the right to assemble for discussion of national issues and to petition the national government for redress of grievances. Because of their disagreement with and desire to suppress the views of the plaintiffs, the defendants forcibly broke up the meeting. The Supreme Court held that section 47(3), by virtue of its language, did not apply to this set of facts. According to the Court, the facts here showed merely a conspiracy to violate or invade rights, not one to deprive the plaintiffs of "equal protection" or "equal privileges and immunities" as section 47(3) requires. To constitute the latter, the invasion of rights would have to be accompanied by "some manipulation of the law or its agencies to give sanction or sanctuary for doing so."\(^{106}\) Three justices dissented, arguing that the right asserted by the plaintiffs was not derived from the Fourteenth Amendment but from the "very idea of government, republican in form"\(^{101}\) and that Congress in section 47(3) had exercised its undoubted power to create a federal cause of action in favor of persons injured by private individuals through the abridgement of federally created constitutional rights.\(^{108}\)

As a practical matter, the Collins decision has reduced section 47(3) to the vanishing point. If the conspiracy must be directed toward a manipulation of the law or its agencies, thereby causing inequality of protection, few if any plaintiffs can allege or prove such a causal chain. It is far better and easier to use section 43, with its uncomplicated and broad scope. But even were a plaintiff able to bring his complaint within the standards set by the Collins decision, the Court indicated that he would then be confronted with "constitutional problems of the first magnitude that, in the light of history, are not without difficulty. These would include issues as to congressional power under and apart from the Fourteenth Amendment, the reserved power of the States, the content of rights derived from national as distinguished from state citizen-

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\(^{105}\) 341 U.S. 651, 71 S.Ct. 937 (1951).

\(^{106}\) Id. at 661.

\(^{107}\) Id. at 663, quoting from United States v. Cruikshank, 2 Otto (92 U.S.) 542 at 552 (1876).

\(^{108}\) 341 U.S. 651 at 663.
ship, and the question of separability of the Act in its application to those two classes of rights." 109

Hardy indeed would be the plaintiff who could drive his complaint safely round all these constitutional roadblocks set up by the Court. The Harris precedent alone might be enough for the Court to declare section 47(3) unconstitutional. He would be better advised to concentrate his efforts under section 43. There alone does the individual stand a fair chance of securing pecuniary relief for the damages suffered at the hands of those who are bent on violating or ignoring his constitutional rights.

Epilogue

The civil rights program of the Reconstruction era has thus come down to a pitiful handful of statutory provisions, most of which are burdened by the dead weight of strict constructionism. The great fervor with which the elected representatives of the people decided to nationalize civil rights has been "cooled by the breath of judicial construction." 110 One by one, the constitutional amendments and the civil rights statutes have been blown down by that breath. The few stark remnants that remain are mute testimony to the power of the judiciary to render impotent the expressed will of the people.

The legislative program of the post-Civil War days was premised on the belief that the fundamental rights of the individual should be defined and enforced by the federal government. But the Supreme Court has consistently refused to accept that premise. It has substituted its belief that civil rights lie within the realm of state power and that any federal attempt to encroach on that power is to be viewed narrowly and suspiciously. The Court has expressed its belief so many times that it would necessitate a judicial and constitutional upheaval of the first magnitude to undo what the Court has done.

It is doubtful if much can be done by way of existing federal statutes to implement effectively the civil rights of individuals. There are some encouraging signs in the application of some of those statutes to the broad rights which have come to be protected against state action under the due process clause. But the greatest source of violations, the


actions of private individuals, are beyond the power of present statutes to reach in any substantial degree. And in the present political climate it seems doubtful that any new congressional legislation will soon be forthcoming, especially along the effective lines recommended by the President’s Committee on Civil Rights.\textsuperscript{111} But as that Committee pointed out:\textsuperscript{112}

“The adoption of specific legislation, the implementation of laws or the development of new administrative policies and procedures cannot alone bring us all the way to full civil rights. The strong arm of government can cope with individual acts of discrimination, injustice and violence. But in one sense, the actual infringements of civil rights by public or private persons are only symptoms. They reflect the imperfections of our social order, and the ignorance and moral weaknesses of some of our people.

“There are social and psychological conditions which foster civil rights; there are others which imperil them. In a world forever tottering on the brink of war, civil rights will be precarious at best. In a nation wracked by depression and widespread economic insecurity, the inclination to consider civil rights a luxury will be more easily accepted. We need peace and prosperity for their own sake; we need them to secure our civil rights as well. We must make constructive efforts to create an appropriate national outlook—a climate of public opinion which will outlaw individual abridgments of personal freedom, a climate of opinion as free from prejudice as we can make it.”

\textsuperscript{111} To Secure These Rights 149-173 (1947).
\textsuperscript{112} Id. at 133.