his case on the insurance rather than on the merits; hence plaintiffs may be
careful not to overemphasize insurance.38 Furthermore, if insurance induces
higher verdicts, then it is likely that juries are granting such verdicts al-
ready, either because insurance has been disclosed during the trial or simply
because the jury has assumed that the defendant is insured.39

The ultimate solution to the problem may be a shift from fault liability
principles to a wider spread of the risk of loss through some form of social
insurance.40 But short of such action, joinder of an insurer at the plaintiff's
option, and full disclosure of insurance in every case, seems highly preferable
to the present rule of non-disclosure—a rule which is not only a fruitful
source of controversy, but fails completely to accomplish its purpose. Per-
missive joinder coupled with free comment would relegate voir dire question-
ing to its proper place, protect the uninsured defendant, and prevent much
useless litigation.

FREEDOM TO CONTRACT—A NEW CIVIL RIGHT*

When the Fourteenth and Fifteenth Amendments were adopted, they
each contained an enabling clause giving Congress the power to enforce the
rights which the Amendments guaranteed.1 Pursuant to these clauses, Con-
gress in the decade after the Civil War passed a series of laws known today as the Civil Rights Acts.2 These Acts recognized the right of all citizens to

38. See Beghtol, The Present Rule As To Disclosure Of Insurance In Personal In-
jury Cases, 15 Neb. L. Bull. 327 (1936), for a discussion of Beghtol's experience under
the rule of full disclosure as it existed in Nebraska prior to 1936. See also note 1 supra.
39. If juries do generally return higher verdicts against insured defendants than
against uninsured defendants, then the vast majority of the people of this country must be-
lieve that insurance should influence the result. And one of the strongest justifications for
the system of trial by jury is its ability to "keep the administration of the law in accord with
the wishes and feelings of the community." Holmes, Collected Legal Papers 238 (1921).
See also Wigmore's statement: "[Jury trial] supplies that flexibility of legal rules which is
essential to justice and popular contentment." Wigmore, A Program For The Trial Of
40. For proposals to this effect, see James, Accident Liability Reconsidered: The
Impact Of Liability Insurance, 57 Yale L.J. 549 (1948); Smith & Lilly, Compensation
For Automobile Accidents: A Symposium, 32 Col. L. Rev. 785 (1932); Symposium, Fi-

1948).

1. Congress announced the ratification of the Fourteenth Amendment on July 21, 1868.
Section 5 states: "The Congress shall have power to enforce, by appropriate legislation, the
provisions of this article." A corresponding provision—Section 2—was included in the
Fifteenth Amendment, ratified on March 30, 1870.
2. Actually, the first of these Acts, 14 Stat. 27 (1866), was passed under the authority
of the Thirteenth Amendment. When the authority of Congress to pass the Act was chal-
vote, and the right of all persons to make and enforce contracts, to receive equal treatment under law, to acquire and dispose of property, and to be free from discrimination in public places. Private persons and public officials who abridged these and other Constitutional rights were subject to civil and criminal sanctions.

At an early stage, however, the Supreme Court ruled that since the Fourteenth and Fifteenth Amendments were limitations on state action only, Congress could not constitutionally prevent private persons from depriving individuals of rights which these Amendments secured.


3. 16 STAT. 140 (1870); 16 STAT. 433 (1871). The sections proclaiming and protecting the right of all citizens to vote were authorized by the Fifteenth Amendment.

4. First proclaimed in the Act of 1866, supra note 2, this right was also incorporated in the Act of May 31, 1870, 16 STAT. 144 (1870), which became REV. STAT. § 1977 (1875) and 8 U.S.C. § 41 (1946).

5. See note 4 supra.


7. 18 STAT. 336 (1875).

8. "Any person" who violated the section entitling "all persons to the full and equal enjoyment of ... inns, public conveyances ... theaters, and other places of public amusement..." was liable to pay damages ($500 was specified to be collected in an action of debt) and was guilty of a misdemeanor. 18 STAT. 336 (1875).

9. E.g., "Any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject ... any inhabitant of any State ... to the deprivation of any right secured or protected by the last preceding section ..." 16 STAT. 144 (1870).

10. E.g., 18 STAT. 336 (1875) (debt); 17 STAT. 13 (1871) (damages). See note 8 supra.

11. E.g., 18 STAT. 336 (1875) (misdemeanor); 17 STAT. 14 (1871) (high crime). See note 8 supra.

12. In the Civil Rights Cases, 109 U.S. 3 (1883), the Court held unconstitutional the first two sections of the Civil Rights Act of 1875, 18 STAT. 335 (1875), which outlawed discrimination by private persons in hotels, theaters, and public conveyances. The Court declared that the Fourteenth Amendment gave Congress power to prohibit state action, but that it did not empower Congress to pass protective legislation operating against discrimination by private persons. And although the Thirteenth Amendment is a restriction on the actions of private persons, the Court held that this type of discrimination was not an incident of servitude within the scope of that Amendment. Justice Harlan, in a long vigorous dissent, would have upheld the legislation under either Amendment, and he decried the majority for sacrificing the "substance and spirit of the recent amendments..." Id. at 26. These cases are discussed in *Konvitz, The Constitution and Civil Rights* 8–28 (1947); *Waite, The Negro in the Supreme Court*, 30 MINN. L. REV. 219, 241 (1946).

Other sections of the Civil Rights Acts were invalidated in United States v. Reese, 92
Nevertheless, the decisions still left intact two provisions of the Acts—now Section 43 of Title 8, and Section 242 of Title 18—which impose criminal and civil liability on persons acting "under color of law." Although these provisions lay dormant for many years, the Department of Justice


In some cases the Court did allow federal protection of rights against private persons. These decisions were based on express provisions of the Constitution or on powers inherent in the federal form of government, but not on the Fourteenth Amendment. E.g., Ex parte Yarbrough, 110 U.S. 651 (1884) (right to vote in a federal election); Logan v. United States, 144 U.S. 263 (1892) (right to be free from mob violence when in custody of a federal officer); Motes v. United States, 178 U.S. 458 (1900) (right to inform a federal officer of a violation of a federal law); United States v. Mosely, 238 U.S. 383 (1915) (right to have vote counted in a federal election). See United States v. Cruikshank, 92 U.S. 542, 552 (1876) (freedom of assembly to discuss problems relating to federal government).


13. Section 43 encompasses the civil remedies: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects . . . any citizen of the United States or any other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress." 8 U.S.C. § 43 (1946), formerly 17 Stat. 13 (1871) and Rev. Stat. § 1979 (1875).


14. Until the changes in the criminal code in 1948, the criminal sanctions of the Civil Rights Acts were embodied in Section 52. Although Section 52 has been the more frequent designation, the references in this Note will be to Section 242, which reads as follows:

"Whoever, under color of any law . . . wilfully subjects any inhabitant . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color . . . shall be fined not more than $1,000, or imprisoned not more than one year, or both." 18 U.S.C. § 242 (Supp. 1950), formerly 14 Stat. 27 (1866); 16 Stat. 144 (1870); Rev. Stat. § 5510 (1875); Civil Code § 20, 35 Stat. 1092 (1909); 18 U.S.C. § 52 (1946).

15. In 1939, § 242 (then § 52, see note 14 supra) had been involved in only two reported cases, and these were never appealed from the federal district courts. CAnn, op. cit. supra note 2, at 71.

Section 43 had been invoked more frequently, but with little success; Giles v. Harris, 189 U.S. 475 (1903); Holt v. Indiana, 176 U.S. 68 (1900); Carter v. Greenehow, 114 U.S. 317 (1884). The notable exceptions were the voting cases. See note 17 infra.

In addition to judicial emasculation, a factor accounting for the dormancy might be that Congress had repealed some of the provisions relating to voting rights, and scattered the surviving sections in the revision of 1875 and the codification of 1909, thus concealing the original purpose of a comprehensive series of provisions. Biddle, supra note 2, at 131–2.
has succeeded in reviving the criminal sanctions, and private persons, taking the cue, have also invoked the civil remedies. In these cases, the courts have held officials liable under the Civil Rights Acts for interference with the right to vote in a federal election, to enjoy freedom of speech and assembly, and to be punished for a crime only after an orderly trial.

Beyond these elemental "political" rights, however, lies a broad range of economic and social activities in which—until recently—a federal "right" to be free from official aid to private discrimination had never been defined. Negroes and other minority groups—for example—are regularly denied access to restaurants, hotels and places of amusement. Where there is no state legislation, they have had no way of pressing their claims.

Further, there was no clear concept of what constituted action under color of law; nor had the Supreme Court, until 1931, recognized many specific civil rights under the Fourteenth Amendment. The development of the Civil Liberties Unit (now the Civil Rights Section) from its inception in 1939 is traced in Carr, op. cit. supra note 2, at 53-4.

16. The development of the Civil Liberties Unit (now the Civil Rights Section) from its inception in 1939 is traced in Carr, op. cit. supra note 2, passim. Also see Biddle, supra note 2, at 134-44.

Civil actions. Smith v. Allwright, 321 U.S. 649 (1944) (right to vote in a congressional primary where exclusion was by order of the party convention); Nixon v. Condon, 286 U.S. 73 (1932) (right to vote in congressional primary where exclusion was by order of the party executive committee); Nixon v. Herndon, 273 U.S. 536 (1927) (right to vote in a congressional primary where exclusion was by statute).


The Classic case illustrates the right to freedom from interference when voting in a federal election. In state elections, however, interference is actionable only when prompted by class or racial discrimination. Snowden v. Hughes, 321 U.S. 1 (1944) (no right to have nomination certified where discrimination was not alleged); Lane v. Wilson, 307 U.S. 268 (1939) (right to register upheld where exclusion was based on race); Myers v. Anderson, 238 U.S. 368 (1915) (right to vote in municipal election upheld where exclusion was based on race).


19. Although a conviction of the sheriff was reversed and a new trial ordered because of the vagueness of the instructions on intent, the constitutionality of § 242 (then § 52, see note 14 supra) was upheld in its application against a sheriff who beat to death a Negro whom he had arrested on charges of theft. Screws v. United States, 325 U.S. 91 (1945). This decision was followed in Williams v. United States, 179 F.2d 656 (5th Cir. 1950) (private detective who appeared to be a police officer beat and maltreated suspects who were never brought to trial); Crews v. United States, 160 F.2d 746 (5th Cir. 1947) (constable beat a suspected drunk and caused him to jump to his death).

Previously, indictments had been upheld in the lower courts. Catlette v. United States, 132 F.2d 902 (4th Cir. 1943) (police brutality and failure to intervene in case of mob violence); Culp v. United States, 131 F.2d 93 (8th Cir. 1942) (operation of "kangaroo court"); United States v. Trierweiler, 52 F. Supp. 4 (E.D. Ill. 1943) (official leading lynch mob); United States v. Sutherland, 37 F. Supp. 344 (N.D. Ga. 1940) (police brutality).

though some states have civil rights statutes, these statutes usually are narrowly construed by the courts and weakly enforced by local administrators.\textsuperscript{21}

The Civil Rights Acts have now been edged into this field. In the recent case of \textit{Valle v. Stengel},\textsuperscript{22} the Court of Appeals for the Third Circuit held that individuals seeking to enter places of amusement could not be subjected to discrimination by persons who act in the name of the state. The case arose when a borough police chief and the managers of a New Jersey swimming pool denied admission to Negroes who were citizens of New York. They brought a civil action under Section 43, alleging that the police officer and managers had denied them certain rights guaranteed by the laws and Constitution of the United States. The court reasoned that the defendants, by refusing to admit those plaintiffs bearing tickets and by refusing to sell tickets to the others, denied plaintiffs the right to make and enforce contracts. The “color of law” requirement was met because the policeman was an officer of the state\textsuperscript{23} and the private defendants acted in concert with him.\textsuperscript{24}


\textsuperscript{22} 176 F.2d 697 (3d Cir. 1949), reversing 75 F. Supp. 543 (D.N.J. 1948).

\textsuperscript{23} The District Court held that the defendants were not acting under color of law because their action violated the New Jersey Civil Rights Statute. \textit{Valle v. Stengel}, 75 F. Supp. 543, 545 (D.N.J. 1948). This reasoning assumes that a state officer cannot act under color of law and violate the law at the same time. But even the misuse of power is action under color of law. Screws v. United States, 325 U.S. 91, 111 (1945). But see dissenting opinion in Screws v. United States, \textit{supra}, at 138, which supports the position taken by the district court in \textit{Valle v. Stengel}. For an analysis of the opinions in the Screws case see Cohen, \textit{The Screws Case: Federal Protection of Negro Rights}, 46 \textit{Col. L. Rev.} 94 (1946).

\textsuperscript{24} The holding that the private defendants came within the statute has no foundation in precedent. The court applied the criminal concept of aiding and abetting. \textit{Valle v. Stengel}, 176 F.2d 697, 702 (3d Cir. 1949). Judge O’Connell, who concurred with the other judges as to the official, dissenting as to the private defendants. \textit{Id.} at 704.

Section 241 of Title 18, formerly Section 51, is the criminal conspiracy section of the Civil Rights Acts. See note 12 \textit{supra}. But since it protects only the rights of United States citizenship, its application cannot be extended to conspiracies to violate the rights guaranteed by the due process or equal protection clauses of the Fourteenth Amendment. Williams v. United States, 179 F.2d 644 (5th Cir. 1950). But under the general conspiracy statute, 18 U.S.C. § 371 (Supp. 1950), private persons cooperating with an official might be prosecuted for violating these rights. This could be accomplished by charging a conspiracy to violate § 242, which is the section applying criminal sanctions to persons who, under color of law, deprive others of certain rights including those guaranteed under the Fourteenth Amendment. See note 14 \textit{supra}. Although § 242 is applicable only to persons acting under color of law, a private individual could be found guilty of conspiring with the state officials to violate the section. \textit{Culp v. United States}, 131 F.2d 93 (8th Cir. 1942).
The court found that the right to make and enforce a contract was protected both by federal statute and by the Constitution, and thus within the scope of Section 43. The statute was Section 41 of the Civil Rights Acts which gives "persons . . . the same right in every State to make and enforce contracts . . ." \textsuperscript{26} The Constitutional basis for this right was found in three places: the privileges or immunities clause of the Fourteenth Amendment;\textsuperscript{26} a similar clause in Article IV,\textsuperscript{27} and the equal protection clause of the Fourteenth Amendment.\textsuperscript{28} Whether this right is based directly on a Constitutional provision or on the explicit language of Section 41 is unimportant, since the rights enunciated in Section 41 can have validity only if they are based on rights secured by the Constitution. Thus, either course of reasoning leads to the conclusion reached by the court, that the Constitution provides some kind of right for people to enter into and enforce contracts free from state-aided discrimination.

The precise scope of this right is not clear, since the court relied indiscriminately on three separate constitutional provisions. Moreover the court wove the two privileges and immunities clauses into its discussion without indicating the substantial difference between them. The provision in Article IV forbids a state from discriminating between its own citizens and citizens of other states; it affords a citizen no protection against his own state.\textsuperscript{29} As it appears in the Fourteenth Amendment, the clause prevents a state from abridging the privileges and immunities of citizens of the United States. The latter clause being an important basis for the decision, the right to make a contract free from state-assisted discrimination was elevated to the status of a privilege of United States citizenship.

\textsuperscript{26} 8 U.S.C. \S 41 (1946), formerly 14 Stat. 27 (1866), 16 Stat. 144 (1870), Rev. Stat. \S 1977 (1875). This section is merely declaratory of certain rights and does not include any civil or criminal sanctions. Although there is no reference as to those against whom this right is protected, it would seem that it derives from the Fourteenth Amendment, and thus applies only to encroachment by the state and not private persons. See Strauder v. West Virginia, 100 U.S. 303, 312 (1879); Virginia v. Rives, 100 U.S. 313, 318 (1879). For a recent use of this section see Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F.2d 212 (4th Cir. 1945), \textit{cert. denied}, 326 U.S. 721 (1945) (a library partly financed by the city violated \S 41 by discriminating against Negroes applying for employment).

For the view that this provision derived from the Thirteenth Amendment and is a restriction against private persons, see dissent of Justices Harlan and Day in Hodges v. United States, 203 U.S. 1, 20 (1906). See note 2 \textit{supra}.

\textsuperscript{26} U.S. Const. Amend. XIV, \S 1.

\textsuperscript{27} U.S. Const. Art. IV, \S 2.

\textsuperscript{28} U.S. Const. Amend. XIV, \S 1.

\textsuperscript{29} See Slaughter House Cases, 16 Wall. 36, 77 (U.S. 1873). An earlier case, Corfield v. Coryell, 6 Fed. Cas. 546, No. 3230 (E.D. Pa. 1823) had held that the privileges and immunities clause of Article IV protected the citizens of one state from infringement of certain fundamental rights by any other state. This view is now rejected. Today a state is required only to treat citizens of other states in the same manner as its own citizens. \textit{See}, \textit{e.g.}, Hague v. C.I.O., 307 U.S. 496, 511 (1939).
If this were the sole basis for the decision, the court could glean no support from the precedents. The privileges and immunities clause of the Fourteenth Amendment has long been so emasculated as to render it superfluous. Few rights are left in its embrace, and the right to make and enforce contracts is not within that select company.

But the court did not have to inflate the virtually defunct privileges and immunities clause of the Fourteenth Amendment in order to find a cause of action under Section 43. The decision could have been better supported by complete reliance on either of the other two constitutional provisions mentioned in the decision. Since a New Jersey statute forbids discrimination in places of amusement, the court could have held that persons acting under

30. In construing the privileges or immunities clause for the first time in the Slaughter House Cases, 16 Wall. 36 (U.S. 1873), the Court held that the privileges of United States citizenship "owe their existence to the Federal Government, its National character, its Constitution or its laws." Id. at 79. These cases established that the clause created no new rights beyond those already enjoyed by citizens of the United States.

This decision doomed to failure all subsequent attempts (for the one exception see note 32 infra) to declare that a state statute abridged a privilege of United States citizenship. The Court has refused to hold that the guarantees of the Bill of Rights are within the privileges or immunities clause, and thus protected against encroachment by the states. E.g., Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908); Maxwell v. Dow, 176 U.S. 581 (1900). Most commentators, however, contend that Congress intended to incorporate the Bill of Rights in the privileges or immunities clause. Flack, Adoption of the Fourteenth Amendment 94 (1908); Borchard, The Supreme Court and Private Rights, 47 Yale L.J. 1051, 1063 (1938); Boudin, Truth and Fiction About the Fourteenth Amendment, 16 N.Y.U.L.Q. Rev. 19, 71-4 (1938). Cf. Meiklejohn, Free Speech And Its Relation to Self-Government 58-61 (1948) (framers intended to incorporate First Amendment). But compare the recent attacks on this position provoked by the dissenting opinion of Justice Black in the Adamson case: Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949); Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation, 2 Stan. L. Rev. 140 (1949).

31. The Court has recognized that certain privileges are federally protected against infringement by private persons, see cases cited note 12 supra, but these cases were not grounded on the Fourteenth Amendment which applies only to state action. In a more recent case four justices preferred the privileges or immunities clause as the source of protection against restriction by California of the right of citizens to move freely from state to state. The majority, however, relied on the commerce clause. Edwards v. California, 314 U.S. 160, 178, 183 (1941).

32. Cf. Madden v. Kentucky, 309 U.S. 83 (1940), overruling Colgate v. Harvey, 296 U.S. 404 (1935). Colgate v. Harvey had held that the right of a resident of one state to contract in another is a privilege of United States citizenship. This was the only case out of more than fifty brought before the Supreme Court where the Court held that a statute abridged a privilege or immunity of United States citizenship. See Howard, The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey, 87 U. of Pa. L. Rev. 262 (1939); Note, Privileges and Immunities of Citizens of the United States—Colgate v. Harvey Overruled, 9 Geo. Wash. L. Rev. 105 (1940).

color of law had denied New York citizens the same privileges granted to New Jersey citizens, thus violating the privileges and immunities clause of Article IV.\(^3\)

Secondly, the court could have rested its decision squarely on the equal protection clause.\(^4\) Although mentioned only briefly in the opinion,\(^5\) the clause has a history of prior interpretation which amply justifies its expansion to include equality in the right to make contracts free from official interference.\(^6\) The Supreme Court has found an invasion of equal protection

34. Since § 43 protects persons against the infringement of rights secured by the Constitution, it obviously includes Article IV. That this argument has never previously been used may be explained by the hitherto limited use of the civil or criminal provisions of the Civil Rights Acts. Nor have out-of-state criminal defendants used this approach to attack the discriminatory enforcement of a non-discriminatory statute. Perhaps this was because the equal protection clause already protects all persons, including out-of-state citizens.

The amusement park involved in this case was probably discriminating against all Negroes, not merely New York Negroes. But the fact of New York citizenship provided an additional legal basis for a cause of action.

35. Recently the Supreme Court has used the equal protection clause to protect property rights. Shelley v. Kraemer, 334 U.S. 1 (1948) (court enforcement of restrictive covenants invalidated). Previously the Court had displayed a preference for the due process clause not only to protect the rights to procedural due process and the rights of the First Amendment, but also to protect property rights in civil rights cases. See, e.g., Buchanan v. Warley, 245 U.S. 60 (1917) (restrictive zoning ordinance invalidated).

Although freedom of contract has been called a property right within the protection of the due process clause, see e.g., Allgeyer v. Louisiana, 165 U.S. 578 (1897), it seems desirable to distinguish the civil right to make a contract without discrimination from the property right to be free from economic regulation. A recent postulation states, "Due process is, after all, a weapon blunted and scarred in the defense of property." Tussman & ten Broek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341, 364 (1949). The use of the equal protection clause emphasizes the freedom from discrimination, and thus distinguishes the right protected in the Valle case from the concept of freedom of contract which has been used to strike down economic regulation.

36. At several points in the opinion the court used the phrase "equal protection of the laws." 176 F.2d 697, 702, 703, 704. But the references seemed chiefly to relate to a denial of the equal protection of the New Jersey Civil Rights Statute, see note 33 supra. E.g., "Chief of Police Stengel, if the allegations of the complainant are to be believed, denied the plaintiffs equal protection of the laws and the fact that the law, the protection of which he denied to them, was a statute of the State of New Jersey rather than a statute of the United States, is immaterial." Id. at 704. At only one point in the opinion did the court state clearly that the right to make and enforce contracts was protected by the equal protection clause against state interference. Id. at 702.

37. It has been contended that the rights protected by § 43 derive only from the privileges or immunities clause of the Fourteenth Amendment. Konvitz, op. cit. supra note 12, at 100-1; cf. Hague v. C.I.O., 307 U.S. 496 (1939) (opinion of Justice Roberts). But recent opinions have asserted that § 43 has greater scope.

In the Hague case, for example, Justice Stone argued, in the other of the two opinions presented in this case, that freedom of speech and assembly derive from the due process clause, and that § 43 protects infringements of due process and equal protection as well as of privileges or immunities. Hague v. C.I.O., supra, at 526. For cases following this
not only in discriminatory laws \( ^{38} \) but also in discriminatory administration of laws that were prima facie valid.\(^{39} \) Furthermore, in Shelley v. Kraemer \(^{40} \) the Supreme Court held that the equal protection clause prevented state court enforcement of restrictive covenants, a form of private discrimination.\(^{41} \)

Even though the facts are somewhat different, the third circuit might well have used the Shelley case as a persuasive precedent. In the Shelley case, a third party, signatory to the restrictive covenant, sought to prevent two willing parties from contracting for the sale of property because one of the willing parties was a Negro. In Valle v. Stengel one of the parties, the management, refused to contract because the other parties were Negroes. The courts in the Shelley case, by enforcing a restrictive covenant, prevented a willing vendor from conveying to a willing purchaser. In the Valle case, however, persons acting under color of law prevented a willing customer from purchasing the services of an unwilling vendor. The cases are thus distinguishable. But the controlling factor is not whether state assistance was invoked by a third party, or by one of the parties to the contract. The essential element, common to both cases, is that persons acting under color of law were enforcing a policy of discrimination designed to prevent Negroes.

view see note 18 supra. The constitutionality of § 242, the criminal counterpart of § 43, was upheld insofar as it applied to due process of law. Screws v. United States, 325 U.S. 91 (1945). See the concurring opinion of Justice Rutledge, id. at 123-4, that § 242 protects all the rights secured by the Fourteenth Amendment. The Civil Rights Section of the Department of Justice operates in accord with this position. Case, op. cit., supra note 2, at 51-2, 75.

In Nixon v. Herndon, 273 U.S. 536 (1927), the Court held that election judges were liable for damages under Section 43 for enforcing a statute prohibiting Negroes from voting in primary elections. The statute was held to violate the equal protection clause. Cf. Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F.2d 212 (4th Cir. 1945), cert. denied, 326 U.S. 721 (1945). See also Snowden v. Hughes, 321 U.S. 1, 6-13 (1943).

The Supreme Court has not yet decided whether § 242 can be used to protect rights guaranteed by the equal protection clause. The issue was raised in United States v. Classic, 313 U.S. 299 (1941), but the Court refused to consider it because the court below had not discussed it. Id. at 329. A decision of a lower court, however, was grounded, in part, on the equal protection clause. Catlett v. United States, 132 F.2d 902 (4th Cir. 1943).


40. 334 U.S. 1 (1948).

from making the same contracts as white persons were permitted to make. *Per* the *Shelley* case, enforcement of such a policy is unconstitutional.42

Of the two rationales which might adequately support the *Valle* decision, the one resting on the equal protection clause would have wider significance. The privileges and immunities clause of Article IV only requires that a state treat the citizens of another state as it would its own. Thus it establishes a right against discrimination only when there is a state civil rights statute, and where the plaintiffs are citizens of another state. This combination of circumstances does not exist in those places where discriminatory practices are most rampant.

The equal protection clause, on the other hand, establishes a right against state-aided private discrimination whether or not there is a state civil rights act and no matter where the victim resides.

Grounded solely on the equal protection clause, the *Valle* decision would impose a more extensive check on discrimination involving contracts. Admittedly, an action would lie only where police or other state officials are called in to enforce discriminatory practices. But if the threat of Section 43 can keep the police away, private persons might be more reluctant to insist on discrimination.43 Thus, the suggested interpretation of the section might bring about a gradual abandonment of discrimination in places of amusement, restaurants, hotels and conveyances where denial of admission at times cannot be effected without police intervention.44

While complete reliance on the equal protection clause would have given the court's conclusion more significance,45 *Valle v. Stengel* has nevertheless made an important contribution by extending the Civil Rights Acts into an area of discrimination heretofore untouched by federal law.

42. See Ming, *supra* note 41, *passim*.

43. At present, in the South the police are always available for sanctioning private white interests against the Negro. MYRDAL, *AN AMERICAN DILEMMA* 530-6 (1944). But even if the police are deterred from assistance by the prospect of civil or criminal liability, there remains the practice of white persons of taking the law into their own hands. *Ibid.* For a discussion of liability of officials because of inaction see Cohen, *supra* note 23, at 104-6.

44. It was discrimination by private persons in this area that was prohibited by the Civil Rights Act of 1875, 18 Stat. 335 (1875), declared unconstitutional in the Civil Rights Cases, 109 U.S. 3 (1883). See note 12 *supra*.

45. The *Valle* decision would have had a much wider significance if it had gathered into the equal protection clause a general right to be free from discrimination. There seems to be no legal reason why an action under § 43 of the Civil Rights Acts must be based on a specific contractual or property right like the "right to make and enforce a contract." If private discriminatory conduct cannot receive protection by a state or by persons acting under color of law, as the *Shelley* and *Valle* cases clearly indicate, then it would appear superfluous for a court to find that such conduct, in addition to being discriminatory, also violates a more narrow right. Under this more sweeping rationale, states and state officials would be prohibited from assisting any private discrimination.

In practice, however, courts are reluctant to speak of a general right to be free from discrimination. Instead, they characteristically pitch their conclusions on a more specific