COMMENTS

THE CIVIL RIGHTS ACT: EMERGENCE OF AN ADEQUATE FEDERAL CIVIL REMEDY?

Resort to the civil remedies provided by the Third Civil Rights Act usually is deprecated or entirely overlooked as a method of redressing infringements of fundamental liberties. Critics of the provisions—pointing to their long disuse,[1] limited scope[2] and questionable origin[3]—regard them as an obsolete remnant of a retaliatory reconstruction program initiated by a partisan Civil War Congress and subsequently all but emasculated by the courts.[4] These inadequacies may, in large measure, be conceded. Nevertheless, in view of the urgent need for an adequate civil remedy to redress invasions of individual rights, and of recent indications of judicial willingness to revitalize those portions of the Act which are still in existence, the time is opportune to reappraise the Act and to determine its present potential. This discussion will be limited to an historical examination of the uses made of those civil actions originated by Sections 43 and 47(3) of Title 8 U.S.C. and consideration of possible extensions in their application.[5]

Section 43 supplies "an action at law, suit in equity or other proper proceeding for redress" against anyone acting under color of state law who interferes with rights, privileges and immunities secured by the Constitution and laws of the United States. Section 47(3) establishes an "action for the recovery of damages" against two or more persons conspiring to deprive another of equal protection of the laws or of equal privileges and immunities under the laws.[6]

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1. See p. 364 *infra*. The quantity of litigation has gradually increased in recent years.

2. Milton Konvitz, a writer who has doubted the usefulness of these civil actions, commented: "Summarizing the situation as to Title 8 U.S.C. § 43, we would say: the rights, privileges and immunities protected by it and by the Fourteenth Amendment, under which it was adopted, are those arising under the Constitution and laws of the United States, which accrue from national citizenship and not those which accrue from state citizenship. The section offers protection against state action only. Neither the Amendment nor the Act created new rights or privileges. The number of rights inherent in national citizenship is extremely limited. Later decisions of the court have not broadened the class of federal privileges and immunities." And as to § 47(3) Mr. Konvitz observed: "The Constitutionality and usefulness of this section is in great doubt." KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 100, 101 (1947).

3. See note 13 *infra*.

4. For a thorough treatment of the judicial annihilation of the civil rights legislation growing out of the three Civil War Amendments, see CARR, FEDERAL PROTECTION OF CIVIL RIGHTS 40-46 (1947).

5. Title 8 U.S.C. §§ 47(1), (2) and 48 also establish civil remedies. These sections deal with a limited number of specific situations (preventing an officer from doing his duty, obstructing justice, and failure to prevent the conduct proscribed by § 47) which are not within the scope of this discussion.

6. REV. STAT. §§ 1979 and 1980 (1875), 8 U.S.C. §§ 43 and 47(3) (1946).

Both sections were originally part of the Third Civil Rights Act,[7] which was enacted pursuant to section 5 of the Fourteenth Amendment granting Congress the power to enforce its provisions by appropriate legislation. While little of the exhaustive congressional discussion which took place before the Act's passage dealt specifically with its civil remedies, it seems clear from the debates that members of Congress intended to strike not only at a broad area of "state action"[8] but also at the acts of private individuals.[9]

Impediments to the accomplishment of this dual legislative purpose have been numerous. Chief among them has been narrow judicial interpretation of the Act's coverage. This was an inevitable result of the decisions which early established that the Fourteenth Amendment, empowering Congress to enact civil rights legislation, was a prohibition against state action only;[10] and that privileges and immunities of United States citizenship were not coextensive with privileges and immunities of state citizenship, and thus the Fourteenth Amendment did not bring within the scope of federal protection any large category of individual rights.[11]

The act has also been plagued with the handicap of unprecise draftsmanship without the countervailing advantages that flexible language can confer when courts are zealous to effect the legislative purpose. Both sections under consideration were drafted in vague terms which fail to define the rights

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7. However, § 47(3) originated even earlier as a portion of *An Act to Define and Punish Conspiracies,* 12 STAT. 284 (1861).

8. There is even ample evidence that Congress in passing the Act was well aware that it might be applied to state legislators, *Speech of Senator Sumner,* CONG. GLOBE, 42d Cong., 1st Sess. 216 (Appendix) (1871), and to state judges, *Speech of Representative Lewis,* CONG. GLOBE, 42d Cong., 1st Sess. 385 (1871).

9. Evidence that members of Congress intended the act to apply to private action includes the following statement by Mr. Shellabarger, the author of the House bill: ". . . the constitutional objection to this section is that the acts it seeks to punish, being committed within a State, can only be defined and punished as a crime under State law. It assumes that in attempting this legislation Congress blots out the jurisdiction and power of the State. It also seems thereby to assume that there are no classes of acts which both the State governments and the national Government may define and punish concurrently as constituting a crime against each government." CONG. GLOBE, 42d Cong., 1st Sess. 69 (Appendix) (1871). A statement by Mr. Beck, an opponent of the bill, also bears on this point: "Scarcely less frightful or less fatal to liberty are the provisions of the first and second section, which undertake to transfer to the Federal Courts all mere questions of personal difficulty or personal rights between citizens of the same State, *making simple assault and battery by two or more persons on others in the same town . . . a felony* punishable . . . if the Federal judge in his discretion sees fit to impose such punishment." (Emphasis added) CONG. GLOBE, 42d Cong., 1st Sess. 352 (1871). Further evidence that this legislation was intended to circumscribe private action is the fact that much of the debate pointed to the necessity of curbing the activities of the Ku Klux Klan, which were in no respect official. See also *Speech of Senator Thurman,* CONG. GLOBE, 42d Cong., 1st Sess. 216 (Appendix) (1871) and *Speeeh of Senator Holman,* CONG. GLOBE, 42d Cong., 1st Sess. 260 (Appendix) (1871).

10. Civil Rights Cases, 109 U.S. 3, 11 (1883); Hodges v. United States, 203 U.S. 1, 14 (1906).

11. The Slaughter-House Cases, 16 Wall. 36, 74, 79 (U.S. 1873); United States v. Cruikshank, 92 U.S. 542, 554 (1875).

protected or the remedies available. The phrase "deprivation of any rights . . . *secured* by the Constitution,"[12] for example, has been a constant source of litigation to determine the meaning of "secured." The greatest obstacle to the Act's successful application, however, stems from judicial antipathy toward this type of reconstruction legislation.[13]

Where resort to the Civil Rights Act has been successful its application has largely followed and paralleled the development of the Fourteenth Amendment. The scope of protection afforded to civil rights by the remedies provided is entirely dependent on "rights, privileges and immunities secured by the Constitution and laws" and "equal protection of the laws or equal privileges and immunities under the laws." The meaning of these phrases of the act in turn depends primarily on the category of civil rights guaranteed against state infringement by the Fourteenth Amendment. In a few instances civil actions under the statute have provided the vehicle for significant substantive developments.[14] The major importance of Sections 43 and 47(3), however, lies in the fact that they provide a *civil remedy* for violations of civil rights which stem from the Constitution and other federal statutes.

THE FIRST FIFTY YEARS

The volume of private litigation under the Third Civil Rights Act and the degree of success achieved have been small until relatively recent years. From 1871 until 1920 no case involving Section 47(3) has been discovered and only twenty-one cases were decided under Section 43. This is not surprising in view of the previously discussed disadvantages inherent in the legislation. A further explanation is suggested by the prevailing social and ethical values of the time. While the Civil Rights Act was directed primarily at personal liberties the sanctity of property was still uppermost in the judicial conscience. Toward the turn of the century the appearance of more appropriate remedies

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12. REV. STAT. § 1979 (1875), 8 U.S.C. § 43 (1946).

13. *See, e.g.,* Screws v. United States, 325 U.S. 91, 140 (1945), in which the Supreme Court considered a conviction under one of the few surviving sections of the civil rights legislation enacted in the Reconstruction Era. The case concerned a brutal killing for personal motives by a southern sheriff whom state authorities refused to prosecute. A majority of the Court voted to remand the cause to the district court for further proceedings. But Justices Roberts, Frankfurter and Jackson, favoring an outright reversal, preferred to tolerate a failure of justice rather than resort to this legislation, remarking: "It is familiar history that much of this legislation was born of that vengeful spirit which to no small degree envenomed the Reconstruction Era."

14. *See, e.g.,* Smith v. Allwright, 321 U.S. 649 (1944) (holding that a political party acts as an agent of the state in establishing membership qualifications in so far as membership determines participants in primary elections); Bomar v. Keyes, 162 F.2d 136 (2d Cir. 1947) (holding that rights secured by the *laws* of the United States are protected by section 43); Picking v. Pennsylvania, 151 F.2d 290 (3d Cir. 1945) (holding that members of the state judiciary may be compelled to compensate persons whose civil rights have been abridged by such judges in the course of judicial proceedings).

obviated the necessity of resorting to the Act to protect economic interests.[15] And not until the close of the period did the more fundamental personal liberties emerge as a legitimate object of governmental protection.

Early cases construed Section 43 to afford injunctive relief against interference with property interests where such equitable remedies otherwise would not have been available under federal equity rules.[16] However, this interpretation was repudiated by *Hemsley v. Meyers*[17] in 1891. The court held that the language of Section 43 providing for an "action at law, suit in equity, or other proper proceeding for redress" did not enlarge federal equity jurisdiction.

In *Holt v. Indiana Mfg. Co.*,[18] a suit to enjoin collection of state taxes levied on federal patent rights, the Supreme Court concluded that Section 43

15. For cases in which the Act was successfully invoked in defense of "property" rights before 1900, see note 16 *infra.* An early case in which the Supreme Court adopted an unduly restrictive construction of the Act in this connection is Carter v. Greenhow, 114 U.S. 317 (1884). A Virginia statute passed to encourage the sale of a state bond issue provided that state taxes would be payable in bond coupons. A later act instructed tax collectors to refuse to accept payment in coupons. In response to plaintiff's contention that his right to federal protection against impairment of his contract rights by the state had been infringed, the Court declared that the proper remedy was a direct contest of the constitutionality of the statute rather than a civil action under section 43. Apparently, protection against impairment of contract obligations was not considered a right secured by the Constitution.

Several sporadic attempts to protect economic interests by means of § 43 after 1900 proved unsuccessful. In Simpson v. Geary, 204 Fed. 507 (D. Ariz. 1913), the court held that the right to contract for and retain employment in a given occupation is not a right secured by the Constitution and a state statute interfering with this right, as long as it is not an arbitrary discrimination amounting to a denial of equal protection, can not be attacked under section 43. In 1920, the court reiterated the principle relied on in the *Holt* case, note 18 *infra,* that general rights of property did not have their origin in the Fourteenth Amendment and this Amendment was not constitutive of them. Marcus Brown Holding Co. v. Pollak, 272 Fed. 137 (S.D. N.Y. 1920). In Devine v. Los Angeles, 202 U.S. 313 (1905), plaintiffs alleged that their title to certain lands was derived from Spain and Mexico by virtue of grants to their predecessors from these countries. They further asserted that state legislation and a municipal charter granting the defendant city rights with respect to waters of a river running through these lands deprived plaintiffs of their property and impaired their contract rights. The Court held that the right of the city to take the water was based on Spanish and Mexican law and not on the city charter and thus plaintiffs' averments of deprivation of property did not afford a basis of jurisdiction under section 43.

16. In Bowman y. Chicago and Northwestern Ry., 115 U.S. 611 (1885), the Court held that the right to transport liquor on a common carrier into a state prohibiting its importation was not a right secured by the Constitution or laws. In 1890, Tuchman v. Welch, 42 Fed. 548 (C.C.D. Kan. 1890), decided that a state law prohibiting sale of liquor in its original packages by a non-resident importer violates the commerce clause. The court, relying on REV. STAT. § 1979, predecessor of section 43, proceeded to enjoin institution of contempt proceedings against plaintiff for violation of a state injunction against importation. M. Schandler Bottling Co. v. Welch, 42 Fed. 561 (C.C.D.Kan. 1890), reached the same result on identical facts, adding: ". . . injunction will lie . . . since such proceedings are an interference with complainant's property rights under the Constitution, for which . . . an action at law or suit in equity may be maintained."

17. 45 Fed. 283 (C.C.D.Kan. 1891).

18. 176 U.S. 68 (1899).

protects *civil rights* only. While it is evident that the Court was endeavoring to curtail resort to this remedy where property rights were involved, confinement of the scope of the section to "civil rights" was at best an uncertain criterion. But in *Anglo-American Provision Co. v. Davis Provision Co.*,[19] the court seemingly felt that the right of a defendant to have full faith and credit accorded to a foreign judgment was such a "civil right" and could not be denied by a state statute. It is difficult to perceive in what manner the right here encroached upon by state law differs significantly from the property rights referred to in the *Holt* case which must be redressed in other types of proceedings.

In 1896 the act was first invoked under circumstances closely related to the abuses it was primarily intended to correct.[20] In *Davenport v. Cloverport*,[21] a state statute authorizing taxation of white residents for the purpose of educating the white children of the state was held to deny to colored children the equal protection of the laws.[22] Another appropriate application of the statute is found in *Giles v. Harris*.[23] This decision was the forerunner of a line of suffrage cases which constitute the most significant contribution of the Third Civil Rights Act to the substantive development of political liberties. The Court recognized that an action under Section 43 was a proper method to challenge state interference with the right to vote.[24]

19. 105 Fed. 536 (S.D. N.Y. 1900).

20. It is interesting to note, however, that one of the earliest judicial references to section 43 was in a civil rights context and suggested that this remedy might meet with favor in the courts. *In re* Tiburcio Parrott, 1 Fed. 481 (C.C.D.Cal. 1880). In this case a federal court held unconstitutional a California statute which prohibited the hiring of Chinese laborers by California employers. The court relied partly on the fact that had the state employer complied he might have rendered himself liable under section 43.

21. 72 Fed. 689 (D. Ky. 1896).

22. The following year in a § 43 action a Pennsylvania law imposing a tax on employers of foreign born unnaturalized residents was declared to violate the Fourteenth Amendment. Fraser v. McConway and Froley Co., 82 Fed. 257 (D. Pa. 1897). In an early case involving state discrimination against alien laborers the court held an Arizona act which required all employers to hire at least eighty per cent qualified electors or native born citizens unconstitutional as a denial of equal protection. Raich v. Truax, 219 Fed. 273 (D. Ariz. 1915). The court enjoined any possible future criminal prosecution of employers for violating the act. Since no criminal action had yet been instituted, the court did not show its usual reluctance to enjoin state criminal proceedings.

23. 189 U.S. 475 (1902).

24. However, the Court denied a mandatory injunction to require a board of registrars to enroll a Negro on the voting lists, declaring that the equitable relief sought was inappropriate because plaintiff alleged that the registration system was unconstitutional and yet sought to be registered under it. Two other important suffrage cases were decided under section 43 in the first fifty years of its existence. In 1908, in Brickhouse v. Brooks, 165 Fed. 534 (C.C.E.D.Va. 1908), a federal circuit court sustained an action for damages based on the wrongful rejection of a Negro's vote for a member of Congress. In this case, the court pointed out that an allegation of willfulness or malice is not a prerequisite to recovery under section 43. Six years later, in Anderson v. Meyers, 182 Fed. 223 (C.C.D.Md. 1910), the Supreme Court held that election registrars who refused to register qualified Negro voters in pursuance of a state statute excluding Negroes were subject to liability under section 43. This case affirmed the *Brickhouse* holding negativing the necessity of pleading malice.

Perhaps the most flagrant departure from the letter and spirit of the Civil Rights Act in its first fifty years was *Brawner v. Irvin.*[25] A Georgia policeman arrested a colored woman and subjected her to brutal physical punishment, releasing her two hours later without preferring charges. After unsuccessfully seeking a criminal prosecution,[26] she initiated an action for damages under Section 43. In denying recovery the court held that life, liberty and property are "primary rights within the protection of the state" and are not rights secured by the Constitution or laws of the United States.

Thus, from 1871 until 1920 the remedy created by Section 43 was used with only moderate success in safeguarding suffrage rights and in challenging state statutes denying equal protection of the laws to minority groups. Although several times invoked in defense of property interests, it failed to provide adequate relief. An appraisal of the statute's application in 1920 would have revealed little promise that it might develop into an effective bulwark against all invasions of civil liberties.[27] In order to facilitate further examination of the development of Sections 43 and 47(3), the cases will be classified according to the nature of the rights sought to be protected.

PROPERTY RIGHTS

The inappropriateness of using the Civil Rights Act to protect property interests has not altogether discouraged recourse to Section 43 for this purpose. But, it is evident that other more successful procedures for challenging state action encroaching on such interests have minimized the necessity of resorting to this statute.

It may be significant that from 1920 to 1938, when substantive due process was most effective as a barrier to state regulation, no Section 43 case has been found in which this concept was relied upon to thwart state invasion of an economic interest. One plausible explanation is revealed by examining the

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25. 169 Fed. 964 (N.D. Ga. 1909).

26. From Brawner v. Irvin, 169 Fed. 964 (N.D. Ga. 1909), and Screws v. United States, 325 U. S. 91 (1945), note 13 *supra,* a strong argument can be made in support of the necessity for an adequate civil remedy to cope with police brutality cases. These cases illustrate a fact well known to prosecutors and law enforcement officers in the South—that grand juries will not indict and juries will not convict state officials under state law for mistreatment of Negroes. While the same difficulties may be encountered in a suit for damages, a civil jury's reluctance to award damages in such a situation may well be less compelling than its unwillingness to convict local officials of a criminal offense. Such a remedy may provide a much needed restraining influence on the dealings of southern sheriffs with the Negroes in their custody.

27. Other cases brought under section 43 in the period from 1871 to 1920 included a decision that common law judicial immunity protects state judges from liability under section 43 for negligently docketing a cause improperly, United States v. Bell, 135 Fed. 336 (3d Cir. 1905); a holding that the right to custody of a child is not a right, privilege or immunity granted by the Fourteenth Amendment, Wadleigh v. Newhall, 136 Fed. 941 (N.D. Cal. 1905); and an opinion maintaining that detention of suspected insurrectionists in a time of emergency did not violate due process thereby rendering a state governor amenable to civil action under the Civil Rights Act, Moyer v. Peabody, 212 U.S. 78 (1908).

cases interpreting the phrase "secured by our Constitution or laws." The idea had long prevailed that to come within the scope of Section 43 a right, privilege or immunity had to be one newly *conferred,* i.e. created, by the Constitution or laws.[28] Since many of the rights arguably protected by the Fourteenth Amendment against state encroachment were recognized in the Colonies and in the states long before the Amendment was adopted, under the *conferred* interpretation Section 43 provided no redress against state action infringing these rights. In *Gobitis v. Minersville School District,* decided in 1937, a federal district court reenunciated the conferred-protected distinction with great particularity.[29] While there had been several attacks on the artificiality of this construction of the act, and one outright repudiation of a similar interpretation of the same language in a criminal statute,[30] it continued to hamstring the effectiveness of the remedy in respect to those rights protected by the Fourteenth Amendment. But two years after the *Gobitis* case, in *Hague v. C.I.O.,*[31] the Third Circuit rejected this interpretation. The court adopted the preferable alternative that "secured" means "protected."[32] The influence of this artificial limitation on Section 43 actions, prior to the *Hague* case, has been felt in other areas to which the remedy has been extended.

By the time this barrier to the use of Section 43 to safeguard property interests was removed the Court had adopted a new philosophy as to the scope of the judicial function in reviewing economic experimentation by the states. Consequently, the only remaining promise of protection to property interests by way of Section 43 lay in the equal protection clause. Since equal protection has been relatively ineffective as a bar to economic discrimination, it is not surprising that this use of Section 43 has met with little success.[33] Still, two

28. See *e.g.,* Gobitis v. Minersville School Dist., 21 F. Supp. 581 (E.D. Pa. 1937); Marcus Brown Holding Co. v. Pollock, 272 Fed. 137 (S.D. N.Y. 1920); Brawner v. Irvin, 169 Fed. 964 (N.D. Ga. 1909).

29. 21 F. Supp. 581, 586 (E.D. Pa. 1937). However, the court proceeded to decide the case on the merits, basing its jurisdiction on other grounds.

30. Smith v. United States, 157 Fed. 721, 724, 725 (8th Cir. 1907). The act in question was REV. STAT. § 5508 (1875), 16 STAT. 141 (1870).

31. 101 F.2d 774 (3d Cir. 1939).

32. While the Supreme Court upheld this decision on other grounds, Chief Justice Stone in a concurring opinion specifically endorsed the Third Circuit's analysis, maintaining that freedom of speech, assembly, press and religion are rights *secured* by the Federal Constitution. 307 U.S. 495 (1939).

The following year the First Circuit adopted the same approach, assuming jurisdiction on the basis of section 43 to enjoin enforcement of a municipal ordinance interfering with freedom of speech, religion and press. Manchester v. Leiby, 117 F.2d 661 (1st Cir. 1941). See also Earl C. Anthony, Inc. v. Morrison, 83 F. Supp. 494, 495 (S.D. Cal. 1948).

33. Recent section 43 cases in which reliance on equal protection to challenge alleged interferences with property interests proved unsuccessful include: Earl C. Anthony, Inc. v. Morrison, 83 F. Supp. 494 (S.D. Cal. 1948) (right to broadcast murder trial); Arroyo v. Puerto Rico Transp. Authority, 66 F. Supp. 1022 (D. P.R. 1946) (right to engage in transportation); Allen v. Killoran, 56 F. Supp. 173 (D. Del. 1944) (right to engage in business without payment of fees); Williams v. Miller, 48 F. Supp. 277 (N.D. Cal. 1942) (right of landowner to erect house on his land without obtaining contractor's license).

recent cases indicate that the Civil Rights Act can not be altogether disregarded in this connection, at least where purposeful or arbitrary discrimination can be shown. In 1949, in *Burt v. City of N.Y.*,[34] Judge Learned Hand overruled a demurrer to an action against New York City's Commissioner of Buildings who was alleged to have intentionally discriminated against an architect in denying his applications for building permits. The following year, the Sixth Circuit concluded that a Michigan tavern owner had stated a cause of action against the Liquor Control Commission by alleging arbitrary discrimination in suspending her license.[35]

SUFFRAGE RIGHTS

In *Giles v. Harris*,[36] the Supreme Court early acknowledged Section 43 as a proper method to prevent state interference with the exercise of the political franchise. This remedy subsequently has become a leading device to redress invasions of suffrage rights. Strangely enough the courts have never resorted to the conferred-protected dichotomy to deny recovery under Section 43 in this area.[37] However, application of the remedy was not without difficulty. Problems concerning "color of state law," exhaustion of state administrative and judicial remedies, and the availability of declaratory judgment and injunctive relief were the biggest obstacles and the cases are largely concerned with the law's development in these respects. Accounts of the increasing federal protection of the right to vote have been frequent but the role played by Section 43 in this development has been uniformly overlooked.

In 1928, a district court decided that Democratic primary election officials were not acting under color of state law in denying Negroes the right to vote and hence the federal court had no jurisdiction under Section 43 to entertain an action against them.[38] In the following year, however, a federal district court overruled a demurrer to a Section 43 damage suit against primary election judges who had denied a Negro the right to participate in the Virginia

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In New Jersey Chiropractic Ass'n v. State Board, 79 F. Supp. 327 (D. N.J. 1948) (right to administer therapy to the public); and Connor v. Rivers, Governor, 25 F. Supp. 937 (N.D. Ga. 1938) (right to engage in business without procuring license), the court held that denial of equal protection had not been properly alleged.

It will be noted from an examination of these cases that the complaints, for the most part, did not involve arbitrary and discriminatory interferences with bona fide property interests.

34. 156 F.2d 791 (2d Cir. 1946).

35. Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 96 (6th Cir. 1947). In both of these cases Justice Frankfurter's distinction in Snowden v. Hughes, 321 U.S. 1 (1943), see note 50 *infra*, was relied upon. Both courts thought that arbitrary and purposeful discrimination was adequately alleged to justify overruling defendant's demurrers.

36. See note 24 *supra* and accompanying text.

37. Perhaps the courts relied on this artificial distinction to avoid injecting federal regulation into areas traditionally governed by the states. Since suffrage rights are not as clearly matters for exclusive state control, the federal courts were not as reluctant to grant relief and hence found no necessity to rely on the distinction.

38. Nixon v. Condon, 34 F.2d 464 (W.D. Tex. 1928).

Democratic primary.[39] Virginia primary elections were extensively regulated by state law, but it was specifically provided that political parties might impose additional conditions on party membership. The court realistically found, on grounds now familiar, that a subversion of constitutional rights was properly alleged.[40]

In the next significant election case[41] the Fifth Circuit upheld the constitutionality of a Louisiana "grandfather clause."[42] The court decided that before seeking redress for alleged deprivation of constitutional rights in the federal courts the complainant was bound to exhaust the state judicial remedies afforded him by the Louisiana Constitution. Six years later the Supreme Court apparently dispelled this misconception in *Lane v. Wilson*.[43] Where election officials denied the plaintiff the right to register he was not obliged to pursue available state remedies before seeking relief in the federal courts.[44]

In *Smith v. Allwright*,[45] decided in 1943, the Civil Rights Act again was instrumental in thwarting the objectives of the Southern "white primary." A damage suit under Section 43 was initiated against Texas election judges for their refusal to permit a Negro to vote in the primary. The Supreme Court was faced with conflicting theories as to the import of a state primary election. On separate occasions it had been determined that the primary was an integral part of state election machinery[46] and that it was merely an activity of a private, voluntary association.[47] The *Allwright* case adopted the former view. The Court thought that, even though the officials were acting pursuant to a party resolution authorized by law rather than direct state regulation, the

39. West v. Bliley, 33 F.2d 177 (E.D. Va. 1929); *Accord*, King v. Chapman, 62 F. Supp. 639 (M.D. Ga. 1945), *aff'd* 154 F.2d 460 (5th Cir. 1946).

40. The judges' action would have been done under color of state law (and hence would violate the Fourteenth Amendment and make them amenable to suit under section 43) if the legislation had expressly excluded Negroes; the result is the same where the state gives the political party authority to do so instead, while maintaining close supervision over all other aspects of primary elections.

41. A section 43 case decided in this same period which is of little present significance is Hume v. Mahan, 1 F. Supp. 142 (E.D. Ky. 1932). See note 50 *infra*.

42. Trideau v. Barnes, 65 F.2d 563 (5th Cir. 1933).

43. 307 U.S. 268 (1938).

44. However, as recently as 1945 the question again arose, this time in connection with administrative remedies provided by the state of Alabama for those who contend their suffrage rights have been violated. The District Court dismissed a complaint under section 43 declaring that the administrative remedy must be exhausted before resorting to the federal courts. The court adroitly distinguished *Lane* v. *Wilson* on the ground that it dealt with a failure to exhaust a *judicial* remedy. Mitchell v. Wright, 62 F. Supp. 580 (E.D. Ala. 1945). However, this "white primary" victory was only temporary as the Fifth Circuit promptly reversed the decision, holding that the *Lane* case applies to *all* state remedies. Mitchell v. Wright, 154 F.2d 924 (5th Cir. 1946).

45. 321 U.S. 649 (1943).

46. United States v. Classic, 313 U.S. 299 (1941).

47. Grovey v. Townsend, 295 U.S. 45 (1935). For a discussion of the general problem see CUSHMAN, LEADING CONSTITUTIONAL DECISIONS 94-97 (8th ed. 1946).

very function of the primary election rendered the political party under whose auspices it was conducted an agent of the state in so far as it determined the participants in the election.[48]

The need for a federal civil remedy and its efficacy as a safeguard of political and civil liberties are perhaps best illustrated by the Negro suffrage cases.[49] Not only have private litigants achieved the greatest success with Section 43 in this area, but the rules established by these cases have paved the way for possible criminal prosecutions. The existence of an effective remedy has apparently imposed a degree of self-restraint on those election officials and politicians who, given the opportunity, would exclude the Negro from southern elections. The realistic approach to the state action problem adopted by these cases affords a method of circumventing one of the most serious obstacles to governmental protection of fundamental rights under the Fourteenth Amendment.[50]

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48. In a recent Fourth Circuit opinion, *Smith* v. *Allwright* was reinforced under even more extreme circumstances. Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947). All state regulation of the South Carolina primary elections had been repealed and the Democratic party, conducting its primary independently of any state supervision, had excluded a Negro voter. The court was unable to perceive any valid distinction between this and the Texas primary case, noting that this denial of the right to participate in the primary deprived the Negro of all effective voice in the government. Here state *inaction* actually appears to have been substituted for state action for the purpose of imputing to the state the activities complained of.

In Brown v. Baskin, 78 F. Supp. 933 (E.D. S.C. 1948), plaintiff sued on behalf of himself and others similarly situated against the state chairman of the Democratic party of South Carolina for declaratory judgment and injunctive relief relative to the right of a Negro to become a member of the party. The court held that the Democratic party was performing a public function and thus fell within the scope of section 43 and a temporary injunction was granted.

49. ". . . the CRS is . . . interested in cases . . . in which a civil action for damages is brought under federal law. The agency is convinced that this is the best federal sanction available for protecting the right of qualified Negroes to vote in federal elections. Its experience in using section 51 and section 52, as criminal sanctions to protect the Negro's political rights, has led it to conclude that it is almost impossible to convict southern, white election officials under these laws. . . . it [CRS] feels that the noncriminal sanction available in section 43 of Title 8 will prove a more effective means of protecting the Negro voter's rights than will available criminal sanctions." Carr, *op. cit. supra* note 4, at pp. 148, 149.

50. A group of section 43 cases closely related to the suffrage cases just discussed concern the right to hold office. The most significant of these is Snowden v. Hughes, 321 U.S. 1 (1943), in which the Supreme Court attempted to clarify the problem of what constitutes a denial of equal protection of the laws under the Fourteenth Amendment. This case apparently cleared the way for actions under section 43 to redress purposeful and arbitrary discrimination in the administration of state law. Plaintiff sought damages from members of a state primary canvassing board who refused to designate him as one of the Republican nominees when he had allegedly received the requisite number of votes in the primary election. In reply to his contention that his right to equal protection of state laws had been violated by the board, the majority pointed out that to establish a denial of this right an element of intentional discrimination must be demonstrated. They concluded that no such arbitrary action had been alleged. The dissenting judges contended that the complaint had satisfied this requirement.

Other cases concerning the right to hold office include: a successful assertion of denial of equal protection and due process by a duly appointed highway commissioner

DISCRIMINATION CASES

The Third Civil Rights Act has frequently been invoked in an attempt to prevent state discrimination because of race or color in matters having no relation to suffrage. Since 1920, suits for damages and injunctive relief under Section 43 have been initiated to challenge numerous forms of governmental race preference.[51] Two of these cases were unsuccessful frontal attacks on the "separate-but-equal" doctrine laid down in *Plessy v. Ferguson.*[52]

Although Section 43 actions have not accomplished any important extensions in the scope of federal protection against racial discrimination and segregation, flagrant instances of outright discrimination have been effectively redressed by means of this remedy. A public library was instructed to admit a qualified Negro to its training course;[53] discriminatory salary practices of public school boards have been enjoined;[54] and state universities have been ordered to provide separate, equivalent facilities or admit Negroes to their colleges.[55] It is probable that these cases have had a greater restrictive in-

illegally removed by the Governor of Georgia, Miller v. Rivers, 31 F. Supp. 540 (M.D. Ga. 1940); a decision holding a Kentucky redistricting act unconstitutional as a deprivation of the right of every state citizen to approximately equal representation in Congress, Hume v. Mahan, 1 F. Supp. 142 (E.D. Ky. 1932) (which also held that the 1929 Congressional Apportionment Act did not require that districts be contiguous and nearly equal in size and population); and a determination that the number of representatives from Virginia is a political question for Congress and therefore not justiciable in the federal courts, Saunders v. Wilkins, 152 F.2d 235 (4th Cir. 1945). On the general subject of equal protection in the political apportionment field see Note, 26 IND. L.J. 259 (1951).

51. Discrimination in rates of pay of public school teachers: Morris v. Williams, 149 F.2d 703 (8th Cir. 1945); Thompson v. Gibbs, 60 F. Supp. 872 (E.D. S.C. 1945); Mills v. Board of Education, 30 F. Supp. 245 (D. Md. 1939). Refusal to admit Negroes to state universities: Wrighten v. Board of Trustees, 72 F. Supp. 948 (E.D. S.C. 1947); Bluford v. Canada, 32 F. Supp. 707 (W.D. Mo. 1940). Allotment of public housing facilities based on racial considerations: Favors v. Randall, 40 F. Supp. 743 (E.D. Pa. 1941). Exclusion of a Negro from a public library training course: Kerr v. Enoch Pratt Library 149 F.2d 212 (4th Cir. 1945). Segregation on busses under state authorization: Simmons v. Atlantic Greyhound Corp., 75 F. Supp. 166 (W.D. Pa. 1947). Action of local law enforcement officers in furtherance of discriminatory practices of a private amusement park: Vale v. Stengel, 176 F.2d 697 (3d Cir. 1948). Segregation in municipality-sponsored recreation: Boyer v. Ganett, 88 F. Supp. 353 (D. Md. 1949).

52. 163 U.S. 537 (1896).

53. Kerr v. Enoch Pratt Library, 149 F.2d 212 (4th Cir. 1945).

54. In Thompson v. Gibbs, 60 F. Supp. 872 (E.D. S.C. 1945), and Mills v. Bd. of Education, 30 F. Supp. 245 (D. Md. 1939), injunctions against continuation of such practices were granted. In Morris v. Williams, 149 F.2d 703 (8th Cir. 1945), a declaratory judgment was entered due to changed circumstances which obviated the necessity of injunctive relief.

55. In Bluford v. Canada, 32 F. Supp. 707 (W.D. Mo. 1940), the court indicated that the state of Missouri has a mandatory responsibility to provide substantially equivalent educational opportunities for its colored and white residents. The relief sought, entrance to the college of journalism of the state university, was denied on the ground that plaintiff had not applied to the proper authorities for a similar course of instruction at the Negro university. However the court granted leave to amend the complaint to allege that a proper application had been made. In Wrighten v. Board of Trustees, 72 F. Supp. 948 (E.D. S.C. 1947), the court granted an alternative injunction instructing the state either to admit plaintiff to the white university or provide separate but equal facilities.

fluence on discriminatory practices than their number might suggest. Yet, the right of state and local governments to segregate racial groups, conditioned on the requirement of substantial equality, still exists.[56] As the courts recede from this archaic constitutional principle, as equal protection comes to mean equal in fact and not in theory, the scope of actions under Section 43 in this area will expand commensurately.

Judicial Proceedings

Despite recurrent failures, litigants who contend that they have been denied due process or equal protection of the laws in the course of state judicial proceedings continue to seek redress under Sections 43 and 47(3) against state judicial officers.

These cases are not only the first significant applications of the long dormant Section 47(3), but also have developed the substantive law defining judicial liability for improper conduct of proceedings. In *Mitchell v. Greenough,*[57] plaintiff proceeded under 47(3) against a prosecuting attorney, a judge and two witnesses, charging them with a conspiracy to deprive him of the right to practice law. He alleged that perjured testimony was intentionally used to secure his disbarment. The court decided that Section 47(3) is a prohibition against denial of equal protection of the laws but does not pertain to violations of due process. Apparently, it was decided that while plaintiff may have succeeded in alleging a denial of due process, the facts set out in his complaint were inadequate to state a claim of violation of equal protection under Section 47(3). The opinion reasoned that plaintiff was subject to no greater hazard than any other individual in the state—that of being prosecuted and convicted on the strength of false testimony—and consequently he was not singled out for arbitrary discrimination. This case has had considerable influence on subsequent actions against members of the state judiciary.[58]

In 1945, the Third Circuit, in *Picking v. Pennsylvania Ry.,*[59] revived the waning hope of recovery against state judges. Picking, arrested pursuant to a request for extradition, alleged that the defendant justice of the peace refused to give him the hearing required by law. The court held that the justice of the peace had acted under color of state law, that his refusal to

56. That the influence of the "separate but equal doctrine" is waning is evidenced by three recent Supreme Court decisions: Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); and Henderson v. United States, 339 U.S. 816 (1950).

57. 100 F.2d 184 (4th Cir. 1938).

58. Allen v. Corsano, 56 F. Supp. 169 (D. Del. 1944), held that section 47 only covers equal protection and an allegation of conviction on perjured testimony is merely an allegation of conspiracy to deny due process and hence states no cause of action under section 47(3). See also Campo v. Niemeyer, 182 F.2d 115 (7th Cir. 1950); Laughlin v. Rosenman, 163 F.2d 838 (D.C. Cir. 1947).

59. 151 F.2d 240 (3d Cir. 1945).

perform his legal duty deprived Picking of liberty without due process, and that Congress in passing the Third Civil Rights Act intended to abrogate common law judicial immunity to the extent necessary to accomplish the purposes of the Act.

Although the threat to judicial independence embodied in the *Picking* decision perhaps gave reasonable cause for alarm,[60] the results of five years of subsequent litigation have not substantiated this fear. While the facts in this case involved a wilful deprivation of constitutional rights, there was nothing in the language of the opinion thus to limit its effect. Moreover, both the language of the statute and prior cases in other areas tend to negative such a requirement.[61] However, the common law principle of judicial immunity and widespread recognition of the necessity of preserving judicial independence in order to attract men of integrity and ability to the bench were strong psychological factors favoring severe restrictions on any tort liability to be imposed on judges. Consequently, it is not too surprising that in the next suit under Section 43 against a state judge the court determined that a purposeful denial of due process was a requisite element of the cause of action.[62]

But in a recent Third Circuit case, *Hutchinson v. Cooper*,[63] plaintiff alleged that out-of-state counsel had been admitted *pro hac vice* to defend him against a murder charge and that the trial judge subsequently without hearing or any showing of misconduct denied the attorney the privilege of appearing. The court held that this was a deprivation of due process. Hence, under Section 43, it had jurisdiction to entertain a suit for injunctive relief directed against the offending judge. There was apparently no intimation of wilfulness on the part of the defendant.

While it would be unwise to subject judges to liability for damages under Sections 43 and 47(3) on the same basis that it has been imposed on others acting under color of state law, a workable solution to this objection seems gradually to be evolving. For even though this difficulty has been judicially ignored to the point that it has not been an articulate factor in the decisions, it appears that actions for damages against judicial officers will meet with little success unless there is a strong showing of purposeful deprivation of a constitutional right.[64] However, it may well be that this reluctance to

60. 46 Col. L. Rev. 614, 622 (1946).

61. See note 24 *supra*.

62. Bottone v. Lindsley, 170 F.2d 705 (10th Cir. 1948). "To state a cause of action under the Civil Rights Statutes the state court proceedings must have been a complete nullity with a purpose to deprive a person of his property without due process."

63. 184 F.2d 119 (3d Cir. 1950). Although the Third Circuit found that the New Jersey court had improperly revoked authority given out-of-state lawyers to represent accused in a New Jersey murder case, the federal court refused to enjoin the proceedings in the state court until opportunity had been given for resort to available state remedies.

64. This result is suggested in a note on the *Picking* case, 46 Col. L. Rev. 614, 620, 621 (1946).

entertain a civil suit against a judicial officer when no malice is alleged will not prevail where injunctive relief is sought under the Civil Rights Act, since this does not entail any invasion of the judge's common law immunity from liability for damages.[65]

Despite the promise extended by the *Picking* decision, a realistic appraisal of actions brought under the Civil Rights Act against state judges reveals that little progress has actually been made in imposing civil liability on judges for actions violating civil rights. The minor successes which have been achieved appear to have affected a workable compromise between the public interest in judicial immunity and the protection of individual liberties. The chief value of the remedy in the future probably will lie in the judicial self-restraint which it promotes.

First Amendment Rights

The Civil Rights Act has played an important role in interposing First Amendment rights as a protective barrier between the states and their citizens.[66] Although the major development of freedom of speech, religion, assembly and press has occurred during the last fifteen years, Section 43 has already become an effective safeguard against state infringement of these rights.[67] The first modern case brought under this section to redress state

65. The *Cooper* case lends support to this distinction.

In other recent cases against members of the judiciary the courts have held that a cause of action had been stated where plaintiff alleged that a justice of the peace joined in a conspiracy to prepare a hostile jury list in order to deprive plaintiff of due process of law, McShane v. Moldovan, 172 F.2d 1016 (6th Cir. 1949); and that a suit by an executrix under sections 43 and 47(3) against a trust company, a probate judge and others for damages arising from an alleged conspiracy to deprive her of her civil rights in the course of judicial proceedings failed to state a cause of action, Moffett v. Commerce Trust Co., 187 F.2d 242 (8th Cir. 1951).

66. Since Gitlow v. New York, 268 U.S. 652 (1925), assuming that First Amendment rights were among the fundamental personal liberties protected by the due process clause of the Fourteenth Amendment, a number of cases have confirmed that result as to each of the liberties embraced in the First Amendment. DeJonge v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); Illinois *ex rel.* McCullom v. Board of Education, 333 U.S. 203 (1948) (freedom of religion); Near v. Minnesota, 283 U.S. 697 (1931) (freedom of press); Thomas v. Collins, 323 U.S. 516 (1945) (freedom of speech).

67. The First Amendment rights thus brought within the pale of the Civil Rights Act include: the right to assemble peacefully to discuss federal legislation, Hague v. CIO, 101 F.2d 774 (3d Cir. 1939); the right of an individual to conduct public meetings and disseminate information for any lawful purpose, Ghadiali v. Delaware State Medical Society, 28 F. Supp. 841 (D. Del. 1939); the opportunity to induce persons to listen in their own homes to phonograph records espousing minority religious views, Oney v. Oklahoma City, 120 F.2d 861 (10th Cir. 1941); the privilege of selling religious literature on city streets free from restraint imposed by municipal regulations; Douglas v. City of Jeannette, 310 U.S. 147 (1942); Hannan v. City of Haverhill, 120 F.2d 87 (1st Cir. 1941); the right of a labor union to be free of restraint on speech and assembly imposed by state labor legislation, Stapleton v. Mitchell, 50 F. Supp. 51 (D. Kan. 1945); the right to conduct religious meetings in a public park, Sellers v. Johnson, 163 F.2d 877 (8th Cir. 1947); the right of unions to exclude from their meetings agents of the state thought to be acting in the interests of an employer, Local 309 v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948).

encroachment upon a First Amendment right was decided on the basis of the old distinction between "secured" and "protected."[68] Plaintiffs challenged the constitutional propriety of a local regulation that school children salute the flag where such a requirement was repugnant to their religious belief. While assuming jurisdiction of the case on other grounds, the court refused to sustain it as an action to redress infringement of rights "secured by the Constitution." However, this restrictive interpretation of "secured" was repudiated the following year and subsequent decisions have resulted in a decisive victory over state invasions of First Amendment freedoms.

Even though the constitutional rights involved in these actions have been uniformly upheld, injunctive relief has been denied in several instances. It has been noted that Section 43 has been construed not to enlarge federal equity jurisdiction.[69] Consequently, a potential threat to even a basic human right is not sufficient to invoke injunctive relief against the impending state action.[70] A more desirable approach where basic civil rights are involved was adopted in *Stapleton v. Mitchell.*[71] Certain provisions of a Kansas labor law were questioned as alleged deprivations of freedom of speech and assembly. The district court enjoined enforcement of a portion of the act, remarking that the doctrine of abstention arose in cases involving property rights and is inapplicable where it is contended that the operation of state legislation will invade the more fundamental First Amendment liberties. While there is thus some tendency on the part of the federal courts to enjoin operation of state laws which only potentially infringe freedom of speech, religion and assembly, it is probable that even in this area the Supreme Court's policy of awaiting authoritative state interpretation and an actual conflict with such rights in the

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Freedom from reprisal by a state legislative committee for having exercised the right to free speech was recently excluded from this category. Tenney v. Brandhove, 19 U.S.L. WEEK 4309 (U.S. May 21, 1951).

68. Gobitis v. Minersville School District, 21 F. Supp. 581 (E.D. Pa. 1937). See notes 28, 30 and 31 *supra,* and accompanying text.

69. See note 16 *supra,* and accompanying text.

70. Thus in Douglas v. City of Jeannette, 310 U.S. 157 (1942), the Supreme Court affirmed a circuit court order dismissing an injunction against criminal prosecutions under a local ordinance licensing street vendors. The Court stressed its general policy of leaving to the states the prosecution of criminal cases arising under their own laws, subject only to Supreme Court review of any federal questions involved. In accordance with this policy the federal courts must refrain from interfering with state criminal proceedings except in unusual cases where intervention is necessary to prevent irreparable injury.

In another case a federal circuit court refused to enjoin criminal action under an ordinance requiring that street vendors secure special permits on the ground that plaintiffs, Jehova's Witnesses, had never applied for a permit and been denied and consequently no denial of freedom of speech or religion was shown. Hannan v. City of Haverhill, 120 F.2d 87 (1st Cir. 1941). See also Whisler v. City of West Plains, Mo., 137 F.2d 938 (9th Cir. 1943), and Reinicke v. Loper, 77 F. Supp. 333 (D. Hawaii 1948). In the latter the same equity rule was applied to administrative proceedings.

71. 60 F. Supp. 51 (D. Kan. 1945).

operation of the statute will prevail.[72] Although the equitable relief provided under Section 43 arguably is not a severe limitation on state invasions of First Amendment rights—since similar relief is available under other federal statutes[73]—the action for damages has supplied a valuable restraint upon conduct subversive to these rights.[74]

RIGHTS, PRIVILEGES AND IMMUNITIES SECURED BY THE LAWS OF THE U. S.

A virtually unexplored category of rights, protection of which may well be brought within the scope of Section 43, is that of "rights, privileges or immunities secured by . . . laws" of the United States.[75] The rights protected by the original act of 1871 were those "secured by the Constitution of the United States." It was not until the Revision of 1874 that the word "laws" first appeared in the statute.

The almost unlimited potentialities of the revised statute, given a literal interpretation, were apparently overlooked until *Bomar v. Keyes,* decided in 1947.[76] A probationary teacher who left her job for nearly a month in order to serve on a federal jury was discharged as a consequence. She instituted an action under Section 43 to recover damages for deprivation of the right, allegedly secured by federal law, to perform federal jury service. The Judiciary Act[77] indirectly provided that women are qualified to serve as jurors but will be excused upon claiming exemption. Judge Learned Hand held that to prevent the plaintiff from serving on a federal jury is to deny a right which the statute was intended to protect and that a reprisal for having exercised the right was tantamount to its deprivation. In reaching this result, Judge Hand acknowledged that the case was the first in which Section 43 had been invoked to redress denial of a right secured by federal law. Nevertheless, he

72. The harsh effect of strict application of this principle is illustrated by United Public Workers v. Mitchell, 330 U.S. 75 (1945), discussed in Davis, *Administrative Law Doctrines,* 28 TEX. L. REV. 376, 379-84 (1950).

73. 28 U.S.C.A. § 1331 (1949).

74. A right analogous to the First Amendment under discussion, that of assembling to petition the government for redress of grievances, was recently the subject of an action under the Civil Rights Act against private individuals. While such a right was recognized in theory, its scope was limited to such an extent as to render it unenforceable. See notes 81-87 *infra* and accompanying text.

75. REV. STAT. § 1979 (1895), 8 U.S.C. § 43 (1946).

76. 162 F.2d 136 (2d Cir. 1947). *But see* United Electrical Workers v. Baldwin, 67 F. Supp. 235 (D. Conn. 1946), in which plaintiff apparently alleged sufficient facts to state a cause of action for deprivation of a right secured by federal law, but the court seemingly treated it as an allegation that the law in question provided for equal treatment, and denial of rights under the Wagner Act, therefore, was a denial of equal protection. Also plaintiff probably did not have in mind a theory of relief such as that involved in the *Bomar* case.

77. 36 STAT. 1164 (1911), 28 U.S.C. § 411 (1946).

concluded that the meaning of the statute was sufficiently clear to preclude any other interpretation.[78]

Presumably the *Bomar* decision proscribes state action infringing rights secured by any federal statute which does not specifically provide that the remedies it creates are exclusive.[79] And in view of the peripheral nature of the right involved, the *Bomar* case is a strong one. The federal act involved incorporated state qualifications for jury service. Thus the "right protected by federal law" might well vary from state to state. Any realistic estimation of the limits to which this new interpretation of Section 43 may be extended must await future judicial experience. A possible explanation of the fact that the *Bomar* case, despite its uniqueness, has not yet occasioned much litigation is that most federal laws which confer rights upon individuals confer equal rights. Thus, when state action interferes arbitrarily with such rights, the relief requested under Section 43 may be fashioned upon the more firmly established theory of equal protection.[80]

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78. In the same year a suit was instituted by a veteran to enforce his re-employment rights under the Selective Service Act against an agency of the Puerto Rican government. The First Circuit denied jurisdiction sought on the ground that this was an action under section 43 to redress deprivation of a right secured by federal law, pointing out that the plaintiff's object was really to require affirmative official action and the suit was, therefore, one against the insular government itself. Insular Police Commission v. Lopez, 160 F.2d 673 (1st Cir. 1947).

16 GEO. WASH. L. REV. 260 (1947) criticized the *Bomar* decision sharply, pointing out that the original act referred only to rights secured by the "Constitution" and that "laws" did not appear until a later revision. The writer contends that since Revised Statutes are only evidence of the law and not conclusive, the court's decision in the *Bomar* case was a judicial expansion of legislative intent. For a discussion of the various issues presented by the *Bomar* decision see 43 ILL. L. REV. 105 (1948).

79. See 60 HARV. L. REV. 1346 (1947), in which the writer suggests that, as a result of the *Bomar* decision, section 43 extends protection to rights granted by all federal legislation except that which is interpreted as providing exclusive remedies for its violation. This group might include, for example, social security legislation and the federal statutes conferring rights on veterans, labor unions, management, etc.

In Schatte v. International Alliance, 182 F.2d 158 (9th Cir. 1950), it was alleged that an NLRB field examiner who investigated unfair labor practice charges against the defendant union was himself a member of a labor organization and did not make an impartial investigation. It was also asserted that the general counsel of the Labor Board knew of this circumstance and was induced by defendant to accept the report and refuse to issue an unfair labor practice complaint against defendant. The court found that the absence of any action done under color of state authority was fatal to the claim of jurisdiction under section 43. In disposing of the claims based on section 47(3) the court remarked that whatever privileges and immunities were created by the NLRA were limited in scope to remedies which were provided in the act. The court's conclusion that the remedies provided by the act are exclusive suggests a ready method which the courts may adopt to limit the scope of the *Bomar* decision.

80. For example, this is the approach taken in United Electrical Workers v. Baldwin, 67 F. Supp. 235 (D. Conn. 1946). Plaintiff alleged that a conspiracy to discourage its right to collective bargaining secured by the Wagner Act was a denial of due process and equal protection. While holding that plaintiff had failed to establish the allegations, the court commented that such a conspiracy (by state and municipal officials) would constitute a basis for suit under section 43.

A REMEDY AGAINST PRIVATE ACTION

Before the recent Supreme Court decision in *Collins v. Hardyman,*[81] there was reason to believe that the Civil Rights Act might embrace *private* infringement of rights of federal citizenship. The Ninth Circuit had reversed a decision dismissing a suit under Section 47(3) against private individuals for interfering with the right to assemble and petition the Federal Government for redress of grievances.[82] A political organization held a meeting for the purpose of drafting a resolution to be transmitted to the President and Congress. The complaint alleged that defendants forcibly broke up the gathering in furtherance of a conspiracy to interrupt the group's activities and prevent adoption of the resolution. The Circuit Court decided that by enacting Section 47(3) Congress had intended to create the remedy requested; that it had the constitutional power to protect this right against private infringement;[83] and that the statute was a proper exercise of that power.[84] Judge Healy, dissenting, insisted that Section 47(3) provides redress only for deprivation of "equal protection of the laws, or of equal privileges and immunities under the laws" and that for some reason never precisely articulated, private citizens are incapable of accomplishing such a denial.

Justice Jackson, speaking for the majority of the Supreme Court, enigmatically observed that the plaintiffs' rights had been violated but had not been denied or impaired. Although its enjoyment was effectively thwarted,

81. 19 U.S.L. WEEK 4371 (U.S. June 4, 1951).

82. Hardyman v. Collins, 183 F.2d 308 (9th Cir. 1950). See also Robeson v. Fanelli, 94 F. Supp. 62 (S.D. N.Y. 1950).

83. A number of rights have been established as attributes of United States citizenship. See Carr, *op. cit. supra* note 4, at 61-62. And while it is only by virtue of the Fourteenth Amendment that Congress can protect the rights inherent in state citizenship (and can protect them only against state action), protection of rights of federal citizenship is not thus derived and consequently not thus limited. That the right to assemble to petition the federal government is such a federal right frequently has been suggested by the courts. *E.g.,* United States v. Cruikshank, 92 U.S. 542, 552-553 (1876); Slaughter-House Cases, 83 Wal. 36, 79 (U.S. 1873); Hague v. C.I.O., 307 U.S. 496, 512 (1939). The enumeration of this right as an attribute of federal citizenship was merely dicta in the first two cases. While the *Hague* case has been relied upon as a square holding that the right to assemble and petition the federal government for redress is such a federal right, it should be noted that only three of the five judges comprising the majority rested their decision on this ground. Justices Stone and Reed based their affirmance on the due process clause of the Fourteenth Amendment.

84. The principal objection to holding that section 47 (3) applies to the private action here involved is that a literal reading of the act would make it applicable to private violations of other rights which cannot constitutionally be protected by the Federal Government. The Ninth Circuit overcame this difficulty by deciding that the portion of section 47 (3) which provides a remedy for injury to "personal or property rights" (which Congress cannot protect against private action) is "clearly severable" from the provision relating to rights and privileges of a citizen of the United States. The latter may reasonably be construed to include only privileges and immunities of United States citizenship, which Congress constitutionally can defend against private interference. In this connection see 36 IOWA L. REV. 368, 370 (1951).

the right "remained untouched."[85] The Court thought that the private discrimination here involved was not "for the purpose of depriving . . . [plaintiffs] . . . of equal protection of the laws or of equal privileges and immunities under the laws." The opinion continued: "We do not say that no conspiracy by private individuals could be of such magnitude and effect as to work a deprivation of equal protection of the laws, or of equal privileges and immunities under laws."[86] The criterion apparently adopted is that private action, to come within the proscription of the statute, must "close all avenues of redress or vindication."[87]

CONCLUSION

While the *Collins* case in effect prevents extension of the remedy to embrace private infringements of civil liberties, other recent developments under Sections 43 and 47(3) indicate that, despite their antiquity, long dormancy, vague phraseology and other defects, the courts are beginning to accord them some of the scope and significance which Congress originally intended. The fact that repeated efforts to revamp our civil rights statutes have met with failure, coupled with recognition of the vital need for such legislation, argues persuasively against the contention that the courts should postpone protection of civil liberties by means of Sections 43 and 47(3) until Congress takes the initiative. Although by no means a panacea, these remedial statutes can serve a useful purpose in a society in which civil rights of minority groups have long been vulnerable to attacks by both private individuals and persons acting under color of state and local governmental authority.

85. It is difficult to perceive a valid reason why the arbitrary, lawless action of private individuals directed at interfering with the enjoyment of privileges or immunities of federal citizenship cannot amount to a denial of equal protection. The contrary is strongly suggested by the admitted fact that when the drafters of the act used the language "equal protection of the laws, or . . . equal privileges and immunities under the laws" they intended to create a remedy against private action. See note 9, *supra*. Yet the effect of this decision is to preclude recovery under the Act except in the purely hypothetical situation where the private action closes all avenues of redress or vindication. This is a far more rigorous standard than that used to define actionable conduct done under color of state authority. It can be persuasively argued that official conduct violating civil liberties no more denies nor impairs the right than does similar private action.

86. 19 U.S.L. WEEK 4371, 4374 (U.S. June 4, 1951).

87. While the Court purported only to construe the statute and not to decide the ultimate question of its constitutional validity as applied to private acts, there is ample indication that such an application—and indeed the Act itself—was regarded with disfavor. Justice Jackson noted that the Act was "passed by a partisan vote in a highly inflamed atmosphere." In addition, he pointed out constitutional difficulties with such a construction, including ". . . issues as to congressional power under and apart from the Fourteenth Amendment, the reserved power of the States, the content of rights derived from national as distinguished from state citizenship, and the question of separability of the Act in its application to those two classes of rights."