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this offer for an indefinite period of time. In denying the nonjoining owner's claim, neither are his contract rights violated nor is the development of his mineral interest impaired.

William T. Carlisle

Protection of Fourteenth Amendment Rights Under Section 241 of the United States Criminal Code

For almost one hundred years there has been uncertainty as to the protection of fourteenth amendment rights under section 241 of the United States Code of Crimes and Criminal Procedure[1] which makes it a felony to conspire to interfere with a citizen's exercise and enjoyment of rights secured by laws or Constitution of the United States. The securing of fourteenth amendment rights raises the issue of defining the appropriate state action necessary to violate these rights. The Supreme Court was confronted with these issues, among others, in the recently decided cases of *United States v. Price*[2] and *United States v. Guest*.[3]

I. Section 241 and the Fourteenth Amendment Rights

Shortly after the ratification of the fifteenth amendment,[4] Congress enacted the Enforcement Act of 1870[5] in response to national concern over the denial of rights to Negroes in southern states during the Reconstruction era.[6] The sponsor of section 6 of the act (now section 241) indicated that he intended the statute to protect fourteenth

[1] 18 U.S.C. § 241 (1964).
[2] 383 U.S. 787 (1966).
[3] 383 U.S. 745 (1966).
[4] February 3, 1870.
[5] An Act to Enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes (the Enforcement Act of 1870), 16 Stat. 140 (May 31, 1870). For purposes of clarity, §§ 241 and 242, as well as their predecessors will be referred to hereinafter as § 241 or § 242. A detailed record of the changes in the two statutes since their original enactment is located in the index to Mr. Justice Frankfurter's opinion in United States v. Williams, 341 U.S. 70, 83 (1951). Though the rights which the original versions of the two statutes provide were not coextensive, the stautes in their present forms do protect against deprivations of the same rights. The only difference is that § 241 punishes for conspiracies; whereas § 242 punishes for substantive violations under color of law of the rights in question. Screw v. United States 325 U.S. 91, 119 (1945) (concurring opinion of Rutledge, J.). Further, § 241 speaks to "two or more persons"; whereas § 242 deals with "whoever, under color of law."
[6] See United States v. Price, 383 U.S. 787 (1966); United States v. Williams, 341 U.S. 70, 92 (1951) (dissent of Douglas, J.); Screws v. United States, 325 U.S. 91, 113 (1945) (concurring opinion of Rutledge, J.); United States v. Mosley, 238 U.S. 383, 387-88 (1915); Stamp, The Era of Reconstruction (1965); Frantz, *Congressional Power To Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353 (1964).

amendment rights which were being denied to Negroes in the South.[7] Decisions of the lower federal courts in 1871 held that section 241 did protect fourteenth amendment rights.[8]

With the end of the Reconstruction era the United States Supreme Court began to limit the rights covered by the proscriptions of section 241. This limitation was first effected in *United States v. Cruikshank*[9] when the Court seemingly held that section 241 applies to and protects only certain rights "granted to the people by the Constitution or laws of the United States."[10] In accordance with the then contemporary constitutional theory,[11] the rights mentioned in the fourteenth amendment found their origin in natural law and thus were not rights granted by the Constitution within the meaning of the statute. Decisions following *Cruikshank* further clarified the rights to be protected by section 241. These cases held that the section protects those rights set forth in *Crandall v. Nevada*[12] and the *Slaughter-House Cases*[13] which are necessary to the integrity of the federal governmental institution[14] and those which are created by Congress in the legitimate exercise of its article I powers.[15] The *Slaughter-House Cases*[16] listed certain of these rights.[17]

The Court's point of view shifted in 1915. Mr. Justice Holmes, in *United States v. Mosley*,[18] observed that section 241 protects all federal

[7] See Appendix to United States v. Price, 383 U.S. 787, 807-20 (1966). See also FLACK, ADOPTION OF THE FOURTEENTH AMENDMENT 203 (1908).

[8] *Ex parte* Riggins, 134 Fed. 404 (N.D. Ala. 1904), *petition for writ of habeas corpus dism.*, 199 U.S. 547 (1905); 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).

[9] 92 U.S. 542 (1876).

[10] *Id.* at 551. See Guinn v. United States, 238 U.S. 347 (1915); *Ex parte* Yarbrough, 110 U.S. 652 (1884).

[11] See, *e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Frantz, *Congressional Power To Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1370-73 (1964); HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930); HARDING, NATURAL LAW AND NATURAL RIGHTS (1955).

[12] 73 U.S. (6 Wall.) 35 (1868).

[13] 83 U.S. (16 Wall.) 36 (1873).

[14] See Motes v. United States, 178 U.S. 458 (1900). *Compare* Logan v. United States, 144 U.S. 263 (1892) *with* United States v. Powell, 212 U.S. 564 (1908).

[15] United States v. Waddell, 112 U.S. 76 (1884); *Ex parte* Yarbrough, 110 U.S. 652 (1884).

[16] 83 U.S. (16 Wall.) 36 (1873).

[17] The right of a citizen to travel to the seat of the government to assert claims against it, to transact business with it, to seek its protection, to share its offices, to engage in administering its functions; the right to free access to all sea-ports handling foreign commerce, to sub-treasuries, land-offices, and courts of justice in the several states; the right to demand the care and protection of the government over his life, liberty, or property when on the high seas or within the jurisdiction of a foreign government; the right to peaceably assemble and petition for redress of grievances; the privilege of the writ of habeas corpus; the right to use the navigable waters of the United States; all rights secured by treaties with foreign nations; the right to become a citizen of a state by bona fide residence therein, with the same rights as other citizens of that state. *Id.* at 79-80.

[18] 238 U.S. 383, 387-88 (1915).

rights "in the lump"[19] and should not be construed so as ". . . to deprive citizens . . . of the general protection which on its face [section 241] most reasonably affords."[20] Mr. Justice Holmes' construction of section 241 was repeated thirty years later in dicta. Mr. Justice Rutledge, concurring in *Screws v. United States*,[21] stated that fourteenth amendment rights are within the scope of section 241. Mr. Justice Murphy, even though dissenting,[22] agreed with this statement.

Mosley had seemingly obviated the issue of coverage of fourteenth amendment rights by section 241.[23] Thirty-six years later the decision in *United States v. Williams*[24] revived the problem.[25] The Court divided evenly on the construction of section 241.[26] Mr. Justice Frankfurter, speaking on behalf of himself and three other members of the Court, stated that section 241 did not protect fourteenth amendment rights. He determined that section 241 dealt only with "rights that flow from the substantive powers of Federal Government"[27] and "that the purpose of section 241 was to reach private action rather than officers of a State acting under its authority."[28] Therefore, section 241 protected only rights which Congress could secure against the interference of private individuals and did not protect rights which the Constitution "merely guarantees from abridgement by the States"[29] from interference by state officers. In a dissent joined by three other justices, Mr. Justice Douglas noted that section 241 had ben applied to the protection of fourteenth amendment rights in previous cases[30] and concluded that the statute should now be held to provide such protection.

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[19] *Ibid.*

[20] *Ibid.*

[21] 325 U.S. 91, 120 (1945) (concurring opinion of Rutledge, J.).

[22] Screws v. United States, 325 U.S. 91, 135 (1945) (dissent of Murphy, J.).

[23] United States v. Mosley, 238 U.S. 383 (1915).

[24] 341 U.S. 70 (1951). There are three "Williams" cases arising out of the same fact situation. The "Williams" case just cited will be referred to in this Note as *Williams*. The first case, United States v. Williams, 341 U.S. 58 (1951), involved a prosecution for perjury. The third, Williams v. United States, 341 U.S. 97 (1951), was a prosecution for violation of § 242 which held that § 242 protects fourteenth amendment rights.

[25] *Compare* United States v. Williams, 341 U.S. 70 (1951) (opinion of Frankfurter, J.) *with* United States v. Williams, 341 U.S. 70, 87-96 (1951) (dissenting opinion of Douglas, J.).

[26] The majority in *Williams* was composed of the four Justices for whom Mr. Justice Frankfurter spoke. Mr. Justice Black concurred on other grounds without consideration of the scope of § 241. United States v. Williams, 341 U.S. 70, 85 (1951) (concurring opinion of Black, J.). The issue was thus left unresolved.

[27] United States v. Williams, 341 U.S. 70, 78 (1951) (opinion of Frankfurter, J.).

[28] *Ibid.*

[29] *Ibid.*

[30] See *Ex parte* Riggins, 134 Fed. 404 (N.D. Ala. 1904), *petition for writ of habeas corpus dism.*, 199 U.S. 547 (1905); 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).

Despite the division of the Court in *Williams*, lower federal courts[31] have followed Mr. Justice Frankfurter's view that ". . . the rights which section 241 protects are those which Congress may constitutionally secure against interference by private individuals."[32] This category "excludes those rights which the Constitution merely guarantees from interference by a State."[33] Thus section 241 was not applied to interference by a state or state officers. Moreover, in cases dealing with the fourteenth amendment itself, the Supreme Court was careful to note that the fourteenth amendment protects against state action only, not against wrongs done by private individuals.[34]

II. The Concept of State Action

The fourteenth amendment places certain restraints on states' actions.[35] The courts have consistently held that some form of state action is necessary before an individual's rights under the amendment can be violated,[36] but there has been much litigation as to what constitutes such state action. The Supreme Court has declared that a state can act through any of its governmental branches, agencies, or officials in a manner which would violate the fourteenth amendment.[37] State action may occur in a variety of situations. In *United States v. Classic*[38] and *Screws v. United States*[39] the Court held that state action included conduct by state officials that exceeded express statutory au-

[31] See, *e.g.*, Alabama v. United States, 304 F.2d 583, 595 (5th Cir. 1962) (dissenting opinion of Cameron, J.); Byrd v. Sexton, 277 F.2d 418, 429 (8th Cir. 1960); Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959); Baldwin v. Morgan, 251 F.2d 780, 789-91 (5th Cir. 1958); Brewer v. Hoxie School Dist. No. 46, 238 F.2d 91 (8th Cir. 1956); United States v. Guest, 246 F. Supp. 483 (M.D. Ga. 1965); Negrich v. Hohn, 246 F. Supp. 175 (W.D. Pa. 1965); United States v. Bailes, 120 F. Supp. 614, 621-27 (S.D.W.Va. 1954).

[32] United States v. Williams, 341 U.S. 70 (1951) (opinion of Frankfurter, J.).

[33] *Id.* at 77.

[34] See, *e.g.*, Bell v. Maryland, 378 U.S. 226 (1964); Robinson v. Florida, 378 U.S. 153 (1964); Griffin v. Maryland, 378 U.S. 130 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. City of Greenville, 373 U.S. 244 (1963); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Monroe v. Pape, 365 U.S. 167 (1961); Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957); Collins v. Hardyman, 341 U.S. 651 (1951).

[35] "No State shall make or enforce . . . nor shall any State deprive . . . nor deny." U.S. Const. amend. XIV, § 1.

[36] Bell v. Maryland, 378 U.S. 226 (1964); Griffin v. Maryland, 378 U.S. 130 (1964); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Collins v. Hardyman, 341 U.S. 651 (1951); Shelley v. Kraemer, 334 U.S. 1 (1948); United States v. Powell, 212 U.S. 564 (1908); Hodges v. United States, 203 U.S. 1 (1905); *Ex parte* Yarbrough, 110 U.S. 652 (1884); Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883). Monroe v. Pape, 365 U.S. 167 (1961) holds that "under color of law" in § 242 is state action within the scope of the fourteenth amendment.

[37] See, *e.g.*, Shelley v. Kraemer, 334 U.S. 1, 14, 15-20 (1948); Civil Rights Cases, 109 U.S. 3, 11, 17 (1883); *Ex parte* Virginia, 100 U.S. 339, 347 (1879); Virginia v. Rives, 100 U.S. 313, 318 (1880).

[38] 313 U.S. 299 (1941).

[39] 325 U.S. 91 (1945).

thority[40] or was a misuse of that authority.[41] *Shelley v. Kraemer*[42] held that judicial enforcement of discriminatory private covenants was state action violative of the fourteenth amendment.[43] Moreover, private persons or organizations may be exercising such governmental authority that their actions constitute state action.[44] In *Burton v. Wilmington Parking Authority*[45] the Court stated that there was state action within the scope of the fourteenth amendment whenever: "The state has so far insinuated itself into a position of interdependence with [the private individual denying the Fourteenth Amendment rights] that it must be recognized as a joint participant in the challenged activity."[46] *Burton* further held that states have the duty to take positive action to insure that individuals are not deprived of the equal use and enjoyment of public facilities owned or operated by or on behalf of the state. If a state does fail to discharge its responsibility, its inaction would constitute action by the state in violation of the fourteenth amendment.

The Court, in applying the *Burton* view of state action, has recently held, in *Griffin v. Maryland*,[47] that when an individual, authorized by the state, purports to act under that authority, his action constitutes state action. It is immaterial that he could have perpetrated the identical act in a purely private capacity or that he was unauthorized by state law to perform the particular action. Though the Court has been expanding the concept of state action to include what was previously private action, under the *Burton* view of state action there is still a question as to how far a state must "insinuate itself into a position of interdependence"[48] with an individual before the Court will find state action sufficient to violate the fourteenth amendment.[49]

The equal protection clause of the fourteenth amendment creates special problems. The clause prohibits any denial by a state of equal

[40] *Ibid.*

[41] United States v. Classic, 313 U.S. 299 (1941).

[42] 334 U.S. 1 (1948).

[43] *Ibid.* See also Barrows v. Jackson, 346 U.S. 249 (1953); Hurd v. Hodges, 334 U.S. 24 (1948).

[44] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948).

[45] 365 U.S. 715 (1961).

[46] *Ibid.*

[47] 378 U.S. 130 (1964).

[48] Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

[49] See text and authorities *supra* notes 38, 39, 41-47. See generally Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. CAL. L. REV. 208 (1957); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); McKenney, *An Argument in Favor of Strict Adherence to the "State Action" Requirement*, 5 WILLIAM & MARY L. REV. 213 (1964).

protection of the law to any person within its jurisdiction.[50] As Mr. Justice Goldberg observed in his separate opinion in *Bell v. Maryland*:[51]

> Denying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. These views are fully consonant with this Court's recognition that state conduct which might be described as 'inaction' can nevertheless constitute 'state action' within the meaning of the Fourteenth Amendment.[52]

However, in *Bell* the Court avoided determining whether or not state inaction is sufficient to violate the fourteenth amendment.[53]

III. UNITED STATES V. PRICE AND UNITED STATES V. GUEST

In *United States v. Price*[54] eighteen individuals, including three police officers, were indicted in the United States District Court for the Southern District of Mississippi for a conspiracy to release three civil rights workers from the Neshoba County, Mississippi, jail, intercept them, and kill them. One of the indictments was brought under section 241. The district court dismissed this indictment on the ground that the broad protection afforded to "rights and privileges secured by the Constitution or laws of the United States"[55] by section 241 did not include rights protected by the fourteenth amendment.[56] Pursuant to section 3731 of the United States Code of Crimes and Criminal Procedure,[57] the case was appealed directly to the United States Su-

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[50] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[51] 378 U.S. 226, 286 (1964) (opinion of Goldberg, J.). The Chief Justice and Mr. Justice Douglas joined in this opinion.

[52] *Id.* at 309-12. See, *e.g.*, Barrows v. Jackson, 346 U.S. 249 (1953); Terry v. Adams, 345 U.S. 461 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948); Marsh v. Alabama, 326 U.S. 501 (1946). See also, United States v. Hall, 26 Fed. Cas. 79, 81 (C.C.S.D. Ala. 1871); Letter from Mr. Justice Bradley to Circuit Judge (later Justice) William B. Woods (unpublished draft) Mar. 12, 1871, in the Bradley papers on file at The New Jersey Historical Society, Newark, New Jersey.

[53] The Court did not reach the constitutional questions since it was necessary to vacate the judgment and remand to the state court for consideration of the effect of a supervening change in the state statute on the convictions under review. Bell v. Maryland, 378 U.S. 226 (1964) (opinion of Brennan, J.).

[54] 383 U.S. 787 (1966).

[55] 18 U.S.C. § 241 (1964). The defendants were also indicted under 18 U.S.C. § 242 which makes it a misdemeanor for one, acting under color of law, to deprive another of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. The district court dismissed as to the nonofficial defendants on the ground that the indictment did not allege that they were officers either in fact or de facto in any act purportedly done by them under color of law. The Supreme Court reversed the district court, holding that private individuals, who wilfully participate in a joint activity with a state or its agents which is prohibited by the Constitution or laws of the United States are acting under color of the law. United States v. Price, 383 U.S. 787 (1966).

[56] United States v. Price, No. 60, S.D. Miss., Jan. 15, 1965.

[57] 18 U.S.C. § 3731 (1964).

preme Court from the district court dismissal. Reversing and remanding,[58] the Court finally resolved the issue *United States v. Williams*[59] left unresolved. The Court held that section 241 protects every right secured by the Constitution.[60] The Court interpreted such rights to include all rights expressly or impliedly stated in the Constitution, a fortiori fourteenth amendment rights. By so construing the statute, the Court, after ninety-six years, has accorded the statute the scope which its sponsor apparently intended it to have[61] and which the statutory language plainly indicates.[62]

Price was specifically concerned with the infringement of the due process clause of the fourteenth amendment. The Court relied on *Griffin v. Maryland*[63] and *Burton v. Wilmington Parking Authority*[64] to find that the allegations of the involvement of police officials were clearly allegations of state action contrary to the due process clause of the fourteenth amendment. The penal provisions of section 241[65] would therefore apply both to the police officials and to their co-conspirators,[66] if on remand, the Government were to establish the facts as alleged.

In *United States v. Guest*[67] six individuals were indicted under section 241 in the United States District Court for the Middle District of Georgia for a conspiracy to deprive Negro citizens of "the right to equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on the behalf of the State of Georgia or any subdivision thereof."[68] The indictment alleged that one of the means

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[58] United States v. Price, 383 U.S. 787 (1966).

[59] 341 U.S. 70 (1951).

[60] United States v. Price, 383 U.S. 787 (1966).

[61] See Appendix to United States v. Price, 383 U.S. 787, 807 (1966).

[62] United States v. Price, 383 U.S. 787, 800 (1966). It is interesting to compare the historical background behind § 241, the end of the reconstruction era, and the current civil rights controversy and relate each set of historical circumstances to the Court's holdings with regard to the fourteenth amendment and § 241 during these periods. See *e.g.*, BARKER, FREEDOMS, COURTS, POLITICS (1965); BOWERS, THE TRAGIC ERA (1929); FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION (1906); FRAENKEL, THE SUPREME COURT AND CIVIL LIBERTIES (1952 ed.); FRIEDMAN, SOUTHERN JUSTICE (1965); JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956); MARSHALL, FEDERALISM AND CIVIL RIGHTS (1964); SHUBERT, CONSTITUTIONAL POLITICS (1960).

[63] 378 U.S. 130 (1964).

[64] 365 U.S. 715 (1961).

[65] The penalty under § 241 is a fine of not more than $5,000, or imprisonment for not more than ten years, or both. 18 U.S.C. § 241 (1964).

[66] It is immaterial that some of the defendants were not state officials, since they were alleged to be wilful participants in a conspiracy with state officials. United States v. Rabinowich, 238 U.S. 78 (1915). This same reasoning applies to § 242's applicability to the non-official defendants.

[67] 383 U.S. 745 (1966).

[68] *Id.* at 747-48. The text of the indictment is reprinted in footnote 1 therein. The other alleged violations dealt with the full and equal enjoyment of public accommodations under

of accomplishing the object of the conspiracy was causing the arrest of Negroes with false reports that the Negroes had committed crimes. On the defendants' motion the district court dismissed the indictment,[69] determining that the indictment alleged only an invasion of fourteenth amendment rights which section 241 does not protect. On direct appeal under section 3731 of the United States Code of Crimes and Criminal Procedure,[70] the United States Supreme Court reversed and remanded,[71] holding that equal protection clause rights, as well as due process rights are protected by section 241.[72]

Unlike *Price*, none of of the defendants in *Guest* were state officials. In order for the indictment to stand, there had to be an allegation of state action sufficient to violate the equal protection clause.[73] The Court found that the allegation of furthering the conspiracy by causing false arrests of Negroes was an allegation of state involvement, sufficient at least to require denial of the motion to dismiss the indictment.[74]

The Court did not resolve the following issues: (1) whether a private individual's invocation of state officials to enforce a private policy of discrimination is state action, and (2) whether state inaction

Title II of Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (1964), public highways, and the right to travel freely to and from the state of Georgia and use of the instrumentalities of interstate commerce.

[69] United States v. Guest, 246 F. Supp. 475 (M.D. Ga. 1965).

[70] 18 U.S.C. § 3731 (1964).

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

[72] *Id.* at 753. The Court stated that its holding did not render the statute unconstitutionally vague, since the gravemen of a violation of § 241 is a conspiracy; and this satisfies the requirement that the offender must act with a specific intent to interfere with the federal rights in question. Screws v. United States, 325 U.S. 91 (1945). The Court thus answered the question of the constitutionality of § 241 in the same way it had answered the question with regard to § 242, in *Screws, supra* note 21.

As to the other counts of the indictment, the Court held that it did not have jurisdiction to review the dismissal of the count dealing with the alleged violations of the right to equal enjoyment of public accommodations since dismissal was rested in the alternative on a defect in pleading. United States v. Borden Co., 308 U.S. 188 (1939). The Court held that the right to travel to and from a state and use the instrumentalities of interstate commerce is protected by the Constitution. This right has been established under the commerce clause in Edwards v. California, 314 U.S. 160 (1941) and as a privilege or immunity of national citizenship under the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) (fundamental privilege of national citizenship). These rights are thus protected by § 241. The defendants could be convicted under § 241 only if they acted with the specific intent to interfere with the federal right of ingress to and egress from a state. Screws v. United States, 325 U.S. 91, 101 (1945). The right to use local facilities is included by the Court in its discussion of the right to equal use of those public facilities owned by the state.

[73] See text and authorities *supra* note 36.

[74] The Court was not faced with the problem of finding state action as regards the alleged violation of the right to travel to and from a state or use the instrumentalities of interstate commerce since rights are secured to citizens, independently of the fourteenth amendment, under the theory of fundamental privileges and immunities of national citizenship set forth in Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) and the commerce clause. Edwards v. California, 314 U.S. 160 (1941).

which permits private discrimination is state action. With regard to the first issue, the Court compared the facts in the case in point to those in *Bell v. Maryland*.[75] It added, however, that the three separate opinions in *Bell* were inconclusive[76] and therefore remanded the case to the lower court without setting out guidelines for determining state action through invocation. With regard to the second issue, the Court stated that it did not have to determine "the threshold level that state action must attain in order to create rights under the Equal Protection Clause,"[77] but, through the Court's analysis and use of case authority,[78] it implied that state inaction which results in a denial of equal use and enjoyment of state-owned facilities to any individual might be state action prohibited by the fourteenth amendment.

IV. Conclusion

In *Price* the Court determined that all constitutional rights, including fourteenth amendment rights, are protected by section 241. This necessarily would include protection against state action. In this latter respect *United States v. Guest* is more significant for its implications than it is for its actual holding. *Guest* specifically found allegations that the defendants caused false arrests of Negroes to be sufficient allegations of state involvement under the equal protection clause. It should be noted that, in discussing *Bell v. Maryland*, the Court did not reject Mr. Justice Goldberg's separate opinion in *Bell*, that denial of equal protection rights includes denial by inaction as well as by action.

The dictum in *Guest* concerning the "undetermined threshold level"[79] of state action implies that the limits of state action may be expanded in the future. Under *Burton*, *Griffin*, and *Shelley* state action

[75] 378 U.S. 226 (1964).

[76] Three Justices in *Bell* were of the opinion that a private individual's recourse to state police and judicial action to carry out his own policy of racial discrimination was sufficient to violate the equal protection clause rights of those who were the objects of the discrimination. Bell v. Maryland, 378 U.S. 226, 242 (1964) (separate opinion of Douglas, J.); *Id.* at 286 (separate opinion of Goldberg, J.). Three Justices disagreed with this view, *Id.* at 318 (dissenting opinion of Blac, J).; and three Justices did not consider the question, *Id.* at 226. This point has now become less important to the extent that the facilities and services are covered by Title II of the 1964 Civil Rights Act, 42 U.S.C. § 2000a, dealing with public accommodations. See Hamm v. City of Rock Hill and Lupper v. Arkansas, 379 U.S. 306 (1964). State action no longer seems necessary with regard to violations of the right to equal use and enjoyment of "public accommodations" within the meaning of the act. This right is now secured independently of the fourteenth amendment, and thus § 241 could reach purely private conspiracies to deprive individuals of rights under this portion of the act.

[77] United States v. Guest, 383 U.S. 745, 756 (1966).

[78] The Court, in discussing the concept of state action, relied on Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), see text *supra* notes 45, 46.

[79] United States v. Guest, 383 U.S. 745, 756 (1966).