FEDERAL INTERVENTION IN THE STATES FOR THE SUPPRESSION OF DOMESTIC VIOLENCE: CONSTITUTIONALITY, STATUTORY POWER, AND POLICY

When outbreaks of domestic violence in the wake of the civil rights movement have necessitated a federal presence in the form of troops or marshals to maintain public order, section 333 of title 10 of the United States Code has been invoked by federal authorities to authorize federal intervention. Section 333, a long-dormant and little-discussed remnant of reconstruction legislation, was enacted in order to secure the fourteenth amendment's guarantee of equal protection of the laws. Judicious exertion of the powers conferred by this statute may serve both remedial and deterrent functions for the suppression of mass violence which the states are unwilling or unable to control.

DURING the past decade racial violence in the South has raised the question of federal power to intervene with force to quell domestic violence within the states.1 The initial use of federal power in this period was occasioned by the 1957 desegregation crisis in Little Rock, Arkansas. In that instance the presence of troops was directly related to the enforcement of federal court orders requiring the integration of the Little Rock schools.2 When a court order is involved, the authority to employ federal troops to enforce that order is generally conceded.3 We shall be concerned with the more

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1 See generally U.S. CIVIL RIGHTS COMM’N, LAW ENFORCEMENT: A REPORT ON EQUAL PROTECTION IN THE SOUTH 1-99 (1965); 1961 U.S. CIVIL RIGHTS COMM’N REP., JUSTICE 1-44.
2 See Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957) (enjoining Governor Faubus from using military force to block desegregation); Aaron v. Cooper, 143 F. Supp. 855 (E.D. Ark. 1956), aff’d, 243 F.2d 361 (8th Cir. 1957) (approving a plan of integration for the school district).

The view that troops may be used to enforce a federal court order has, however, been questioned. See Schweppe, Enforcement of Federal Court Decrees: A “Recurrence to Fundamental Principles,” 44 A.B.A.J. 115 (1958).
controversial issue of the use of federal power to suppress domestic violence in the absence of a court order.

This discussion essentially concerns a principal source of potential federal power over domestic disorder, namely, section 333 of title 10 of the United States Code, which reads as follows:

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it--

(1) so hinders the execution of laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

The "vague powers conferred by this measure" have become the focal point of considerable controversy in recent years. The statute was invoked by the Justice Department in Little Rock in 1957, in Montgomery, Alabama, in 1961, at the University of Mississippi in 1962, and at the University of Alabama in 1963; but each of these incidents involved federal court orders.

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Two other federal statutes relate to the use of the military in domestic matters:

10 U.S.C. § 331 (1964), implements article IV, § 4 of the Constitution by providing for the utilization of federal troops to suppress insurrection upon request of the state legislature, or of the state executive if the legislature cannot convene.

Section 332 of title 10, U.S.C., completes the trilogy, authorizing the use of the armed forces or militia without prerequisite state consent whenever it becomes "impracticable" to execute federal laws by the ordinary judicial processes because of violence or other obstruction. It will be noticed that § 332 is quite similar in terms to paragraph 2 of § 333. A chief difference is that § 333 offers a wider choice of avenues to the President, by providing for the use of the militia, armed forces, or "any other means."


7 N.Y. Times, May 21, 1951, p. 78, col. 8.


10 For the court order involved in the Montgomery situation, see United States v.
The first action taken by the Government pursuant to section 333 in the absence of a court order occurred in Alabama in June 1963. A five-week crisis in Birmingham preceded federal intervention. During this period there were numerous Negro demonstrations and outbreaks of rioting and disorder, but the Kennedy Administration maintained that it was impotent to interpose federal force. A significant change in this position followed renewed rioting on May 13, incited by the bombing of an integration leader’s home and a Negro motel. Federal troops were dispatched to bases in the vicinity of Birmingham in preparation for service if needed. The statutory authority for this action was explicitly stated to be section 333, paragraph 1. The sudden assertion of power under this long latent statute was defended by the Attorney General on the theory that the severity of the rioting had increased significantly and that the Alabama state police were tending to in-


President Kennedy was quoted at a news conference as follows: "We have, in addition, been watching the present controversy to detect any violations of the Federal civil rights—or rather, statutes. In the absence of such violations or any other Federal jurisdiction, our efforts have been focused on getting both sides together to settle in a peaceful fashion the very real abuses too long inflicted on the Negro citizens of that community." N.Y. Times, May 9, 1963, p. 16, cols. 1-2. (Emphasis added.)

An attempt to determine whether Mr. Kennedy felt that the Government lacked legal power to act or whether, on the other hand, the decision had been made not to utilize such power at that time produced the following colloquy:

"Q. Mr. President, in the Alabama crisis in Birmingham, according to your interpretation of the powers of the Presidency, was there a power that you possess, either by statute or the Constitution, that you chose not to invoke, or did you use your powers, in your view, to the fullest in this controversy?

"A. There isn't any Federal statute that is—was involved in the last few days in Birmingham, Ala. I indicated the areas where the Federal Government had intervened in Birmingham—the matter of voting, the matter of dealing with education, other matters. On the specific question of the parades, that did not involve a Federal statute.

"Q. Mr. President, two Negro students are . . .

"A.—As I indicated in my answer—and that is the reason why Mr. Marshall has been proceeding in the way he has—and we have not had, for example, a legal suit, as we have had in some other cases that—where there was a Federal statute involved."

Ibid.

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Ibid.


13 Ibid.

14 See the reply by President Kennedy to Governor Wallace's inquiry as to the authority for the troop movements to Alabama, id., May 14, 1963, p. 26, cols. 2-3.
flame rather than to pacify the situation, thus producing a condition "quite different" from that existing previously.\textsuperscript{15}

Governor Wallace responded to this mild Kennedy initiative by filing a motion for leave to interpose an original bill of complaint in the United States Supreme Court, praying for both declaratory and injunctive relief to effect the removal of the troops from the state of Alabama.\textsuperscript{16} The Supreme Court denied the motion on the ground that the troop movements were "preparatory measures" only;\textsuperscript{17} hence the issue of statutory authorization for their commitment to action under circumstances such as existed in Birmingham was not at that time ripe. Thus, the disposition of the case in no way resolved any interpretive difficulties posed by section 333.\textsuperscript{18}

The next major crisis raising the federal intervention problem involved the murder of three civil rights workers in Neshoba County, Mississippi, in June of 1964. Here the issue was one of federal "police action" to provide protection for civil rights workers in that state. Attorney General Kennedy ostensibly took the position that such intervention was legally impossible.\textsuperscript{19} This view provoked immediate and vigorous dissent, including a statement issued by twenty-nine professors of law which declared that there was "no

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  \item \textsuperscript{15} Id. at 26, col. 2.
  \item \textsuperscript{16} One of Governor Wallace's major objections to the troop movements was that Alabama had not requested federal aid to suppress insurrection as is specified by article IV, § 4 of the federal Constitution. Brief for Plaintiffs, pp. 11-12, Alabama v. United States, 373 U.S. 545 (1963). It may be pointed out here that 10 U.S.C. § 331 (1964) implements article IV, § 4 of the Constitution by providing for utilization of federal troops to suppress insurrection upon request of the state legislature, or of the state executive if the legislature cannot convene. On the other hand, § 333 was enacted pursuant to § 5 of the fourteenth amendment, and hence is independent of article IV, § 4, even if the latter is read to require a request of the state as a condition precedent to federal intervention.
  \item \textsuperscript{17} Alabama v. United States, 373 U.S. 545 (1963) (per curiam).
  \item \textsuperscript{18} The Justice Department asked that leave to file an original action in the Supreme Court be denied on the express ground that the complaint lacked substantial merit and requested the Court to underscore the President's authority under § 333: "A prompt decision authoritatively determining the powers of the President may reduce the danger of domestic violence and of unlawful combinations and conspiracies depriving citizens of constitutional rights that a State may be unable or unwilling to protect. We accordingly urge the Court, in its disposition of the plaintiffs' motion, to make it clear that the President is not without power, should future eventualities require it, to take upon his own initiative those steps authorized by Section 333 in order to safeguard the constitutional rights of citizens of the United States." Brief for Defendants, p. 7.
  \item \textsuperscript{19} The Attorney General reportedly told an NAACP delegation that federal preventative police action could not be taken because of the division of powers between the state and national governments. N.Y. Times, June 25, 1964, p. 1, col. 5. He was otherwise quoted as saying that the situation was "'a local matter for local law enforcement'" and that federal authority was "'very, very limited.'" Id. p. 18, col. 8.
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question” but that paragraph 2 of section 333 authorized federal “police action” to protect civil rights workers in circumstances such as those which existed in Mississippi.20

The final incident to be noted involved the attack upon civil rights demonstrators by state troopers and others in Selma, Alabama, in March 1965. That situation is significant, not because of the extent of federal involvement, which, prior to the Selma-Montgomery march was rather limited, but because the Justice Department altered its previous position concerning section 333. The power to intervene was no longer denied, but the primary responsibility of local law enforcement and the grave character of a military solution continued to be major themes.21

The Historical Context of Section 333

In order to understand the function and scope of section 333, it is necessary to consider the conditions under which it was enacted and the evils it was intended to remedy. The statutory predecessor of section 333 was originally a part of the Third Enforcement Act,22 which was a comprehensive scheme of federal civil rights legislation23 adopted pursuant to section 5 of the fourteenth amend-

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20 The full text of the professors’ statement can be found in 110 CONG. REC. 15851-52 (1964) (submitted by Senator Javits), and an abridged version is in N.Y. Times, July 1, 1964, p. 23, cols. 2-3. Deputy Attorney General Katzenbach’s reply, 110 CONG. REC. 18661-62 (1964) (submitted by Representative Lindsay), emphasized that law enforcement is a local responsibility and stated that § 333 contemplates circumstances “where there has been such a complete breakdown of law and order that civilian law enforcement measures are overwhelmed and use of armed forces is required.” Id. at 18662. The purpose of § 333, viewed against the background of its historical setting, indicates, as we shall see, that Mr. Katzenbach was more nearly correct.

The professors were not without influence, however, as they inspired a facile interpretation by Time magazine to the effect that § 333 “fully empowers the President to use all necessary force on every foot of American soil to uphold the constitutional rights of ‘any part or class’ of U.S. citizens whenever local officials fail to do so.” Time, Nov. 19, 1965, p. 76. Unfortunately, this expansive interpretation appears to be somewhat confused, combining haphazardly Supreme Court dicta, disparate elements from the professors’ statement, and a portion of § 333 (paragraph 1) specifically excluded by the professors from their argument.

21 See the statements of Mr. Katzenbach in N.Y. Times, March 10, 1965, p. 23, cols. 7-8. The respective attitudes of Mr. Robert Kennedy and Mr. Katzenbach are discussed in id., March 14, 1965, §§ 4 (Editorials), p. E4, cols. 4-8.


The First Enforcement Act is the Act of May 31, 1870, ch. 114, 16 Stat. 140, which was amended by the Enforcement Act of February 28, 1871, ch. 99, 16 Stat. 433. These statutes dealt primarily with the protection of voting rights.

23 The Third Enforcement Act contained six sections, which may be summarized as follows:

The first section, REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964), provided for
civil suits against anyone who "under color of law" deprived another of "rights, privileges, or immunities secured by the Constitution . . . ." This section, as is still in effect, may play an increasing role in federal civil rights litigation since it was given a more expansive interpretation in Monroe v. Pape, 365 U.S. 167 (1961). See note 34 infra.

Section 2 was a conspiracy statute providing both criminal and civil remedies. Within its terms was a lengthy series of forbidden activities which included the overthrow of the United States Government, hindering any United States officer from carrying out his duties, threatening any witness or juror in any federal court proceeding, or intimidating anyone in his lawful support of a candidate for federal elective office. Section 2 was divided and incorporated into several sections of the Revised Statutes (e.g., Rev. Stat. §§ 629, 699, 5330, 5406-07, 5518, 5520 (1875)), most of which have now been repealed. The most expansive portions of the section have long been dead letters. In the original statute, both civil and criminal penalties were provided for conspiracy to deprive "any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws." The criminal portion, as Rev. Stat. § 5519 (1875), was declared unconstitutional in United States v. Harris, 106 U.S. 629 (1882), on the ground that the statute was aimed at the action of individuals whereas the fourteenth amendment was directed solely as a limitation upon the states. The provision for civil damages is now 42 U.S.C. § 1985 (3) (1964), but in Collins v. Hardyman, 341 U.S. 651 (1951), the Court in dismissing for failure to state a cause of action added by way of dictum that as far as the action of private citizens was concerned only a massive and active conspiratorial organization such as the Klan of 1871 could deprive individuals of equal protection, and in that instance grave constitutional issues might be raised because of this very attempt to reach individual action. Id. at 658-59, 662.

Section 3 was the predecessor of § 333.

The fourth section, 17 Stat. 14 (1871), provided that whenever unlawful combinations became so powerful as to "overthrow or set at defiance" state and federal authority within the state, or when the state authorities were in complicity with the unlawful combination, such combinations were to be deemed a rebellion and the President was authorized to suspend the writ of habeas corpus in the rebellious areas. This provision expired by its own terms at the end of the next regular session of Congress.

Section 5, 17 Stat. 15 (1871), provided that no one in complicity with the illegal combinations (i.e., the Klan) could serve as a federal juror and prescribed an exculpatory oath to that effect.

Section 6, ibid., created a civil cause of action against any person who, having knowledge of a conspiracy described in § 2, failed to attempt to prevent the contemplated crime.

It may be noticed that §§ 1-4 constitute a systematic scheme to provide remedies for violence occurring on varying scales and degrees of intensity. Section 1 leaves the initiative to the individual victim of wrongdoing; § 2 deals with conspiracies through the ordinary civil processes. On the other hand, § 3 was aimed at conspiratorial organizations whose suppression may require the aid of the military, and § 4 contemplates full-scale rebellion or official complicity in the conspiratorial designs.

24 "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.
Klan Act, for it was directed primarily against the terror tactics of that organization.

The extent of the disorder fomented by Klan activity in the South in 1871 was a matter of some conjecture, congressional opinion being sharply divided along party lines. The Democrats claimed that the crime rate in the North compared unfavorably with conditions in the South. The Forty-second Congress did have before it the report of a Select Committee of the Senate to Investigate Alleged Outrages in the Southern States, the Radical majority of which concluded that there was widespread violence and a combination or conspiracy of awesome proportions rendering the insecurely held Radical state governments impotent. This un-

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25 CONG. GLOBE, 42d Cong., 1st Sess. app. 91 (1871) (remarks of Representative Duke); id. at 131 (remarks of Representative Brooks).

The opposition Democrats alternatively argued (a) that there was no crime problem in the South, e.g., id. at 337 (remarks of Representative Whitthorne), and (b) that any unrest or violence was the result of the policies of the Radical party, e.g., id. at 421-25 (remarks of Representative Winchester).

26 "It is clearly established—1st. That the Ku-Klux organization does exist, has a political purpose, is composed of members of the democratic or conservative party, has sought to carry out its purpose by murders, whippings, intimidations, and violence, against its opponents. 2nd. That it not only binds its members to carry out decrees of crime, but protects them against conviction and punishment, first by disguises and secrecy; second, by perjury, if necessary, upon the witness stand and in the jury box. 3rd. That of all the offenders against the law in this order, (and they must be many hundreds, if not thousands, because these crimes are shown to be committed by organized bands ranging from ten up to seventy-five) not one has yet been convicted in the whole State [of North Carolina]." S. REP. No. 1, 42d Cong., 1st Sess. XXX-XXXI (1871).

This Senate report also purports to document some 137 attacks (most in the form of whippings) perpetrated by the Klan upon Negroes and white Republicans in North Carolina over a two-year period. Id. at XIX-XX. United States Attorney General Ackerman estimated that the "unlawful combination" embraced two-thirds of the active white men in the state with the majority of the remainder sympathetic. H.R. Exec. Doc. No. 268, 42d Cong., 2d Sess. 1 (1872).

27 Republican estimates of Klan strength in North Carolina alone ranged from 10,000 to 40,000 and up. CONG. GLOBE, 42d Cong., 1st Sess. 154 (1871) (remarks of Senator Sherman); id. at 340 (remarks of Representative Kelley); id. at app. 169 (remarks of Senator Pool).

As to the views of later historians, Randall and Donald state that the Klan attained "considerable dimensions" by 1871. RANDALL & DONALD, THE CIVIL WAR AND RECONSTRUCTION 683 (2d ed. 1961). Oberholtzer mentions that the Klan claimed 550,000 members as early as 1868, but also points out that this is a mere guess. 2 OBERHOLTZER, A HISTORY OF THE UNITED STATES SINCE THE CIVIL WAR 343 (1922). See generally MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 720-25 (1965).

28 The state of affairs from the Radical viewpoint was well summed up by Representative Coburn of Indiana:

"Such, then, is the character of these outrages—numerous, repeated, continued from month to month and year to year, extending over many States; all similar in character, aimed at a similar class of citizens; all palliated or excused or justified or absolutely denied by the same class of men. Not like the local outbreaks sometimes
lawful combination constituted the nature and extent of the evil which the Radical-controlled Congress attempted to eradicate and indicates the general character of the circumstances under which appeal to section 333 would be appropriate.

Thus Congress in the Third Enforcement Act fashioned a statute designed to pacify the South and to remove the pressure which was allegedly being exerted against the besieged state governments. These objectives were to be accomplished by federalizing those aspects of the criminal law relating to crimes directed against the exercise of civil rights. The use of federal troops was designed to supply a military solution in areas of the most widespread violence, but for the most part the troops were to operate in aid of the federal courts by apprehending violators of federal criminal civil rights legislation as then contained in the Enforcement Acts. In appearing in particular districts, where a mob or a band of regulators may for a time commit crimes and defy the law, but having every mark and attribute of a systematic, persistent, well-defined organization, with a fixed purpose, with a regular plan of action.

Such occurrences show that there is a preconcerted and effective plan by which thousands of men are deprived of the equal protection of the laws. The arresting power is fettered, the witnesses are silenced, the courts are impotent, the laws are annulled, the criminal goes free, the persecuted citizen looks in vain for redress. This condition of affairs extends to counties and States; it is, in many places, the rule, and not the exception. CONG. GLOBE, 42d Cong., 1st Sess. 458-59 (1871).

Congressional action was in response to President Grant's call for new federal legislation to suppress the Klan. His message to Congress is found in 7 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 127-28 (1898).

The chief exponent of the Third Enforcement Act in the Senate was Senator Edmunds of the Judiciary Committee, which reported the act. He commented as follows regarding the purpose of the predecessor of § 333:

"When you come to the later sections, which are in aid of the first, you have the simple and ordinary provision in the third that, when the laws are opposed, when the courts are in danger of being unable to carry out their decrees, to arrest and punish offenders, the executive arm is to go to their assistance, is to oppose force to force, as is done in every city and county in the country every day, when the occasion for it occurs, under the State laws and under national laws . . . When force is to be opposed to the quiet progress of the law the arm of the nation is to resist force with force, is to gather up the offender and turn him over to the courts of justice for trial. That is all there is to it. We are not attempting to overturn the judiciary; we are attempting to uphold it." CONG. GLOBE, 42nd Cong., 1st Sess. 698 (1871). (Emphasis added.)

At another point, Mr. Edmunds stated: "Under this [the third] section . . . the President and his forces really act as a posse comitatus, although they are entitled to act under this bill just as police officers are entitled to act, as a posse comitatus, so to speak, without a warrant; that is, the President may go in with his forces and seize the conspirators and turbulent and wicked men who are engaged in these acts of violence, without waiting for anybody to swear out a warrant against these people before a commissioner or a judge. He may capture them, as we always do in such cases. He occupies in fact, seeing the thing go on and being called upon to repress it by force, precisely the position that a body of police would occupy in seeing a riot
fact, the original text of section 333 contained a final clause which directed that "any person who shall be arrested under the provisions of this and the preceding section shall be delivered to the marshal of the proper district, to be dealt with according to law."\(^{31}\)

The peculiar phraseology of section 333 suggests not only its original function as part of this statutory scheme but also the nature of the evil which the Enforcement Acts were intended to suppress.\(^{32}\) Certain interpretive difficulties arise when attempting to adapt to contemporary conditions a law which was, to a large degree, formulated to meet a circumstance of history not existent in the streets of a city, who would seize the rioters and take them before a judge... to be held for trial in the federal courts for conspiracy under the preceding sections of the same act. *Id.* at 567-68.

\(^{31}\) Act of April 20, 1871, ch. 22, § 3, 17 Stat. 14. The phraseology "according to law" was interpreted to mean prosecution for violation of the preceding criminal sections of the Enforcement Act. Senator Edmunds expressed the matter as follows: "Then the party being brought into court would be tried under the preceding sections of this act for being engaged in a conspiracy of the nature named, and would be tried in that case under the second and third sections in the circuit court of the United States for that State or the district court, as the case might be, and wherever that court should be held, instead of being tried in the very county, as always by State laws it is provided, where the offense was committed." *Cong. Globe, 42d Cong., 1st Sess.* 568 (1871).

This final clause relating to marshals was deleted in the first codification of § 333, *Rev. Stat.* § 5299 (1875), and thereafter, 10 U.S.C. § 333 (1964).

\(^{32}\) Military intervention in various parts of the South and suspension of the writ of habeas corpus in nine South Carolina counties were amazingly successful in bringing the Klan almost immediately under control. In April of 1872, the United States Attorney General could report 501 arrests in South Carolina with 53 guilty pleas and 5 jury trials all resulting in convictions; while 37 persons had been convicted or pleaded guilty and 944 were under indictment in North Carolina. *H.R. Exec. Doc.* No. 268, 42d Cong., 2d Sess. 3-4 (1872). At the same time the District Attorney for North Carolina reported that the power of the Klan had been broken in that state. *Id.* at 29-30. See *Randall & Donald, op. cit. supra* note 27, at 684. See *Proceedings in the Ku Klux Klan Trials at Columbia, S.C. in the United States Circuit Court, 1871*, for a portion of the record of the five jury trials, including United States v. Mitchell, 26 Fed. Cas. 1283 (No. 15790) (C.C.D.S.C. 1871), and United States v. Crosby, 25 Fed. Cas. 701 (No. 14893) (C.C.D.S.C. 1871).

For eighty years § 333 remained buried in obscurity. It was cited in 1913 by President Cleveland as an authority for his use of troops, over the vigorous protests of the Governor of Illinois, in the Chicago Pullman strike of 1894. *Cleveland, The Government in the Chicago Strike 19-20* (1913). However, the proclamation issued at the time of the strike refer only to the execution of federal laws and protection of federal property, making no reference to specific statutory authority. *Id.* at 54. Invocation of § 333 was also discussed in 1908 when the Governor of Nevada requested federal troops to suppress violence which had erupted in the course of a labor dispute. President Theodore Roosevelt, through Secretary of State Elihu Root, insisted that "a mere statement of domestic disturbance would not seem to be sufficient" to allow the use of federal troops. *H.R. Doc.* No. 607, 60th Cong., 1st Sess. 6-7 (1908). It may be noted in passing that both the Pullman and Goldfield interludes involved labor disputes, rather than violence related to racial strife.
today. For example, the emasculation of many Reconstruction-era statutes left federal civil rights legislation in the criminal field in a state of some disarray at least until very recently. [The basic statutes in the area of general criminal civil rights legislation are sections 241 and 242 of title 18, United States Code, which punish the deprivation or conspiracy to deprive persons of constitutional rights and are both remnants of the Enforcement Acts. In addi-


34 The demise of various elements of the Enforcement Acts commenced almost immediately after their enactment. In 1914 it was stated that of forty-two sections in the original acts only seven remained nominally in force. The others had either been repealed, rendered obsolete, or declared unconstitutional. Davis, The Federal Enforcement Acts, in STUDIES IN SOUTHERN HISTORY AND POLITICS 205, 228 (1914). Today, however, the century-old remnants of another era have been given renewed invigoration by a Court much more sympathetic than the one which initially reduced them to inconsequential relics.

The significant sections of the Enforcement Acts still in force are the following:

(1) 18 U.S.C. § 241 (1964) (formerly Act of May 31, 1870, ch. 114, § 6, 16 Stat. 141) is a criminal conspiracy statute, prescribing a fine of up to $5000 and/or imprisonment for a period of not more than ten years for conspiracy to injure any citizen in the exercise of a federal constitutional right, or going in disguise on the highway with intent to prevent the free exercise of such a right. This statute, by a narrow 4-1-4 decision in Williams v. United States, 341 U.S. 70 (1951) (Black, J., concurring), was construed to protect only those rights arising from the relationship of the individual to the federal government. This encompasses such weighty items as the right to travel to Washington, D.C., to protection on the high seas, and to supply arms to the federal government. See the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79-80 (1873). However, § 241 has recently been authoritatively reinterpreted in a manner similar to that advocated by the dissenters in Williams. In United States v. Price, 86 Sup. Ct. 1152 (1966) the Court held that § 241 encompasses all federal constitutional and statutory rights, including the fourteenth amendment's guarantee of protection against deprivation by the state of life and liberty without due process of law. Id. at 1158, 1160. In a companion case, United States v. Guest, 86 Sup. Ct. 1170 (1966), § 241 was interpreted to provide redress for denial of those rights secured by the equal protection clause of the fourteenth amendment. Id. at 1151.

(2) 18 U.S.C. § 242 (1964) (formerly Act of May 31, 1870, ch. 114, § 17, as amended, Rev. Stat. § 5510 (1875)), prescribes a fine or not more than $1000 and/or a prison sentence of not more than one year for anyone who "under color of any law" willfully subjects an inhabitant of any state to the deprivation of constitutionally secured rights. The scienter requirement was strictly construed in Screws v. United States, 325 U.S. 91 (1945), in order to save the statute from the vice of vagueness. Hence, it must be shown that the defendant acted with the intent of violating a "constitutional requirement which has been made specific and definite." Id. at 105.

In addition, the civil remedies provided by the Enforcement Acts have proved to be ineffective, largely because of the hostile attitude of the Supreme Court.

(1) Act of April 20, 1871, ch. 22, § 1, as amended, Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1964) provides for the accrual of a cause of action to anyone deprived by another "under color of law" of federal constitutional rights. This statute was revived by the decision in Monroe v. Pape, 365 U.S. 167 (1961), after a series of cases which had held it applicable only upon a showing of racial discrimination against a particular class and narrowly limiting the rights protected and the scope of "under color of law." E.g., Stiff v. Lynch, 287 F.2d 297 (7th Cir. 1961); Eaton v. Bibb, 217 F.2d 446 (7th
tion, recent statutes provide criminal penalties for certain specific actions such as interference with federal voting registrars.\textsuperscript{35} Furthermore, it may be inaccurate to describe the contemporary situation as one in which state and federal civil processes are effectively paralyzed by a massive conspiracy of such dimensions that military force is required to maintain order and to execute the laws. To the extent that section 333 embodies this condition precedent, its present applicability may be somewhat more limited than the interventionists insist upon.

\textit{Section 333 and Its Theory of Equal Protection}

Because of the extremely hazardous conditions in the South regarding the personal safety of those of the Republican persuasion (white and Negro) and the failure of the state governments to provide even a minimum degree of protection from violence, it is hardly surprising that the Radical-dominated Forty-second Congress considered at some length the meaning and application of the equal protection clause of the fourteenth amendment. From the

\textsuperscript{1} Monroe v. Pape, \textit{supra}, held that a cause of action is stated by showing (a) a deprivation of constitutional rights including those guaranteed by the due process clause of the fourteenth amendment and (b) that such deprivation was effected by one holding power by virtue of state law, even if his acts were in violation of that law. \textit{Id.} at 171, 184.

(2) Act of April 20, 1871, ch. 22, § 2, as amended, Rev. Stat. § 1980 (1875), 42 U.S.C. § 1985 (3) (1964), is a civil conspiracy statute, providing a cause of action to the injured party upon a showing of any of the following: (a) conspiracy to deprive equal protection of the laws; (b) conspiracy to prevent the local authorities from according to all the equal protection of the laws; (c) conspiracy to prevent a legal voter from giving lawful support to candidates for federal office; (d) or, in each of the above situations, persons having gone on the highway in disguise or on another's premises to effect the stated end. The important and broadly phrased provision for deprivation of equal protection was rendered impotent in \textit{Collins v. Hardyman}, 341 U.S. 651 (1951). See note 23 \textit{supra}.

(3) Finally, there is Act of May 31, 1870, ch. 114, § 16, as amended, Rev. Stat. § 1977 (1875), 42 U.S.C. § 1981 (1964), based upon § 1 of the original Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, which declares that everyone shall have equal rights in each state to sue in its courts, make contracts and enjoy equal protection for the security of person and property.

\textsuperscript{35} Voting Rights Act of 1965, §§ 11, 12, 79 Stat. 443, 42 U.S.C.A. §§ 1973i-j (Supp. 1965) (interference with the exercise of the right to vote or official duties required to be performed by the statute). See also Civil Rights Act of 1960, § 101, 18 U.S.C. § 1509 (1964) (interference with the exercise of rights under a federal court decree); Civil Rights Act of 1960, §§ 201-03, 18 U.S.C. §§ 837, 1074 (1964) (flight to avoid prosecutions for damaging or destroying any building or other real or personal property; threats or false information concerning attempts to damage or destroy real or personal property by fire or explosives).

Numerous proposals have been made for the strengthening of 18 U.S.C. §§ 241-42 (1964), and the replacement of these statutes with comprehensive federal criminal legislation. See note 155 and note 166 \textit{infra} and accompanying text.
congressional debates emerges a view espoused by speakers for the majority which places great emphasis upon a concept of *protection* to be afforded by the state. Briefly stated, the theory is that the state is required by the equal protection clause to extend the *protection* of equal laws to all of its inhabitants; should it fail or refuse to do so, Congress may step in by virtue of section 5 of the fourteenth amendment to extend that protection which the state has denied. 

Although there were divergent views as to the details of interpretation and application of this theory, the following general outlines of the concept of "protection" embodied in section 333 emerge from the congressional debates:

1. "It is a fundamental principle of law that while the citizen owes allegiance to the Government he has a right to expect and demand protection for life, person, and property." 

2. The great objective of the equal protection clause is that the protection of government be extended *equally* to all persons within the jurisdiction of the respective states. 

3. The command that the state shall not *deny* equal protection of the laws means that the state shall not withhold or fail to afford such protection. That is to say, the phraseology "no State shall deny" is the equivalent of "each State shall afford." 

4. Hence, acts of *omission* by the state, as well as acts of commission, may violate the equal protection clause. In particular, if a state has sufficient laws to safeguard the fundamental rights of person and property, but is prevented from or refuses to execute such laws, then this amounts to an effective denial of equal protection. 

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36 This is the argument basically relied upon by the Justice Department in Alabama v. United States, 373 U.S. 545 (1963). See Brief for Defendants, p. 9.

37 Cong. Globe, 42d Cong., 1st Sess. 322 (1871) (remarks of Representative Stoughton). See Harris, The Quest for Equality 1-23 (1969), where the notion of protection by the government is developed as a basic concept of Western political theory. The author then considers this theme as embodied in the equal protection clause and its interpretation in the constitutional history of that clause. Id. at 24-158.


39 Id. at 514 (remarks of Representative Poland); id. at app. 80 (remarks of Representative Perry); id. at 608 (remarks of Senator Pool); id. at 251 (remarks of Senator Morton); id. at app. 71 (remarks of Representative Shellabarger); id. at 481 (remarks of Representative Wilson); id. at 501 (remarks of Senator Frelinghuysen).

40 Id. at 482 (remarks of Representative Wilson); id. at 459 (remarks of Representative Coburn); id. at 501 (remarks of Senator Frelinghuysen); id. at 608 (remarks of Senator Pool); id. at app. 300 (remarks of Representative Stevenson); id. at app. 182 (remarks of Representative Mercur).
5. On the other hand, infrequent violations of state laws, for which the state provides a reasonable remedy, do not indicate state infringement of the equal protection clause. Since it is unrealistic to suppose that all criminals will be apprehended or that the punishment inflicted will satisfy everyone, so it is that the distinction here made may in some cases become a matter of controversy. Nevertheless, as the Radicals viewed the situation in 1871, the inadequacy of the southern governments to cope with disorder was painfully apparent and beyond question.

6. When the state fails to extend the equal protection of the laws, Congress may enact "appropriate legislation" by virtue of section 5 of the fourteenth amendment in order to guarantee such protection. It is at this point that a division on the theoretical level appeared in Republican ranks. The phrase "when the state fails" suggests the point of view of the more moderate Republicans that Congress could only provide for federal action if it were conditioned upon a precedent denial of equal protection by the state. On the other hand, the Radicals contended that section 5 was an affirmative grant of power to enact legislation relating to the guarantees of section 1 of the fourteenth amendment whether or not the states were adequately complying with the injunctions of section 1. The distinction was somewhat academic in 1871, for all

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41 Id. at 514 (remarks of Representative Poland); id. at 697 (remarks of Senator Edmunds); id. at app. 153 (remarks of Representative Garfield); cf. id. at 333-34 (remarks of Representative Hoar in discussion of article IV, § 4 of the Constitution, guaranteeing a republican form of government).

42 Under § 333 as enacted the determination as to when deterioration of state law enforcement efforts reaches such a point as to constitute a denial of equal protection in terms of paragraph 1 of § 333 is to be made by the President. See text accompanying notes 135-43 infra.

43 Id. at 514 (remarks of Representative Poland); id. at app. 182 (remarks of Representative Mercur); id. at 608 (remarks of Senator Pool); id. at app. 300 (remarks of Representative Stevenson); id. at app. 251 (remarks of Senator Morton); id. at 459 (remarks of Representative Coburn); id. at 501 (remarks of Senator Frelinghuysen); id. at 506 (remarks of Senator Pratt); id. at app. 71 (remarks of Representative Sheppard); id. at 482 (remarks of Representative Wilson).

44 See HARRIS, op. cit. supra note 37, at 45-49; Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 YALE L.J. 1353, 1358 (1964). Representative Garfield discussed extensively the power of Congress under the fourteenth amendment. He compared the scope of § 1 with a version which the Thirty-ninth Congress had rejected: "Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." CONG. GLOBE, 42d Cong., 1st Sess. app. 150 (1871).

Discussing the differing phraseology, Garfield continued: "The one [§ 1 as adopted]
Republicans could agree that the southern states were indeed denying the equal protection of the laws.

7. Finally, the Radicals were agreed that it was impractical to the point of futility to enact legislation punishing the states for failure to adhere to the requirements of section 1 of the fourteenth amendment. The basic difficulty was that the states had been rendered powerless to act. Hence the Enforcement Acts, including section 333, were directed against the activities of individuals. exerts its force directly upon the States, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations. The other, the rejected proposition, would have brought the power of Congress to bear directly upon the citizens, and contained a clear grant of power to Congress to legislate directly for the protection of life, liberty, and property within the States." Id. at app. 151. Hence it follows that Congress may not directly legislate with respect to "life, liberty, and property," but may only step in to correct a precedent constitutional denial by the state. See Garfield's remarks, id. at app. 153.

Compare the views of the more radical Representative Bingham: "These last amendments—thirteenth, fourteenth, and fifteenth—do, in my judgment, vest in Congress a power to protect the rights of citizens against States, and individuals in States, never before granted. The power to enforce this provision [§ 1] by law is as full as any other grant of power to Congress. Mr. Speaker, this House may safely pass laws for enforcing all the privileges and immunities of citizens of the United States, as guarantied by the amended Constitution and expressly enumerated in the Constitution. The Government owes high and solemn duties to every citizen of the country. It is bound to protect him in his most important rights.' [Quoting Daniel Webster.] Has he rights any more important than the rights of life, liberty, and property? It is clear that if Congress do so provide by penal laws for the protection of these rights, those violating them must answer for the crime, and not the States: The United States punishes men, not States, for a violation of its laws." Id. at app. 83-86.

Of course, the outnumbered Democrats vigorously dissented from the view of their Radical brethren on the issue of the effect of §§ 1 and 5 of the fourteenth amendment. They argued alternatively that § 1 was a limitation upon the power of the states only, that § 5 authorizing "appropriate legislation" applied only to §§ 2, 3, and 4 of the amendment, and that in any event § 1 only proscribed state action in the form of discriminatory legislative enactments. See, e.g., id. at 455 (remarks of Representative Cox); id. at 572-73 (remarks of Senator Stockton); id. at app. 48 (remarks of Representative Kerr); id. at app. 117 (remarks of Representative Farnsworth); id. at app. 208 (remarks of Representative Blair); id. at app. 259 (remarks of Representative Holman); id. at app. 315 (remarks of Representative Burchard).

In maintaining their respective positions, both Radicals and Democrats appealed to the proceedings of the Thirty-ninth Congress which had passed both the Civil Rights Act, ch. 31, 14 Stat. 27 (1866), and the fourteenth amendment. Unfortunately, §§ 1 and 5 of the amendment were not extensively debated nor their full implications drawn out because of congressional preoccupation with other sections, particularly § 2, which dealt with reduction of state representation in the House of Representatives in proportion to the number of potential voters whose right to vote is abridged. Nevertheless, there was considerable support for the Democratic view. See CONG.

46 Id. at 506 (remarks of Senator Pratt); id. at app. 251 (remarks of Senator Morton); id. at 608 (remarks of Senator Pool); id. at 514 (remarks of Representative Poland); id. at 459 (remarks of Representative Coburn); id. at 691 (remarks of Senator Edmunds).
Early cases in the lower federal courts lent considerable support to the Radical Republican view of the fourteenth amendment outlined above in regard both to the plenary power of Congress to act prior to any state neglect of its constitutional duties and to congressional action directed against individuals. However, the Supreme Court, on the other hand, the language of Representative Bingham, principal author of § 1 of the fourteenth amendment, CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866), Representative Farnsworth, id. at 2539, and Representative Poland, id. at 2961, suggests the possibility of a broader interpretation. The Thirty-ninth Congress also passed the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, which was inexplicitly enshrined in § 1 of the fourteenth amendment. See Harris, op. cit. supra note 37, at 36-37. In the debates on this act, references to protection for life and property from violence were not uncommon. See CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866), Representative Wilson; id. at 1152 (remarks of Representative Shellabarger); id. at 1262-63 (remarks of Representative Broomall); id. at 1293 (remarks of Representative Lawrence). Thus, while the germ of the “protection” notion may be contained in the debates of the Thirty-ninth Congress, the concept did not appear fully developed until the discussions concerning the Enforcement Acts. The newly explored implications of the fourteenth amendment produced various cries of anguish, including the following from Representative Storm of Pennsylvania: “If the monstrous doctrine now set up as resulting from the provisions of that Fourteenth Amendment had even been hinted at that Amendment would have received an emphatic rejection at the hands of the people.” CONG. GLOBE, 42d Cong., 1st Sess. app. 87 (1871).

Of course, it might be argued that the interpretation which the Forty-second Congress placed upon the fourteenth amendment is fully authoritative, for the compositions of the Thirty-ninth and Forty-second Congresses were similar, both including such influential members as Representatives Bingham, Garfield and Shellabarger. However, the weight given to this factor must be reduced by the extent to which the views of both Republicans and Democrats varied with the political advantage sought to be gained. In particular, Democrats opted for an expansive interpretation and Republicans a more moderate one prior to the ratification of the fourteenth amendment. After the final approval of that amendment, the roles tended to become reversed. See Magrath, Morrison R. Waite: The Triumph of Character 119-20 (1963).

For example, in United States v. Hall, 26 Fed. Cas. 79 (No. 15822) (C.C.S.D. Ala. 1871), Judge Woods, who ironically was later to write the opinion in United States v. Harris, 106 U.S. 629 (1882), which severely restricted congressional power under the fourteenth amendment, aptly summarized the theory of the Enforcement Acts: “[C]ongress has the power, by appropriate legislation, to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation, for the fourteenth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. 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 . . . . [T]o guard against the invasion of the citizen’s fundamental rights, and to ensure their adequate protection, as well against state legislation as state inaction, or incompetency, the amendment gives congress the power to enforce its provisions by
in a series of devastating decisions which included *United States v. Reese*,47 *United States v. Cruikshank,*48 *United States v. Harris,*40 and the *Civil Rights Cases,*60 narrowly circumscribed congressional power under section 5 of the fourteenth amendment by imposing a strict concept of "state action" upon section 1 of that amendment, thereby creating the dichotomy between "state action" and "individual action." This appeared to undercut the most effective application of congressional power—action directly against individuals whose illegal activities the state did not control.51 Thus arose the notion that the fourteenth amendment finds application only against certain action of the states. At first glance, this interpretation of the fourteenth amendment may seem to cast doubt upon the constitutionality of section 333 insofar as the statute purports to authorize federal action against individuals. However, section 333 is somewhat unusual, for the statute assumes that state inaction to assure equal protection is violative of the fourteenth amendment,62 and in that context measures are authorized against individuals. The Supreme Court has never had occasion to consider a statute interpreted in this precise manner;63 however, the line of Supreme Court cases narrowly construing congressional power under the fourteenth amendment by no means excludes application of that amendment to mixed situations involving "state action" and "private action."64 It remains, then, to consider whether "state

appropriate legislation. And as it would be unseemly for congress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses . . . ." *United States v. Hall*, supra at 81. (Emphasis added.)


47 92 U.S. 214 (1876).
48 92 U.S. 542 (1876).
49 106 U.S. 629 (1883).
50 109 U.S. 3 (1883).
51 See text accompanying note 45 supra.
52 The following colloquy took place between Representatives Farnsworth and Shellabarger:

"MR. FARNSWORTH: The third section [predecessor of § 333] makes no reference to the unconstitutional acts of a State. It refers to the unlawful acts of a combination of two or more persons.

"MR. SHELLABARGER: No; it assumes that the State has denied protection to some of its citizens." Conc. Glosa, 42d Cong., 1st Sess. app. 116 (1871).
53 See *Frantz*, supra note 44, at 1359.
54 *Ibid.* The older Supreme Court cases emphasized that congressional enactments had attempted to regulate individual conduct and were not conditioned upon a
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action" is present in the section 333 situation\(^6\) and whether the precedent denial of constitutional rights by the states. For example, in United States v. Harris, which declared unconstitutional a federal statute [REV. STAT. § 5519 (1875), see note 23 supra] punishing conspiracy to deprive equal protection of the laws, the Court stated: "When the State has been guilty of no violation of its [the fourteenth amendment's] provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress." 106 U.S. at 639. (Emphasis added.)

Similarly, in the Civil Rights Cases the Court stated that punishment of the mere "wrongful act of an individual" unsupported by state authority in the form of laws, customs, judicial or executive procedures was not within the reach of congressional power under the fourteenth amendment. The Court assumed that the victim's "rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress." 109 U.S. at 17. See Collins v. Hardyman, 341 U.S. 651, 661 (1951). The Court complained that the Civil Rights Act of 1875, ch. 114, 18 Stat. 335, "does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States which may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities." 109 U.S. at 14.

The rationale in these cases hardly speaks to the issue of congressional power in the instance in which the state fails or refuses to safeguard the victims' rights in violation of the prohibitions of the fourteenth amendment. In Ex parte Riggins, 194 Fed. 404 (C.C.N.D. Ala. 1904), writ quashed sub nom. Riggins v. United States, 199 U.S. 547 (1905), Harris and the Civil Rights Cases were explained in the following manner: "It was the plenary power of Congress over state laws and state officers, when the state was not at fault, and not the auxiliary power of Congress or its right to punish individuals who prevented the enjoyment of a right secured to the citizen under the Constitution and laws of the United States, which was there involved and decided." Ex parte Riggins, supra at 415. (Emphasis added.)

\(^6\) The presence of "state action" in a § 333 situation depends in part upon whether the conditions set forth in the statute are within the scope of the fourteenth amendment's equal protection clause, or at least that Congress may so determine under § 5. See Wechsler, The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543, 558-60 (1954). The Supreme Court has occasionally hinted that the equal protection clause may indeed require that a certain minimal level of protection be afforded by the state governments. For example, in Barbier v. Connolly, 113 U.S. 27 (1884), the Court stated that the clause intended that "equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights . . . ." Id. at 31. And again, "the equal protection of the laws is a pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). (Emphasis added.) In Truax v. Corrigan, 257 U.S. 312 (1921), the Court bound the due process and equal protection clauses together, commenting that the former secured "a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the legislature may not withhold." Id. at 332. The equal protection clause then guarantees that this "minimum of protection" will be enjoyed.
measures which it authorizes against individuals are "appropriate legislation" in terms of section 5 of the fourteenth amendment.5

We may begin with the elementary observation that the "state action" requirement has been seriously eroded in recent years.5

on a non-discriminatory basis. More recently, in Griffin v. Illinois, 351 U.S. 12 (1956), the Court, in requiring that indigent defendants be given a free transcript of their trial for purposes of appeal, established a minimum standard of treatment for those criminally accused. See Harris, op. cit. supra note 37, at 78-81.

More frequently, however, the Court has focused upon the aspect of equality, holding that in the applications of its laws the state may not "invidiously discriminate" against individuals or classes thereof. E.g., Douglas v. California, 372 U.S. 353 (1963); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (finding no invidious discrimination); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (same); Skinner v. Oklahoma, 316 U.S. 535 (1942).

For many purposes with respect to § 333 it may make little difference which analysis is adopted. Clearly, for example, if uncontrolled violence should erupt in one area of a state, protection has been denied in the sense discussed by the Forty-second Congress. However, to the extent that a state maintains order in one portion of its territory and is unwilling to do so in another part, there is surely an "invidious discrimination" against the victims of the rampant violence. A case could conceivably arise, however, in which the state failed to afford protection on a large scale as the result of a serious impairment of governmental processes. In such an instance there would be no "invidious discrimination" and appeal to the "required minimum of protection" would necessarily have to be made. It is hardly likely, however, should such an extreme condition arise, that much notice would be taken of the legal subtleties of the situation.

"This discussion is focused upon the fourteenth amendment because it was envisaged by the Forty-second Congress as the constitutional authority for the enactment of § 333 and because the Supreme Court has recently reconsidered the scope of congressional power to enforce that amendment. See notes 62-69 infra and accompanying text. It must be mentioned, however, that the fourteenth amendment need not be the exclusive source of congressional power in the field of civil rights legislation. For example, the Civil Rights Act of 1964, 78 Stat. 241 (codified in scattered sections of 5, 28, 42 U.S.C.), was bottomed and upheld on the basis of the commerce power alone. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

Considering the broad scope which has traditionally been assigned to the commerce power, it is hardly arguable that Congress could not provide for federal intervention to keep open those channels of commerce which would assuredly be adversely affected by violence on the scale contemplated by § 333. In fact, the Supreme Court has indicated in sweeping language that federal power pursuant to the commerce clause may be exerted against obstructions to interstate commerce even in the absence of congressional statute. Thus, in In re Debs, 158 U.S. 564 (1895), the Court stated: "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the arm of the Nation and all its militia, are at the service of the nation to compel obedience to its laws." Id. at 582. (Emphasis added.) See United States v. U.S. Klans, Knights of Ku Klux Klan, Inc., 194 F. Supp. 897, 901-04 (M.D. Ala. 1961). See generally Burke, The Civil Rights Uses of In Re Debs, 1 LAW IN TRANSITION Q. 139 (1964).

60See, e.g., Abernathy, Expansion of the State Action Concept Under the Fourteenth Amendment, 48 CORNELL L.Q. 375 (1963); Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. PA. L. REV. 473 (1962); Karst & Van Alstyne, Comment:
For example, in *Lombard v. Louisiana* the mere statement of the mayor and superintendent of police expressing disinchantment with sit-in demonstrations and stating the intention to enforce Louisiana’s neutral trespass law against the demonstrators was sufficient to constitute “state action” and a violation of the equal protection clause. The demonstrators’ convictions for criminal mischief (trespass) in refusing to leave a restaurant were therefore overturned.

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For the view that the concept of “state action” has not been “expanded,” see Lewis, *The Meaning of State Action*, 60 Colum. L. Rev. 1083 (1960); Manning, *State Responsibility Under the Fourteenth Amendment: An Adherence to Tradition*, 27 Fordham L. Rev. 201 (1958).


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... 373 U.S. 267 (1963).

The Court said that because of the mayor’s statement the city of New Orleans must be treated “exactly as if” it had an ordinance requiring segregation in eating establishments. Id. at 273. By making this identification, the Court was able to dispose of the case on the authority of *Peterson v. City of Greenville*, 373 U.S. 244 (1963), thus eliminating the necessity for a re-examination of the “state action” problem. The Court finally disposed of one portion of the sit-in cases in *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964), 1965 Duke L.J. 640, holding that the passage of the Civil Rights Act of 1964, 78 Stat. 241 (codified in scattered sections of 5, 28, 42 U.S.C.), abated state “sit-in” convictions which involved facilities covered by the act.

It was formerly thought that the state had to initiate or be intimately involved with discriminatory activity to run afoul of the fourteenth amendment. Thus, Mr. Justice Harlan, concurring in part and dissenting in part in *Peterson v. City of Greenville*, 373 U.S. 244 (1963), stated: “The ultimate substantive question is whether there has been ‘State action of a particular character’ ([Civil Rights Cases, ]... [109 U.S. at 11] ... )—whether the character of the State’s involvement in an arbitrary discrimination is such that it should be held responsible for the discrimination.” *Peterson v. City of Greenville*, supra at 249. (Emphasis in original.) Or, again, “the Equal Protection Clause reaches only discriminations whose origins and effectuation arise solely out of individual predilections, prejudice, and acts. *Civil Rights Cases, 109 U.S. 3.*” *Evans v. Newton*, 382 U.S. 296, 316 (1966) (Harlan, J., dissenting).

There are indications, however, that it makes no difference that a state applies its laws with an even hand indiscriminately to all. In *Bell v. Maryland*, 378 U.S. 226 (1964), three of the six-man majority felt that such applications of the state’s neutral trespass law resulted in an unconstitutional deprivation of equal protection in a sit-in situation. At least one state case, *State v. Brown*, 195 A.2d 379 (Del. 1963), has so held. Mr. Justice Stewart’s opinion for the Court in *United States v. Guest*, 86 Sup. Ct.
Modern Supreme Court cases, such as *Lombard*, have dealt with section 1 of the fourteenth amendment as a judicially-enforced, self-executing limitation upon the states. However, a distinction has sometimes been drawn between the reach of section 1 of the fourteenth amendment unaided by statute and the broader power of Congress under section 5 of that amendment. Nevertheless, because Congress has not attempted to base legislation upon this section since the overthrow of the civil rights acts in the 1870's, few contemporary definitions of congressional power are available. However, some cases and commentators suggest an expansive inter-

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1170 (1966), suggests by way of dicta that this view expressed in *Bell* may now command a majority of the Court. Reference is made to the "co-operative private and state action . . . involved in *Bell*." *Id.* at 1177. However, in the preceding paragraph Mr. Justice Stewart had pointed out that the Court had found "state action" violative of the equal protection clause in situations in which "the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violations." *Ibid.*. This controversy as to "the threshold level that state action must attain in order to create rights under the Equal Protection Clause," *ibid.*, is, of course, a direct outgrowth of *Shelley v. Kraemer*, 334 U.S. 1 (1948).

For example, the dissent of Mr. Justice Black, joined by Justices Harlan and White, in *Bell v. Maryland*, *supra* note 60, indicates that § 1 as a self-executing restriction upon the states defined by the judiciary is limited to "state action," but that the power of Congress under § 5 is not so limited, thus opening the way for legislation directed against individuals. *Id.* at 326 & n.11. See Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L.J. 219, 222. This notion that the power of Congress is more extensive than that of the judiciary is also expressed in the separate opinion of Mr. Justice Brennan in *United States v. Guest*, *supra* note 60, at 1191-92. Mr. Justice Brennan points out that the framers of the fourteenth amendment intended to augment the power of Congress and not that of the judiciary. Congress was viewed as the body most able to fashion procedures for the implementation of fourteenth amendment rights. *Id.* at 1191 & n.7.

In the recent case of *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Supreme Court in upholding the Voting Rights Act of 1965, 79 Stat. 437 (codified in scattered sections of 42 U.S.C.), had occasion to interpret § 2 of the fifteenth amendment which is in terms virtually identical to § 5 of the fourteenth amendment. The Court stated that "the basic test to be applied . . . is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." *South Carolina v. Katzenbach*, *supra* at 326. The Court then adopted as a statement of that test the following classic pronouncement of Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *South Carolina v. Katzenbach*, *supra* at 326. A similar position with respect to § 5 of the fourteenth amendment is taken by Mr. Justice Brennan in *United States v. Guest*, *supra* note 60, at 1191-92 (separate opinion).
pretation of section 5 clearly broad enough to bring within its scope activities of individuals which contribute to the deprivation of fourteenth amendment rights when the state itself does not protect those rights.63

Perhaps the most significant recent decision in this connection is United States v. Guest,64 involving the construction of section 241 of title 18, United States Code,65 which prescribes punishment for conspiracy to injure any citizen in his enjoyment of federal constitutional or statutory rights.66 In particular the separate opinion of Mr. Justice Brennan concludes that section 5 must be interpreted with the same latitude as any other express power of Congress and that "Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of . . . [fourteenth amendment rights] is necessary to . . . [their] full protection."67 Similar views, though less fully developed, were stated

In South Carolina v. Katzenbach, supra at 818, Ex parte Virginia, 100 U.S. 339 (1880) is cited with approval. The latter case contains some interesting language concerning what constitutes "appropriate legislation" under § 5 of the fourteenth amendment:

"It is the power of Congress which has been enlarged [by § 5]. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." Ex parte Virginia, supra at 345-46. (Emphasis in original.)

There is, other more restrictive language in the opinion: "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial." Id. at 346. (Emphasis added.) It is clear that the Court is contemplating "state action" as consisting only of positive actions of governmental officials. When it is conceded that non-action is also state action for fourteenth amendment purposes (see notes 70-73 infra and accompanying text) then the scope of "appropriate legislation" must necessarily be reconsidered.

63 See, e.g., Harris, op. cit. supra note 37; Frank & Munro, The Original Understanding of "Equal Protection of the Laws," 50 COLUM. L. REV. 131 (1950); Frantz, supra note 44; Hale, Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals, 6 LAW. GUILD REV. 627 (1946); Peters, Civil Rights and State Non-Action, 34 NOTRE DAME LAW. 303 (1959); Roche, Civil Liberty in the Age of Enterprise, 31 U. CHI. L. REV. 103, 107-12 (1963); Van Alstyne, Mr. Justice Black, Constitutional Review, and the Talisman of State Action, 1965 DUKE L.J. 219. See generally MAGRATH, op. cit. supra note 45, at 116-34.


66 See note 34 supra.

67 86 Sup. Ct. at 1191. (Emphasis added.)
by Mr. Justice Clark in his concurring opinion. Thus a broad interpretation of section 5 apparently commands a majority of the Court. Of course, the constitutionality of section 333 by no means depends upon a circumvention of the "state action" doctrine, for

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68 Id. at 1180.
69 United States v. Guest produced four opinions, Mr. Justice Stewart's opinion for the Court, Mr. Justice Clark's concurrence, joined by Justices Black and Fortas, Mr. Justice Brennan's separate opinion, joined by Mr. Chief Justice Warren and Mr. Justice Douglas, and Mr. Justice Harlan's separate opinion.

Prior to the Guest case Justices Douglas and Goldberg had been particularly vigorous in urging the Court to adopt an expansive interpretation of § 5 of the fourteenth amendment. These Justices essentially espoused the Radical view that Congress may act directly upon individuals in relation to § 1 rights whether or not the states are adequately protecting those rights. See note 44 supra and accompanying text. Douglas and Goldberg would have placed congressional authority to enact the 1964 Civil Rights Act, 78 Stat. 241 (codified in scattered sections of 5, 28, 42 U.S.C.), squarely upon § 5 of the fourteenth amendment. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 279-80 (Douglas, J., concurring), 293 (Goldberg, J., concurring). (These respective concurrences were also made applicable to Katzenbach v. McClung, 379 U.S. 294 (1964).) Douglas and Goldberg reiterated their views in Hamm v. City of Rock Hill, 379 U.S. 306, 317 (1964).

Thus it is now possible to interpret the views of virtually all of the Justices as indicating that congressional power under § 5 of the fourteenth amendment is not limited by traditional "state action" concepts. Under this interpretation, the search for "state action" in the § 333 situation is unnecessary.

70 There are a few ways of making an end run around the "state action" obstacle without directly seeking its demise. For example, in Congress of Racial Equality v. Clemmons, 323 F.2d 54 (5th Cir. 1963), cert. denied, 375 U.S. 992 (1964), the court stated that there were "two major exceptions" to the state action requirement of the fourteenth amendment and described them as follows: "As pointed out in Collins v. Hardyman, one exception is a massive conspiracy such as the Klan in Reconstruction days, 'so far flung and embracing such members * * * [as] to deprive Negroes of their legal rights and to close all avenues of redress or vindication.' . . . [341 U.S. 651, 662 (1951)]. . . . The other exception applies when private persons take over governmental functions." [Citations omitted.] Congress of Racial Equality v. Clemmons, supra at 62-63.

Unfortunately, this is not a promising approach. In the first place it is limited to the "massive conspiracy." Secondly, reliance upon Collins v. Hardyman, supra, is misplaced, for the dicta in that case indicate that grave constitutional problems would arise even if the statute were applied to individuals comprising a "massive conspiracy." Note 23 supra. Collins, of course, predates the new burst of enthusiasm shown by the Court for civil rights actions. This era commenced with Monroe v. Pape, 365 U.S. 167 (1961). See note 34 supra.

A somewhat novel approach is taken in Brewer v. Hoxie School Dist., 238 F.2d 91 (8th Cir. 1956), 43 VA. L. Rev. 255 (1957), in which school officials, duty bound to accord equal protection in their operation of schools, were held to have a federal right to be free from interference by private individuals in the performance of this duty. Accordingly, an injunction was granted against such private individuals. The court did not disclose all the characteristics of this "federal right," but it is apparently in the nature of a privilege or immunity of United States citizenship, arising as it does from the relation between the individual and the federal government. Specifically, the cases cited by the court in Brewer describing other such analogous federal rights fall into this category of privileges and immunities, which means in addition that Congress
it does in fact assume the existence of "state action"—albeit of a particular variety, which may perhaps more accurately be labeled "state non-action." The Supreme Court has held that non-action may indeed amount to "state action" for fourteenth amendment purposes. Further, cases in the courts of appeals have produced factual situations more directly relevant to that which would be encountered in connection with section 333. Specifically, it has been held that the equal protection clause was violated when state officers failed to protect persons in their custody from mob violence.  

could probably legislate to protect the exercise of this new federal right. Cases cited by the court include United States v. Classic, 313 U.S. 299 (1941) (right to vote and have vote counted in congressional election); In re Quarles, 158 U.S. 592 (1895) (right to inform marshal of federal law violation); Logan v. United States, 144 U.S. 269 (1892) (right of one under federal confinement to be protected against violence); Ex parte Yarbrough, 110 U.S. 651 (1884) (right to vote in federal election); United States v. Cruikshank, 92 U.S. 542, 552 (1876) (right to assemble peaceably to petition Congress for redress of grievances); Anderson v. United States, 269 Fed. 65 (9th Cir. 1929), cert. denied, 255 U.S. 576 (1921) (right to furnish federal government with war materiel). Compare the remarks of Representative Poland: "When the State has provided the law, and has provided the officer to carry out the law, then we have the right to say that anybody who undertakes to interfere and prevent the execution of the State law is amenable to this provision of the Constitution [the equal protection clause] and to the law that we may make under it declaring it to be an offense against the United States." CONG. GLOBE, 42d Cong., 1st Sess. 514 (1871).  

Even should this prove to be an acceptable analysis, there is still the major problem in connection with its application to § 333 situations in that this approach assumes that state officials desire to exercise a "federal right" but are being prevented from doing so. However, the vast majority, if not all, of the instances in recent years in connection with which § 333 has been discussed have involved situations in which it was desired to intervene in spite of, and not by invitation of, state and local officials.  

See note 52 supra and accompanying text.  

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). Therein the Court said: "But no State may effectively abdicate its responsibilities by either ignoring them or merely failing to discharge them whatever the motive may be. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." (Emphasis added.) Id. at 725. See the discussion by Mr. Justice Goldberg, concurring in Bell v. Maryland, 378 U.S. 226, 310-11 (1964), citing 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).  

It has been said, Williams, supra note 57, at 363, that non-action as violative of the fourteenth amendment was established in Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926), wherein the Court stated that "property may be as effectively taken by a long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmation of them . . . ." Id. at 591.  

The reapportionment cases, the most prominent of which are Baker v. Carr, 369 U.S. 186 (1962), and Reynolds v. Sims, 377 U.S. 553 (1964), also present a species of state "inaction" held to be in violation of the equal protection clause.  

In Catlette v. United States, 132 F.2d 902 (4th Cir. 1943), the court held that "since the failure of Catlette to protect the victims from group violence or to arrest the members of the mob who assaulted the victims constituted a violation of his
If, then, culpable state inaction in failing to protect its inhabitants from violence may be deemed a denial under the equal protection clause, it only remains to be seen if the means employed by section 33—action directly against individuals, and not merely legislation directed against recalcitrant state officials—may be constitutionally sustained as "reasonably necessary to protect a right created by and arising under" the fourteenth amendment.

It may be that in the case of isolated incidents involving no more than very localized violence the "appropriate legislation" would punish the culpable failure of the state official to do his duty.

common law duty [to protect a prospective victim from an assault or illegal restraint in the officer's presence], his dereliction in this respect comes squarely within the provisions of ... [18 U.S.C. § 242 (1964)].

"It is true that a denial of equal protection has hitherto been largely confined to affirmative acts of discrimination. The Supreme Court, however, has already taken the position that culpable official State inaction may also constitute a denial of equal protection." Catlette v. United States, supra at 907. (Emphasis added.)

Almost precisely the same language as in the second quoted paragraph is found in Lynch v. United States, 189 F.2d 476, 479-80 (5th Cir.), cert. denied, 342 U.S. 831 (1951). Both cases cite as authority McCabe v. Atcheson T. & S.F. Ry., 235 U.S. 151 (1914), in which the Court held that if railroads under state authority supplied sleeping or other facilities for whites, they must do likewise for Negroes, the failure to do so constituting a denial of equal protection; and Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), in which the Court held that the establishment of a law school for whites and the failure to do so for Negroes was a denial of equal protection. Of course, the Court did not hold that the state had an affirmative duty either to provide sleeping facilities on railroads or legal training facilities. The failure to act (nonaction) was a denial of equal protection only after the state had granted these advantages to particular portions of the population.

Lynch v. United States, supra, also refers to the broad language of Mr. Justice Rutledge's concurrence in Screws v. United States, 325 U.S. 91, 126 (1945), wherein the Justice said that the rights protected by 18 U.S.C. §§ 241-42 (1964) are "the rights to a fair trial, including freedom from sham trials; to be free from arrest and detention by methods constitutionally forbidden and from extortion of property by such methods; from extortion of confessions; from mob action incited or shared by state officers; from failure to furnish police protection on proper occasion and demand . . . ." Screws v. United States, supra at 126. (Emphasis added.)


44 In this connection, we have already considered some of the authorities, notes 61-63 supra and accompanying text, dealing with the issue of a broad interpretation of the congressional grant of power under § 5 of the fourteenth amendment, one which would reach the conduct of individuals. We have also concluded that Supreme Court cases are not in opposition when there is identifiable "state action," notes 53-54 supra and accompanying text.

45 United States v. Guest, 86 Sup. Ct. at 1191 (separate opinion of Brennan, J.).


Any private individuals acting in concert with the state official may also be reached by Congress. See United States v. Price, 86 Sup. Ct. 1152, 1156-57 (1966); text accompanying note 67 supra.
However, the situation contemplated by section 333 is characterized by widespread and uncontrolled violence. Therefore, unless statutory provisions for punishment of state officials impel said officials to take action to suppress the violence (which, after all, may be beyond their control), this gesture would be patently futile and possibly unfair. It is hardly clear how incarceration or other penalties imposed upon state officials for dereliction of duty will tend to halt rioting occurring in the streets. The choice then is not between “appropriate” legislation reaching only state officials and “inappropriate” legislation directed against individual conduct. Rather, the choice is between “appropriate legislation” to effectuate the objectives, prohibitions, and guarantees of the fourteenth amendment on the one hand, and what may be totally ineffective legislation on the other.

If it be insisted that an alternative analysis be provided which does not so readily dispose of “state action” in the enforcement stage of section 333, the following may be suggested. To the extent that the state through any of its officials is in complicity with or encourages a mob, rioters or conspirators, it is hardly difficult to denominate the action of the “mob” as “state action,” or as the instrumentality by which the state is denying equal protection.

If this approach sounds even vaguely farfetched, it need only be recalled that in Lombard v. Louisiana the mere statement of sympathy by the mayor for besieged local restaurateurs and of intention to apply a neutral trespass law against the demonstrators constituted the prohibited denial of equal protection.

The more difficult case, however, arises in the event that the “mob” without complicity wrests control from local authorities who are rendered powerless to suppress it. How can the “mob” then

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77 Violative “state action” in the situation where violence is beyond the control of state functionaries may be said to be the failure to call upon the federal government for assistance on the theory that the state is required in any event to provide the protection of the laws. The original House version of § 333 contained a reference to this effect. See note 121 infra. If the state does enlist federal aid, we are then likely dealing with the circumstances covered by 10 U.S.C. § 332 (1964), see note 4 supra.

78 Consider the factual situations in the cases cited in note 76 supra.


80 Here we are concerned with the very narrow situation involving rebellion against state authority, with the presumption that the state does not call upon the federal government for aid pursuant to 10 U.S.C. § 331 (1964) (note 4 supra). If federal law is interfered with, there is ample authority under 10 U.S.C. §§ 332, 333 (2) (note 4 supra) to support federal intervention. This latter situation, of course, does not involve the “state action” problem.
be considered a state instrumentality? It could be argued that the fourteenth amendment places restrictions upon "the state," which may be defined in terms of that governmental mechanism exercising a monopoly of political power within its sphere of competence. To the extent that the "mob" wrests territorial control from the governmental authorities, it is arguable that it invades this province of the state and, acting in loco reipublicae, displaces the state organs as political "sovereign." The prohibitions of the fourteenth amendment would then operate directly upon the "mob"; which virtually by definition may be considered to have breached its constitutional duty of equal protection, and may be acted upon through federal legislation such as section 333.

81 For an argument that an analogous institution, the lynch mob, may be encompassed within the designation "state action" to the extent that it displaces state authority, see Comment, 57 YALE L.J. 855, 871-73 (1948).
84 Cf. Hale, supra note 82, at 199. Consider the approach of Evans v. Newton, 382 U.S. 296 (1965), that when private individuals or groups take over from the state "powers or functions governmental in nature" such individuals or organizations become "instrumentalities of the State and subject to its constitutional limitations." Id. at 299. Newton dealt with maintenance of municipal parks but the rationale covers the police protection and general exercise of governing authority. To the extent, for example, that private individuals exercise governmental functions, such as a lynch mob does in executing a prisoner, then those individuals would directly fall under the ban of the constitutional restrictions. See Terry v. Adams, 345 U.S. 461 (1953) (dealing with various stages of the electoral process exercised by private groups); Marsh v. Alabama, 326 U.S. 501 (1946) (religious solicitation in a privately-owned town); Smith v. Allwright, 321 U.S. 649 (1944) (dealing with various stages of the electoral process); Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949) (same); Rice v. Elmore, 165 F.2d 387 (1947), cert. denied, 333 U.S. 875 (1948) (same).
85 The notion that a riotous mob is required to extend the protection of equal laws (and due process of law, one may not doubt) may at first blush appear to partake of the absurd. This is, however, merely a utilization of legal terminology to rationalize a predetermined result. Consider the analysis of Saleilles: "One wills at the beginning the result; one finds the principle afterwards; such is the genesis of all judicial construction," quoted in Cardozo, The Nature of the Judicial Process 170 (1921).
86 Another approach may be suggested by a dictum in Texas v. White, 74 U.S. (7 Wall.) 700 (1868). Under pressure of determining the effect to be given to the domestic legal actions of the confederate states during the civil war, the Supreme Court
The Terms of Section 333: Prerequisites to Intervention

Having considered the historical events giving rise to section 333 and its constitutional basis, we may turn to a discussion of the conditions precedent to federal action under the authority of this statute. We are met at the outset with the most difficult passage, both in terms of its obscurity and the stringent prerequisite to federal intervention which it purports to lay down. Under subsection 1, violence, conspiracy, etc., which "hinders the execution of the laws of that State" and those "of the United States within the State" shall be suppressed. The Judiciary Committee of the Senate offered the following definition of the term "state": "It is not difficult to see that . . . the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state." Id. at 720.

The key is the phraseology "united by looser and less definite relations." If a "mob" stages a putsch and gains de facto control of certain territory, it may fall within this definition of "state," and hence fall under the prohibitions of the fourteenth amendment. It may attenuate the argument to the final breaking point, however, to suggest that the people in a mob presently raging out of control are "united by . . . relations" which have even the remotest coloration of de facto government. In passing it may be noted that while these suggestions have been framed with reference to a mob engaged in riot, the approach could be applied to clandestine terrorist organizations, such as the 1871 Klan, which vie with the state governments for control of the population.

It may be helpful to set out at this point the various portions of § 333 which will be considered presently in the text.

"The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—[A.] (1) so hinders the execution of the laws of that State, and of the United States within the State,

[B.] that any part or class of its people

[C.] is deprived of a right, privilege, immunity, or protection named in the Constitution

[D.] and secured by law,

[E.] and the constituted authorities of that State are unable, fail or refuse to protect that right, privilege, or immunity, or to give that protection; or

[F.] (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws." 10 U.S.C. § 333 (1964).

The conjunctive was added in the House only after considerable debate. Initially, the section referred only to hindering the execution of the laws of the state. Cong. Globe, 42d Cong., 1st Sess. 317 (1871). However, the moderate Republicans became quite squeamish when confronted by the notion of using federal troops to enforce state law. See the extensive discussion of congressional power generally under the fourteenth amendment by Representative Garfield, id. at app. 151-54; and the remarks of Representative Willard, id. at app. 189.

On the Radical side it was contended that the federal government had power to enforce local law when the state refused to do so as a means or necessary incident to
had stricken this clause from the House-passed bill,\textsuperscript{88} objecting (1) to the apparent requirement of literal obstruction or interference with governmental officials attempting to carry out their legally imposed functions;\textsuperscript{89} and (2) to the fact that execution of both federal and state laws must be so hindered. The Committee felt that intervention under this formula would be extremely difficult because few of the existing conditions fulfilled the requirements enumerated.\textsuperscript{90} In addition, the Judiciary Committee had provided, by way of a new clause, for federal intervention whenever the same violence or conspiracies obstructed "the equal and impartial course of justice."\textsuperscript{91} This was interpreted to embrace the administration of justice by both the state and federal courts.\textsuperscript{92}

All of this was too much for the moderate Republicans,\textsuperscript{93} not to mention the Democrats.\textsuperscript{94} Therefore, the phraseology adopted

\textsuperscript{88}The version of § 3 of the Enforcement Act as reported by the Judiciary Committee began approximately in the following manner: That in all cases where insurrection, domestic violence, unlawful combinations, or conspiracies in any State shall deprive any portion or class of the people of such State of any of the rights, privileges, immunities or protection named in the Constitution and secured by this act or obstruct the equal and impartial course of justice, and the constituted authorities of such State . . . . See CONG. GLOBE, 42d Cong., 1st Sess. 521-22, 567, 703 (1871). In addition to striking the "hinder the execution" clause, the Committee added the italicized portion, which later in the proceedings was shifted, and as part of what was to become paragraph 2 of § 333 applied only to the "course of justice" under federal law. See CONG. GLOBE, 42d Cong., 1st Sess. 708, app. 355-36 (1871).

\textsuperscript{89}Senator Edmunds, spokesman for the Judiciary Committee, pointed out the following: "As the section now stands, . . . these insurrections and unlawful combinations or conspiracies, in order to be interfered with by the President of the United States by military power, must . . . go to the point of obstructing and hindering in the technical sense (when anybody is interfered with under it) the execution of the laws of that State and also the laws of the United States, putting it in the conjunctive." CONG. GLOBE, 42d Cong., 1st Sess. 567 (1871). (Emphasis added.)

\textsuperscript{90}Continuing, Senator Edmunds stated: "In a case of that kind it would involve a great deal of difficulty and require a great deal of proof to reach the point where the President could interfere at all. We thought it desirable to leave his right to interfere . . . upon a plain and simple state of facts, as follows: first, that there should be a conspiracy, an unlawful combination which should be so far carried into effect as to deprive as a matter of fact some portion or class of the people of a State of the rights and privileges which the Constitution of the United States secures to them, so that the President would have a plain and simple case to act upon, which nobody could misunderstand . . . ." Ibid.

\textsuperscript{91}See id. at 567, 703. See note 88 supra.

\textsuperscript{92}See id. at 567.

\textsuperscript{93}See, e.g., id. at 687 (remarks of Senator Schurz); id. at 581 (remarks of Senator Trumbull).

\textsuperscript{94}See, e.g., id. at 572 (remarks of Senator Stockton).
by the House was restored, resulting in the incorporation of language which is substantially the same as that appearing in section 333 today. The clause referring to the “course of justice” was dropped to paragraph 2 of section 333 and limited solely to the “course of justice” as administered by the federal courts.

With this background we must still determine what federal and state laws the hindrance of which will bring into play section 333 and the circumstances under which they will be “hindered” within the meaning of the statute. Section 333 itself indicates that the hindrance of any federal law is not necessarily sufficient; rather, the hindrance must produce or result in the deprivation of a federal constitutional right. This immediately brings to mind the various

96 Concerning the restoration, Senator Edmunds stated that “it is to meet the views of those who thought the amendments of the committee . . . were too harsh, and that they authorized the use of the military in aid of the courts of justice in too easy a case as the committee first reported the section. We therefore concluded to leave those words stand as they were in the House bill in that part of the section where they are in the conjunctive, which would not allow the United States to interfere if their own laws were opposed, unless the State laws were also; and in order to get rid of that difficulty we have added words referring solely to the laws of the United States and the courts of the United States [in the second paragraph of the section] . . . .” Id. at 703.

97 In its enthusiasm to advocate federal intervention under § 333, the United States Civil Rights Commission has stated that its interpretation “does not involve or require a violation of Federal statutes to permit Presidential action although section 333 speaks of interference with State laws and laws ‘of the United States.’ The legislative history suggests that the requirement of interference with ‘laws of the United States’ would be satisfied by interference with rights protected under the 14th amendment.” U.S. Civil Rights Comm’n, Law Enforcement: A Report on Equal Protection in the South 155 n.6 (1965).

However, this conclusion is not supported by the authorities which the Commission cites. For example, reference is made to Representative Shellabarger’s discussion of the original House bill, Cong. Globe, 42d Cong., 1st Sess. app. 71 (1871), which does not contain the phraseology “laws of the United States.” See note 87 supra and accompanying text. Citation is also made to a speech of Representative Shellabarger concerning the addition of the conjunctive “and of the United States” in which the representative comments that § 333 had been changed so as “to require that the authority of the United States . . . also be invaded and defied.” Id. at 478. Finally, the remarks of Senator Edmunds made after the Judiciary Committee had struck the entire “hinder the execution” clause (see notes 89-90 supra and accompanying text), are cited, as well as his comments at the time the House phraseology was restored (see note 95 supra and accompanying text).

As the Commission’s citations make clear, the “hinder the execution” clause in the final version of § 333 referred to interference with the carrying into effect or implementation of the laws, not to a mere arguable denial of equal protection. Furthermore, because § 333 refers specifically to constitutional rights, privileges, and protection, reading the “hinder the execution” clause such that it is also satisfied by a deprivation of fourteenth amendment rights has the effect of reducing this very much debated clause to utter surplusage.

98 For example, hindering revenue agents in the apprehension of federal tax law
federal civil rights statutes which are designed in large measure to secure and protect federal constitutional rights, but these need not be the exclusive fount. If, for example, a conspiracy should be formed to obstruct proceedings in the federal courts, the hindered laws are those relating to federal judicial procedure, but the effect is to deprive those seeking access to the courts of their constitutional right to due process of law.

In connection with the state laws which must be "hindered," the situation is analogous to the "federal law" interpretation. Once again the criterion is interference with execution of the laws which proceeds to the point of deprivation of a federal constitutional right as, for example, the right to the protection of equal laws. Because the states are charged in the first instance with law enforcement through the local agencies, it is easier to identify the state law element. For example, in the case of uncontrollable rioting, it is the unlawful assembly, anti-riot, and trespass statutes which may be obstructed. In situations of general lawlessness, as in 1871, virtually the entire state criminal machinery is opposed.

As to what may constitute a hindrance or obstruction of state law, it may be said that any impediment to effectuating state laws when such condition results in a denial of constitutional rights is within the contemplation of section 333. This would seem to include those instances in which the unlawful combination or conspiracy, or those engaged in violence, enjoy the benevolent non-violators would not seem to produce a deprivation of constitutional rights. However, if the federal officers were attempting to enforce federal civil rights legislation, their obstruction would tend to deprive the victims of remedies and protection provided by the federal constitution and laws for violations of their civil rights.

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100 See notes 26-30 supra and accompanying text.

101 Thus, Representative Hawley stated that section 333 would allow intervention "under such circumstances as the failure of the State authority to execute the law for any reason whatever, through the unlawful complicity of the State authorities in favor of those engaged in certain conspiracies or insurrection, or from any such cause by which the citizens of the United States are deprived of those rights mentioned in the first and second sections [of the Enforcement Act]." Cong. Globe, 42d Cong., 1st Sess. 383 (1871). (Emphasis added.)

Of course, when speaking of equal protection, congressmen referred to "denial" in the sense of withholding that protection. Denial implies the failure to extend for whatever reason, including inability and refusal. See note 39 supra and accompanying text.
interference of the local authorities. The laws are more certainly sabotaged, and their effectuation prevented, by official nonfeasance than by a concerted opposition of citizens.102

With respect to the hindrance of federal law, it is well to point out initially what has been stated elsewhere,103 and which is equally applicable to the state laws; namely, that hindrance means something more than mere violation of law. It denotes a serious impediment to the implementation of the law by the ordinary civil processes. There is necessarily something of a subjective distinction to be made here, and it is the President's responsibility to ascertain the substance of the distinction and determine when civil authority must be reinforced by the military or other extraordinary federal force. Such reinforcement may be needed in at least two instances: (1) in cases in which violators of laws such as federal criminal civil rights legislation become too numerous to be apprehended by the usual authorities. This, of course, was the original purpose of section 333,104 but it is unlikely to be an important contemporary factor except under extreme conditions because of the existence of numerous federal law enforcement agencies established since the statute was passed, most notably the FBI; (2) the second situation is that of mass violence, or rioting, wherein civil authority, including that of the federal government, is opposed. It is quite true that section 333 was not designed as an anti-riot statute. It happens, however, that some riot situations fit the statutory criteria and that domestic violence in the form of racial disturbances is a major problem in the present day. It is certainly the case that when rioting rages uncontrolled any civil law which

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102 It is true that in 1871 the Radicals retained control of most of the southern governments (see RANDALL & DONALD, THE CIVIL WAR AND RECONSTRUCTION 683, 685 (2d ed. 1961)), and were concerned with the removal of obstructions to the functioning of these governments. Some congressmen directed their attention to this particular facet of the situation. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 514 (1871) (remarks of Representative Poland). Others, however, viewing with alarm the rapid disintegration of the carpetbag regimes, contemplated the circumstance in which state officials might act in complicity with the conspirators. See, e.g., remarks of Representative Hawley, supra note 101. Thus the last clause of paragraph 1 of § 333 refers to the inability, failure, or refusal of the state authorities so to execute state law as to prevent the deprivation of federal constitutional rights.

103 It should be pointed out, however, that it may not be possible to bring within the scope of § 333 every conceivable situation of violence. If, for example, state officials such as the state police actually enforce a law, it would be difficult to find that state law was "hindered" in its execution, even if the constitutionality of the particular law or its application were later challenged.

104 See text accompanying note 41 supra.

105 See notes 30-31 supra and accompanying text.
purports to act directly upon the individual in the afflicted area must necessarily be "hindered" in its execution.  

Section 333 continues by prescribing that a "part or class" of the populace must have been deprived of federal constitutional rights. Just how many are necessary to comprise the requisite portion is not clear, but it would seem that if any significant segment of the population were affected, this would be sufficient. As a practical matter, of course, the size of the class may relate directly to a determination that federal law is being hindered in its execution. The greater the number of people being deprived of constitutional rights, as in rioting, for example, the greater the chance that the regular civil authorities will be unable to execute the laws.

Turning to the question of the constitutional "right, privilege, immunity, or protection," the deprivation of which will satisfy the statute, one finds that subsequent constitutional development necessitates a shifting of emphasis among these terms. Congressmen in the Forty-second Congress placed a great deal of reliance upon that masterpiece of Radical ambiguity, the privileges and immunities clause of the fourteenth amendment, with an elucidating interpretive gloss supplied by Mr. Justice Washington’s opinion on circuit in Corfield v. Coryell. In that opinion some of the privileges and immunities of state citizenship within the scope of article IV, section 2 of the Constitution were detailed, and this discussion was more or less "incorporated" into the congressional (which is to

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105 To this point the discussion as it relates to the obstruction of federal law is also applicable as an explication of paragraph 2 of § 333.

106 Mr. Shellabarger, who chaired the House committee which composed the statute, insisted that it referred to more than "one individual merely." Cong. Globe, 42d Cong., 1st Sess. app. 71 (1871). Opposing Representative Farnsworth, however, was unconvinced. He insisted that one man is a "portion" and that two can make an "unlawful combination." Id. at app. 114.

Of course, the statute was originally designed to embrace those who fell into one or both of the Republican and Negro categories. Nevertheless, no identifiable class was enumerated in the statute.

107 For the view that there was no consensus in the Thirty-ninth Congress as to the meaning and scope of § 1 of the fourteenth amendment, see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5, 139 (1949); Harris, The Quest for Equality 39-40 (1960).

108 6 Fed. Cas. 546, 551-52 (No. 3230) (C.C.E.D. Pa. 1823). Quotations from Corfield v. Coryell were made by Representative Frelinghuysen, Cong. Globe, 42d Cong., 1st Sess. 501 (1871); Senator Vickers, id. at 660; Representative Shellabarger, id. at app. 69; Representative Bingham, id. at app. 84, Representative Willard, id. at app. 188.

109 "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2.
say, Radical) view of the privileges and immunities clause of the fourteenth amendment. Representative Shellabarger emphasized that Mr. Justice Washington had included "protection by the government" among the fundamental privileges and immunities of citizens. This item formed a link in the discussion between the privileges and immunities clause and the parallel effect of the equal protection clause. It is most fortunate that the major alternative ground to the guarantee accorded by the privileges and immunities proviso was present in the equal protection clause, for whatever hopes the Radicals may have had for the viability of the privileges and immunities concept were annihilated by the Supreme Court in the Slaughter-House Cases. Notwithstanding the demise of the privileges and immunities clause, there is certainly sufficient vitality in the equal protection clause, and in the notion of "protection by the government" contained therein, to afford a wide basis for the application of section 333 in cases of widespread, uncontrolled violence.

Another prerequisite to federal intervention is that the constitutional right, privilege, immunity or protection must be "secured

110 The fact that Corfield's broad language referred to privileges of state citizenship and the fact that, on the other hand, the fourteenth amendment refers to privileges of citizens of the United States were fully exploited in the Slaughter-House Cases, which rejected the Corfield formula. See note 113 infra and accompanying text. In any event, Mr. Justice Washington's interpretation of article IV, § 2 is said to be ambiguous, self-contradictory, and partially wrong. See Fairman, supra note 107, at 9-12, 56.

In addition to reliance upon Corfield, Representative Bingham insisted that the rights guaranteed by the first eight amendments were also within the scope of the privileges and immunities clause of the fourteenth amendment. CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871). The historical accuracy of this view is doubted by modern authority, Mr. Justice Black to the contrary notwithstanding. See Adamson v. California, 372 U.S. 46 (1963). See TENBROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 225-28 (1953); Fairman, supra note 74; Grahm, The "Conspiracy Theory" of the Fourteenth Amendment, 47 YALE L.J. 371 (1938); Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation, 2 STAN. L. REV. 140 (1949). But see 2 CROSSKEY, POLITICS AND THE CONSTITUTION 1119 (1953).

111 CONG. GLOBE, 42d Cong., 1st Sess. app. 69 (1871).

112 Section 333 was amended in the Senate specifically to include the term protection following "right, privilege, immunity." Id. at 705.

113 83 U.S. (16 Wall.) 36 (1873). Commentary on the Slaughter-House Cases has hardly been commendatory. See, e.g., 1 BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 225-28 (1890); McGovney, Privileges or Immunities Clause, Fourteenth Amendment, 4 IOWA L. BULL. 219, 221-22 (1918); Trimble, The Privileges of Citizens of the United States, 10 U. KAN. CITY L. REV. 77, 84 (1942); Weihofen, The Ghost Clause Walks Again, 14 ROCKY MT. L. REV. 77, 78-79 (1942). See also Fairman, supra note 107.
by law." As originally enacted,\textsuperscript{114} the statute read "secured by this act," meaning the Enforcement Act of April 20, 1871. Hence the removal of the specific reference to the Act of April 20 broadens the phrase to comprehend constitutional rights secured by federal law generally, including both the criminal\textsuperscript{115} and civil statutes.\textsuperscript{116} The key to the interpretation of this clause lies in the term "secured." There is authority for the proposition that secured means "created by, arising under or dependent upon"\textsuperscript{117} federal law rather than the more stringent requirement that the constitutional right be protected fully by federal statutes.\textsuperscript{118} Of course, recent enactments have greatly increased the scope of rights extensively protected by federal law.\textsuperscript{119} Furthermore, federal law in the formal sense does in fact purport to guarantee many other of the broad rights defined by the fourteenth amendment,\textsuperscript{20} even if the effectiveness of the legislation implementing those rights does leave a good deal to be desired.

The question as to the identity of the "constituted authorities" within the meaning of the statute who may be unable, fail, or refuse to protect constitutional rights may be disposed of summarily. While there is evidence that this phrase in the original House bill referred only to local as opposed to state authorities,\textsuperscript{121} amendment in the Senate tended to remove this distinction.\textsuperscript{122} Hence, the final

\textsuperscript{114} Act of April 20, 1871, ch. 22, § 3, 17 Stat. 14 (1871).
\textsuperscript{115} See notes 34-35 supra and accompanying text.
\textsuperscript{116} Federal constitutional rights may be secured by legislation which is non-criminal in nature. In fact, most of the recent enactments (see note 99 supra) have been of this type.
\textsuperscript{117} Logan v. United States, 144 U.S. 263, 293 (1892).
\textsuperscript{118} United States v. Guest, 86 Sup. Ct. at 1189 (separate opinion of Brennan, J).
\textsuperscript{119} See the recently enacted civil rights statutes cited note 99 supra.
\textsuperscript{120} For example, Act of May 31, 1870, ch. 114, § 16, provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." Rev. Stat. § 1977 (1875), 42 U.S.C. § 1981 (1964).
\textsuperscript{121} The House bill contained the additional clause "and the constituted authorities of such State shall . . . fail or neglect, through the proper authorities, to apply to the President of the United States for aid . . . ." Cong. Globe, 42d Cong., 1st Sess. 317 (1871). As to the distinction, Mr. Farnsworth offered the following: "Do 'constituted authorities' mean those of a city, or town, or county, and 'proper authorities' those of the State? Undoubtedly that is the intention. It is admitted that there are 'proper authorities' through which to apply to the President, and that can only mean the Legislature, or Governor, if the Legislature is not in session, as provided by the Constitution." Id. at app. 114-15.
\textsuperscript{122} The section was amended so as to strike out the entire clause relating to a failure
phraseology encompassed both local and state officials. Furthermore, it would seem that responsibility for maintaining order ascends from local officials in the first instance, through state authority, to the federal government in the last resort. It would seem particularly incongruous, in view of the federal structure, to sanction the intervention of the general government when local authority alone breaks down, if the state is ready and able to step in and restore order effectively.

In considering paragraph 2 of section 333, which provides for federal intervention whenever the execution of federal law is obstructed, one must recall that this provision was appended as the result of a compromise, the prevailing view being that federal military force ought not to be authorized in direct support of the state courts. Thus paragraph 2 refers only to the execution of federal laws and the course of justice thereunder. As such, paragraph 2 overlaps paragraph 1 to the extent that each contemplates interference with the execution of federal laws. Distinctions in their

of the “constituted authorities” to apply to the President for aid through the “proper authorities.” Id. at 567.

123 See note 5 supra and accompanying text.

124 See note 83 and text accompanying notes 91-96 supra.

125 Paragraph 2 of § 333 could be applied to the enforcement of federal court orders under the following theories: (1) The “course of justice” refers to the normal processes of the federal courts. See notes 91-92 supra and accompanying text. Therefore, if the situation is such that court orders cannot be enforced by marshals, who are the ordinary functionaries, then paragraph 2 authorizes the use of stronger measures, including troops. (2) Under 28 U.S.C. § 547 (1964), marshals are required to “execute all lawful writs, processes and orders issued under the authority of the United States and command all necessary assistance to execute ... [their] duties.” If marshals are prevented from executing court orders, then there is an obstruction of this federal mandate.

Even the opponents of the use of federal troops to enforce federal court orders concede that paragraph 2 could plausibly be applied to that end. See Schweppe, Enforcement of Federal Court Decrees: A “Recurrence to Fundamental Principles,” 44 A.B.A.J. 113, 114 (1958). The argument is advanced, however, that in the Civil Rights Act of 1957, § 122, 71 Stat. 637, Congress repealed Rev. Stat. § 1989 (1875), which had explicitly authorized such intervention in certain civil rights cases. The point pressed is that repeal of the specific authorization necessarily implied repeal of the more general statute which could conceivably apply to the particular circumstance. Schweppe, supra at 114.

This analysis, however, would render a valid statute, namely, § 333, paragraph 2, devoid of much of its original force. Even if the argument from implication were accepted, the fact is that the repealed Rev. Stat. § 1989 (1875) referred only to judicial processes issued in the civil actions created by Rev. Stat. §§ 1977-80, 1988, 42 U.S.C. §§ 1981-83, 1985, 1992 (1964). Furthermore, there is evidence to indicate that in 1957 Congress was merely attempting to place civil rights legislation on a par with other legislation as regards enforcement of court orders through the military and did not intend to eliminate this mode of enforcement. See Pollitt, A Dissenting View: The Executive Enforcement of Judicial Decrees, 45 A.B.A.J. 600, 603 (1959).
application when both federal and state law are hindered would seem to go more to pragmatic questions of the extent and purpose of the intervention rather than to when such intervention could be undertaken.\^126

Some insight into this distinction is provided by *Ex parte Siebold*,\^127 where the Supreme Court, in a case not noted for its niggardly interpretation of federal power, commented that the federal government had "the power to command obedience to its laws, and hence the power to keep the peace to that extent."\^128 This case suggests (though the interpretation of section 333 was not in issue) that the federal government could properly intervene under paragraph 2 of section 333 to the extent necessary to enforce its own laws.\^129 But the purpose for intervention under paragraph 1 is much broader. There the state has been deemed to have denied the equal protection of the laws and the federal objective is to accord that protection.\^130 Furthermore, under section 1 federal force may be directed toward violence or conspiracy which is obstructing *state* judicial proceedings or preventing *state and local* authorities from executing those state laws which provide constitutional "protection." After all, this protection was a basic purpose of the original statute.\^131

A final prerequisite to federal intervention, as well under sec-

\^126 Paragraph 2 is triggered solely by interference with federal law and is basically an instrumentality for the enforcement of that law. If federal law alone is hindered, the sole remedy is under paragraph 2, or 10 U.S.C. § 332 (1964). If state law alone is interfered with, there is no remedy under either paragraphs 1 or 2. If the execution of both federal and state law is obstructed, the remedy may be under paragraphs 1 or 2 to the extent described in the following textual paragraph.

\^127 100 U.S. 371 (1879).

\^128 Id. at 395.

\^129 Consistent with *Ex parte Siebold*, there is authority which tends to indicate that military force could be utilized to enforce federal laws even in the absence of a congressional enactment. It has been stated, for example, that the executive power of article II, § 2 of the Constitution is the power to execute the laws. *Myers v. United States*, 272 U.S. 52, 117 (1926). However, since there have been federal statutes authorizing the use of military force since 1792, Act of May 2, 1792, ch. 28, §§ 1-2, 1 Stat. 264, the predecessor of 10 U.S.C. §§ 331-32 (1964), the unaided executive power has never been delineated. See *In re Debs*, 158 U.S. 564, 582 (1895); note 56 *supra*. For a discussion of the civil rights application of the *Debs* rationale for the granting of injunctions against violence in the absence of explicit statutory authorization, see Burke, *The Civil Rights Uses of In re Debs*, 1 LAW IN TRANSITION Q. 139 (1964).

\^130 When paragraph 1 is invoked, federal authorities would not be interested solely in the delivery of the mails or the protection of revenue agents; riot, violence, or conspiracy could be suppressed to the point at which equal protection is restored.

\^131 See notes 26-30 *supra* and accompanying text.
tions 331 and 332 as under section 333, is the issuance of a presi-
dential proclamation ordering an end to violence. Various Presi-
dents have interpreted this provision somewhat differently, but the
consensus appears to be that a proclamation is a legal require-
ment and that its purpose is a final warning to the unlawful elements in
an attempt to avert resort to the extreme measure of using troops. In
any event, proclamations have regularly been issued prior to
troop commitments in the course of the recent incidents.

The President’s Authority Under Section 333

The President has wide discretion to act under section 333 in
at least two significant aspects: (1) he determines which circum-
stances require this extraordinary exercise of power and in those
instances is authorized to “take such measures as he considers neces-
sary”; (2) he also is to choose the form of intervention, whether
by the armed forces, the militia, “or any other means.”

With respect to the latter element, there is some uncertainty
as to what measures come within the scope of “any other means.”
On this the congressional debates shed no light whatsoever. The
explanation most consistent with the breadth of the phraseology
would suggest that the President may utilize any individuals or
agency which is at his disposal and suited to law enforcement, which
would include federal marshals.

The question of the legal propriety of the President’s use of
this discretion to take particular action in a given circumstance is a
much more difficult problem, turning as it does upon the extent to
which, if any, his action pursuant to section 333 will be subject to
judicial review. The basic obstacle to review of the President’s

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132 A proclamation must be issued in accordance with the terms of 10 U.S.C. §
334 (1964): “Whenever the President considers it necessary to use the militia or the
armed forces under this chapter [chapter 15 of title 10, U.S.C., entitled “Insurrection,”
which includes §§ 331-34], he shall, by proclamation, immediately order the in-
surgents to disperse and retire peaceably to their abodes within a limited time.”

133 See Rich, The Presidents and Civil Disorder 201-06 (1941). For the opinion
of Attorney General Brownell to this effect, see 41 Ops. Att’y Gen. 313, 327 (1957).

134 Rich, op. cit. supra note 133, at 206.

(1963).

136 The only discussion on this point was the unheeded statement by Represen-
tative Hawley that he favored striking the phrase “or other means” because he said
he did not know what other means the President should be authorized to employ.

137 The only major consequence which apparently would follow a Court determi-
discretion is that a decision by the coordinate executive branch to employ the military to suppress violence is a classic illustration of a "political question." As early as 1827 the Supreme Court in *Martin v. Mott*, commenting on the President's discretion under a statute authorizing the calling out of the militia to repel invasion and suppress insurrection, noted that his discretion was absolute. Furthermore, the only court which has ever directly considered that the President did in fact act outside his statutory authority would be the withdrawal of troops or other forces allegedly sent in under § 333 and the resultant political consequences which such a decision would have for the President. A suit for damages against the federal government under the Tort Claims Act is precluded by the explicit provision that there can be no recovery for discretionary acts even if they are taken pursuant to an invalid statute. *Federal Tort Claims Act*, ch. 753, § 421 (a), as amended, 28 U.S.C. § 2680 (1964). Furthermore, any convictions obtained as a result of arrests effected by the forces dispatched in the abuse of discretion would not necessarily be overturned, for even in the event that such arrests were held to be illegal, it does not follow that this is a jurisdictional defect as regards the courts before which the arrestees may be tried. See *4 Wharton, Criminal Law and Procedure* § 1484 (12th ed. 1957); cf. *Albrecht v. United States*, 273 U.S. 1, 8-9 (1927).

Consider an analogous situation in which the accused is removed by illegal means from one jurisdiction to another. Mr. Justice Black, speaking for a unanimous Court in *Frisbie v. Collins*, 342 U.S. 519 (1952), rejected the contention that such a defect would overturn a subsequent conviction in the following terms: "This Court has never departed from the rule announced in *Ker v. Illinois*, 119 U.S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of 'forcible abduction.' . . . The process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Frisbie v. Collins*, supra at 522. The notion that *Mapp v. Ohio*, 367 U.S. 643 (1961) impliedly overrules *Frisbie* by forbidding all such "shortcut methods in law enforcement" was summarily rejected in *Hobson v. Crouse*, 332 F.2d 561, 562 (10th Cir. 1964) (per curiam).

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138 Act of February 28, 1795, ch. 36, § 1, 1 Stat. 424.
140 "We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons . . . The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union . . . Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts." 25 U.S. (12 Wheat.) at 30-32. See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1848). There are frequent Supreme Court statements which demonstrate the solicitude with which the Court approaches questions concerning the discretionary exercise of power by the co-ordinate political branches. One of these is found in *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 184 (1919): "But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exercising a power given, it is clear that it involves considerations which are beyond the
fronted section 333 came to the conclusion that “the necessity of using troops ... in any given emergency” is “solely for the determination of the President,” citing Martin v. Mott. However, in recent years the judicial deference in matters relating to “political questions” has significantly diminished and it is perhaps unwise to rely upon the assumption that the Court will maintain a strict hands-off policy with respect to those matters remaining within this category.

The authority to use military force was circumscribed in the case of Sterling v. Constantin, in which the Supreme Court not only reviewed an act of military discretion of the governor of Texas but upheld an injunction against his declaration of martial law in a particular Texas county. The Court held that the governor’s broad discretionary powers were not absolute, flagrant abuse of discretion being an occasion for judicial determination and inter-

reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion.” (Emphasis added.)


The most notable example, of course, is the series of reapportionment cases beginning with Baker v. Carr, 369 U.S. 186 (1962). In Baker, Mr. Justice Brennan discussed at some length the criteria of the “political question,” taking as his example the guaranty clause, U.S. Const. art. IV, § 4. It is of interest that Mr. Justice Douglas in his concurring opinion specifically disavowed Mr. Justice Brennan’s suggestion that all guaranty clause issues would be unreviewable because classified as “political questions.” Baker v. Carr, supra at 242 n.2. See Bonfield, Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government, 50 Calif. L. Rev. 245 (1962); Bonfield, The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 Minn. L. Rev. 513 (1962).

The relevance of Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), may be noted at this point. There the Supreme Court affirmed the granting of a preliminary injunction to restrain the Secretary of Commerce from taking over certain steel mills pursuant to a presidential executive order. The order was held to be beyond the constitutional or statutory power of the President, and the decision indicates that the Supreme Court may not hesitate to curb the aggrandizement of power of the co-ordinate executive branch in particular instances, even if an element of national emergency is involved.

However, there is a crucial distinction between Sawyer and presidential action under § 333. The Court noted that the President’s power must derive either from the Constitution or from statute, and that no congressional enactment purporting to authorize seizure of the mills. Id. at 585-86 (Black, J.); id. at 586-609 (Frankfurter, J., concurring), id. at 635-40 (Jackson, J., concurring), id. at 656-59 (Burton, J., concurring), id. at 660-62 (Clark, J., concurring). Thus, while the Court did restrain the executive branch, it was made clear that similar presidential action pursuant to a valid congressional statute would have been sustained. See also Texas v. White, 74 U.S. (7 Wall.) 700, 729-31 (1868).

287 U.S. 378 (1932).
Of course, Sterling must be viewed with some caution in our context, involving as it does the power of a state governor rather than that of the coordinate executive branch, the Presidency. Nevertheless, it is not at all clear that the Court would stand aside in the case of “an act of mere oppression, an arbitrary fiat that overleaps the bounds of judgment.”

The question of review of the President's exercise of his power under section 333 might arise in a variety of circumstances. Alabama v. United States suggests the possibility of a suit for the removal of troops or an injunction against their use, brought against the Secretary of Defense and alleging that his action in dispatching troops was in excess of his statutory and/or constitutional authority. The issue of presidential discretion might also arise as a

145 "It does not follow from the fact that the Executive has this range of discretion . . . that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. . . . What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." Id. at 400-01.

146 Mr. Justice Cardozo, dissenting in Panama Refining Co. v. Ryan, 293 U.S. 388, 446 (1935), contrasting Sterling with Martin v. Mott.

147 373 U.S. 545 (1963) (per curiam).

148 The Government conceded in Alabama v. United States, citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), that such a suit is one against the individual and not against the sovereign United States without its consent. Brief for Defendants, p. 6. See note 143 supra.

The disposition of Alabama v. United States on the ripeness issue (see notes 16-18 supra and accompanying text) raises the question of when a request for an injunction against action under § 333 would be considered on the merits. Apparently, a plaintiff would have to establish in addition to any movements of federal forces that the President clearly intended to commit them to action and, of course, that such commitment would result in irreparable injury to the plaintiff.

A related procedural issue concerns the factors which may give a state standing to raise the issue of the constitutionality of § 333. In Alabama v. United States it was averred that the use of troops under § 333 was "in violation of the sovereignty of the State of Alabama." Complaint, p. 4. Allegations of unconstitutional invasion of the State's reserved powers have been held sufficient to give a state standing to challenge the constitutionality of federal statutes. For example, in Missouri v. Holland, 252 U.S. 416 (1920), the Court, per Mr. Justice Holmes, stated that "the ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes. The State also alleges a pecuniary interest, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State." Id. at 431, citing Marshall Dental Mfg. Co. v. Iowa, 226 U.S. 460, 462 (1913); Georgia v. Tennessee Copper Co., 206 U.S. 250, 257 (1907); Kansas v. Colorado, 185 U.S. 125, 142 (1902). See Georgia v. Pennsylvania R.R., 324 U.S. 439, 447 (1944); Hopkins Fed. Savings & Loan Ass'n v. Cleary, 296 U.S. 315, 337 (1935).

In Alabama v. United States it was further contended that the "threat to domestic law and order within Alabama posed by the continuing presence of the
defense to a false imprisonment suit or habeas corpus action brought by an individual taken into custody by the extraordinary federal authorities.\textsuperscript{149}

\textit{The Administration of Section 333}

As noted above, the original function of section 333 was to provide a vehicle for the apprehension of violators of federal law, criminal civil rights legislation in particular.\textsuperscript{160} These persons were then to be turned over to the federal marshal for prosecution in the federal courts.\textsuperscript{151} However, the clause relating to the mar-

\textsuperscript{149} Cf. Duncan v. Kahanamoku (Hawaiian Martial Law Cases), 327 U.S. 304 (1946), in which the substitution of military for civilian trials, ordered by the Governor of Hawaii and approved by the President was held not to be authorized by the Hawaiian Organic Act, ch. 399, § 67, 51 Stat. 153 (1900); Korematsu v. United States, 325 U.S. 214 (1944), finding no abuse of discretion in excluding those of Japanese ancestry from military zones under Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942), issued pursuant to the Act of March 21, 1942, ch. 191, 56 Stat. 173 (now 18 U.S.C. § 1383 (1964)); Luther v. Borden, 17 U.S. (7 How.) 1 (1848), in which the fact that martial law had been declared by the state legislature was a sufficient defense to an action for trespass.

\textsuperscript{160} See notes 16-17 supra and accompanying text.

\textsuperscript{151} Section 333 presents an explicit exception to the Posse Comitatus Act, enacted as Act of June 18, 1878, ch. 265, § 15, as amended, 18 U.S.C. § 1385 (1964). The act forbids under criminal penalty the use of the armed forces to execute "the laws" except in cases of explicit congressional or constitutional authorization. At one time it was tenable to argue that the Posse Comitatus statute, passed in 1878, was intended to apply only to \textit{subsequent} congressional authorization. This view, as it affects § 333, is effectively answered by the observation that in 1956 Congress recodified \textit{both} statutes in the same enactment, Act of Aug. 10, 1956, ch. 1041, § 335, 10 U.S.C. § 335 (1964), in the case of section 333; and ch. 1041, § 18 (a), 18 U.S.C. § 1385 (1964), for the Posse Comitatus statute. See Schweppe, \textit{supra} note 125, at 190, 192.
shals was deleted in 1875 in the Revised Statutes version and in subsequent recodifications. Therefore, as to those taken into custody by the federal forces, the following possibilities appear to exist as to their disposition:

1. Those arrested could be turned over to the state authorities to be prosecuted for violations of state and local law. An objection here, however, is that in the situations involving paragraph 1 of section 333 the state has presumably failed to execute its own law and has deprived elements of its populace of equal protection. Therefore, the state courts may be an ineffective forum in which to prosecute the arrestees.

Here one may observe another effect of a Court determination that the President in a given instance had no statutory authorization for the use of troops—the conclusion that the President has violated the Posse Comitatus Act. The act provides a prison sentence of up to two years and/or a $10,000 fine. It would take, however, a rather vivid imagination to suggest that a president is likely to enforce these provisions against himself. For the view that the Posse Comitatus Act was intended to apply only to the use of troops by federal marshals and not by the President, see Pollitt, supra note 125, at 603, 606; 41 Ors. ATT'Y GEN. 313, 329-30 (1957); 19 Ors. ATT'Y GEN. 299-96, 570-71 (1890); 17 Ors. ATT'Y GEN. 333-35 (1882); 17 Ors. ATT'Y GEN. 242-44 (1881); 16 Ors. ATT'Y GEN. 162-64 (1878). Congressional opinion was divided on this point. See 7 CONG. REC. 3846-49, 4240-48 (1878).

128 Rev. Stat. § 5299 (1875). The fact that alteration was made as a part of the vast codification of federal law in the 1870's makes it impossible to isolate a congressional "intent" as to the meaning of the change. As a basic proposition, the Revised Statutes were supposed to be a reorganization of federal law, not an alteration in substantive content. See remarks of Representative Poland, CONG. GLOBE, 43d Cong., 1st Sess. 646-48, 1029, 1210, 1461 (1874). Nevertheless, the deletion of the clause relating to marshals evidently eliminates that particular procedure as the only allowable one under the statute.


130 It may be questioned whether those arrested by federal authority could be tried for violation of state law in the federal courts. Of course, one begins with the general proposition that "the federal courts are without jurisdiction to try alleged criminal violations of state statutes." Beal v. Missouri Pac. R.R., 312 U.S. 45, 49-50 (1941). In some instances, however, federal courts do try violations of state law, as when a case is removed to the federal courts under 28 U.S.C. § 1443 (1964) by an accused who is denied in the state courts his equal civil rights guaranteed by federal legislation. See Wright, FEDERAL COURTS § 21, at 59 (1963).

At the time this removal statute was debated as § 3 of the Civil Rights Act of 1866, 14 Stat. 17, it was bitterly attacked on the ground that federal courts could not constitutionally enforce state law. See CONG. GLOBE, 39th Cong., 1st Sess. 479-80 (1866) (remarks of Senator Saulsbury), id. at 598-99 (remarks of Senator Davis). The constitutionality of the statute was, however, upheld in Virginia v. Rives, 100 U.S. 313 (1879), and Tennessee v. Davis, 100 U.S. 257 (1879); Strauter v. West Virginia, 100 U.S. 303 (1879); see California v. Chue Fan, 42 Fed. 865 (C.C.N.D. Cal. 1890).

In defending the removal bill, Senator Trumbull remarked that "the bill draws to the Federal Government no power if the States will perform their constitutional obligations." CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866). This suggests a possible rationale for the enforcement of state law in the federal courts in the § 333 situation:
2. There may be prosecution in the federal courts for violations of federal civil rights legislation.\textsuperscript{155}

3. Those taken into custody may be detained for a reasonable period on the theory that the power to detain is an incident to that of suppressing violence. Support for this conclusion is found in \textit{Moyer v. Peabody},\textsuperscript{156} in which a former governor was sued by a labor leader who had been held in custody for a month and a half during the course of labor unrest. The Court held that there had been no denial of due process.\textsuperscript{157} However, considering the expansion of the state has failed to enforce its own law through its courts to provide that protection of the laws which the fourteenth amendment requires. Congress, therefore, as a remedy for this state nonfeasance, may provide that protection which the state has denied by utilizing the federal courts to enforce state law.

The argument, of course, is directed to the power of Congress. The question is, however, whether Congress in § 333 \textit{intended} to provide a federal forum for state law enforcement. Aside from the implications for federalism inherent in this interpretation, it is a fact that Congress initially intended to provide, in conjunction with § 333, a federal forum for the prosecution of federal civil rights laws. See notes 30-31 \textit{supra} and accompanying text and note 158 \textit{infra}. It is therefore doubtful that § 333 can be properly stretched to the point of enforcement of state law in the federal courts, both because of the legislative history of § 333 and its complete lack of specificity on this point.


In addition, the provisions of § 7 of the Enforcement Act of May 31, 1870, ch. 114, 16 Stat. 141, provided as follows: “That, if in the act of violating any provision of the two preceding sections [one of which is the predecessor of § 241], any other felony, crime or misdemeanor shall be committed, the offender, on conviction of such violation of said sections, shall be punished for the same, with such punishments as are attached to said felonies, crimes, and misdemeanors, by the laws of the State in which the offense may be committed.”

Thus, when a conspiracy under federal law was accompanied by a crime under state law, the \textit{conspiracy} was to be punished with the same sentence as that prescribed for the \textit{state crime}. This presented a somewhat ingenious method of punishing in the federal courts such crimes as murder, burglary, or assault, which are normally prosecuted in state courts under state law. This statute, as Rev. Stat. § 5509 (1875), was upheld in several cases. \textit{E.g.,} \textit{Rakes v. United States}, 212 U.S. 55 (1909); \textit{Motes v. United States}, 178 U.S. 458 (1900); \textit{Logan v. United States}, 144 U.S. 263 (1892). Rev. Stat. § 5509 (1875) was repealed by the Act of March 4, 1909, ch. 321, § 342, 35 Stat. 1153. However, discussion of § 5509 is relevant today, for the Justice Department has considered asking for the enactment of a similar statute. See \textit{N.Y. Times}, March 30, 1965, p. 1, col. 4.

\textsuperscript{156} 212 U.S. 78 (1909).

\textsuperscript{157} As to the power of the Governor under the Colorado anti-insurrection law, the United States Supreme Court, through Mr. Justice Holmes, stated: “That means that he shall make the ordinary use of soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power.” \textit{Id.} at 84-85.
the due process concept since 1909, a lengthy detention would almost assuredly be subject to habeas corpus proceedings.\textsuperscript{168}

The question as to which of these dispositions would be most appropriate is a matter which must await the application of section 333 to a given set of circumstances. A number of factors are relevant: whether the state courts are sufficiently free of obstruction or prejudice to provide a forum for effective prosecution; whether a case can be made for federal statutory violations; or whether the federal objective is merely to restore order in a riot-torn community. It may be noted that the various courses of action suggested are not mutually exclusive, though they could not necessarily be pursued simultaneously. The appropriate tack will be largely a matter of pragmatic exigency.

\textit{The Future Use of Section 333}

What conclusions may finally be drawn from this survey of the terms and history of section 333, together with its invocation during the course of recent incidents? We may begin with the suggestion that it would be well to distinguish sharply between the \textit{legal} power to act under section 333 and \textit{discretionary} intervention in those circumstances in which the statutory prerequisites are satisfied. It was the failure to draw this distinction with clarity, both at the time of the Birmingham riots in 1963 and in the aftermath of the murder of the civil rights workers in Mississippi in 1964, which precipitated a good deal of criticism of the Justice Department.\textsuperscript{159}

\textsuperscript{168} A fourth possibility for the disposition of persons taken into federal custody is the institution of military tribunals. This alternative is subject to a number of infirmities. In the first instance, § 333 was intended to aid, rather than displace, the civil courts in their execution of the laws. See \textit{Cong. Globe}, 42d Cong., 1st Sess. 383 (1871) (remarks of Representative Hawley); note 16 \textit{supra}. One would apparently have to argue that the deletion in the Revised Statutes, note 152 \textit{supra}, changed the entire purpose and effect of § 333 by allowing the replacement of the civil courts by military tribunals. Furthermore, one will encounter the traditional hostility of the Supreme Court to the utilization of military tribunals as long as the civil courts remain open. See \textit{Duncan v. Kahanomoku} (Hawaiian Martial Law Cases), 327 U.S. 304 (1945), \textit{Ex parte Milligan}, 71 U.S. (4 Wall.) 2 (1866). Of course, we are presuming here that the civil courts are functioning, as they have been during the recent crises. A situation may be posited, however, in which insurrection or rebellion forces the closure of the courts. In that event, the question of military tribunals appears in a new light. However, it is debatable whether § 333 itself authorizes the establishment of such tribunals because of its purpose to aid the civil courts and, by analogy, because Congress explicitly provided for the case of rebellion and suspension of habeas corpus in the section of the Third Enforcement Act immediately following the predecessor of § 333. See note 23 \textit{supra}.\textsuperscript{159}

\textsuperscript{159} Further confusion was added by the fact that various critics presented divergent
It may be agreed that the President ought not to avoid political responsibility for his non-action by using the shield of legal impotency. On the other hand, it is quite clear that he has a difficult determination to make when issues relating to the invocation of section 333 arise. And whichever course is decided upon, criticism from those not in a position of responsibility is likely to be widespread.

In the first instance, a conscientious attempt to apply the terms of section 333 as a matter of law to a given set of circumstances is itself frequently a troublesome assignment. Moreover, even if it is decided that there is power to intervene, there is the basic and acute political problem of whether troops are to be the means of intervention. A long tradition of civilian government and distrust of military rule, not to mention local autonomy in matters of general law enforcement, is hardly conducive to ready acceptance of massive federal intervention to supplant state and local authority. Considerations of federalism must weigh heavily when confronting suggestions that the federal government, under section 333 or otherwise, take over law enforcement functions traditionally views as to the scope of federal intervention. Some merely suggested a "federal presence," in the form of marshals or the FBI, for example, to help stabilize a situation permeated with racial tension. See N.Y. Times, June 27, 1964, p. 1, col. 8, p. 10, col. 2; id., June 28, 1964, § 4 (Editorials), p. 1, col. 4. Such a "presence" can be justified on the basis of preventing violations of federal law, e.g., 18 U.S.C. §§ 241-42 (1964), or providing a means to apprehend violators thereof. Here federal law is merely being enforced by the federal civil authorities; this is not a § 333 situation.

Another group of critics went a good deal further and demanded "preventive police action" in Mississippi to protect civil rights workers. N.Y. Times, June 25, 1964, p. 1, col. 5, p. 18, cols. 6-7. See note 20 supra and accompanying text. The NAACP suggested transferring all law enforcement functions in Mississippi to the federal government. N.Y. Times, June 27, 1964, p. 10, col. 7. To the extent that purely local law enforcement responsibilities are to be taken over by federal authorities, there is an extension of federal intervention beyond the mere enforcement of federal statutes. It has been suggested that such an exertion of federal power may be perfectly proper pursuant to paragraph 1 of 333. See notes 127-31 supra and accompanying text. In such a situation, however, it is necessary to determine in the first instance that the statutory prerequisites to intervention are satisfied.

If one speaks in terms of an influx of marshals, there is the added problem that the federal process servers are numerically insufficient to take on long-term law enforcement responsibilities. See N.Y. Times, June 26, 1964, p. 15, cols. 1-2.

There is in addition the related problem of how to effect a withdrawal of federal forces once they have been committed, in order to prevent the federal government from becoming bogged down in local law enforcement. In this connection, the Justice Department has shown considerably greater enthusiasm for the use of force when a court order, as in Little Rock or at the University of Mississippi, delimits both the objective and the duration of the employment of federal power than when there is no such well-defined and limited objective, as in Birmingham or Mississippi in 1964. See notes 7-9 supra and accompanying text.
exercised by state and local authorities. Furthermore, intervention and the manner thereof during the present period of readjustment of relations between the races will be dictated in part as a matter of tactics to achieve the administration goal of racial harmony. Therefore, in recent years one observes the pursuit of a generally conciliatory approach in the area of race relations. Great caution has been taken with respect to the interposition of federal force, much to the displeasure of some civil rights partisans.

Having summarily considered a few of the necessary components of a decision to intervene under section 333, we may briefly consider some of the situations in which such intervention may be legally appropriate. The case most likely to arise is that in which widespread violence, as for example, rioting, is not brought under control by state and local authorities who are unwilling or unable to do so. This situation appears to meet the statutory criteria, and may describe the Birmingham crisis of 1963.

A second situation to which section 333 would be applicable is a general breakdown of local law enforcement efforts, as existed in 1871. By comparison, it is doubtful that such conditions exist today. To extend this point somewhat further, it may be that if local officials fail to execute the law so as to protect a portion of the population from crime or violence, then intervention would be possible. This of course assumes that conditions have deteriorated to the point at which the execution of federal laws is hindered to the extent that force supplementary to the usual civil authorities is required.

A third situation is somewhat more doubtful. Suppose that the state or local authorities use extreme or repressive police methods

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161 In commenting upon the federalism issue, Mr. Justice Douglas, speaking for the Court in Screws v. United States, 325 U.S. 91 (1945), indicated the traditional balance of functions in the federal system: "[Statutory construction] should . . . respect the proper balance between the States and the federal government in law enforcement. Violation of local law does not necessarily mean that federal rights have been invaded. . . . The Fourteenth Amendment did not alter the basic relations between the States and the national government. . . . Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States." Id. at 108-09.

162 The spirit of Theodore Roosevelt's assertion "'better twenty-four hours of riot, damage, and disorder than illegal use of troops,'" quoted in Rich, op. cit. supra note 133, at 129, has pervaded the attitude of the federal government in most instances.

163 See note 101-02 supra and accompanying text.
against a segment of the population. Paragraph 1 of section 333 is excluded, unless one indulges in the apparent fiction that such methods "hinder" a "proper" execution of state law. There is a greater possibility of justifying intervention, however, in connection with paragraph 2. It might be argued in the situation posited that violators of federal law, in particular of section 242\textsuperscript{64} which proscribes the deprivation "under color of any law" of any person of his federal constitutional rights, have become so numerous and difficult otherwise to apprehend as to require extraordinary federal force to subdue them. The result of all of this, however, might be the fascinating spectacle of federal troops confronting a contingent of state police in an attempt to arrest the latter for the commission of a federal misdemeanor.

Section 333 of course was not intended to operate in isolation, and its potential effectiveness as both a deterrent and an ultimate sanction depends to some extent upon complementary federal civil rights legislation.\textsuperscript{165} The buttressing of these provisions appears requisite to an effective implementation of federal authority.\textsuperscript{166}

\textsuperscript{64} 18 U.S.C. § 242 (1964). See note 34 \textit{supra}.

\textsuperscript{165} It is open to question whether change is desirable in the present wording of § 333. In an area of such sensitivity as the domestic use of military power, one must concede a good deal of discretion to the Executive. Furthermore, the interpretive gloss placed upon the statute, that it authorizes the use of federal force when the ordinary state and federal civil processes are unable and/or fail to execute the laws in order to protect the constitutional rights of a portion of the population, appears to provide an adequate vehicle for the protection of those rights. On the other hand, the requirement that state law be hindered in its execution may tend to allow a highly subtle Presidential query as to whether, and in what sense, that law is "hindered" to impede federal protection of federal constitutional rights. Alternatively, it may be suggested that the clearer the statutory terms, the less opportunity there is for a President to mask a crucial political decision behind the obscurity of the statute. Furthermore, the revitalization of 18 U.S.C. §§ 241-42 (1964) (see notes 34 and 64-69 \textit{supra} and accompanying text) fills a void, allowing federal prosecution of violence which is less widespread and uncontrolled than the conditions contemplated by § 333. See note 23 \textit{supra}.

However all this may be, with attention focused upon jury selection and federal punishment of civil rights crimes, there are no clarion calls for alterations of § 333. This, in the final analysis, may be just as well.

\textsuperscript{66} The usefulness of one venerable statute, 18 U.S.C. § 241 (1964), has been greatly increased by the recent Supreme Court cases of United States v. Price, 86 Sup. Ct. 1152 (1966), and United States v. Guest, 86 Sup. Ct. 1170 (1966). See note 34 and notes 64-69 \textit{supra} and accompanying text.

It has been suggested that 18 U.S.C. § 242 (1964) would be improved and strengthened by eliminating therefrom the scienter requirement of Screws v. United States, 325 U.S. 91, 103-04 (1945). Thus the statute could be amended to make clear its application to "(a) any act or omission which the accused knew or should have known would deprive such [constitutional] rights; or (b) any act or omission con-
Thus a reluctant federal government assumes greater power for the protection of constitutional rights, which protection some states in derogation of their basic responsibilities have failed to extend.

stituting a crime of violence within the penal laws of the State, Territory or District within which it took place." Kates and Emerson, Memorandum of Law: Adequacy of Present Federal Criminal Legislation in the Civil Rights Field and Draft Statutes, pt. I-B, at 4, 1965. The authors also suggest an amendment to § 241, bottomed on the commerce clause, to punish perpetrators of racial violence on streets and highways. Id., pt. I-A, at 1, 8. It might also be suggested that the penalty provisions of both § 241 and § 242 be increased and that § 241 be transformed into a substantive rather than a conspiratorial offenses. For an alternate suggestion regarding § 241, see note 155 supra. For the conclusions of the United States Civil Rights Commission concerning the inadequacies of §§ 241 and 242 and its recommendations for congressional action in the criminal field, see U.S. Civil Rights Com'n, Law Enforcement: A Report on Equal Protection in the South 103-10, 177-78 (1966); 1961 U.S. Civil Rights Rep., Justice 45-55, 110-13. For an extensive draft statute to bring "civil rights crimes" within the scope of federal jurisdiction, see Amsterdam, Memorandum: "Civil Rights Protection Act of 1966" (White House Conference "To Fulfill These Rights"), Nov. 16, 1965.