Cornell Law Review

Volume 47
Issue 3 *Spring 1962*

Article 3

Under Color of Law Classic and Screws Revisited

Dean Alfange Jr.

"UNDER COLOR OF LAW": *CLASSIC* AND *SCREWS* REVISITED

Dean Alfange, Jr.†

> The construction given § 20 [of the Criminal Code] in the *Classic* case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. The *Classic* case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded.
>
> — MR. JUSTICE DOUGLAS, in *Screws v. United States*[1]

> A sharp change from this uniform application of seventy years was made in 1941, but without acknowledgment or indication of awareness of the revolutionary turnabout from what had been established practice. The opinion in *United States v. Classic* . . . accomplished this.
>
> —MR. JUSTICE FRANKFURTER, dissenting, in *Monroe v. Pape*[2]

INTRODUCTION

It is not altogether unusual for two members of the Supreme Court to disagree sharply on the wisdom of a decision they have handed down. Nor is it unusual for Justices to make flatly contradictory statements as to the effects of a particular decision or its basis in prior judicial rulings. However, one who has glanced at the above statements of Justices Douglas and Frankfurter would be entitled to a certain amount of surprise, on turning to the case of *United States v. Classic*,[3] to find that Justice Frankfurter had joined with the majority in that ruling, while Justice Douglas had filed a rather vigorous dissenting opinion. These rather startling reversals of position have clearly not been due to abrupt changes of heart on the part of the Justices involved, but, instead, have been occasioned by a great shift in emphasis from what was originally considered to be the sole vital aspect of the *Classic* case to another part of the decision, now seen to be of major significance, but then passed over almost carelessly by the majority, and overlooked entirely by the dissenters.

This aspect of *Classic* was the interpretation given by the Court to the phrase "under color of . . . law" appearing in section 20 of the Criminal Code (now 18 U.S.C. § 242),[4] making punishable any acts committed

† See contributors' section, masthead p. 442, for biographical data.

1 325 U.S. 91, 112 (1945).

2 365 U.S. 167, 216-17 (1961).

3 313 U.S. 299 (1941).

4 In 1940, § 20 of the Criminal Code, which was drawn from § 20 of the Civil Rights Act of 1866, re-enacted as § 17 of the Enforcement Act of 1870, and which subsequently appeared as § 5510 of the Revised Statutes, and, in 1940, as 18 U.S.C. § 52, provided:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the

"under color of . . . law" which served to deprive an individual of rights "secured or protected by the Constitution and laws of the United States." In that case, the Court held, without any indication of dissent, that the phrase rendered the statute applicable, not only to public officers acting with explicit state authorization, but also to officers whose official acts might be unauthorized or illegal, but which are, nevertheless, "under color of law" by virtue of the official capacity of the officer. Four years later, in *Screws v. United States*,[5] two members of the *Classic* majority, Justices Roberts and Frankfurter, together with Justice Jackson who had been appointed to the Court in the intervening period, expressly repudiated that interpretation, and insisted that the law was only intended by Congress to make punishable the acts of public officers specifically sanctioned by a state through "law, statute, ordinance, regulation, or custom." The Court, however, reaffirmed in *Screws* the interpretation it had given in *Classic*, and did so again, in 1951, in *Williams v. United States*,[6] again over the dissent of Justice Frankfurter, joined this time by Justices Jackson and Minton.

That this issue still rankles in the mind of Justice Frankfurter became apparent in his recent lone dissent in *Monroe v. Pape*,[7] a civil suit for damages brought under 42 U.S.C. § 1983,[8] a statute providing for the civil liability of persons who deprive others of federally guaranteed rights "under color" of law. This case was brought by a Negro against thirteen Chicago policemen who, without a search or arrest warrant, allegedly broke into his apartment late at night, made him and his wife stand naked in the living room together with their six children, struck him and several of the children, ransacked the apartment, and then took him to the police station where he was held and interrogated for ten hours without being arraigned. On the basis of the *Classic* and *Screws* decisions, the Court ruled that these acts of the police officers had been committed "under color of law" even though they were forbidden by the state of Illinois. Justice Frankfurter, however, refused to concede

Constitution and 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, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

In 1948, this statute was redesignated 18 U.S.C. § 242, without significant alteration.

[5] 325 U.S. 91 (1945).

[6] 341 U.S. 97 (1951).

[7] 365 U.S. 167 (1961).

[8] First enacted as § 1 of the Ku Klux Act of 1871, and subsequently appearing as § 1979 of the Revised Statutes, this provides:

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

the applicability of these precedents, terming the construction of the phrase found in these cases "a statutory interpretation which started as an unexamined assumption on the basis of inapplicable citations and has the claim of a dogma solely through reiteration."[9] Such powerful language appears to warrant a re-examination of the *Classic* and *Screws* decisions, in an effort to determine their soundness from the standpoint of constitutional and statutory interpretation, and to ascertain whether these rulings, insofar as they deal with the construction of "under color of law," are, in fact, so untenable as to merit the biting condemnation hurled at them by Justice Frankfurter.

UNITED STATES V. CLASSIC

The *Classic* case was one of the first to be prosecuted by the Civil Rights Section of the Department of Justice, which had been established in 1939 by Attorney General Frank Murphy, among other purposes, "to direct, supervise and conduct prosecutions of violations of the provisions of the Constitution or Acts of Congress guaranteeing civil rights to individuals."[10] The five defendants, including one Patrick B. Classic, were election commissioners who supervised the Democratic primary in a single precinct in New Orleans, Louisiana, in September, 1940. Ironically, they were members of the reform group that was trying to wrest control of the Louisiana political machinery from Huey Long, but their status as "reformers" did not deter them from altering and counting in favor of their candidate for Congress eighty-three votes which had been cast for a second candidate and fourteen which had been cast for a third. Needless to say, Long chose not to tolerate that particular form of corruption, and successfully urged the United States Attorney in Louisiana to conduct an investigation. Upon receipt of the report of this investigation, Attorney General Robert Jackson decided to press the prosecution of Classic and his associates, primarily to test the vitality of the 1921 decision of the Supreme Court in *Newberry v. United States*,[11] which had apparently denied to the federal government all power to regulate primary elections.[12] It was the aspect of classic dealing with federal control of primaries that occupied the attention of the lawyers for the government and the defendants and of the majority of the Supreme Court, and little heed was paid to the interpretation of section 20 of the Criminal Code, one of the statutes under which the defendants were indicted.

---

[9] 365 U.S. 167, 220-21 (1961).

[10] Order of Att'y Gen., No. 3204, Feb. 3, 1939, quoted in Carr, Federal Protection of Civil Rights 24 (1947).

[11] 256 U.S. 232 (1921).

[12] Carr, supra note 10, at 85-87.

In considering the validity of the indictment on review of a district court decision sustaining a demurrer,[13] the Supreme Court was faced with three main questions: (1) whether the term "elections" in article I, section 4 of the Constitution was to be read to include primary as well as general elections, and thus to confer power on Congress to regulate the conduct of congressional primaries, (2) whether section 19 of the Criminal Code (now 18 U.S.C. § 241),[14] was applicable to conspiracies to deprive qualified voters, by means of a dishonest count of the ballots, of their right to full participation in primaries, and (3) whether section 20 of the Criminal Code, the "under color" statute, could be applied to officials who fraudulently altered and miscounted ballots in a party primary. The majority of the Court considered most carefully the first of these questions, gave somewhat less consideration to the second, and almost none to the third. The dissenters concerned themselves exclusively with the second question, except to note their agreement with the majority on the first. They made no reference at all to the third.

Only seven Justices took part in the *Classic* decision; the vacancy caused by the retirement of Justice McReynolds had not yet been filled, and Chief Justice Hughes took no part in the consideration of the case because he had been counsel for Newberry before the Supreme Court twenty years earlier. The opinion of the Court was written by Justice Stone, who was joined by Justices Roberts, Reed, and Frankfurter. The dissent was written by Justice Douglas, with whom Justices Black and Murphy concurred.[15]

Neither of the opinions showed the least hesitancy in declaring primaries to be embraced by the constitutional term "elections," although

---

[13] United States v. Classic, 35 F. Supp. 66 (E.D. La. 1940).

[14] In 1940, § 19 of the Criminal Code, which was drawn from § 6 of the Enforcement Act of 1870, and subsequently appeared as § 5508 of the Revised Statutes, and, in 1940, as 18 U.S.C. § 51, provided:

> If two or more persons 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, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

In 1948, this statute was redesignated 18 U.S.C. § 241, without significant alteration, except that the provision establishing future ineligibility for federal office was dropped as "incongruous."

[15] The dissenters, ironically, were the very members of the Court most interested in the protection of individual rights, and one of them, as attorney general, had established the Civil Rights Section within the Department of Justice for the purpose of revitalizing the few civil-rights laws. Yet, here, in the first major test of the most important of these statutes undertaken by the Civil Rights Section, he and his colleagues, because of the vagueness of the statute, voted to construe it narrowly, and thus to weaken one of the few potentially effective tools in the hands of the federal government to punish those who might deprive others of civil rights secured by the Constitution or federal law.

the majority, because of *Newberry*, apparently felt constrained to defend its judgment at some length. More than half of Justice Stone's twenty-two-page opinion was directed to this point. Once having established that the constitutional reference encompassed primary elections, it was but a small step for the Court to establish also that the Constitution granted a federal right to qualified voters of unfettered participation in congressional primaries, and that this right was protected by sections 19 and 20 of the Criminal Code. In *United States v. Mosley*[16] in 1915, the Supreme Court had held, only one Justice dissenting, that section 19 was applicable to state election officials who conspired to miscount ballots, and thereby injure the rights of voters, in a general election for a congressional seat. Consequently, since the Court in *Classic* was deciding that the primary election, as well as the general election, was an integral part of the process of choice, the expansion of the statute to cover conspiracies to count primary ballots fraudulently followed almost of necessity.

It was precisely at this point, however, that the minority in the *Classic* case balked. The dissent of Justice Douglas, after establishing initial agreement with the majority that congressional primaries could constitutionally be regulated by Congress, was devoted entirely to an explanation of his refusal to assent to the extension of section 19 to cover fraudulent counting of primary ballots. He condemned the statute as being too vague to establish an adequate standard of criminality, and while he did not believe that it was unconstitutional on its face because of vagueness,[17] he did think that it could not be applied to conspiracies to interfere with the right to vote in primary elections.[18]

The minority, however, did not concern itself with the vagueness of the "under color" statute. The lack of mention of this statute by Justice Douglas is puzzling and leaves his dissenting opinion curiously incomplete. The Court had been called upon to review a district court decision sustaining the demurrer to two counts of the indictment against Classic

16 238 U.S. 383 (1915).

17 Justice Douglas agreed with the Mosley decision, which sustained an indictment under § 19 for a conspiracy to perform the same sort of acts at a general congressional election that Classic and his co-defendants had been indicted for conspiring to commit at a primary election. However, he stated that, in Mosley, the Court "went to the verge," but that its position was "a tenable one, since § 19 originally was part of an Act regulating general elections." 313 U.S. 299, 334-35.

18 Relying on United States v. Gradwell, 243 U.S. 476 (1917), in which the Court ruled that § 19 did not apply to a conspiracy to deprive congressional candidates (rather than voters, as in Classic) of their right to an honest count of primary ballots, Justice Douglas declared that, as the statute "was part of a legislative program governing general elections, not primary elections," it could not be extended to cover the rights of either candidates or voters in primaries, and that, therefore, he accepted "the unanimous view in the Gradwell case that § 19 has not by the mere passage of time taken on a new and broadened meaning." 313 U.S. 299, 336.

—one count alleging violation of section 19 and the second alleging violation of section 20 of the Criminal Code—and the majority had ruled that the demurrer should not have been sustained with regard to either count. Yet the dissent was limited to a discussion of the first count only, and it is, therefore, impossible to ascertain the view of the minority as to the second count, although, on its face, section 20 appears to exhibit the same infirmity as section 19, in that both seek to protect rights which are only vaguely defined as those "secured or protected by the Constitution and laws of the United States."

However, if the minority totally avoided all mention of section 20, the majority scarcely gave it greater attention, despite the fact that that statute had only been applied in three previously reported cases,[19] and that it had never received any authoritative interpretation. The brief discussion of section 20[20] undertaken by the Court took up barely two pages of its opinion. The Court first pointed out that the phrase "on account of such inhabitant being an alien, or by reason of his color or race" applied only to the part of the statute dealing with the subjection of inhabitants to "different punishments, pains, or penalties," and did not limit the part dealing with the deprivation of federally guaranteed rights to acts committed on account of the alienage, color, or race of the victim.[21] The interpretation of the phrase "under color of any law" was then settled by a bare assertion:

> The right of the voters at the primary to have their votes counted is, as we have stated, a right or privilege secured by the Constitution, and to this § 20 also gives protection. The alleged acts of appellees were committed in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election. *Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.*[22] [Emphasis added.]

In support of this assertion, the Court merely listed three precedents: *Ex parte Virginia*,[23] *Home Telephone & Telegraph Co. v. Los Angeles*,[24]

---

19 United States v. Sutherland, 37 F. Supp. 344 (N.D. Ga. 1940); United States v. Stone, 188 Fed. 836 (D.C.D. Md. 1911); United States v. Buntin, 10 Fed. 730 (C.C.S.D. Ohio 1882). A fourth case involved the application of an earlier version of the statute, § 17 of the Enforcement Act of 1870. This was United States v. Jackson, 26 Fed. Cases 563, No. 15,459 (C.C.D. Cal. 1874), which contained language expressly stating that an unauthorized act of a state official could not be considered to have been committed "under color of law." This case was strongly relied on by Justice Frankfurter in his dissent in Monroe v. Pape, supra note 7, at 215-16. See note 92, infra, and the text thereat and following.

20 For the text of § 20 as it appeared in 1940, see supra note 4.

21 313 U.S. 299, 326-27 (1941).

22 Id. at 325-26.

23 100 U.S. 339 (1879).

24 227 U.S. 278 (1913).

and *Hague v. C.I.O.*[25] In the first of these, the same Court that was engaged in whittling down the vitality of the various civil rights acts passed by Congress between 1866 and 1875[26] upheld the validity of section 4 of the Civil Rights Act of 1875,[27] which made it a crime for any official "charged with any duty in the selection or summoning of jurors" to exclude qualified persons from service as jurors "on account of race, color, or previous condition of servitude." A county judge in Virginia had been indicted for violation of this section of the act, and he and the state had petitioned for his release on habeas corpus, claiming the unconstitutionality of the section. The Court, however, only Justices Field and Clifford dissenting, held that the fifth section of the fourteenth amendment had empowered Congress to enforce the equal protection clause of that amendment with appropriate legislation, and that the act condemning racial discrimination in the selection of jurors was appropriate and, therefore, constitutional. Although section 4 did not contain the phrase "under color of law," it was necessary for the Court to demonstrate how the fourteenth amendment, which was directed at states, could give Congress the power to punish individuals. It did so in this significant dictum:

> Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.[28]

Thus, the key factor involved in translating individual action into state action seems here clearly to be the "public position" of the actor, and the fact that, by virtue of his public position, "he acts in the name and for the State, and is clothed with the State's power." There is no suggestion that state action might not be involved if the state official exceeded his authority or that his acts, even if in violation of a state law, would be any less "in the name and for the State." Moreover, at the close of its opinion in this case, the Court, through Justice Strong, in-

---

[25] 307 U.S. 496 (1939).

[26] See Civil Rights Cases, 109 U.S. 3 (1883); United States v. Cruikshank, 92 U.S. 542 (1876). Chief Justice Waite and Justices Miller, Field, and Bradley were all on the Court from Cruikshank to the Civil Rights Cases. Between Cruikshank and Ex parte Virginia, the only change on the Court was the replacement of Justice Davis by Justice Harlan. Between Ex parte Virginia and the Civil Rights Cases, Justices Woods, Matthews, Gray, and Blatchford had replaced Justices Clifford, Swayne, Strong, and Hunt. Cf. Harris, The Quest for Equality 84-94 (1960); Gressman, "The Unhappy History of Civil Rights Legislation," 50 Mich. L. Rev. 1323, 1339-42 (1952).

[27] 18 Stat. 335 (1875).

[28] 100 U.S. 339, 347 (1879).

dicated that even in such cases the official could be punished by the federal government under the fourteenth amendment. Refusing to consider the discriminatory selection of jurors a judicial act that might somehow be immune from federal punishment, Justice Strong declared:

> But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the State statute? That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion. It is idle, therefore, to say that the act of Congress is unconstitutional because it inflicts penalties upon State judges for their judicial action. It does no such thing.[29]

In the *Home Telephone* case in 1913, the Court undertook a long explanation of the extent of federal judicial power to redress a grievance caused by a state violation of the fourteenth amendment. It rejected unanimously and in no uncertain terms a ruling by a federal district court that if an action of a municipality or of a municipal official appeared to be in violation of the state constitution as well as the fourteenth amendment, a federal court could not take jurisdiction in a suit to enjoin the action until the case had come before the highest court of the state and that court had ruled that the act was authorized under state law. The Court ruled, instead, that the fourteenth amendment gave the federal government considerably more room for action. Speaking for the Court, Chief Justice White stated that

> the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. . . . That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.
>
> . . . In other words, the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that States acting in their governmental capacity in a complete sense may do acts which conflict with its provisions, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, provided against all and every such possible contingency.[30]

The third case cited by the majority in *Classic* as precedent for its

---

[29] Id. at 348-49.
[30] 227 U.S. 278, 287-88 (1913).

ruling regarding the term "under color of law" was *Hague v. C.I.O.* The Court was so badly divided in the *Hague* case, however, that it becomes difficult to find a statement expressing the view of the majority on the scope of federal power to punish state officials whose acts contrary to state law contravene the federal constitution. No more than two Justices joined in any opinion in that case, the major stumbling block being the inability of the Court to decide whether the denial by city officials of the right of members of a labor union to hold organizational meetings and to disseminate information regarding the advantages of union membership under the National Labor Relations Act, was a violation of the privileges or immunities clause or due process clause. Nevertheless, a five-two majority of the Court (Justices Frankfurter and Douglas taking no part) was clearly agreed that the federal courts had jurisdiction under section 24(14) of the Judicial Code[31] to hear a suit brought by the union members under section 1979 of the Revised Statutes (now 42 U.S.C. § 1983)[32] to enjoin the mayor and other officials of Jersey City, New Jersey, from acting under color of law to deprive them of their fourteenth amendment rights to free speech and freedom to disseminate information, even though the evidence demonstrated conclusively that the restraint of the organizational activities of the union had been "accomplished without authority of law and without promptly bringing the persons taken into custody before a judicial officer for hearing."[33]

Thus, although neither *Ex parte Virginia* nor *Home Telephone* was concerned with an interpretation of the phrase "under color of law," they clearly indicate that when an official "misuses the power possessed to do a wrong forbidden by the [Fourteenth] Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant" in that it "was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs." The Court demonstrated no doubt whatever that the fourteenth amendment empowered the federal government to punish those who acted "in the name and for the State" to deprive an individual of a federally protected right, even though the illegal act might not have been authorized by the state, or might even have been

---

31 Now 28 U.S.C. § 1343 (3) (1958), this provides:
The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
* * *
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

32 See supra note 8.

33 307 U.S. 496, 505 (1939).

violative of the state constitution or of state law. Moreover, in the *Hague* case, where an "under color of law" statute was directly involved, it apparently never occurred to any of the Justices participating in the case that the illegal force and violence used by the Jersey City police to enforce a municipal licensing ordinance might not have been "under color of law" because of their illegality. It may be concluded, therefore, that the simple assertion of Justice Stone in *Classic* that misuse of state power was nevertheless to be considered action taken "under color of law" was not a novel doctrine, contrary to the tenor of previous decisions of the Court, but, in fact, seemed to be implicit in the previous decisions he cited. In light of subsequent developments, however, it is unfortunate that Justice Stone did not see fit to provide a more elaborate defense of this position.

One decision which Justice Stone might well have cited in defense of his interpretation of section 20 was *Iowa-Des Moines Nat'l Bank v. Bennett*.[34] This ruling had been recalled in an applicable district court ruling handed down in 1940, one year prior to *Classic*. The district court decision was *United States v. Sutherland*,[35] in which demurrers to three counts of an indictment charging violation of section 20 of the Criminal Code by a police officer in Georgia who extorted a confession of theft from a Negro by means of threats and torture were overruled. The court ruled that in line with such decisions as *Chambers v. Florida*,[36] the coercion of a confession constituted deprivation of liberty without due process of law, and that the acts of coercion in this case had been committed by the police officer "under color of state law" inasmuch as he was "acting under authority of a State law creating the office of policeman and detective,"[37] and since "decisions of the Supreme Court . . . hold that the action of a duly qualified officer, acting within the scope of his authority, constitutes State action, even though the particular acts complained of may not be authorized."[38]

The decisions referred to by the district court included *Ex parte Virginia* and the *Home Telephone* case, as well as the *Iowa-Des Moines National Bank* case, in which Justice Brandeis, speaking for a unanimous Court, gave the same construction to the "under color" phrase that Justice Stone was later to give in *Classic*, although no statute specifically employing the phrase was directly under consideration. Justice Brandeis declared:

---

34 284 U.S. 239 (1931).
35 37 F. Supp. 344 (N.D. Ga. 1940).
36 309 U.S. 227 (1940).
37 37 F. Supp. 344, 346 (N.D. Ga. 1940).
38 Ibid.

> But acts done "by virtue of a public position under a State Government . . . [and] in the name and for the State," . . . are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law. When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law.[39]

Since 1879, with one significant exception, the Court has consistently held that the action of state officials, even in violation of state law, constituted state action within the meaning of the fourteenth amendment. The one exception was the 1904 case of *Barney v. New York City*,[40] in which the Court affirmed a decree of a lower federal court dismissing for lack of jurisdiction a suit to enjoin completion of a New York City subway line by a plaintiff who claimed that a change in the construction plans, made in disregard of a state statute prohibiting such a change, would deprive him of his property without due process of law. The Court ruled that since the change was forbidden by state law, the new construction was not state action, and thus the fourteenth amendment did not empower the federal courts to act. However, within three years, the Court began hastily to back away from the *Barney* doctrine, and in 1907, in *Raymond v. Chicago Union Traction Co.*,[41] the Court held that even though the state board of equalization had "omitted and ignored" applicable provisions of the Illinois constitution in levying a particular tax, the action of the board was still state action. By 1913, in the *Home Telephone* case, the Court directly intimated that *Barney* had been so attenuated that it was unnecessary to overrule it,[42] and it has been justifiably observed that in that case the Court apparently "administered the final *quietus*" to the *Barney* decision.[43]

Thus, since the Court's concept of state action under the fourteenth amendment clearly included acts by state officials unauthorized by or in violation of state law, section 20 of the Criminal Code could only have been held to have been inapplicable to such acts if the phrase "under color of law" had been construed to have been decidedly more narrow than the amendment itself and to have been intended to bar federal prosecution of state officials whose acts deprived others of federally protected rights, except when those acts were specifically authorized by

---

[39] 284 U.S. 239, 245-46 (1931).
[40] 193 U.S. 430 (1904).
[41] 207 U.S. 20 (1907).
[42] 227 U.S. 278, 294 (1913). Cf. United States v. Raines, 362 U.S. 19, 25-26 (1960).
[43] Isseks, "Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials," 40 Harv. L. Rev. 969 (1927).

law. No reason was suggested to the Court in *Classic* for applying such a narrow construction to the phrase.

SCREWS V. UNITED STATES

The immediate effect of the *Classic* decision was to remove the props which supported *Grovey v. Townsend*,[44] for, once the primary election was recognized as an integral part of the electoral process, the myth on which the *Grovey* decision was founded, that political parties were private groups and could thus bar Negroes from participation in primaries without violation of the fifteenth amendment, was destroyed. This effect of *Classic* was at once apparent,[45] but it seemed to have escaped the attention of at least one member of the Court, Justice Roberts, the author of *Grovey*. He silently concurred in *Classic* and ultimately raised a lone voice in protest only in 1944, when the Court, following the logic of *Classic* to its inescapable conclusion in *Smith v. Allwright*,[46] expressly overruled the *Grovey* decision.

Yet if Justice Roberts had been duped through his tacit concurrence in *Classic*,[47] he was not alone, and this was evidenced in 1945 when, in the case of *Screws v. United States*,[48] the second principal effect of the *Classic* decision became manifest. In *Screws*, the Court reaffirmed the interpretation it had given section 20 in *Classic*, but it did so only over the vigorous protest, not only of Justice Roberts, but also of Justice Frankfurter, another member of the *Classic* majority, in an unsigned dissent in which Justice Jackson also joined.

Screws was one of those unfortunate cases that was disposed of by the Court to the dissatisfaction of everyone. It grew out of a conviction for violation of section 20 of a county sheriff in Georgia and two other police officers who had arrested, handcuffed, and then beaten to death a Negro man whom they had accused of stealing a tire, and whom they had sworn to "get." State officials either could not or would not prosecute them for murder, and, consequently, in an effort to prevent them from escaping all punishment, the Civil Rights Section took action to bring about their indictment in a federal court, under sections 19 and 20 and the general conspiracy statute.[49] A demurrer was sustained with regard to the count charging violation of section 19, but was overruled with

---

[44] 295 U.S. 45 (1935).
[45] See, e.g., Berry, "United States v. Classic," 1 Nat'l B.J. 149 (1941).
[46] 321 U.S. 649 (1944).
[47] Professor Mason has observed that the other members of the Court felt that Justice Roberts had been "duped" in concurring in Classic, and that he was aware of their belief. See Mason, Harlan Fiske Stone: Pillar of the Law 616n. (1956).
[48] 325 U.S. 91 (1945).
[49] Criminal Code, § 37, 35 Stat. 1096. Now 18 U.S.C. § 371 (1958).

regard to the other counts. Screws and the other two defendants were tried and convicted on the remaining counts, and the conviction was affirmed, two-one, by the Court of Appeals for the Fifth Circuit.[50]

The opinion of the Supreme Court in *Screws*, which became the majority opinion only through the extremely reluctant concurrence of Justice Rutledge, was written by Justice Douglas, who was joined by Chief Justice Stone and by Justices Black and Reed. Justice Murphy, who, along with Justice Black, had concurred in the point of view expressed by Justice Douglas in *Classic*, was, in this case at least, willing to resolve his doubts in favor of the constitutionality of the statute, and prepared an eloquent dissent arguing for the outright affirmance of the convictions.

Having omitted all reference to section 20 in his *Classic* dissent, Justice Douglas was able to consider the statute free from the inhibiting effect of a former pronouncement of his own on the matter. Yet he was obviously greatly disturbed by the argument that the statute was too vague to establish an adequate standard of criminality. However, because of the obvious desirability of maintaining the existence of a federal statute that could be used for the protection of constitutional rights, he was unwilling to declare it unconstitutional. Instead, he stated that it was valid because it contained the qualification "willfully," and thus could be applied only to punish those acts "willfully" committed, or, in other words, committed with "a specific intent to deprive a person of a federal right made definite by decision or other rule of law."[51] But, although the Court upheld the constitutionality of the statute, it reversed the convictions and ordered new trials for Screws and the others because the trial judge had not expressly instructed the jury that the defendants could not be found guilty unless they had acted "willfully," with specific intent to deprive their victim of his constitutional rights.[52]

If, however, the reversal of the convictions proved unsatisfying to those who wished to see the effective application of the civil-rights statutes in police brutality cases of this sort, the Court's interpretation of "under color of law" proved even more unsatisfying to those, represented on the Court by Justices Frankfurter, Roberts, and Jackson, who wished to keep the federal government out of the business of prosecuting individuals,

[50] 140 F.2d 662 (5th Cir. 1944).

[51] 325 U.S. 91, 103.

[52] Id. at 106-07. On retrial, Screws and his associates were acquitted, and the requirement of proving willfulness has come to be a great obstacle to federal prosecutors seeking to obtain convictions under 18 U.S.C. § 242, the present version of § 20. It may not be difficult to prove that a policeman who beats a handcuffed prisoner is acting with an evil intent, but the Department of Justice has found that it is exceedingly difficult to prove to the satisfaction of a jury that he is acting with "a specific intent to deprive a person of a federal right made definite by decision or other rule of law." See Shapiro, "Limitations in Prosecuting Civil Rights Violations," 46 Cornell L.Q. 532 (1961) and "Justice," 5 United States Comm. on Civ. Rights Report 45-52 (1961).

even state officials, who have committed essentially state offenses. The interpretation given by the Court to the phrase was identical with that given in the *Classic* case; it was held to apply to the acts of state officials, committed in the course of official duties even if violative of state law.

Because of the strong objection to this interpretation expressed in the dissent, the Court gave the point somewhat greater consideration than it had in *Classic*. However, the majority saw no reason to alter that holding. Justice Douglas saw "no warrant for treating the question in state law terms." Instead, he declared: "The problem is not whether state law has been violated but whether an inhabitant of a State has been deprived of a federal right by one who acts under 'color of any law.' "[53] The Court briefly considered a statement made by Senator Trumbull during the debate in the Senate over the Civil Rights Act of 1866[54] and a statement made by Senator Sherman during the debate over the Enforcement Act of 1870,[55] both of which had been cited by the dissenters as proof that Congress did not intend the phrase "under color of law" to refer to unauthorized acts of state officials. However, the Court declared that "those statements in their context are inconclusive on the precise problem involved in the *Classic* case and in the present case."[56] Justice Douglas concluded:

> We are not dealing here with a case where an officer not authorized to act nevertheless takes action. Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used

---

[53] 325 U.S. 91, 108.

[54] If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts; but if he is discriminated against under color of State laws because he is colored, then it becomes necessary to interfere for his protection. Cong. Globe, 39th Cong., 1st Sess., p. 1758 (1866), cited in 325 U.S. 91, 143.

[55] In answer to a question as to whether the law would apply to an individual who prevented a Negro from voting when the Negro was authorized to vote by state law, Senator Sherman replied:

> That is not the case with which we are dealing. I intend to propose an amendment to present a question of that kind. This bill only proposes to deal with offenses committed by officers or persons under color of existing State law, under color of existing State constitutions. No man could be convicted under this bill reported by the Judiciary Committee unless the denial of the right to vote was done under color or pretense of State regulation. The whole bill shows that. My honorable friend from California has not read this bill with his usual care if he does not see that that runs through the whole of the provisions of the first and second sections of the bill, which simply punish officers as well as persons for discrimination under color of State laws or constitutions; and it so provides all the way through.

Cong. Globe, 41st Cong., 2d Sess., p. 3663 (1870), cited in 325 U.S. 91, 143-44.

[56] 325 U.S. 91, 111. See Cohen, "The Screws Case: Federal Protection of Negro Rights," 46 Colum. L. Rev. 94, 95-99 (1946), where the statements of Senator Trumbull and Senator Sherman are analyzed in context, and it is concluded that both senators were referring only to the inapplicability of the law to ordinary persons not acting under color of law, and that neither had any intention of implying that state officers, acting in pursuance of their official duties, would become immune from punishment under the act if they violated state law.

> excessive force in making the arrest effective. It is clear that under "color" of law means under "pretense" of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea.[57]

Yet the fundamental reliance of the Court for its interpretation was the *Classic* decision, which, the Court declared, was "indistinguishable from this case so far as 'under color of' state law is concerned," and in which the question of the proper construction of section 20 "was squarely involved and squarely met."[58] Justice Douglas argued that since there was no adequate reason for abandoning the principle of stare decisis, the *Classic* ruling had to be controlling.

The argument for a contrary construction of "under color of law," which had been entirely overlooked in *Classic*, was raised and vigorously defended by the dissenters in *Screws*. The participation in *Classic* by Justices Frankfurter and Roberts was excused on the basis of inattentiveness. The dissent stated: "The truth of the matter is that the focus of attention in the *Classic* case was not our present problem, but was the relation of primaries to the protection of the electoral process under the United States Constitution,"[59] and that section 20 "is now here for the first time on full consideration as to its meaning and its constitutionality, unembarrassed by preoccupation . . . with the more compelling issue of the power of Congress to control State procedure for the election of federal officers."[60]

The dissenters did not directly contest the Court's averment that acts of state officials contrary to state law nevertheless constituted state action within the meaning of the fourteenth amendment; the weight of precedent was too strong for such a contention. However, the dissent did try to cast doubt on the validity of the doctrine, stating that it "has had a fluctuating and dubious history," and recalling that "*Barney v. City of New York*, . . . which ruled otherwise, although questioned, has never been overruled."[61] Nevertheless, no serious attempt was made to build an argument on the aged and infirm *Barney* ruling, which an earlier Court had disdained to overrule because of its evident weakness.[62] Instead, the

---

[57] 325 U.S. 91, 111.
[58] Id. at 110.
[59] Id. at 147.
[60] Id. at 141.
[61] Id. at 148. See Barney v. City of New York, 193 U.S. 430 (1904).
[62] See text accompanying note 42, supra. Cf. Isseks, supra note 43, at 972, where the author, in a paper which he "prepared for the course on Federal Jurisdiction conducted by Professor Felix Frankfurter at the Harvard Law School," and in which he stated that he

dissenters asserted that the error in *Classic* was the assumption, accepted "quite needlessly," "that the scope of § 20 was coextensive with the Fourteenth Amendment."[63] They declared:

> But assuming unreservedly that conduct such as that now before us, perpetrated by State officers in flagrant defiance of State law, may be attributed to the State under the Fourteenth Amendment, this does not make it action under "color of any law." Section 20 is much narrower than the power of Congress. Even though Congress might have swept within the federal criminal law any action that could be deemed within the vast reach of the Fourteenth Amendment, Congress did not do so. The presuppositions of our federal system, the pronouncements of the statesmen who shaped this legislation, and the normal meaning of language powerfully counsel against attributing to Congress intrusion into the sphere of criminal law traditionally and naturally reserved for the States alone. When due account is taken of the considerations that have heretofore controlled the political and legal relations between the States and the National Government, there is not the slightest warrant in the reason of things for torturing language plainly designed for nullifying a claim of acting under a State law that conflicts with the Constitution so as to apply to situations where State law is in conformity with the Constitution and local misconduct is in undisputed violation of that State law. In the absence of clear direction by Congress we should leave to the States the enforcement of their criminal law, and not relieve States of the responsibility for vindicating wrongdoing that is essentially local or weaken the habits of local law enforcement by tempting reliance on federal authority for an occasional unpleasant task of local enforcement.[64]

Thus, in *Screws*, unlike *Classic*, the Court was called upon to defend its construction of section 20 against a concerted attack on several grounds presented by a dissentient minority. It is unfortunate that the Court responded to this attack primarily in terms of stare decisis, for the minority was quite justified in contending that the single precedent relied on by the majority was one in which the problem was settled by an assertion unsupported by adequate study. As a consequence, sixteen years after *Screws*, it was possible for the identical battle to be refought in the Supreme Court in *Monroe v. Pape*, a case involving the civil "under color" statute in which that phrase concededly was intended to have the same meaning as in section 20.

The *Monroe* case is remarkably similar to the *Screws* case. The dissent of Justice Frankfurter in *Monroe* is considerably longer, occupying

---

was "greatly indebted to Professor Frankfurter for suggestions in connection with the problem herein discussed," declared categorically that:

> Whatever may be the merits of the result in the Barney case, the reasoning is unmistakably erroneous. The Board of Rapid Transit Commissioners was acting on behalf of the state of New York. There was state action. State officials did act. Any other conclusion is a metaphysical denial of the actual facts.

However, see the conflict in the concurring opinions of Justice Frankfurter in Snowden v. Hughes, 321 U.S. 1, 13-17 (1944), and United States v. Raines, 362 U.S. 19, 28 (1960).

63 325 U.S. 91, 147 (1945).

64 Id. at 148-49.

some fifty pages, but, with the addition of one new argument, it makes the same points already made in *Screws*, although in greater detail. The majority opinion of Justice Douglas in *Monroe* is devoted almost entirely to the central question of statutory interpretation, but it again is grounded largely on stare decisis, except that several lengthy quotations from the CONGRESSIONAL GLOBE are included as a counterbalance to the legislative history arguments presented in the dissent. Neither in *Screws* nor in *Monroe* did the majority make any endeavor to meet directly the arguments of the dissenters in order to show the untenability of the reasoning offered in defense of a narrow construction of the statutes.

THE SCREWS AND MONROE DISSENTS: AN ANALYSIS

The *Screws* dissenters put forward four reasons for refusing to accept the *Classic* interpretation of section 20: (1) the Court's "preoccupation" in *Classic*, (2) "the pronouncements of the statesmen who shaped this legislation," (3) "the normal meaning of language," and (4) the "presuppositions of our federal system." In *Monroe*, Justice Frankfurter repeated each of these arguments and added a fifth—that the judicial history of the "under color" statutes demonstrates conclusively that the federal courts, prior to *Classic*, had consistently rejected the construction given by the Court in that case. However, of all these reasons for questioning the *Classic* interpretation, only the first appears soundly based, and that one does not really militate in favor of the narrow construction urged by the dissenters.

The Court's "Preoccupation" in Classic

There can be little doubt that the Court had been preoccupied in *Classic* and that, despite Justice Douglas's contention that the issue had been "squarely met," its interpretation of the phrase "under color of law" had not been carefully considered. The issue in *Classic* had been the constitutionality of federal regulation of primaries, and that issue was so dramatic that it had all but obscured the other, and perhaps equally important, questions raised by the case. The Court was being asked to overturn a well-known previous decision that had seemingly denied to Congress the power to regulate primary elections for federal offices, and it was only natural, therefore, that the predominant concern of the lawyers preparing the brief for the government should have been with that question, with only perfunctory attention given to the attendant questions of statutory interpretation. Moreover, as to section 20, the government had scant precedent on which to build a lengthy argument. Prior to the creation of the Civil Rights Section within the Department of

Justice, the statute had almost never been applied,[65] and thus the government was left with little alternative except to cite the line of cases in which unauthorized acts of state officials had been declared to have constituted state action within the meaning of the fourteenth amendment, and to argue briefly that it saw "no reason why it [§ 20] should be held to have a narrower scope than the Amendment itself."[66]

Similarly, the Court was forced to center its attention on the question of primaries; it had undertaken to reject its apparent holding in a celebrated case, and, although it was unanimous on this point, it was constrained to state its opinion with some care and at some length. Consequently, the bulk of its thought and reasoning was devoted to this issue, and the problems of statutory interpretation and application were patently relegated to positions of secondary significance. Some consideration was given in the opinion of the majority to the applicability of section 19 to acts depriving citizens of their right to vote in an honest primary election, but this was necessitated by the dissent, in which it was argued that the statute was too vague to have such an extended application. However, no dissent was expressed to the Court's interpretation of section 20, and, thus, Justice Stone saw no need to offer any defense at all of the construction given to "under color of law."

If the silence of the *Classic* dissenters on the matter of section 20 was calculated to allow Justice Stone's interpretation to pass without fanfare or particular notice, the plan was remarkably successful. Only four Justices joined in the sole opinion which made any mention of section 20, and two of these, as it later developed, had clearly been hoodwinked, whether by design or not. Had Justices Roberts and Frankfurter recognized the potential usefulness of that statute for the initiation of federal prosecutions in cases involving essentially state offenses, granted their views on the desirability of noninterference by the federal judiciary in state administration of criminal law, it is utterly inconceivable that they could have acquiesced in the *Classic* decision.

In fact, once the potentiality of section 20 in cases such as *Screws* became apparent, these two Justices did not rest with the claim that "under color of law" had to be given a narrow construction; they insisted that the entire statute was unconstitutional for vagueness.[67] Yet, if this statute were void on its face, as they argued, then section 19 must be void also, in that it employs almost identical language in referring to federally pro-

[65] See supra note 19 and accompanying text. Cf. Rotnem, "Clarifications of the Civil Rights' Statutes," 2 Bill of Rights Rev. 252 (1942).

[66] Brief for Appellant, p. 45, United States v. Classic, 313 U.S. 299 (1941).

[67] 325 U.S. 91, 149-53 (1945).

tected rights.[68] However, in *Classic*, they had demonstrated no hesitancy in affirming the constitutionality of section 19, and, on this point, they could not plead inattentiveness, since the *Classic* dissenters had vigorously condemned the extensive application of a vague statute, and had thus raised the matter directly. Beyond doubt, therefore, if the problem of the interpretation of section 20 had been "squarely met" in *Classic*, it had been "squarely met" by only two members of the Court, Justices Stone and Reed. Justices Roberts and Frankfurter were busy elsewhere.

"The Pronouncements of the Statesmen who Shaped this Legislation"

The problem remains, however, of determining whether the Court's interpretation of section 20, admittedly hastily arrived at, is, nevertheless, a reasonable one. The interpretation may, of course, be entirely defensible, even though the Court did not adequately defend it, and, on examination, this appears to be the case. The three additional reasons given in the *Screws* dissent, together with the reason initially discussed in the *Monroe* dissent, for the outright rejection of the *Classic* interpretation are, at best, insufficient, and certainly do not foreclose all further argument on the matter, as the *Screws* dissent seems to assert,[69] and as Justice Frankfurter has reiterated in *Monroe*.[70]

Heaviest reliance was placed in both dissents on the legislative history of the Civil Rights Acts which, it was argued, clearly demonstrates the narrow range of applicability that Congress intended the "under color of law" sections of these acts to have. However, the congressional debates over these acts provide only the most meagre evidence of legislative intent with regard to "under color of law," and whatever evidence may be gleaned is entirely inconclusive. Since the *Screws* case brought the judicial disagreement on this issue into the open, scholars and law clerks alike have busied themselves poring over the vast number of pages which comprise the printed record of the debates on these bills,[71] only to return essentially empty-handed. Statements may be found which, out of context, appear to justify either the broad or the narrow construction of

[68] This point is made by Mr. Justice Rutledge, concurring in Screws v. United States, supra note 67, at 119.

[69] See text accompanying note 64, supra.

[70] See 365 U.S. 167, 222-23 (1961).

[71] For the debates preceding the adoption of the Civil Rights Act of 1866, which contained the original version of § 20, see Cong. Globe, 39th Cong., 1st Sess., p. 211-12 474-81, 497-507, 522-30, 569-78, 594-607, 1115-25, 1151-62, 1262-72, 1290-96, 1755-61, 1801-09, 1832-37 (1866). For the debates preceding the adoption of the Enforcement Act of 1870, which re-enacted the original version of § 20, see id., 41st Cong., 2d Sess., p. 3479-93, 3509-21, 3558-71, 3607-16, 3654-59, 3660-90, 3752-62, 3800-09, 3871-84 (1870). For the debates preceding the adoption of the Ku Klux Act of 1871, from which was derived 42 U.S.C. § 1983, see id., 42d Cong., 1st Sess., p. 317-22, 329-41, 351-58, 361-401, 408-32, 436-63, 475-92, 508-22, 566-82, 599-610, 645-66, 685-709, 750-52, 754-66, 769-79, 787-95, 798-801, 804-08, 819-31 (1871).

the phrase, and many of these statements are quoted in the opinions of the Court and in the dissents.[72] Nevertheless, the fact remains that none of the members of Congress actually discussed the type of situation encountered in the *Classic*, *Screws*, or *Monroe* cases, and the topics under consideration in the quoted passages were always somewhat different. For example, in the statements by Senators Trumbull and Sherman, quoted in the *Screws* dissent and requoted in the *Monroe* dissent,[73] the purpose of the speaker was to make clear that the "under color of law" provision was not intended to apply to private individuals. It is not at all clear that either senator had any intention of implying that a state official who, in the exercise of his duties, violated a state law (particularly an unenforced state law), and, in so doing, deprived an individual of a federally guaranteed right, would automatically be exempt from punishment.[74]

The statement by Senator Sherman, in particular, would appear to be a very weak reed for the support of the dissenters' argument. Senator Sherman declared: "No man could be convicted under this bill reported by the Judiciary Committee unless the denial of the right to vote was done under color or pretense of State regulation."[75] The phrase "or *pretense* of State regulation" seems clearly to indicate that a state official, acting without authority but using his position in such a manner as to convey the impression of authority, could be punished under what was to become section 20. However, shortly after quoting this statement in his *Monroe* dissent, Justice Frankfurter made the following observation:

> Certainly the night-time intrusion of the man with a star and a police revolver is a different phenomenon than the night-time intrusion of a burglar. The aura of power which a show of authority carries with it has been created by state government. For this reason the national legislature, exercising its power to implement the Fourteenth Amendment, might well attribute responsibility for the intrusion to the State and legislate to protect against such intrusion. The *pretense* of authority alone might seem to Congress sufficient basis for creating an exception to the ordinary rule that it is to the state tribunals that individuals within a State must look for redress against other individuals within that State. The same *pretense* of authority might suffice to sustain congressional legislation creating the exception. See *Ex parte Virginia* . . . But until Congress has declared its purpose to shift the ordinary distribution of judicial power for the determination of causes between co-citizens of a State, this Court should not make the

---

72 See supra notes 54 and 55. See also Monroe v. Pape, 365 U.S. 167, 172-85, 195-98, 225-36 (1961).

73 365 U.S. 167, 226-27 (1961). The texts of these statements appear in notes 54 and 55, supra.

74 See Cohen, supra note 56, at 95-98.

75 Cong. Globe, 41st Cong., 2d Sess., p. 3663 (1870), quoted in Screws v. United States, 325 U.S. 91, 143 (1945); Monroe v. Pape, 365 U.S. 167, 227 (1961), and note 55, supra.

shift. Congress has not in § 1979 [42 U.S.C. § 1983] manifested that intention.[76] [Emphasis added.]

Senator Sherman's remarks are rather poor evidence that Congress had not manifested that intention.

From a reading of the congressional debates, it is quite apparent that the sponsors of the Civil Rights Acts primarily intended the "under color of law" sections to prevent state officials from executing state laws which would serve to deprive individuals, notably Negroes, of rights guaranteed them by the Civil War amendments or other provisions of the Constitution or federal laws. But since no one mentioned the subject directly, it is not so apparent whether Congress intended these sections to apply to state officials whose unconstitutional acts violated state law. As was conceded in the *Screws* dissent, the legislation passed by the Reconstruction Congresses did not manifest a genuine concern for the niceties of federalism.[77] The intent of Congress in the Civil Rights Acts was, incontrovertibly, to implement the enforcement sections of the Civil War amendments in order to nullify the Black Codes and to offer the protection of the federal government to persons whose rights were inadequately protected by the state governments. Congress did not desire to alter the balance of the federal system with regard to those states already offering some form of equal protection to the Negro, but with regard to those states that would not do so, it was prepared to utilize the full power of the federal government to force compliance with the spirit of these amendments.[78]

The Enforcement Act of 1870, which re-enacted the "under color of law" provision that was to become section 20 of the Criminal Code, was originally proposed as a measure to enforce the guarantee of voting rights contained in the fifteenth amendment, although its scope was expanded by amendments to cover enforcement of the fourteenth amend-

---

[76] 365 U.S. 167, at 238-39 (1961). Senator Sherman was, of course, referring to the "under color of law" provision in the criminal statute, not the civil statute; however, no one has suggested that the phrase was intended to have a different meaning in one statute than in the other.

[77] Screws v. United States, 325 U.S. 91, 140 (1945). But cf. the dissent of Justice Frankfurter in Monroe v. Pape, 365 U.S. 167, 248 (1961), in which he characterized the spirit of the Reconstruction Congresses as one of "compromise." Compromise is, of course, a relative concept. The fact that the extreme Radicals could not have their way completely may indicate a form of compromise, but the fourteenth amendment and the Civil Rights Acts represent a compromise that could hardly have been reached at any time other than the Reconstruction era.

[78] See Flack, The Adoption of the Fourteenth Amendment 210-77 (1908); Harris, supra note 26, at 25-26; James, The Framing of the Fourteenth Amendment (1956); Bickel, "The Original Understanding and the Segregation Decision," 69 Harv. L. Rev. 1 (1955). Professor Harris has declared: "It would be astounding . . . if the [fourteenth] amendment had not been directed at empowering Congress to protect the lives and rights of persons when the states persistently showed either unwillingness or impotence to do so." Supra note 26 at 41.

ment as well.[79] Its purpose, as Senator Sherman put it, was to prevent "the denial of the right to vote . . . under color or pretense of State regulation." In other words, its purpose was to require state election officials to grant suffrage to Negroes, and it would be nonsensical to assume that its proponents were so concerned with the "presuppositions" of the federal system that they would have been willing to tolerate subterfuges that would allow states to circumvent the requirements of the act. Yet such an assumption is necessary if one is to accept as valid the construction of the statute that Justice Frankfurter and the other dissenters have asserted to be clearly demanded by its legislative history, for it would have been a simple matter for a state to pass a law forbidding racial discrimination by its election officials, and then to ignore the law while its officials, thus immunized from federal prosecution, proceeded to discriminate in the most flagrant manner. In fact, since it has been held by the Supreme Court that the fifteenth amendment was self-executing and operated to nullify automatically all discriminatory language in provisions of state constitutions and state laws dealing with suffrage (thus changing a clause enfranchising "every white male citizen" to read "every male citizen"),[80] almost all discriminatory acts of state election officials have, since the adoption of the fifteenth amendment, been contrary to the state constitution or to some state law. Yet surely the "under color of law" statute was meant to apply to these officials, irrespective of the illegality of their actions under existing state law.

To be sure, Justice Frankfurter has admitted that state officials could be punished under "under color of law" statutes, even if their unconstitutional acts had not been authorized by state legislation, so long as it could be shown that the acts were sanctioned by state custom.[81] However, it is hardly likely that Congress intended to insist on the very difficult task of proving the existence of a state custom before allowing the punishment of a state official whose vicious and intentional act, illegal under state law yet condoned by the state, deprived an individual of a federally guaranteed right.

In any event, the opponents of the Civil Rights Acts in Congress did not attack the "under color of law" provisions on the ground that they could be used for the prosecution of state officials who violated state law. Instead, they emphasized the potential injustice of subjecting to punishment a state officer whose only crime might be the faithful execution of his duties under state law, and the injustice of making such an

[79] See Cong. Globe, 41st Cong., 2d Sess., 3660-90, passim (1871).
[80] Myers v. Anderson, 238 U.S. 368 (1915); cf. Guinn v. United States, 238 U.S. 347 (1915).
[81] 365 U.S. 167, 235 (1961).

official choose between state prosecution for failure to comply with state law and federal prosecution for compliance.[82] This emphasis, of course, might have been occasioned by an understanding that the "under color of law" provisions were not intended to apply to officials who violated state law, but the general tenor of the debates seems to indicate otherwise. No one pointed out the incongruity of a criminal statute that would punish an innocent act but would have no application to one that was patently wrongful. Moreover, the proponents of the Civil Rights Acts repeatedly stated that the "under color of law" provisions would not be used to punish state officials who, through some error, innocently and unwittingly deprived someone of a federal right, but that, where evil intent was present, the statute would apply. As Representative Lawrence of Ohio declared: "And if an officer shall intentionally deprive a citizen of a right, knowing him to be entitled to it, then he is guilty of a willful wrong which deserves punishment."[83] Representative Lawrence was speaking directly of officers who deprived citizens of rights through the execution of unconstitutional state legislation, but his emphasis, and the emphasis of the other congressmen of like mind, was on the need to punish state officials who maliciously abridged individual federal rights, and not a word appears in the debates to indicate that Congress had any intention of exempting from punishment those state officials whose unconstitutional acts, performed in the line of duty, might not have been expressly authorized by state legislation or by a state custom whose existence could be proven.

"The Normal Meaning of Language"

The next point made in defense of a narrow construction of the "under color of law" provisions was that such a construction was required by "the normal meaning of language." This contention, however, will hardly bear even superficial scrutiny. As Justice Douglas stated in his opinion in *Screws*: "If . . . the statute was designed to embrace only action which the State in fact authorized, the words 'under color of law' were hardly apt words to express the idea."[84]

The term "under color of" means "under pretense of." This definition is found, among other places, in Hyamson's *Dictionary of English Phrases*, where it is noted that a use of the phrase with that meaning appeared as early as 1557.[85] As early as 1899, the Supreme Court quoted,

[82] See, e.g., the remarks of Representative Rogers of New Jersey, Cong. Globe, 39th Cong., 1st Sess., pp. 1120-22 (1866), and Representative Davis of New York, id. at p. 1265.

[83] Id. at p. 1837.

[84] 325 U.S. 91, 111 (1945).

[85] Hyamson, Dictionary of English Phrases 93 (1922). The phrase appeared in a poem

without the slightest suggestion of disapproval, the following passage from an opinion of the Supreme Court of Iowa, adopting the same definition:

> "Color of law" does not mean actual law. "Color," as a modifier, in legal parlance, means "appearance as distinguished from reality." Color of law means "mere semblance of legal right."[86]

The Iowa court, in turn, had drawn its definitions from Kinney's *Law Dictionary and Glossary*,[87] which, together with the other law dictionaries of the time, emphasized the identity of "color" and "pretense."[88] These sources clearly define the terms "color of office" or "color of authority," which appear to have been in more common usage at the time of the Civil Rights Acts than "color of law," as pertaining to "[a]n act which is done by an officer under the pretence or semblance that it is within his authority, when in truth it is not,"[89] and there is no reason for believing that "color" takes on a different meaning when used in conjunction with "law" rather than with "authority."[90] The terms are restrictive in that they encompass only acts committed by someone who is "at least a *de facto* officer,"[91] and not acts committed by one who only pretends to be an officer, but the lexicographers certainly provide no hint that the applicability of the terms should be restricted to cases in which the officer possesses actual authorization for his act. In fact, they plainly indicate that to exclude unauthorized acts from the scope of the "under color of law" provisions would be to exclude the very acts to which those provisions, according to "the normal meaning of language," seem most directly to refer.

---

by Sir Thomas Wyatt, "The Lover Lamenteth his Estate with Suit for Grace," which begins:

For want of will in woe I plain,
Under color of soberness.

This poem, although published in 1557, was necessarily written prior to 1542, the date of Wyatt's death.

[86] McCain v. Des Moines, 174 U.S. 168, 175 (1899). The passage was taken from the opinion of the Supreme Court of Iowa in State ex rel. West v. Des Moines, 96 Iowa 521, 65 N.W. 818 (1896).

[87] Kinney, Law Dictionary and Glossary 166 (1893).

[88] See, e.g., 1 Abbott, Dictionary of Terms and Phases 242 (1879); 1 Rapalje and Lawrence, Dictionary of American and English Law 230 (1883); 1 Bouvier's Law Dictionary and Concise Encyclopedia 527 (Rawle 8th ed. 1914).

[89] 1 Abbott, supra note 88, at 242. "Color of authority" has been so interpreted by the Supreme Court. See, e.g., Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 245-46 (1931) (quoted from in text accompanying note 39, supra), and Mosher v. City of Phoenix, 287 U.S. 29, 32 (1932). In Mosher, the Court held that federal courts had jurisdiction to hear suits commenced against a city by persons deprived of rights secured by the federal constitution, even if the acts of the city were not authorized by the state, for, in such cases, the city was, nevertheless, "acting under color of state authority." But cf. Monroe v. Pape, 365 U.S. 167, 187-92 (1961), where it was held that suits against municipalities were not authorized under 42 U.S.C. § 1983 because of the express intention of Congress that the statute not apply to them.

[90] The government brief in Classic argued that "'color of authority' and 'color of law' are equivalent terms" (Brief for Appellant, p. 45, United States v. Classic, 313 U.S. 299), and it is, indeed, difficult to see how they might differ.

[91] 1 Bouvier, supra note 88, at 527.

The Judicial History of "Under Color of Law"

In his *Monroe* dissent, Justice Frankfurter raised a point not mentioned in the dissent in *Screws*. He asserted that in *Classic* the Court had substituted a novel and indefensible interpretation of the phrase "under color of law" for the narrow construction which had always been accepted as correct by judges and litigants alike. He declared:

> During the seventy years which followed these enactments, cases in this Court in which the 'under color' provisions were invoked uniformly involved action taken either in strict pursuance of some specific command of state law or within the scope of executive discretion in the administration of state laws. The same is true, with two exceptions, in the lower federal courts. . . .
>
> A sharp change from this uniform application of seventy years was made in 1941, but without acknowledgment or indication of awareness of the revolutionary turnabout from what had been established practice. The opinion in *United States v. Classic* . . . accomplished this.[92]

This statement, however, is so misleading that it can hardly be looked upon as anything more than an ill-considered effort to build a plausible argument from evidence of the most insubstantial sort. In order to have adequately supported his sweeping contention that the *Classic* interpretation of "under color of law" represented a "sharp change from this uniform application of seventy years," it would have been necessary for him to show that the narrow construction of the provisions had been definitively accepted, and that it had been repeatedly reaffirmed, "uniformly applied," and rigidly adhered to in the seventy-year period prior to the *Classic* ruling. That such a demonstration was impossible becomes manifest from a glance at the cases cited in support of the contention.

---

[92] 365 U.S. 167, 212-17 (1961). The two exceptions noted by Justice Frankfurter in the cases before the lower federal courts were Brawner v. Irvin, 169 Fed. 964 (C.C.N.D. Ga. 1909), a police brutality case in which a civil suit under what is now 42 U.S.C. § 1983 was dismissed, not because of an adverse interpretation of the "under color" provision, but on the ground that freedom from whipping by a local policeman was not a federally guaranteed right (see text accompanying note 114, infra), and United States v. Jackson, 26 Fed. Cases 563 (No. 15,459) (C.C.D. Cal. 1874), a criminal case under §§ 16 and 17 of the Enforcement Act of 1870, in which the circuit court categorically stated that "it was not the design of Congress to prevent or to punish . . . abuse of authority by state officers." Ibid. Justice Frankfurter also cited a dictum from the opinion of Justice Bradley in the Civil Rights Cas., 109 U.S. 3, 16 (1883), in which he distinguished the "under color of law" provision of the Civil Rights Act of 1866 from the provisions of the Civil Rights Act of 1875 which the Court was then declaring to be unconstitutional. The "under color of law" provision was constitutional, according to Justice Bradley, since it was "clearly corrective in character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified." Admittedly, this provision was intended to do what Justice Bradley stated; however, this is not to say that it might not have been intended to do more and to reach unauthorized acts of state officers as well. Certainly the Court could not have meant to imply that such a use of the provision might be unconstitutional, for, only four years prior to its decision in the Civil Rights Cases, it had specifically held that such unauthorized acts constituted state action within the meaning of the fourteenth amendment, and thus settled the question of the constitutionality of the "under color of law" provisions when applied to those acts. See Ex parte Virginia, 100 U.S. 339, 347 (1879).

Justice Frankfurter was able to find exactly one case in which a federal court had assigned a narrow construction to the phrase, and this was *United States v. Jackson*, an obscure 1874 decision of the circuit court for the district of California,[93] the substance of which appears to have been forgotten by everyone until it was rescued by him from oblivion. Yet, he unabashedly quoted from this case at great length[94] in an attempt to elevate it to the status of "a dogma solely through reiteration," as he accused the Court of endeavoring to do with *Classic*.[95]

Justice Frankfurter was able to demonstrate the absence of a clear-cut ruling accepting the broad interpretation of the phrase prior to *Classic*, but this was not a significant success. The fact is that the "under color of law" provisions received very little judicial consideration for the period of approximately seventy years following their enactment. Prior to the creation of the Civil Rights Section in 1939, the criminal provision had been involved in only three reported cases,[96] which attests to nothing except the extreme reluctance of the federal government to use the statute as the basis for prosecution. The civil provision, on the other hand, received somewhat more attention because of its availability for private litigants who wished to challenge the constitutionality of some state action in the federal courts. In footnotes to his *Monroe* dissent, Justice Frankfurter listed some thirteen cases in which this provision had been considered by the Supreme Court,[97] and some thirty-one cases before the lower federal courts in which it had been involved in the years before 1941.[98] These cases, he asserted, "uniformly involved action taken either in strict pursuance of some specific command of state law or within the scope of executive discretion in the administration of state laws."[99] However, closer consideration of these cases reveals some interesting details.

For the most part, the fact that suits under this provision were brought against officials who had enforced particular state laws or who had acted within the authority of their positions was to have been expected since the provision was a handy vehicle for attacking the constitutionality of a state law or a state administrative action said to be in violation of the due process or equal protection clauses of the fourteenth amendment. Particularly in the period 1870-1940, when the preservation of economic rights appeared to be the primary concern of the judiciary, and the pro-

93 26 Fed. Cas. 563 (No. 15,459) (C.C.D. Cal. 1874).
94 See supra notes 19 and 92.
95 See text accompanying note 9, supra.
96 See supra note 19.
97 365 U.S. 167, 213 N.N. 19 & 20 (1961).
98 Id. at 214-15n.
99 Id. at 213.

tection of civil rights was a cause for which the courts evinced little concern, it is hardly surprising that the number of cases in which the unconstitutionality of unauthorized acts of state officials was complained of was negligible compared to the number of cases in which acts fully authorized by state law were challenged.

Yet, if it had been accepted without question that unauthorized acts of state officials were totally outside the scope of the "under color of law" statutes, as Justice Frankfurter implied, the behavior of the plaintiffs in many of the cases he cited is quite inexplicable. These plaintiffs often sought to strengthen their suits by alleging not only that they had been deprived of federal rights by the authorized acts of the defendant officials, but also that the officials, in the course of depriving them of their rights, had acted maliciously and illegally.[100]

For example, in *Tuchman v. Welch*,[101] and *M. Schandler Bottling Co. v. Welch*,[102] a zealous county attorney in Shawnee County, Kansas, sought to enforce the prohibition laws of that state by repeatedly commencing criminal actions against liquor distributors who brought whiskey and beer into the state and sold it in its original packages, despite the fact that the Supreme Court had at that time ruled that a state could not constitutionally prohibit such acts.[103] Malicious prosecution was not sanctioned by the laws of Kansas, nor was any county attorney authorized to engage in such practice, and, in this respect, the act of a county attorney who, for the purpose of harassment, causes liquor distributors to be arrested and confined, knowing that they will subsequently be released on a writ of habeas corpus issued by a federal court, is similar to the act of a county sheriff who, for a vengeful purpose, unnecessarily beats a prisoner in the course of an arrest. Nevertheless, the distributors, in applying for an injunction under the "under color of law" provision, did not emphasize the point that the attorney was seeking to enforce the prohibition laws of Kansas, but, instead, chose to stress the illegality of official harassment. And the federal circuit court, which granted the injunction under the authority of this provision, clearly indicated that it felt that the statute applied. Commenting that the attorney was "inviting an action for malicious prosecution, in which the respondent could take no shelter behind the state, and for which the state would in no wise be

100 In Hague v. C.I.O., 307 496 (1939) (see text at note 33, supra), one of the cases cited, the Court agreed that the civil "under color" statute applied in a case in which city officials had abridged free speech "without authority of law." Id. at 505. This decision was one of the three relied on by the Court as precedent for its interpretation of "under color of law" in Classic.

101 42 Fed. 548 (C.C.D. Kans. 1890).

102 42 Fed. 561 (C.C.D. Kans. 1890).

103 Leisy v. Hardin, 135 U.S. 100 (1890).

answerable," the court nevertheless declared that he was liable under the statute because "under color of his office as county attorney" and "instigated by a purpose to harass the petitioner by repeated vexatious prosecutions," he sought to deprive the distributors of their "personal liberty" in violation of the fourteenth amendment.[104] The decision in these cases is so similar to *Classic* and *Screws* that one is at a loss to see how they can be cited as examples of a "uniform application" from which *Classic* was a "revolutionary turnabout."

Moreover, other cases cited by Justice Frankfurter seem to confirm the pattern. In *Wadleigh v. Newhall*,[105] the plaintiff sued to recover damages from a *de facto* state official who, under color of a California law providing for the appointment of guardians for minors when determined by a court to be necessary, had caused his children to be taken from him and placed in the custody of a legal guardian. The allegations made against the defendant were rather extensive and were not restricted to authorized acts. The circuit court totalled charges of twelve felonies and thirty-nine misdemeanors.[106] However, despite this vast number of illegal and unauthorized acts alleged to have been committed "under color of law," the circuit court, although it dismissed the suit on other grounds, said nothing to indicate that the allegations of criminal behavior, if well founded, would have served to remove the defendant's acts from the "under color" category, and, thus, to have rendered the statute inapplicable. The plaintiff obviously did not believe that his accusations of criminality destroyed his case, and, if, because of universal judicial acceptance of the narrow construction of "under color of law," they did, it is strange that the court should have remained silent on this point.

Nor was judicial acceptance of the narrow construction any more in evidence in the period immediately preceding *Classic*. In *Mitchell v. Greenough*,[107] suit was brought under the civil "under color" provision and other parts of the Civil Rights Acts against a prosecuting attorney, a deputy prosecuting attorney, and a judge, who, it was alleged, had knowingly permitted the use of perjured testimony against the plaintiff in order to secure his disbarment. The knowing use of perjured testimony by state officials is hardly an act authorized by state law; therefore, under the narrow construction of "under color of law," no suit could be brought.

---

104 42 Fed. 548, 552-53 (C.C.D. Kans. 1890). The temporary injunctions granted in the Welch cases were later dissolved by the circuit court, not because of any modification of the court's construction of "under color of law," but because it was subsequently decided that an action at law for damages was the "proper proceeding for redress," not a suit in equity for an injunction. See Hemsley v. Myers, 45 Fed. 283 (C.C.D. Kans. 1891).

105 136 Fed. 941 (C.C.D. Cal. 1905).

106 Id. at 949-50.

107 100 F.2d 184 (9th Cir. 1938).

Yet the federal court of appeals, while ordering dismissal of the suit, did so on other grounds, and made no mention at all of a restrictive interpretation of the phrase, which, in itself, would have been determinative.

In *Blackman v. Stone*,[108] a case in which candidates of the Illinois Communist Party for federal and state offices sued the members of the State Electoral Board for damages because of the Board's refusal to allow their names to appear on the ballot, the Seventh Circuit Court of Appeals found it necessary to satisfy itself, not only that the state election laws were constitutional, but that the members of the Board had complied with these laws "in every respect."[109] This latter determination, however, was, of course, entirely unnecessary if, as Justice Frankfurter claims, the narrow construction of "under color of law" received "uniform application" up until the time of *Classic*. It is only explicable if the court had been ignorant of the narrow construction, and had proceeded on the assumption that acts of state officers in violation of state law could, nevertheless, be considered to have been committed "under color of law."

Miller v. Rivers,[110] also cited by Justice Frankfurter, is still another case which does not seem to support his argument. This case involved a suit brought by the chairman of the State Highway Board against E. D. Rivers, the Governor of Georgia. Rivers had attempted to remove the chairman from office, although he had no authority under state law to do so. The removal was enjoined by the state courts, but Rivers iguored the injunction, declared martial law, used military force to take over the Highway Department, and utilized his power as Governor to pardon those cited for contempt for disregarding the injunction. The chairman then brought suit in federal court, asking for an injunction against Rivers under the civil "under color" statute, on the ground that the Governor, acting "under color of law," was depriving him of his fourteenth amendment right to due process of law. According to the Frankfurter doctrine, the federal court would have had no jurisdiction in this case, for the Governor's action, which had been undertaken in complete disregard of state law, could not have been held to have been committed "under color of law," despite the fact that the full military and police power of the state had been arrayed in its defense. Nevertheless, the court, tacitly rejecting its opportunity to apply "uniformly" the narrow construction of "under color," found no difficulty in issuing the injunction on the basis of the "under color" statute.[111]

---

108 101 F.2d 500 (7th Cir. 1939).
109 Id. at 503.
110 31 F. Supp. 540 (D.C.M.D. Ga. 1940).
111 This decision was subsequently reversed by the court of appeals. See Rivers v. Miller,

Justice Frankfurter found only two exceptions to his rather questionable rule that cases in the federal courts involving the "under color" provisions had only concerned faithful execution of state laws. The first of these was the *Jackson* case,[112] on which he placed such heavy reliance. The second was *Brawner v. Irvin*,[113] a case whose facts are very similar to those in *Screws*. In *Brawner*, the chief of police of a Georgia town arrested a Negro woman whom he accused of having struck a child of one of his relatives, flogged her with a whip in her yard, and then threw her into jail for a short time without preferring charges. The woman sought to persuade the state to prosecute the officer for this assault, but state officials declined to take action and the grand jury refused to return an indictment. She thereupon brought suit in federal court under the civil "under color" statute, but her suit was dismissed on the grounds that the action of the police chief was not state action (which was directly contradictory to the ruling of the Supreme Court in *Ex parte Virginia*), and that "the right of an individual to life, liberty, and property, and to be free from molestation" was a state right, not a federal right, so that Negroes have to "take their chances with other citizens in the states where they make their home,"[114] a contention which has meaning only if the initial assertion, that the act of the policeman was not state action, is accepted as valid. However, since this assertion had already been categorically rejected by the Supreme Court, the entire opinion in the *Brawner* case collapses. Therefore, if, as Justice Frankfurter claims, the narrow construction of "under color of law" had been universally accepted, it is odd that this judge did not base his dismissal on the incontestable ground that the act of the policeman, while constituting state action within the meaning of the fourteenth amendment, was not an act committed "under color of law" within the meaning of the statute. That he did not is strong evidence that he did not construe the statute in this way and militates rather heavily against the Frankfurter doctrine.

Justice Frankfurter conceded that in two cases, initiated by the Civil Rights Section, and decided by the lower federal courts just prior to *Classic*,[115] it had been held that police brutality was action committed "under color of law," but he added: "In neither of these two cases does

112 F.2d 439 (5th Cir. 1940). The reversal was based on the ground that the injunction had to be dissolved, as the case had become moot following the governor's later decision to comply with state court rulings. The circuit court took no exception to the substance of the lower court's ruling.

112 26 Fed. Cas. 563 (No. 15,459) (C.C.D. Cal. 1874).

113 169 Fed. 964 (C.C.N.D. Ga. 1909).

114 Id. at 966, 968.

115 United States v. Sutherland, 37 F. Supp. 344 (N.D. Ga. 1940); United States v. Cowan, an unreported case cited by the government in Brief for Appellant, p. 45, United States v. Classic, 313 U.S. 299 (1941).

there appear to have been any examination of the legislative history of the 'under color' statutes, nor is any reasoning offered to support the conclusion of the courts."[116] However, there does not appear to have been any examination of the legislative history of the "under color" statutes in any case before the federal courts prior to *Screws*. There certainly was none in the *Jackson* case, which Justice Frankfurter seems to feel was the definitive statement made on the subject during the seventy-year period in question. From a perusal of the cases involving these statutes which were decided in this period, it may be quite reasonably concluded that the primary purpose of the statutes, or, at least, the primary purpose to which the statutes were put, was to prohibit the execution of unconstitutional state laws. However, it strains credulity to attempt to infer from these cases that unauthorized acts of state officers were excluded from the scope of the statutes by the phrase "under color of law." Except for one isolated instance, the history of the interpretation of this phrase through all the cases cited in Justice Frankfurter's footnotes[117] does not demonstrate that any federal court was aware that the narrow construction was to be applied, let alone that the courts had given this construction "uniform application."

The "Presuppositions of Our Federal System"

The remaining reason for the refusal of the dissenting Justices in *Screws* and *Monroe* to accept the *Classic* interpretation was described in the *Screws* dissent as the "presuppositions of our federal system," and herein lies the key to the judicial attitude underlying these dissents. It is, of course, not difficult to determine whose "presuppositions" were being referred to, but such a determination does very little to help an argument which is based almost exclusively on legislative intent, for the Reconstruction Congresses, which framed the Civil War amendments and passed the Civil Rights Acts, certainly did not share the same presuppositions regarding federalism as the advocates of states' rights. States' rights doctrines had reached their nadir at that time, and, while the majority of congressmen, who, after all, were representatives of states, by no means wished to destroy the federal system, they were, nonetheless, dedicated to the task of rearranging power within that system so that the federal government would be able to take positive action to prevent the states from directly abridging, or indirectly encouraging the abridgment of, the civil and political rights of Negroes and other minority groups.[118]

116 365 U.S. 167, 215 N.22 (1961).
117 See text accompanying notes 97-99, supra.
118 See note 78, supra, and accompanying text. Representative John A. Bingham of Ohio,

These presuppositions, thus, were not legislative at all, but were judicial.[119] The same judicial attitude that made a mockery of legislative intent with regard to the privileges or immunities clause of the fourteenth amendment in the *Slaughterhouse* cases[120] is in evidence in the arguments for a narrow construction of "under color of law" put forward in the very name of legislative intent. No one questions the wisdom of judicial caution in this area; the unwillingness of the federal judiciary to take upon itself the supervision of every distribution of rights and privileges undertaken at the state and local levels is, for the most part, highly salutary. Nevertheless, the wisdom of judicial caution is not an excuse for judicial inaction. There is an unsettling tendency on the part of some states and localities to tolerate flagrant abuses of authority by public officials leading to unconstitutional denials of the rights of individuals to life and liberty,[121] and the federal "under color" statutes clearly authorize criminal punishments or civil remedies for such abuses. No reason exists for barring the use of these statutes to provide redress in these instances through an unnecessarily restrictive interpretation of the phrase.

This is particularly true since the only argument available to the critics of the broad interpretation of the statutes is based on legislative intent, and not on constitutionality. The constitutionality of including abuse of authority by state officials within the concept of state action embodied in the fourteenth amendment was affirmed in 1879 in *Ex parte Virginia*, and has been put beyond challenge by a long series of Supreme Court decisions since that date.[122] Moreover, the Court in 1879 was keenly aware of the dangers to the presuppositions of federalism contained in the Civil Rights Acts, and had demonstrated its steadfast determination to safeguard the federal system against congressional in-

---

one of the most influential members of Congress during the Reconstruction period, and one of those most active in the drafting of the fourteenth amendment and the Civil Rights Acts, answered "God forbid," when it was suggested that this legislation was intended to eradicate federalism and states' rights. However, he was just as definite in his assertion that its intent was "to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State." See James, supra note 78, at 107, 129-30, passim.

119 See Flack, supra note 78, at 8, where it is observed: "Those who believe this dual form of Government best, all things being considered, must thank the Judicial, and not the Legislative, Department for preserving it."

120 83 U.S. (16 Wall.) 36 (1873). For a description of the attitude of the author of this opinion, see Fairman, Mr. Justice Miller and the Supreme Court, 1862-1890, 179-86, passim (1939).

121 In some areas, where allegations of abuse of police authority may prove to have positive political advantages for the policeman concerned, there is an actual incentive for atrocity. For example, with regard to the Screws affair, the Civil Rights Commission has commented: "The episode did not seriously tarnish the reputation of Claude M. Screws. In 1958 he ran for the State Senate and was elected." "Justice," supra note 52 at 9.

122 See text accompanying notes 40-43, supra.

cursions. Yet even this Court recognized that if the fourteenth amendment was to have any meaning at all, its prohibitions would have to reach state officials as well as states.

Congress was not blind to the eagerness with which the southern states sought ways to circumvent the federal civil-rights demands of the Reconstruction period, and, since the narrow construction of "under color of law" would have provided a remarkably simple means of circumvention by allowing any state with the proper laws in its statute books to tolerate, encourage, and subsidize the violation of its own laws by its own officials, thus properly immunized from federal prosecution, it is inconceivable that either the Senate or the House, had the point been directly raised in the debates preceding the passage of the "under color" provisions, would have exhibited the remotest intention of so limiting these statutes. To paraphrase the language of the Court in *Ex parte Virginia:* "This must be so, or the [statutory] prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

Conclusion

Even the late Professor Zechariah Chafee was invoked in the *Monroe* dissent as an opponent of the broad application in the present day of the remnants of the Civil Rights Acts of the nineteenth century.[123] The argument of Professor Chafee in the work there referred to[124] was that the existing federal statutes for the protection of civil rights are hopelessly inadequate, a point that it is difficult to disagree with, and that the passage of a comprehensive series of new statutes, grounded on the authority not only of the fourteenth amendment but also of other provisions of the Constitution, is imperative.[125] This is, of course, particularly in the absence of the new legislation, a good deal less than an argument against the continued application of the old laws in situations in which their application would be appropriate, and one may question whether Professor Chafee would have pressed his contention that far.

Undoubtedly, Congress should replace the "under color" statutes with new enactments drafted with considerably more comprehensiveness and precision; equally undoubtedly, Congress possesses the authority to do so. Nevertheless, the Supreme Court, as in *Classic, Screws,* and *Monroe,* is entirely justified in sanctioning the use of the old statutes in criminal prosecutions and civil suits against state officers who, in the course of their duties but in violation of state law, deprive others of

123 365 U.S. 167, 244 (1961).
124 Chafee, "Safeguarding Fundamental Human Rights: The Tasks of States and Nation," 27 Geo. Wash. L. Rev. 519 (1959).
125 Id. at 529.

federal rights. Such application of the statutes is constitutional; there is no indication that it is contrary to the intent of the Congresses which passed the acts concerned, and common sense would seem to dictate that it is squarely in line with congressional intent. The real argument against the broad construction of "under color of law" is not based on legislative intent, but is based on the sincere conviction that the course of wisdom lies in insisting that the states alone should prosecute violators of state law. No one would contest this argument were it not for the fact that too many states, notably in cases of police brutality, allow their officers to violate their laws with impunity.[126] Where a state promptly prosecutes such violators, it may properly be contended that the federal government should not enter in. Similarly, if federal prosecutions or civil damage suits are commenced in cases involving nothing more heinous than excusable administrative error, it would be proper to demand that the courts use considerable discretion in applying the "under color" provisions. Nevertheless, murder is not excusable; neither is forcible entry by policemen not in possession of a warrant, especially when the entry is accompanied by assault. Such acts, when committed by state officers in line of duty, are proscribed by the "under color" statutes, and, if they are tolerated by a state, it is a mistaken reverence for the principle of federalism which prompts the argument that the federal courts should not intervene.

[126] See "Justice," supra note 52, at 5-28.