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Fourteenth Amendment Congressional Power to Legislate Against Private Discriminations the Guest Case

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is clear that plaintiff did suffer some loss occasioned by his exclusion and the consequent inability to receive listing commissions on the additional properties which he would have had available for listing purposes. The suggested calculation of damages would therefore be more consistent with the position reiterated by the court that, though damages be uncertain in amount, recovery is not precluded.[119]

Conclusion

There is an increasing recognition today that a private association is affected with a public interest when membership constitutes an economic necessity and the association is therefore able to effectively deprive a person of his livelihood. *Grillo v. Board of Realtors* significantly extends that recognition to cover real-estate boards engaged in multiple listing. In condemning the multiple listing system of defendant Board as an unlawful restraint of trade and a concerted refusal to deal, *Grillo* presents an important "first look" into the proper role of multiple listing systems in the real-estate brokerage business. No doubt other cases will follow, and the scope of *Grillo* may require future delineation.[120] Though the result of that case appears to be sound, other multiple listing systems must stand or fall on the basis of their individual practices. In addition, *Grillo* should provide the impetus for a self-examination by real-estate boards of their multiple listing systems and may well result in some corrective measures being voluntarily undertaken should the appraisal reveal serious limitations on nonmember participation.

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FOURTEENTH AMENDMENT CONGRESSIONAL POWER TO LEGISLATE AGAINST PRIVATE DISCRIMINATIONS: THE *GUEST* CASE

More than eighty years of Supreme Court opinions on the scope of the fourteenth amendment have denied Congress power to deal directly with private discriminations which subvert the rights that amendment was designed to protect. Since the *Civil Rights Cases*[1] were decided in 1883, it has been held that federal legislation under section 5 of the fourteenth amendment[2] must be di-

[119] Grillo v. Board of Realtors, 91 N.J. Super. 202, 230, 219 A.2d 635, 651 (Ch. Div. 1966). No punitive damages were allowed as the court found that defendants' conduct "was motivated, at most, by an intent and desire to promote their business," and no actual malice or wanton and willful disregard of the rights of plaintiff was shown. Id. at 232, 219 A.2d at 652.

[120] The reasoning of Grillo would seem equally applicable to strike down an arrangement by which independent brokers circulate listings among a chosen few to the exclusion of other licensed brokers in the area. It is submitted that such a trade practice should not be similarly condemned as falling outside the "rules of the game."

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[1] 109 U.S. 3 (1883).

[2] U.S. Const. amend. XIV, § 5 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

rected toward correcting discriminatory state action. But in two separate opinions in *United States v. Guest*,[3] a majority of the Supreme Court has indicated its readiness to authorize congressional use of federal power against discriminations which do not involve actual state participation, and has thereby disaffirmed the state-action requirement set forth in the *Civil Rights Cases*.[4]

The opinion of the Court was limited to the private abridgment of fourteenth amendment rights which may have been aided by state officials,[5] and did not decide whether Congress could enact legislation against individual action under section 5. The two separate opinions, however, by purposely plunging into that question and answering it, raised the eyebrow of at least one member of the Court, Mr. Justice Harlan, who considered the voluntary pronouncements, "to say the very least, extraordinary."[6]

The first separate opinion, in concluding that private action is within the scope of congressional power, indicated that this conclusion was a necessary expansion of the Court's opinion.[7] Mr. Justice Clark, with Justices Black and Fortas concurring, stated:

> [I]t is . . . both appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.[8]

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[3] 383 U.S. 745 (1966). The majority of the Court includes Chief Justice Warren, and Justices Clark, Black, Fortas, Brennan, and Douglas.

The Guest case arose as a result of an indictment against Herbert Guest and five others on criminal conspiracy charges under 18 U.S.C. § 241 (1964). A Georgia jury had previously acquitted two of them for the murder of Lemuel A. Penn, and the federal indictment alleged that they had deprived Negroes of rights and privileges secured to them by the Constitution and laws of the United States. The full indictment appears at 383 U.S. 745, 747-48 n.1 (1966).

The Supreme Court received the case on direct appeal after the district court granted a motion to dismiss because the indictment failed to charge an offense under the laws of the United States. United States v. Guest, 246 F. Supp. 475 (M.D. Ga. 1964). The Court's decision announced in the opinion by Justice Stewart, remanded the case to the district court on a finding that there could have been state action—in "causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts"—sufficient to bring the conspiracy within the scope of 18 U.S.C. § 241 (1964). 383 U.S. 745, 753-60 (1966). The conspiracy to prevent the right to travel freely to and from the State of Georgia was held to be a violation of the statute even without state action, providing specific intent to interfere with the right could be proved. The Court noted exclusive federal control over interstate commerce to conclude that the right to travel freely interstate was a "federally protected" right. For the distinction between federally protected rights and state protected rights, and the importance placed upon this distinction by the Court, see text accompanying notes 80-87 infra.

[4] United States v. Guest, 383 U.S. 745, 762 (Clark, J., concurring, joined by Black, J., and Fortas, J.), 782-83 (Brennan, J., concurring in part, dissenting in part, joined by Warren, C.J., and Douglas, J.) (1966).

[5] United States v. Guest, 383 U.S. 745, 755 (1966). See Note, 20 Vand. L. Rev. 170, 174 (1966).

[6] United States v. Guest, supra note 5, at 762 n.1 (Harlan, J., concurring in part, dissenting in part).

[7] Id. at 762 (Clark, J., concurring, joined by Black, J., and Fortas, J.).

[8] Ibid. Enumeration of the fourteenth amendment rights is a difficult exercise. In Strauder v. West Virginia, 100 U.S. 303, 310 (1879), the Court stated:

> The Fourteenth Amendment makes no attempt to enumerate the rights it designed [sic] to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights . . . .

Recognizing this encompassing definition of fourteenth amendment rights, Justice Brennan, in his concurring opinion, specified that the Guest case dealt with the right to equal utilization of public facilities owned or operated by or on behalf of the state. United States v.

In a second separate opinion, Justice Brennan, with whom Chief Justice Warren and Justice Douglas concurred, reached a similar conclusion. The opinion of the Court had indicated that some positive state action was required to enforce Title 18, Section 241 of the United States Code, which prohibits conspiracies by private individuals against constitutionally protected civil rights.[9] Justice Brennan concluded, however, that individual activity which infringed fourteenth amendment rights could violate the statute without any active participation by the state.[10] He then concluded that section 241 and "legislation indubitably designed to punish entirely private conspiracies to interfere with the exercise of Fourteenth Amendment rights" is a permissible use of congressional power under section 5.[11]

The actual import of both separate opinions, however, is unusually vague. Neither opinion states in clear terms what state action will be required in the future, nor what limitations will remain on congressional power to legislate under section 5 of the fourteenth amendment. Justice Clark referred only to congressional action against private *conspiracies* in discussing this congressional power, indicating that there must be two or more persons involved and that they must act with specific intent.[12] Justice Brennan revived the *McCulloch v. Maryland*[13] limitation which required that the means chosen by Congress be adapted to a constitutional end, and suggested it apply to section 5. He further insisted that his consideration of congressional legislative power under that section was limited to the issue of private discriminations in relation to state owned and operated facilities.[14] But these conglomerate limitations did little to indicate clearly the real attitude of their proponents.

The separate opinions did not completely abandon the state-action requirement so as to permit the federal government to reach wholly private discriminations. To apply that interpretation would be to construe those opinions as contradicting the Court's unanimous opinion in *United States v. Price*,[15] a case decided the same day as *Guest*, which expressly reaffirmed the state-action

Guest, 383 U.S. 745, 780-81 (1966) (Brennan, J., concurring in part, dissenting in part, joined by Warren, C.J., and Douglas, J.). See also the text accompanying notes 15-21 infra.

[9] 18 U.S.C. § 241 (1964) provides:

> 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
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> 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 or imprisoned not more than ten years, or both.

[10] United States v. Guest, 383 U.S. 745, 781 (1966) (Brennan, J., concurring in part, dissenting in part, joined by Warren, C.J., and Douglas, J.).

[11] Id. at 781-82.

[12] See the definition of "conspiracy" in Black, Law Dictionary 382-83 (4th ed. 1951), and its application in a federal case, Screws v. United States 325 U.S. 91 (1945).

[13] 17 U.S. (4 Wheat.) 316 (1819). The famous limitation applied by Justice Marshall was:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id. at 421.

[14] United States v. Guest, supra note 10, at 780-81.

[15] 383 U.S. 787 (1966).

theory.[16] If Justice Clark intended to repudiate the state-action theory completely, he could not have simultaneously joined the opinion of the Court in *Price* which affirmed the requirement of state action.[17] Similarly, there would have been no need for Justice Brennan to carefully restrict his opinion to a private denial of equal access to state facilities if his objective had been to disaffirm the state-action theory entirely.[18]

It is thus necessary to distinguish state action in the creation of the state facilities, which is related *indirectly* to the discrimination, and state action by positive state participation in preventing the equal use of state facilities, which is related *directly* to the discrimination. Unless this distinction is made, an analysis of the separate opinions and their relation to the state-action theory becomes complicated by an inherent contradiction in discussing the aborgation of the state-action concept in the protection of "fourteenth amendment rights." Since the fourteenth amendment is directed to the state, in order to create a situation where a private individual could abridge a right under the amendment, some action or instrumentality of the state must be involved. The state must create the public facility—in *Guest*, it was a state highway—which citizens have a right to use under the fourteenth amendment before private individuals can violate the amendment by interfering with that right.

The *Civil Rights Cases* restricted congressional legislative power under section 5 of the fourteenth amendment to "appropriate legislation for correcting the effects of such prohibited State laws and State acts . . . and this is the whole of it."[19] Those cases confined the scope of the power to *corrective* legislation which operated on *positive* state participation in the discrimination. On the authority of the *Civil Rights Cases*, the Court has continually refused to permit federal control of private activity unless it could first find the taint of positive state participation.[20] This limitation was directly confronted by Justice Brennan in his separate opinion. With reference to the requirement that congressional legislation be corrective in nature, he stated: "I do not accept—and a majority of the Court today rejects—this interpretation of § 5."[21] Similarly, Justice Clark's reference to congressional power to regulate private conspiracies affecting fourteenth amendment rights implicitly denounced the "corrective-legislation" restriction.[22] The two separate opinions, therefore, abrogated the state-action concept to the extent that positive state participation in the discriminatory activity would no longer be required to invoke federal legislation prohibiting the abridgment of fourteenth amendment rights. However, there must still be some connection with the state in the first instance, at least in an indirect way, in order to acquire a right under the fourteenth amendment.

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[16] Id. at 799.

[17] United States v. Guest, 383 U.S. 745, 761 (1966) (Clark, J., concurring).

[18] Justice Brennan repeatedly insisted that a private denial of access to state facilities was the limited subject of his opinion. See id. at 776-77, 780-82 (Brennan, J., concurring in part, dissenting in part).

[19] Civil Rights Cases, 109 U.S. 3, 11 (1883).

[20] In order to adhere to the Civil Rights Cases, the Court has occasionally gone to the extreme of discovering state action in cases where there appears to be only private activity; see note 59 infra and cases cited in notes 60-69 infra.

[21] United States v. Guest, 383 U.S. 745, 783 (1966) (Brennan, J., concurring in part, dissenting in part).

[22] Id. at 762 (Clark, J., concurring).

The Framers' Intent To Include Private Action in the Fourteenth Amendment

The inclusion of individual activity and private wrongs within the ambit of congressional power under section 5 of the fourteenth amendment, and the acknowledgment of a congressional power to legislate directly against such action is, perhaps surprisingly, not a radical departure from what appears to be the intended purpose of the amendment. At the time the amendment was passed, congressional power was considerably limited by Supreme Court interpretation. Congressional control of state action was, in effect, nonexistent. The Court had held that a right or privilege established in the Constitution implied a congressional right to enforce it,[23] but that the "Federal Government . . . has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it."[24] It has been suggested, in light of the above, that the congressional debates probably centered around a policy which would operate to protect civil rights should the state fail to do so.[25] Furthermore, it has been suggested that even if the amendment's sponsors had intended congressional action to supersede state law where positive discriminatory action had been taken by the state, they probably also intended that it would operate directly on private activities.[26]

Both an intent to deal only with positive state action and an intent to reach individual action are supported by different sections of the congressional debates.[27] One writer felt that the essence of the amendment's legislative authority must have been congressional power over individual activity, since the entire area of private wrong, sheltered by state inaction "is one which congressional power cannot reach at all, unless Congress can deal with the private acts directly."[28] But because of the existence at the time of enactment of at least two

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[23] See Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

[24] Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1861).

[25] Frantz, "Congressional Power to Enforce the Fourteenth Amendment Against Private Acts," 73 Yale L.J. 1353, 1356-57 (1964).

[26] Ibid. For a description of particular events involving private activity which inspired the enactment of the fourteenth amendment, see Mr. Snyder's address to the House of Representatives, Cong. Globe, 42d Cong., 1st Sess., 196-203 (appendix) (1871). See also ten-Broek, The Antislavery Origins of the Fourteenth Amendment 164 (1951).

[27] Mr. Bingham, actual draftsman of the second sentence of sections 1 and 5, in an address to the House of Representatives, said:

> It is clear that if Congress do so provide by penal laws for the protection of these rights [guaranteed by the fourteenth amendment], those violating them must answer for the crime, and not the States. The United States punishes men, not States, for a violation of its law.

Cong. Globe, 42d Cong., 1st Sess. 85-86 (appendix) (1871). Yet other statements in the same speech by Mr. Bingham indicated that the amendment was intended to be only a limitation on state governments by expressly copying the criterion set forth by the Supreme Court for application of constitutional limitations upon the states. See id. at 83-84; Other conflicting speeches were by Mr. Morton addressing the Senate:

> The Government can act only upon individuals. . . . If the effect of the amendment is simply that the United States shall exert a negative upon a State, it amounts to but very little . . . . The legislation which Congress is authorized to enact must operate, if at all, upon individuals.

Id. at 251 (appendix); and by Mr. Hamilton to the House of Representatives:

> . . . [I]t will be seen that the Constitution does not act upon corporations or individuals; they are not prohibited from making a distinction between citizens in their relations with them, or is any power given to Congress to enact laws on that subject.

Cong. Record, 43d Cong., 1st Sess. 741 (1874). See also Avins, "'State Action' and the Fourteenth Amendment," 17 Mercer L. Rev. 352 (1966).

[28] Frantz, supra note 25, at 1356-57.

distinct political views on the scope of the new amendment,[29] the intent of the framers as to this power was not clearly expressed in the course of the discussions.[30] At one extreme was an attitude which would sustain almost unlimited congressional power to protect constitutional rights against both official and private action, to the point of displacing state authority altogether without awaiting state abridgments of constitutional rights. At the other extreme, "a minority consisting almost exclusively of Democrats" espoused the view, most approximating the state-action theory, that federal legislation could be directed only against state abridgment of fourteenth amendment rights.[31] They argued that Congress could eliminate state laws unequal in their protection or application and could correct state action, but that was the extent of the congressional power to legislate under the fourteenth amendment.

The *Civil Rights Cases* and subsequent decisions which followed them adhered to this theory[32] and required positive action by a state officer or state law which abridged fourteenth amendment rights before federal law might be invoked. The holding of the Court in *Guest* conformed with this view.[33] The separate opinions, however, were moving toward the first theory—that private activity is within the scope of federal protection under the fourteenth amendment. Despite a conspicuous lack of judicial precedent upholding this view, there is support for the proposition that many legislators intended Congress to have the "constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by States."[34]

Judicial Establishment of the State-Action Theory

Soon after the fourteenth amendment's adoption, the judiciary was faced with the almost insuperable task of determining how extensive the reach of the amendment was in light of the varying political views of the framers.[35] In *United States v. Hall*,[36] a circuit court adopted an expansive interpretation of the legislative power under the fourteenth amendment:

> [A]s it would be unseemly for congress to interfere directly with state

[29] See Harris, The Quest for Equality 45 (1960). The author suggests the existence of a third political view which took a position in the middle of the two extremes, and leaned toward the state-action theory. Under this view, Congress had the power and responsibility to protect constitutional rights in the event the states failed or refused to do so, or had themselves acted wrongfully. Ibid.

[30] See excerpts from the congressional debates at note 27 supra.

[31] Harris, supra note 29.

[32] See, e.g., United States v. Powell, 212 U.S. 564 (1909) (per curiam), affirming 151 Fed. 648 (N.D. Ala. 1907); Hodges v. United States, 203 U.S. 1 (1906); notes 60-69 infra.

[33] United States v. Guest, 383 U.S. 745, 755 (1966).

[34] Flack, The Adoption of the Fourteenth Amendment 277 (1908); See tenBroek, supra note 26, at 223 where the author writes:

> The State Governments, like other governments, were under a duty to protect such rights. The Fourteenth Amendment confirmed that duty and imposed it also on Congress.

See also Barnett, "What is 'State' Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?" 24 Ore. L. Rev. 227 (1945).

There is, however, authority the other way. See Avins, supra note 27, at 359:

> It is thus clear beyond the slightest shadow of a doubt that the members of Congress who were contemporaries of the passage of the fourteenth amendment well understand [sic] that the last sentence of the first section of this amendment was directed solely to the actions of the states.

[35] See text accompanying notes 27-32 supra.

[36] 26 Fed. Cas. 79 (No. 15282) (C.C.S.D. Ala. 1871).

> enactments, and as it cannot compel this activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses, and protect the rights which the amendment secures.[37]

The Supreme Court's first treatment of this issue was in *United States v. Cruikshank*,[38] where it was decided that the right to free assembly "remains . . . subject to State jurisdiction."[39] Though this opinion upheld the decision of the circuit court,[40] that court's decision was based on what seemed to be an opposite premise: "congress has the power to pass laws to directly enforce the right and punish individuals for its violation . . . ."[41] It has been said, however, that the disparity is only apparent, and that the Supreme Court had not intended to restrict the amendment's protection solely to positive state action,[42] but only intended to place the initial responsibility for protecting fourteenth amendment rights with the state.

The Supreme Court would have been in a politically precarious position no matter which of the three interpretations from the congressional debates it adopted. Its treatment of the issue has been said to have frustrated the congressional intent to provide redress for private wrongs.[43] But whether the Court's position was frustrating or faithful to the legislative intent, it was a compromise which incorporated a moderate outlook on congressional legislative power and was "far less limiting in its effect on congressional . . . power than the 'state action' theory."[44] In a series of decisions following *Cruikshank*,[45] the Court concluded that congressional power should be a safeguard against the state's failure to protect its citizens from abridgment of their civil rights—the primary responsibility for this protection resting with the state by virtue of the fourteenth amendment.[46] The wrong which violated the Constitution was the action the state had taken, or failed to take; it was not the private discriminatory act, but the state's failure to legislate against it, which constituted the wrong.[47] The Court held that Congress could attack the problem at its roots by providing

[37] Id. at 81. Justice Brennan, in his separate opinion in Guest, displayed a similar attitude. Although he recognized the ability of Congress to deal with state action, he further suggested: "it is also appropriate to punish other individuals—not state officers themselves and not acting in concert with state officers—who engage in the same brutal conduct for the same misguided purpose [of abridging fourteenth amendment rights]." United States v. Guest, supra note 33, at 784 (Brennan, J., concurring in part, dissenting in part). [Footnote omitted.]

[38] 92 U.S. 542 (1876).

[39] Id. at 551-52. This is not to say that there is no federal jurisdiction of the subject, but "the people must look [first] to the States" for their protection of its enjoyment. Id. at 552.

[40] United States v. Cruikshank, 25 Fed. Cas. 707 (No. 14897) (C.C.D. La. 1874).

[41] Id. at 713.

[42] Frantz, supra note 25, at 1370.

[43] Peters, "Civil Rights and State Non-Action," 34 Notre Dame Law. 303, 314 (1959). See also Gressman, "The Unhappy History of Civil Rights Legislation," 50 Mich. L. Rev. 1323, 1339-40 (1952); Flack, supra note 34, at 262-63, 277.

[44] Frantz, supra note 25, at 1359.

[45] Including Ex parte Virginia, 100 U.S. 339 (1879), which upheld a federal law making exclusion of Negroes from state or federal juries a federal criminal offense; Strauder v. West Virginia, 100 U.S. 303 (1879); and Neal v. Delaware, 103 U.S. 370 (1881). For a thorough analysis of the theory in these cases see Frantz, supra note 25, at 1373-77.

[46] See United States v. Cruikshank, 92 U.S. 542, 555 (1876).

[47] United States v. Rives, 100 U.S. 313, 318-19 (1880); see United States v. Harris, 106 U.S. 629, 639 (1883).

legislation against individual activity in place of the state legislation which should have been enacted, but only when the states had failed to do their duty.[48] It was further held that in some cases Congress might anticipate the state's failure to act and enact legislation against individual activity, though such legislation was necessarily conditioned upon the state's subsequently acting on the same subject.[49] These first decisions, therefore, were expansions of the Court's initial theory that the primary responsibility for protection of fourteenth amendment rights rested with state governments, and that the federal government could only legislate when the state had failed to do so.

Then in *United States v. Harris*[50] the Court further limited the scope of the legislative power by holding that federal legislation could not be directed exclusively against the action of private persons, unless some connection to the laws of the state or the administration of the laws by a state official was shown.[51] It is easy to see how, in the next logical step, all federal legislation directed against private activity involving no positive state participation could be eliminated.

Only a few months after *Harris*, the Court decided the *Civil Rights Cases*,[52] stating with respect to section 5 of the fourteenth amendment:

> [It] invests Congress with power to . . . adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts . . . . It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment.[53]

This interpretation of section 5 has been used as the authoritative precedent for all subsequent cases involving the scope of the legislative power under the amendment. It was, in fact, cited with approval in Justice Stewart's opinion for

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[48] See Ex parte Virginia, supra note 45, at 345; Strauder v. West Virginia, supra note 45, at 311-12; United States v. Harris, supra note 47, at 639.

[49] United States v. Harris, supra note 47, at 639-40. The sum of the first group of decisions was that congressional legislation which "impinges directly on the conduct of private individuals *and which operates uniformly regardless of the role played by the state* is unconstitutional." Frantz, supra note 25, at 1359. This interpretation of these early decisions indicates that this standard resulted not because private acts were beyond the reach of congressional power; "rather, it is because (a) Congress may not presume that states will fail to discharge their constitutional duties; (b) Congress may not deprive the states, in advance of any default on their part, of the very function the amendment commands them to perform." Ibid.

State inability or neglect to deal with individual action, then, could be considered a violation of the amendment and within the power of congressional legislation. Under this theory, an obvious abridgment of civil rights found in *Guest*, coupled with the failure of the state to convict the defendants would certainly be a foundation for the application of federal law; see note 2 supra. The evolution of the early cases, however, ignored state inaction and failed to regard it as a violation of the amendment. As a result, only positive state action was included within the purview of congressional legislation.

[50] 106 U.S. 629 (1883).

[51] Id. at 640.

[52] 109 U.S. 3 (1883).

[53] Id. at 11.

the Court in *Guest* when he found positive state action sufficient to bring the case within the state-action formula.[54]

In retrospect, the first decisions on the power of the fourteenth amendment placed the Court in a position from which it could choose one of two alternatives with which to define the federal legislative power under the amendment. The decisions could have tended toward increased congressional control of wholly private activity, or could have narrowly defined the amendment to include only corrective legislation directed toward positive state action. The Court chose the latter course in arriving at its conclusions in the *Civil Rights Cases*. The separate opinions in *Guest* indicated an express dissent from this interpretation, and Justice Brennan specifically denounced the "corrective-legislation" restriction of the *Civil Rights Cases* as not in accordance with the attitude of a majority of the Court.[55]

The Erosion of the State-Action Theory in Cases Involving Federal Legislation

An analysis of the application of the state-action theory to discriminations which violate the fourteenth amendment requires a distinction between cases arising under section 1 of the amendment,[56] which do not involve a federal statute and are thereby limited to judicial interpretation, and cases involving federal legislation enacted under section 5.[57] The *Guest* case, by repudiating the "corrective-legislation" restriction on congressional enactments authorized by section 5, did not expressly expand the scope of judicial review of discriminations which do not purport to violate any federal statute.[58]

It is almost generally understood, however, that despite ostensible acceptance of the *Civil Rights Cases,* the rigid state-action concept with regard to *judicial* classification of discriminatory activity has been considerably eroded.[59] The

[54] United States v. Guest, 383 U.S. 745, 755 (1966).

[55] Id. at 783 (Brennan, J., concurring in part, dissenting in part).

[56] U.S. Const. amend. XIV, § 1 provides, in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[57] U.S. Const. amend. XIV, § 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[58] See text accompanying notes 19-22 supra.

[59] See Horowitz, "The Misleading Search for 'State Action' Under the Fourteenth Amendment," 30 So. Cal. L. Rev. 208 (1957); Avins, supra note 27; Peters, supra note 43. A great part of the dissention from the rigid state-action requirement for section 1 violations arose because of the gap in protection resulting from the inability of corrective legislation to deal with state inaction, and yet not reach private activity. The judiciary began recognizing such state inaction as state action in order to correct such discrimination in conformity with the state-action concept. There was "state action," then, at times when the state had not acted at all.

For indications that the amendment is violated when private persons or unofficial groups take life, liberty, or property, and the state fails to taken action see tenBroek, supra note 26, at 206; Peters, supra note 43; Lewis, "The Meaning of State Action," 60 Colum. L. Rev. 1083, 1085 (1960); Abernathy, "Expansion of the State Action Concept Under the Fourteenth Amendment," 43 Cornell L.Q. 375, 412-18 (1958). "[W]hat the state *can* do it *must* do to protect the individual against constitutionally unreasonable discriminations on the part of other private persons." Id. at 416. See also Catlette v. United States, 132 F.2d 902 (4th Cir. 1943), where the court states: "The Supreme Court . . . has already taken the position that culpable official State inaction may also constitute a denial of equal protection." Id. at 907. For a summary of quotations from congressional debates indicating that a "*denial* under the Fourteenth Amendment included *inaction* as well as action," see Cohen, "The Screws Case: Federal Protection of Negro Rights," 46 Colum. L. Rev. 94, 105-06 n.61 (1946).

Court has reached what would otherwise be considered private discriminations by imputing state action to them and thereby bringing them within the section 1 restrictions. A private election group was held to be imbued with characteristics of a state when it, in effect, chose the candidates to run in general elections;[60] activities of state officers acting in direct violation of state law[61] or in an ordinarily non-official capacity were held to fall within the state action concept, thereby violating the fourteenth amendment;[62] a privately owned and operated town with a business district fully accessible to the public took on a public nature and became subject to the fourteenth amendment,[63] as did a privately leased restaurant where the state owned the building in which it was operated;[64] private restrictive covenants which were not violative of the fourteenth amendment when standing alone, became violative when enforced in a state court;[65] and a private college acquired characteristics of a state where the school board was formed and authorized by state statutes.[66] Statements of mere policy by public officials,[67] and a health board regulation which "encouraged" restaurant segregation[68] were held to constitute sufficient state action to invoke the fourteenth amendment. Most recently in *Evans v. Newton*[69] the Court imputed a public function to a private park which had been operated by the city but since restored to private trustees, who were to continue enforcement of racial restrictions. State and private activity have been distinguished only by very fine lines in these decisions, and one author has even suggested that eventually the Court may consider state-licensed drivers as state officials.[70] Even in *Guest*, Justice Stewart exercised this exact judicial method of imputing state participation to private discriminations by drawing the assumption of state action from the false arrest of Negroes.[71] If this were said to be sufficient action of the state to satisfy section 1, there would be no difficulty in validating a federal statute which reached such activity under the authority of section 5. The majority of the Court, however, chose to lift the restriction on congressional legislation under section 5 rather than squeezing the controversial activity into section 1.

Unlike the state-action requirement in judicial treatment of activity under section 1, the corrective-legislation restriction on section 5 is not so easily removed in degrees. Where there has been no federal statute involved, the Court has probed each set of facts to uncover state action. A federal statute cannot be accorded such individual application, however, and either must be expressly limited to correcting state activity, or must run the risk of being invalid due to encroachment upon areas not contemplated by the authority of section 5.[72]

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[60] Smith v. Allwright, 321 U.S. 649 (1944); see Terry v. Adams, 345 U.S. 461 (1953).
[61] Screws v. United States, 325 U.S. 91 (1945).
[62] Griffin v. Maryland, 378 U.S. 130 (1964).
[63] Marsh v. Alabama, 326 U.S. 501 (1946).
[64] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
[65] Shelley v. Kraemer, 334 U.S. 1 (1948).
[66] Pennsylvania v. Board of Directors, 353 U.S. 230 (1957).
[67] Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. City of Greenville, 373 U.S. 244 (1963).
[68] Robinson v. Florida, 378 U.S. 153 (1964).
[69] 382 U.S. 296 (1966), 51 Cornell L.Q. 862 (1966).
[70] Avins, supra note 27, at 353.
[71] United States v. Guest, 383 U.S. 745, 756 (1966).
[72] The conspiracy statute upon which Guest was decided, 18 U.S.C. § 241 (1964), has

The only certain way to recognize congressional power over private activity requires the abandonment of the corrective-legislation restriction on the section 5 power.

In light of the deterioration of the state-action theory in judicial interpretations under section 1 of the fourteenth amendment, and increased pressure on Congress and the Supreme Court to reach certain private discriminations, the abandonment of the corrective-legislation restriction on section 5 was not totally unexpected. Decisions following the *Civil Rights Cases,* which solidified the theory that federal legislation could only operate against positive state action,[73] have been severely criticized as unnecessarily restrictive, since legislation against private conduct could be just as corrective as legislation against positive state action.[74] Professor Thomas P. Lewis, in a recent article recognizing the need for displacement of the positive state-action concept in congressional legislation, predicted that the Court would have to find an outlet through which individual action might be reached:

> Unless the Court overrules the *Civil Rights Cases* the next question seems to be whether the Court can and will find a general principle to support expansions of the [state action] concept into some areas of ordinary nongovernmental effort.[75]

One such outlet, the commerce clause, has been used to justify congressional regulation of places of public accommodation such as restaurants and inns,[76] but it is limited in application and fails to reach wholly private discriminations having no relation whatever to interstate commerce. It is only mildly surprising, then, that six members of the Court in *Guest* should reach the conclusion that section 5 empowers Congress to legislate against conspiracies interfering with fourteenth amendment rights even where the state has not actively participated in the discrimination.

Civil Rights Conspiracy Statute Expanded

The language of Title 18, Section 241 of the United States Code ignores the positive state-action restriction on congressional legislation.[77] The statute prohibits any private conspiracy to deprive any citizen of the rights granted him by the Constitution and laws of the United States,[78] but its application has been limited by judicial interpretation to conform with the positive state-action requirement.

Apparently, however, the statute was not designed to correct positive state

received special treatment. Instead of holding the statute invalid for encroaching on areas prohibited to congressional legislation by the state-action theory, the Supreme Court merely refused to apply it in those situations. By means of almost ad hoc interpretation, the Court has nursed the statute to a narrow application of "federally protected rights," despite the fact that its language broadly includes all rights protected by the Constitution; see text accompanying notes 77-87, infra.

73 See, e.g., cases cited at notes 60-69 supra.

74 See Peters, supra note 43, at 331. For a contrary conclusion see Horowitz, supra note 59, at 210-11. In the Guest decision, Justice Brennan comments: "[the corrective-legislation concept] attributes a far too limited objective to the Amendment's sponsors." United States v. Guest, 383 U.S. 745, 783 (1966) (Brennan, J., concurring in part, dissenting in part).

75 Lewis, supra note 59, at 1121.

76 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

77 18 U.S.C. § 241 is quoted at note 9 supra.

78 See Note, 74 Yale L.J. 1462 (1965).

action. Section 242, the counterpart of section 241, is explicitly directed against actual state discrimination,[79] and it is unlikely that Congress would legislate against identical issues in successive sections. But if section 241 were applied to wholly private discriminations against fourteenth amendment rights, the "corrective-legislation" restriction on congressional power under section 5 would render it unconstitutional. The Supreme Court has cautiously applied it, therefore, to conspiracies affecting "federally protected rights" concerning which the state could never take action, *i.e.*, those rights which are *exclusively* under the protection of the federal Constitution or laws. Among these "federally protected" rights are the right to perfect a homestead claim,[80] the right to vote in federal elections,[81] the right to be secure from unauthorized violence while in federal custody,[82] the right to inform on violations of federal law,[83] and the right to enforce a federal court order.[84]

On the other hand, those rights which the Court has considered "state protected," notably the fourteenth amendment rights, have been excluded from the statute's coverage.[85] For example, the right to work and live in a certain state[86] and the right to be free from unauthorized assault while in the custody of a state official[87] were held to be unprotected by the statute. These rights were considered to be solely within the jurisdiction of the state, and federal law, therefore, could not operate directly on their abridgment by individuals.

The two separate opinions in *Guest*, in repudiating the positive state-action theory and the restrictive corrective-legislation requirement, have thereby expanded the scope of section 241 to include wholly private conspiracies which interfere with fourteenth amendment rights.[88] This interpretation is supported by the legislative history of the statute, which indicates that it was originally intended to reach individual activity violating rights protected by the fourteenth amendment.[89] Moreover, some of the earliest decisions concerning section 241 held that it applied to individual interference with rights secured by that amendment.[90] These decisions, however, were decided prior to the establishment of the positive state-action theory in the *Civil Rights Cases*, and have since been denounced as "plainly inconsistent with subsequent decisions of this Court."[91]

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[79] 18 U.S.C. § 242 (1964) states, in part:
Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined . . . .

[80] See United States v. Waddell, 112 U.S. 76 (1884).

[81] See United States v. Classic, 313 U.S. 299 (1941); Ex parte Yarbrough, 110 U.S. 651 (1884).

[82] See Logan v. United States, 144 U.S. 263 (1892).

[83] In re Quarles, 158 U.S. 532 (1895).

[84] United States v. Lancaster, 44 Fed. 885 (W.D. Ga. 1890).

[85] See, e.g., 15 Am. Jur. 2d "Civil Rights" § 15, at 416-18 (1964). See also Note, 20 Vand. L. Rev. 170, 171 (1966).

[86] United States v. Wheeler, 254 U.S. 281 (1920); Hodges v. United States, 203 U.S. 1 (1906).

[87] United States v. Powell, 151 Fed. 648 (N.D. Ala. 1907), aff'd, 212 U.S. 564 (1909).

[88] See text accompanying notes 19-22 supra.

[89] See Senator Pool addressing the Senate, Cong. Globe, 41st Cong., 2d Sess. 3611-13 (1870).

[90] See Ex parte Riggins, 134 Fed. 404 (N.D. Ala. 1904); United States v. Mall, 26 Fed. Cas. 1147 (No. 15712) (C.C.S.D. Ala. 1871); United States v. Hall, 26 Fed. Cas. 79 (No. 15282) (C.C.S.D. Ala. 1871).

[91] United States v. Williams, 341 U.S. 70, 81 n.8 (1951) (opinion of Frankfurter, J., announcing the decision of the Court).

More recent cases, however, have indicated a relaxation of the statute's requirements. In *United States v. Williams*[92] the Court split as to whether fourteenth amendment rights were included within the scope of the rights protected by section 241. Four Justices concluded that these rights were not covered by the statute.[93] Four dissenting Justices concluded that if the defendants were acting under color of law, thereby satisfying the positive state-action requirement, fourteenth amendment rights should be included within the statute's protection.[94] Even the dissent, however, implied that if there had been no state action at all, there would have been no basis for extending the statute to include fourteenth amendment rights.

The question did not directly arise again until *United States v. Price*,[95] which was decided the same day as *Guest*. In *Price*, the Court unanimously held that fourteenth amendment rights were included within the protection of section 241[96] and adopted the theory of the dissenting opinions in *Williams*.[97] At the same time the unanimous opinion reaffirmed the positive state-action theory,[98] thereby indicating that the statute could apply only when correcting active state participation in the conspiracy. Since the conspiracy at issue in *Price* clearly involved positive state action, the Court was not asked to decide whether the statute would apply if there had been no active state participation.[99] In fact, the Court specifically mentioned that nongovernmental activity was beyond the scope of the opinion.[100] It is interesting to note, however, that the Court reprinted excerpts from the legislative discussions on statutory predecessors of section 241 at the end of its opinion. The remarks of Senator Pool in that appendix stand for the proposition that the statute is to reach individual activity which violates a citizen's civil rights, regardless of state participation.[101] Therefore, though the Court in *Price* affirmed the positive state-action theory because it was the least complicated application of the statute to the conspiracy involved, it alluded to a further application when positive state participation was not present. In *Guest* Justice Stewart, by finding positive state action in the arrest of Negroes, applied section 241 in the same manner as did the Court in *Price*. But six of his colleagues, unable to hold that positive state participation was clearly present in the case, chose to disaffirm the requirement that the statute

92 341 U.S. 70 (1951).
93 Id. at 78.
94 Id. at 90-92 (dissenting opinion).
95 383 U.S. 787 (1966).
96 Id. at 798.
97 United States v. Williams, 341 U.S. 70, 90-92 (1951) (dissenting opinion).
98 United States v. Price, 383 U.S. 787, 799 (1966).
99 Id. at 799-800.
100 Id. at 798 where the Court acknowledged: "whatever the ultimate coverage of [section 241] . . . may be, it extends to conspiracies otherwise within the scope of the section, participated in by officials alone or in collaboration with private persons . . . ."
101 Senator Pool stated:

> There is no legislation that could reach a State. . . . It can only reach the individual citizens of the State in the enforcement of law. You have, therefore, in any appropriate legislation, to act on the citizen, not on the State.

Cong. Globe, 41st Cong., 2d Sess. 3611 (1870); quoted in United States v. Price, 383 U.S. 787, 811 (1966). Senator Pool further stated:

> That the United States Government has the right to go into the States and enforce the fourteenth and the fifteenth amendments, is in my judgment, perfectly clear, by appropriate legislation that shall bear upon individuals.

Cong. Globe, 41st Cong., 2d Sess. 3613 (1870); quoted in United States v. Price, supra, at 818.

correct actual state involvement and extended it to private activity which interferes with fourteenth amendment rights. By implication from these separate opinions, therefore, only *indirect* state participation sufficient to create a fourteenth amendment right is necessary to apply section 241 to wholly private conspiracies which interfere with such a right.

CONCLUSION

In *United States v. Guest*, a majority of the Supreme Court disaffirmed that part of the *Civil Rights Cases* which restricted congressional power under section 5 of the fourteenth amendment to corrective legislation against positive state action. Despite what appears to be an unusual departure from established precedent, it is quite possible that the Court's conclusion does not oppose the intent of the amendment's framers. Moreover, the initial Supreme Court decisions on the section 5 legislative power, rendered prior to the *Civil Rights Cases*, did not require that congressional enactments necessarily be directed at positive state action.

Even before *Guest* the Court had tacitly weakened the state-action requirement by discovering state participation in most private activity at issue in section 1 cases that did not involve a federal statute. But though this case-by-case technique expanded judicial power under section 1 of the fourteenth amendment, it could not readily be used to expand legislative power under section 5. The *Guest* majority produced this result by a different method—a general relaxation of the corrective-legislation requirement under section 5. This relaxation simultaneously expanded 18 U.S.C. § 241, the conspiracy statute involved in the case, which had previously been restricted solely to "federally-protected" rights, excluding any interference with fourteenth amendment rights by individuals. Without the corrective-legislation requirement, it will apply as its draftsmen intended—to private conspiracies which interfere with fourteenth amendment rights.

The necessity for actual state participation, or *positive* state action, has now been reduced to a minor role both in cases that involve only section 1 and in those involving congressional power under section 5. Arguably, *Guest* has completely removed this requirement from the legislative formula of section 5. But some form of *indirect* state action is still necessary in that federal enactments must be aimed at protecting fourteenth amendment rights which arise through some prior action of the state. The separate opinions in *Guest*, nevertheless, provide an open door allowing Congress to legislate directly against many private discriminations which interfere with fourteenth amendment rights.

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