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Removal of Civil Rights Cases -- Recent Developments

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COMMENTS

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§ 1443. Civil Rights Cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.[1]

For eighty-five years the Supreme Court interpretation of section 1443 of the Judicial Code, providing for federal removal of cases arising out of civil rights litigation, has remained unchanged. The large bulk of Court cases "hold" that a cause is not removable under the statute unless there is a state law or constitution that on its face denies the equal civil rights of the defendant.[2] However, the past year has seen a series of decisions by the Courts of Appeals for the Second and Fifth Circuits[3] that have reexamined and revitalized this section, which had fallen into general disuse as a result of the Supreme Court interpretation. This comment will analyze section 1443 in light of these decisions. In order to grasp the significance

[1] 28 U.S.C. § 1443 (1964).

[2] Kentucky v. Powers, 201 U.S. 1 (1906); Williams v. Mississippi, 170 U.S. 213 (1898); Murray v. Louisiana, 163 U.S. 101 (1896); Smith v. Mississippi, 162 U.S. 592 (1896); Gibson v. Mississippi, 162 U.S. 565 (1896); Bush v. Kentucky, 107 U.S. (17 Otto) 110 (1883); Neal v. Delaware, 103 U.S. (13 Otto) 370 (1881). The word "hold" is used here loosely, since it is subject to question just what certain of the Court cases do hold. See text accompanying notes 28-33 *infra.*

[3] Peacock v. City of Greenwood, 347 F.2d 679 (5th Cir. 1965), *petition for cert. filed,* 34 U.S.L. WEEK 3073 (U.S. Aug. 19, 1965) (No. 471). Rachel v. Georgia, 342 F.2d 336 (5th Cir.), *cert. granted,* 382 U.S. 808 (1965); New York v. Galamison, 342 F.2d 255 (2d Cir.), *cert. denied,* 380 U.S. 977 (1965). *Accord,* City of Chester v. Anderson, 347 F.2d 823 (3d Cir.), *petition for cert. filed,* 34 U.S.L. WEEK 3098 (U.S. Aug. 10, 1965) (No. 443); Robinson v. Florida, 345 F.2d 133 (5th Cir. 1965); Board of Educ. v. City-Wide Comm. for Integration of Schools, 342 F.2d 284 (2d Cir. 1965) (per curiam).

of these cases a short resume of the history of the statute and a summary of the more significant Supreme Court cases are necessary.[4]

I. Statutory History

The source of the conflict as to the meaning of the statute is the vague and ambiguous wording given to it by its original drafters and those who recodified it into the *Revised Statutes* of 1875. In seeking to determine the correctness of the interpretation recently given section 1443, the admonition of Mr. Justice Holmes must be borne in mind: "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed."[5]

Section 3 of the Civil Rights Act of 1866,[6] one of many reconstruction statutes, provided that district and circuit courts had original and concurrent jurisdiction

> Of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any state court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any

[4] For a more complete analysis of the topic see Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial,* 113 U. Pa. L. Rev. 793 (1965) [hereinafter cited as Amsterdam]. Mr. Amsterdam's excellent article considers every facet of civil rights removal beginning with the first Judiciary Act of 1789 and continuing through New York v. Galamison, 342 F.2d 255 (2d Cir. 1965). Although this writer does not agree in many respects with Mr. Amsterdam's analysis, his article should be consulted by any advocate concerned with the civil rights removal problem.

[5] Johnson v. United States, 163 Fed. 30, 32 (1st Cir. 1908).

[6] Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27. Section 1 of the act declared in part that

> all persons born in the United States . . . of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other. . . .

Section 2 of the act made it a crime for any person "under color of any law, statute, ordinance, regulation, or custom" to deprive any person of any right secured by the act. Sections 4-10 were devoted to compelling and ensuring the arrest and prosecution of violators of § 2.

> arrest or imprisonment, trespass, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases . . . ."

Though the intended scope of this provision is uncertain—the pertinent legislative history materials being of little assistance—the broad purpose was to repudiate the *Dred Scott Case*.[7] The only history of any merit is found in the floor debates.[8] Even though they lend little to the interpretation of the act, they do cast serious doubts on the correctness of the interpretation that was subsequently given it by the Supreme Court, *i.e.*, that removal was limited to a statute unconstitutional on its face.[9] It cannot be denied that the 1866 act was directed towards counteracting the black codes enacted by the recently defeated Confederate states,[10] but it is equally certain that local discrimination,[11] denial of justice through the courts,[12] and

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[7] Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

[8] The Senate bill, S.61, was introduced and managed by Senator Trumbull who was chairman of the Judiciary Committee. For a complete index to the floor proceedings as set forth in the *Congressional Globe*, see Amsterdam 811 n.78.

[9] See cases cited at note 2 *supra*.

[10] See, *e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 603, 1118, 1160, (1866). The following remarks of Representative Cook are particularly illustrative.

> Can any member here say that there is any probability, or any possibility, that these States will secure him in those rights? They have already spoken through their Legislatures; we know what they will do; these acts, which have been set aside by the military commanders, are the expressions of their will. . . .
>
> . . . .
>
> It is idle to say these [freedmen] will be protected by the states. The sufficient and conclusive answer to that position I submit is, that those states have already passed laws which would now virtually reenslave them.

Id. at 1124. See generally, U.S. COMMISSION ON CIVIL RIGHTS, FREEDOM TO THE FREE 32-35 (1963).

[11] See, *e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866) (remarks of Senator Trumbull), *id.* at 602-03 (remarks of Senator Lane).

[12] Particularly indicative are the hearings before the Joint Committee on Reconstruction, established to investigate the status of the Negro in former slave states where black code legislation had been enacted. These hearings are relevant in determining the intent of the 39th Congress, for many of the members of this committee led the fight for the enactment of the Civil Rights Removal Act. The attitude of the Congress which enacted the 1866

the discriminatory application of various state laws not unconstitutional on their face was of deep concern to the Congress.[13] One illustration of this is reflected in the following statement of Senator Lane of Indiana made during the floor debates:

> [W]hy do we legislate upon this subject now? Simply because we fear and have reason to fear that the emancipated slaves would not have their rights in the courts of the slave States. The state courts already have jurisdiction of every single question we propose to give to the courts of the United States. Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the state courts.[14]

Not only does the tenor of the debates upon the bill indicate a broader scope than that given section 1443 by the Court, but the language of the act itself demonstrates an intent to redress nonstatutory denials of federal constitutional rights. The original act intended to secure to those "persons who are denied or cannot enforce in the courts or judicial tribunals of the state or locality where they may be . . ." their federal rights. The reference to locality indicates that something less than a statutory obstruction would support removal. Moreover, the rights protected in the section 1 and specifically referred to in section 3, included "full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens . . . any law, statute, ordinance, regulation or custom to the contrary notwithstanding."[15] Use of the words "proceedings" and "custom" are further evidence that unconstutional statutes denying equal rights were not the only state process that could result in a denial of federal guarantees.[16] Yet it was the use of ambiguous language that was partially responsible

act was molded in part by the committee hearings. Many of the witnesses before the committee stated that the prejudice of Southern judges or juries was the primary obstacle faced by Negroes in obtaining justice. See, *e.g.*, *Hearings Before The Joint Committee on Reconstruction*, 39th Cong., 1st Sess., ser. 1273, pt. 3, at 37 (1866) (testimony of General Howard); *id.* at 62 (testimony of Mr. Stafford); *id.*, pt. 4, at 75 (testimony of General Custer); *id.*, pt. 2, at 271 (testimony of Colonel Beadle); *id.*, pt. 2, at 291 (testimony of Major Lawrence).

[13] See, *e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1123-24, 1151, 1759 (1866).

[14] *Id.* at 602 (1866).

[15] See note 6 *supra*.

[16] Senator Trumbull repeatedly told the Senate that the "denial" phrase of § 3 was intended to allow removal in all cases where a *custom* or statute of the state discriminated against the freedmen. CONG. GLOBE, 39th Cong., 1st Sess. 475, 1759 (1866).

for the narrow construction given the statute. There can be no doubt that the 39th Congress knew how to use more explicit language. In 1867 the diversity removal act was amended to permit removal by a nonresident of a state upon allegations that he had been denied justice due to prejudice or local influence.[17] Had Congress intended to allow removal to state citizens (freedmen) under such circumstances, why had it not used similar language?

The nine years following the enactment of the 1866 act resulted in the adoption of three additional civil rights acts.[18] Various sections of the 1866 act were incorporated into these acts.[19] The first major revision of section 3 took place with its codification into the *Revised Statutes* of 1875 and 1878 as section 641.[20] Though the

[17] Act of March 2, 1867, ch. 196, 14 Stat. 558, which provides, in its relevant part, that where there is diversity of citizenship and the amount in dispute exceeds $500, the out-of-state citizen may remove if he files "an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court. . . ." This statute was a part of the Reconstruction legislation. It was carried forward into the *Revised Statutes* § 639(3) (1875), and the Judicial Code of 1911, ch. 231, § 28, 36 Stat. 1087. It was dropped from the 1948 revision of the Judicial Code. The Reviser's Note states that "these provisions, born of the bitter sectional feelings engendered by the Civil War and the Reconstruction period, have no place in the jurisprudence of a nation since united by three wars against foreign powers." Reviser's Note, 28 U.S.C.A. § 1441 at 2-3 (1950). The better explanation, however, is that it had fallen into general disuse because of restrictions placed upon its use.

[18] Civil Rights Act of May 31, 1870, ch. 114, 16 Stat. 140; Civil Rights Act of April 20, 1871, ch. 22, 17 Stat. 13; Civil Rights Act of March 1, 1875, ch. 114, 18 Stat. 335.

[19] See New York v. Galamison, 342 F.2d 255, 260-61 (2d Cir. 1965). See also Amsterdam 826-28.

[20] REV. STAT. § 641 (1875) provides:

> When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause . . . be removed. . . .

Congress has periodically made a codification of the laws of the United States for the sake of greater clarity and convenience. These codifications seen in the *Revised Statutes* of 1875, the Judicial Code of 1911 and of 1948, have been primarily mechanical and not substantive.

revisers are said to have intended no alteration of meaning of the civil rights removal section,[21] the changes in the language have made interpretation even more difficult. Section 641 was brought forward into section 31 of the Judicial Code of 1911, without any significant change.[22] The 1948 codification resulted in real alteration of the language and structure, but the reviser's note disclaims any intent to change the meaning.[23]

It is appropriate to mention here that the 1866 statute was initially construed to give a right of removal because of local prejudice, as it was intended to do.[24] In *State v. Dunlap*[25] the North Carolina Supreme Court held that the act was intended to include "cases where, by reason of prejudice in the community, a fair trial cannot be had in the State courts."[26] However, as the following cases reveal, the Supreme Court subsequently gave section 1443(1) the narrowest of interpretations, and was never to construe section 1443(2).

II. The Supreme Court Cases

A brief summary of the more significant Supreme Court cases interpreting section 1443(1) must suffice here. *Strauder v. West Virginia*[27] was the first case to reach the Court in which the civil rights removal provision was construed. Strauder, a Negro indicted for murder, sought removal on the ground that a state statute barred members of his race from jury service. The West Virginia court denied removal, and he was convicted. The Court reversed, holding the state statute sufficient basis for removal under section 641 of the *Revised Statutes* (now section 1443). *Strauder* may be taken to authorize removal only when a state statute is unconstitutional. However, a more realistic interpretation would be that the test of removability is whether the statute directs the federally unconstitutional result complained of.[28] The Court has taken the former view.

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[21] See note 59 *infra*.
[22] Judicial Code of 1911, ch. 231, § 31, 36 Stat. 1096.
[23] H.R. Rep. No. 308, 80th Cong., 1st Sess. A 134 (1947).
[24] State v. Dunlap, 65 N.C. 491 (1871); Gaines v. State, 39 Tex. 606 (1873). *But see* Fitzgerald v. Allman, 82 N.C. 492 (1880). The *Gaines* decision was reversed in Texas v. Gaines, 23 Fed. Cas. 869 (No. 13,847) (C.C.W.D. Tex. 1874).
[25] 65 N.C. 491 (1871).
[26] *Id.* at 495.
[27] 100 U.S. (10 Otto) 303 (1880).
[28] *Id.* at 311-12.

Virginia v. Rives,[29] decided the same day, also involved an allegation of exclusion of Negroes from the jury that tried and convicted Negro defendants.[30] The defendants eventually succeeded, by writ of habeas corpus, in being transferred to federal custody. The state of Virginia moved for a rule to show cause why a mandamus compelling remand should not issue. The Supreme Court granted the writ of mandamus to the state. After noting that section 641 (section 1443) rested on the fourteenth amendment, the Court pointed out that unconstitutional action by state officers was not state action for fourteenth amendment purposes. The Court then held that the removal of cases under section 641 did not apply to all cases in which a defendant might be denied equal protection. Because the removal petition had to be filed before trial, the Court felt that the members of the Thirty-ninth Congress (1866) had intended that no "judicial infraction of the constitutional inhibitions, after trial or final hearing has commenced"[31] would justify removal. To justify removal there must be a factual showing that the defendant cannot enforce his federal rights. This inability to enforce set out in section 641 "is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it."[32]

Rives can be interpreted to mean no more than that the allegations of discrimination by the defendant were insufficient, and the reference to legislation may be taken to be nothing other than an example of what is a sufficient allegation that will support removal. Or it can be interpreted narrowly to mean that a statute or constitutional provision must, on its face, deny defendant his rights. The latter was the construction adopted by the Court[33] in *Neal v. Dela-*

[29] 100 U.S. (10 Otto) 313 (1880).

[30] Petitioners also alleged a strong community prejudice against them because of their race therefore inability to obtain an impartial trial and that no Negro had ever served on a jury in which a member of their race had an interest.

[31] 100 U.S. at 319.

[32] *Id.* at 319-20.

[33] The same day the Court handed down its opinions in *Strauder* and *Rives*, it decided *Ex Parte* Virginia, 100 U.S. (10 Otto) 339 (1880). Here a state judge had been indicted under § 4 of the Civil Rights Act of 1875, ch. 114, 18 Stat. 336, for exclusion of Negroes from jury service. Petition

ware.[34] The defendant Negro, as in *Rives,* sought removal on the ground that Negroes were systematically excluded from state juries by a 1831 provision of the Delaware Constitution. The Supreme Court, by means of direct review,[35] reversed Neal's conviction, but as far as removal was concerned, denied the petition. The defendant had failed to allege facts that demonstrated that any civil right had been denied. As to whether section 641 would support removal in light of the Delaware constitutional provision, the Court reasoned that since the fourteenth amendment rendered that provision void, the jury commissioners or other subordinate officers had acted "without authority derived from the constitution and laws of the State"[36] in which case Congress had not authorized removal. Had the discriminatory legislation been adopted after the enactment of the fourteenth amendment as in *Strauder,* or had the state court repudiated that amendment, there would have been grounds for removal. But here the legislation had been in effect prior to the amendment.

The *Neal* opinion did suggest that removal might be justified if judicial action by the highest state tribunals resulted in denial of

for writ of habeas corpus was based on the theory that the fourteenth amendment applied only to the states, and action by an individual was not "state action." The Court rejected this saying acts done under color of state authority were within the statute. *Ex parte* Virginia reveals that the Court was willing to go beyond state law and to intervene in the jury selection process if unlawful. This case disposes of any contention that *Rives* may have narrowly construed § 641 because of some constitutional difficulty, or because the Reconstruction legislation was only the result of bitter hatred and should be curtailed. If either contention was the reason for the *Rives* construction of § 641, certainly such reservations would have applied, at least equally, in *Ex parte* Virginia.

[34] 103 U.S. (13 Otto) 370 (1881).

[35] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386. The current statutory provision is 28 U.S.C. § 1257 (1964).

[36] The only way to overcome this presumption that the state courts would adhere to the federal constitution would be by a showing of clear state action disregarding the Constitution. An example of such state action was not only "the Constitution or laws of the State, as expounded by the highest judicial tribunal," 103 U.S. (13 Otto) at 393, but also judicial action of the state.

> [H]ad its judicial tribunals, by their decisions, repudiated that [fourteenth] amendment as a part of the supreme law of the land, or declared the acts passed to enforce its provisions to be inoperative and void, there would have been just ground to hold that there was such a denial, upon its part, of equal civil rights, or such an inability to enforce them in those tribunals, as, under the Constitution and within the meaning of that section [641], would authorize a removal of the suit or prosectuion to the Circuit Court of the United States.

Id. at 392.

equal civil rights.[37] But even stare decisis as a basis for removal was lost in *Kentucky v. Powers*,[38] decided in 1906, the most recent and constrictive Supreme Court case construing section 1443(1). Powers, the Republican candidate for the office of Secretary of State of Kentucky in a bitterly contested election, was charged with the murder of the unsuccessful Democratic candidate for governor. His victorious Republican running mate, now governor, pardoned him. The local law enforcement officials and judges, all Democrats, were alleged to have connived in the selection of the juries that tried him, so as to exclude all Republicans. Powers was tried and convicted three times, on each occasion objecting to the discrimination in jury selection and pleading his pardon as a defense. The Kentucky Court of Appeals had reversed his conviction each time, but because of a Kentucky statute, the Court of Appeals of Kentucky held that it was without power to upset the trial judge's ruling as to the jurors—thus the court's rulings were the law of the case and as binding as a statute. Clearly, if stare decisis was a ground for removal, section 641 was applicable. The lower federal court sustained removal on this ground.[39]

Mr. Justice Harlan, speaking for the Court, held removal unavailable and ordered the case remanded to the Kentucky state court.

> It is not contended, as it could not be, that the constitution and laws of Kentucky deny to the accused any rights secured to him by the Constitution of the United States or by any act of Congress. Such being the case, it is impossible, in view of prior adjudications, to hold that this prosecution was removable into the Circuit Court of the United States by virtue of Section 641 of the Revised Statutes.[40]

Because the removal section requires the petition for removal to be filed before trial, the Court continued, the petitioner must allege and prove before going to court that his equal civil rights will be denied by the court once he reaches the trial stage. The *Powers* opinion presumed that state courts would apply the laws of the state indiscriminately.[41] Accordingly, the Court seems to have held that the

[37] *Ibid.*

[38] 201 U.S. 1 (1906).

[39] Kentucky v. Powers, 139 Fed. 452, 487 (C.C.E.D. Ky. 1905), *rev'd*, 201 U.S. 1 (1906).

[40] 201 U.S. at 35.

[41] Mr. Amsterdam points out that this presumption is untenable since it is based on the assumption that state judges will not be hostile to federal

only justification for removal prior to trial is a showing that a state statute or constitutional provision was invalid on its face. As a result of the *Rives-Powers* doctrine, until 1965 federal courts had been unanimous in holding that removal was possible under section 1443(1) only when petitioner could show that a state statute or constitution, invalid on its face, denied him a federally protected right.[42] The absence, since 1906, of Supreme Court decisions construing the civil rights removal statute is due not only to the narrow construction apparently given it in *Powers,* but also the statutory provision of 1887, carried forward into the Judicial Code of 1948, exempting from review all orders of remand by federal districts courts.

III. The Recent Decisions

The increase in court decisions involving removal under section 1443 is the immediate result of a 1964 amendment to 28 U.S.C. § 1447(d).[43] Title IX of the Civil Rights Act of 1964 provides that when a case, removed pursuant to section 1443, is ordered remanded to the state court, that order "shall be reviewable by appeal or otherwise."[44] The purpose of the amendment, revealed by legislative history, is to extend the right of removal to those defendants who demonstrate an inability to secure their federally protected rights because of local prejudice, "or for any reason involving the un-

rights unless so directed by state statute, "or that no form of proof except positive law will sustain a relatively sure prediction of judicial conduct." Such assumptions defeat the purpose of the removal provision for this is where removal is least needed. Where a state court upholds a statute or constitutional provision that is unconstitutional on its face, there exists, under 28 U.S.C. § 1257(2), a right of direct appeal to the Supreme Court. Amsterdam 857. It is strange that Mr. Amsterdam should make this argument. One of soundest arguments made for giving § 1443 the scope it deserves is to end the use of harassing court actions to defeat civil rights movements. Under § 1257(2) appeal is possible only from a *final* state court decision. The relief granted by § 1257(2) is definitely not nearly so great as is suggested.

[42] *E.g.,* Eubanks v. Florida, 242 F. Supp. 472 (1965); Louisiana v. Tyson, 241 F. Supp. 142 (E.D. La. 1963); City of Clarksdale v. Gertge, 237 F. Supp. 213 (N.D. Miss. 1964); Maryland v. Kurek, 233 F. Supp. 431 (D. Md. 1964); Alabama v. Shine, 233 F. Supp. 371 (M.D. Ala. 1964); North Carolina v. Alston, 227 F. Supp. 887 (M.D.N.C. 1964); Anderson v. Tennessee, 228 F. Supp. 207 (E.D. Tenn. 1963); City of Birmingham v. Croskey, 217 F. Supp. 947 (N.D. Ala. 1963); *In re* Hagewood, 200 F. Supp. 140 (E.D. Mich. 1961); Rand v. Arkansas, 191 F. Supp. 20 (W.D. Ark. 1961); Texas v. Dorris, 165 F. Supp. 738 (S.D. Tex. 1958).

[43] See Rachel v. Georgia, 342 F.2d 336 (5th Cir. 1965). *Rachel* illustrates the ease with which cases are removable under this amendment.

[44] Civil Rights Act of 1964 § 901, 28 U.S.C. § 1447(d) (1964).

constitutional *application* of state laws. The legislative history also calls specifically for the courts to redetermine the scope of the right to remove under section 1443."[45] This call was speedily answered, as the following cases reveal.

Chronologically, the first of these court of appeals opinions was *New York v. Galamison.*[46] Petitioner and fifty others were attempting removal of prosecutions under a variety of state charges arising out of car and subway stall-ins, sit-ins, and schoolyard leafleting to protest racial discrimination. Petitioners relied solely on section 1443(2), for if it were given the interpretation they sought, there would not have to be a showing of denial or inability to enforce rights—an impossible task for these defendants[47]—as under section 1443(1). Removal was sought on the ground that the prosecutions arose out of acts

> of protest and resistance [which] were "under color of authority" of one or more of three "law[s] providing for equal rights" —the guarantees of free speech and petition embodied in the due process clause of the Fourteenth Amendment, the equal protection clause of that Amendment, and statutory protection conferred by the constitution, notably 42 U.S.C. §§ 1981 and 1983.[48]

Alternatively the petitioner contended that his resistance to "police commands was 'on the ground that it would be inconsistent with' same three sets of laws."[49] Judge Friendly, writing the majority

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[45] 43 N.C.L. REV. 628, 635-36 (1965).

> It is particularly important, it seems to me, that the right to a fair trial free from racial hostility and antagonism should be guaranteed. This is what the Congress of 1866 tried to do. This is what the removal statute will do if properly construed.
>
> It is the purpose of title IX to make it possible for the courts to consider whether the removal statute can be given such construction.

110 CONG. REC. 6955 (1964) (remarks of Senator Dodd). See also *id.* at 6551 (remarks of Senator Humphrey).

[46] 342 F.2d 255 (2d Cir. 1965).

[47] Petitioners made no allegations of discriminatory application of the statutes under which they were prosecuted. Mr. Amsterdam stated that no allegations were made because they could not be proved, but there is discrimination between privileged and underprivileged groups. "*[E]nforcement* discrimination is unprovable because the privileged groups do not (and do not have to) engage in the protest demonstrations in which the underprivileged groups engage." Amsterdam 865 n.274. Carrying this reasoning one step further the result would necessarily be the abolishment of all state court jurisdiction over matters involving civil rights. This writer views the petition for removal in *Galamison* as an effort by diligent counsel to expend every remedy possible in avoiding a final decision.

[48] 342 F.2d at 258.

[49] *Ibid.*

opinion, rejected both of these contentions, holding that neither the equal protection nor due process clauses of the amendment nor the statutes gave color of authority to protest against discrimination. More significantly, the court stated:

> When the removal statute speaks of "any law providing for equal rights," it refers to those laws that are couched in terms of equality, such as the historic and recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. § 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all.[50]

Galamison is particularly significant for the construction it has given two of the most troublesome phrases of the statute. These phrases are "act under color of authority" and, "any law providing for equal [civil] rights." The latter phrase is found in both subsections (1) and (2) and has identical meaning in both.[51] A number of constructions can be given to "equal civil rights,"[52] but the petitioners in *Galamison* contended that reference was either to statutes and constitutional amendments protecting all civil rights, or to statutes such as the civil rights acts of 1866, 1870, and 1871 and the thirteenth, fourteenth, fifteenth amendments. The court rejected the former construction for the reason that the utilization of the word "equal" would be completely redundant and, as to the latter, excluded the Civil Rights Act of 1871, now section 1983 of title forty-two,[53] for the same reason.[54] Since first amendment rights were in issue, the petitioner's case depended upon inclusion of section 1983

[50] *Id.* at 271.

[51] Section 641, set out in note 20 *supra*, granted removal to any person who could not enforce in state courts "any right secured to him by any law providing for the equal rights of citizens of the United States" and to officers or other persons charged with wrongs done under "color of authority derived from any law providing for equal rights as aforesaid." In § 31 of the 1911 Judicial Code the "color of authority" passage, as in § 641, referred back to the "aforesaid" laws of the first part of the act. Omission of "aforesaid" in the 1948 revision effected no substantive change according to the reviser's notes. H.R. REP. No. 308, 80th Cong., 1st Sess. A 134 (1947). *But see,* New York v. Galamison, 342 F.2d 255 (2d Cir. 1965).

[52] See Amsterdam 866.

[53] REV. STAT. § 1979, 42 U.S.C. § 1983 (1964).

[54] Appellants say that since the rights of freedom of speech and of petition are guaranteed to all and not just to some, they also are "equal" civil rights. But this truism, which is the strength of the argument, is also its weakness. What is so obvious to appellants must have been just as obvious to Congress, and "equal" would thus have been surplusage.
242 F.2d at 268.

within the meaning of "equal civil rights." An action under section 1983 encompasses "any rights, privileges, or immunities secured by the constitution and laws,"[55] *i.e.*, due process as well as equal protection claims.[56] The argument has recently been made that the authors of the *Revised Statutes* of 1875, in rewriting section 3 of the 1866 act, intended, by adding the word "equal" to the term "rights," to include thereby all statutes having an equalitarian purpose.[57] Such an interpretation would result in the inclusion of section 1983. As seen above, Judge Friendly held that reference was only "to those laws that are couched in terms of equality,"[58] and that section 1983 was not a law providing for equal civil rights within the meaning of section 1443. The court pointed out that such an inclusion would have expanded the original act significantly (to say the least), something the Congress specifically expressed an intent that the revision was not to do.[59] Moreover, the court visualized the practical effect of allowing any first amendment or due process claims to be removed under either section of the statute. Trying to limit such

[55] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958). The origin of this statute is the third civil rights act, Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, which had adopted the remedial provisions of the first civil rights act of 1866. See Monroe v. Pape, 365 U.S. 167 (1961).

[56] The term due process, as used herein, includes concepts of procedural fairness, *e.g.*, notice, hearing, confrontation, impartial tribunal and the like. *Ibid.* Note that § 1983, *supra* note 55, also protects first amendment rights, *e.g.*, the right to picket, parade, distribute leaflets and the like. See, *e.g.*, Hague v. CIO, 307 U.S. 496 (1939). Equal protection claims, as used herein, contemplate fourteenth amendment rights to equal treatment without invidious discrimination.

[57] Amsterdam 871-73. Mr. Amsterdam contends that "equal civil rights" refers "to statutes (and/or constitutional provisions) whose purpose was to protect the Negro and assure him in his civil rights, whether or not the statute (or constitutional provision) speaks explicitly in terms of equality." *Id.* at 866.

[58] 342 F.2d at 271.

[59] It would be a flight of fancy to attribute, on the basis of a readily explicable change in wording, such an undisclosed purpose to a Congress which was aiming only to "revise, simplify, codify, arrange, and consolidate" existing statutes, and was so intent on avoiding substantive alterations that it designated a lawyer for the purpose of eradicating any such changes made by the codifying commission.

Id. at 267-68.

claims to civil rights demonstrators would be a "formidable" burden upon the courts, and drawing the line to one class of action or people would be all but impossible.[60] Obviously the Thirty-ninth Congress (1866) did not intend to include due process claims within section 3, since the fourteenth amendment was passed after the initial approval of the act. It is equally doubtful that the authors of the *Revised Statutes* of 1875 meant to incorporate section 1983 (which would permit due process claims), into the removal section. This is so not only for the reasons suggested by Judge Friendly but also because the right given by that section is the right to maintain a civil action, and when taken in context with the remainder of section 1443(2), it is difficult to see what "color of authority" section 1983 lends to conduct in the exercise of first amendment rights.[61]

Although *Galamison* correctly held that a claim arising under the due process clause of the fourteenth amendment is not removable under the statute, substantial difficulty may arise out of the court's holding that section 1443(1) applies to rights under the equal protection clause.[62] The following statement from the dissent readily discloses the danger of speaking in terms of equal protection:

[60] *Id.* at 270. Judge Marshall, dissenting, stated that the majorities' fears were not well founded and that a "limiting principal could perhaps be found" that would permit use of the due process clause only where there was an alleged denial of substantive equal protection. *Id.* at 280. Judge Friendly makes short order of his fellow judge's argument: "But the guarantee of liberty in the due process clause either is or is not a law providing for equal rights within the removal statute, and if it gives 'color of authority' for one type of protest, it does so for all." *Id.* at 270.

[61] It should be noted that the Supreme Court in *Strauder,* only five years after enactment of the *Revised Statutes,* made this explicit statement: "This act *plainly has reference to* sect. 1977 and 1978 of the statutes which partially enumerate the rights and immunities intended to be guaranteed by the Constitution. . . ." Strauder v. West Virginia, 100 U.S. (10 Otto) 303, 311 (1880). (Emphasis added.) Clearly the Court that held the removal statute constitutional and upheld its application considered § 1979 (42 U.S.C. § 1983) not a law providing for "equal civil rights" within the meaning of § 641. *But see,* 342 F.2d at 281 n.7 (dissenting opinion).

[62] *Galamison* stated that "equal civil rights" in subsection (1) includes rights arising under both the equal protection clause and equalitarian statutes, but that the phrase "equal rights" in subsection (2) includes only equalitarian statutes. There is little foundation for saying that these two phrases are not of identical meaning. See note 51 *supra.* It is submitted that "laws providing for equal civil rights" means only statutory enactments and not constitutional provisions. As pointed out in note 61 *supra, Strauder* made it clear that "this act plainly has reference to sects. 1977 [42 U.S.C. § 1981] and 1978 [42 U.S.C. § 1982] of the statutes. . . ." Mr. Amsterdam points out that prior to the *Revised Statutes,* "removal jurisdiction had been used

> We should approach the problems inherent in some of these petitions, not by severing and separately compartmentalizing the Due Process and Equal Protection Clauses, but realizing that they are both part of the same constitutional amendment, undoubtedly the most basic of all laws providing for equal rights, and that these clauses often intersect.[63]

That the two clauses of the amendment do intersect,[64] and that a due process claim can be drafted to present equal protection claims is clear.[65] Utmost caution must be exercised by federal courts in processing removal petitions so long as equal protection claims are a basis for removal.

The *Galamison* decision is the first federal appellate court opinion to rule on the question of what constitutes "color of authority."[66] The majority—assuming only for argumentive purposes that section 1443(2) was not limited to officers or those acting in their behalf—held that neither the equal protection clause of the fourteenth amendment nor section 1981 of title forty-two,[67] a statute "couched in equalitarian terms," gave authority to do the acts in question. The court stated that the legislature must have manifested an intention that the beneficiary do something. A law providing a citizen with only a defense to a prosecution or a law granting the power to have civil or criminal liability imposed on those interfering with him is insufficient.[68] In support of this conclusion the court correctly pointed out that to hold otherwise would be to deprive section 1443(1) of all effect, *i.e.*, "the requirement of showing denial or inability to enforce [a right] would be avoided by resort to [1443(2)]."[69] The contrary argument is that the first section applies to deprivations of rights in state trial procedure, whereas subsection (2) "isolates and separately treats cases involving substantive

exclusively to implement specific congressional programs," and there was no reason for the revisers to go beyond this use. It may be argued that the equal protection clause is a substantive civil rights provision to which the removal statute is an adjunct. See Rachel v. State, 342 F.2d 336, 342 (5th Cir. 1965).

[63] 342 F.2d at 280.

[64] Bolling v. Sharpe, 347 U.S. 497 (1954).

[65] McGowan v. Maryland, 366 U.S. 420 (1961); Hornsby v. Allen, 326 F.2d 605 (5th Cir.), *rehearing denied*, 330 F.2d 55 (5th Cir. 1964).

[66] Only two reported district court decisions have dealt with this section. City of Clarksdale v. Gertge, 237 F. Supp. 213 (N.D. Miss. 1964); Arkansas v. Howard, 218 F. Supp. 626 (E.D. Ark. 1963).

[67] REV. STAT. § 1977, 42 U.S.C. § 1981 (1964).

[68] 342 F.2d at 264.

[69] *Ibid.*

federal claims."[70] It is said that the Thirty-ninth Congress recognized that where substantive rights were involved, the need for immediate federal jurisdiction was imperative, and by means of subsection (2) made this possible.[71] This interpretation would merit consideration were it not for the fact that this section clearly applies only to officers or those acting in behalf of officers.[72] When this is realized, the word "acts" found in subsection (2) no longer denotes substantive claims but the acts of officers or those acting on behalf of officers.

The majority in *Galamison* expressly declined to decide whether section 1443(2) covered only officers or those assisting them, but there is evidence that Judge Friendly felt it limited to this category.[73] Persons exercising color of authority under subsection (2) might be (a) only federal officers enforcing equal civil rights, or (b) federal officers and those authorized to assist them, or (c) the preceding class and all persons exercising privileges or immunities under such law.[74] An examination of the Civil Rights Act of 1866 leads to the conclusion that alternative (b) is the correct interpretation. Section 3 permitted removal of suits "against any officer, civil or military, or other person . . . ." Alternative (a) is obviously inapplicable due to the "officer . . . or other person" formula. Those who favor (c) put much emphasis on this phrase as demonstrating that the section was not so limited as is here suggested. Logically, the phrase "other persons" refers to those persons who, under section 5 of the original act, were appointed by United States commissioners to aid in the enforcement of the act, and these persons were also authorized to call bystanders or the *posse comitatus* to their aid.[75] *Galamison* also correctly pointed out that "since the first clause was directed only towards freedman's rights, symmetry would suggest that the second clause concerned only acts of enforcement."[76] Supporting this is the fact that removal was permitted where there had been an "arrest or imprisonment, trespass, or wrongs done . . . under color of authority"—the type of charges that would be brought against officers and those assisting them.

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[70] Amsterdam 877.
[71] *Ibid.*
[72] See text accompanying notes 73-81 *infra.*
[73] 342 F.2d at 262-63.
[74] Amsterdam 875.
[75] Act of April 19, 1866, ch. 31 § 5, 14 Stat. 28.
[76] 342 F.2d at 262.

An even more persuasive reason for limiting removal to alternative (b) is that section 3 of the 1866 act provided that removal was to be carried out "in the manner prescribed by the 'Act relating to habeas corpus . . . .' "[77] The habeas corpus act of 1863 referred to also used the phrase "any other person," which in that context meant someone deputized by the President or Congress to do something.[78] Finally, it is asserted that giving section 1443(2) the narrow construction (b), results in redundancy with the officer removal statute, section 1442.[79] Subsection (2) must therefore, go further.[80] This assertion might be quickly dispatched by pointing out that subsection (2) was an innovation, whereas extension of federal officer removal came nearly a century later and could hardly be said to enlarge the former. However, the better rebuttal is that section 1443(2) does provide additional protection to federal officers. Under 1442(1) officers are allowed removal only for acts done under "color of such office." If acts done under color of a specific office were as broad as "acts done under color of authority derived from federal law" the remainder of section 1442 would itself suffer from redundancy.[81]

Whereas the Second Circuit in *Galamison* deemed it unnecessary to decide if the right of removal under subsection (2) is limited

[77] See statute set out in text accompanying note 6 *supra.*

[78] Habeas Corpus Suspension Act, ch. 81, § 5, 12 Stat. 756 (1863). See Bigelow v. Forrest, 76 U.S. (9 Wall.) 339 (1869).

[79] 28 U.S.C. § 1442 (1964) reads in part:

> (a) a civil action or a criminal prosecution commenced in a State court against . . .
>
> (1) any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue . . . [may be removed.]

The remaining three subsections of § 1442(a) are concerned with removal by (2) a property holder who derives title from such a federal officer, (3) any officer of the U.S. courts, for any act done under color of office or in performance of his duties, (4) any officer of Congress for an act done in discharge of his duties. Prior to the 1948 revision the corresponding provision of the code had covered only civil suits or criminal proceedings against officers or other persons acting under the revenue laws. Judicial Code of 1911, ch. 231, § 33, 36 Stat. 1097.

[80] Amsterdam 878.

[81] This argument is more fully developed in a book prepared by Berl I. Bernhard and Ronald B. Natalie, Director and Associate Director respectively of the Special Committee on Civil Rights Under the Law of the Association of the Bar of the City of New York. This book, to be published in 1966, deals with removal, habeas corpus, and equitable remedies, and recommends legislative changes in certain of these areas.

to federal officers and quasi-officers, a recent opinion by the Court of Appeals for the Fifth Circuit has expressly held it is so limited. In *Peacock v. City of Greenwood,*[82] discussed more fully below, removal was sought under both sections of section 1443. In response to the allegation that the acts committed by petitioners were done under color of authority, the court held that "the original language and context of § 1443(2) compel the conclusion that the section is limited to federal officers and those assisting them or otherwise acting in an official or quasi-official capacity."[83] It is the majority of the factors discussed above that led the court to this conclusion.

Although it is apparent that subsection (2) was originally intended to apply only to federal officers and those assisting them, the recent case of *Hamm v. City of Rock Hill*[84] extended removal under this section to persons engaged in wholly unofficial conduct.[85] In *Hamm,* the Supreme Court reversed the conviction and dismissed the charges against civil rights demonstrators who were tried under a South Carolina anti-trespass statute. The Court stated that section 203(c) of the Civil Rights Act of 1964 immunized from prosecution persons seeking to gain admittance to establishments covered by the act, so long as denial of service or request to leave the premises was based on an intent to discriminate.[86] In light of *Hamm* Judge Friendly recognized in *Galamison* that Congress may have authorized self-help to enforce certain rights under the 1964 Act.[87] However, to hold such is not inconsistent with the intention of the original act. Here an express act of Congress does in fact give particular individuals under specified conditions "authority" to engage in certain conduct.

Subsection (1) of section 1443 grants the right of removal "to any person who is denied or cannot enforce in the [state] courts" his federally protected rights. The main purpose of this section

[82] 347 F.2d 679 (5th Cir. 1965).
[83] *Id.,* at 686. *Accord,* City of Clarksdale v. Gertge, 237 F. Supp. 213 (N.D. Miss. 1964).
[84] 379 U.S. 306 (1964).
[85] The court in *Peacock v. City of Greenwood* failed to take account of the *Hamm* decision and its effect on § 1443(2). That it would agree to this extension seems likely since the Court of Appeals for the Fifth Circuit had recognized § 1443 as an adjunct to the 1964 Civil Rights Act. See note 102 *infra.*
[86] 379 U.S. at 311.
[87] 342 F.2d at 265.

was and is now to ensure protection of the rights of members of the Negro race. This was the intention of the Congress that enacted the statute[88] and also the intent of the 1964 Congress that amended section 1447(d) in an attempt to give it renewed vitality.[89] When a Negro is denied a constitutional right he is, at least supposedly, provided a state forum in which to protect this right.[90] However, when this same forum is used by local and state officials as a device to deny these statutory and constitutional rights,[91] the alternative is either to seek federal court protection or to turn to the streets.[92] To ensure that a federal forum is available when this and other situations arise, Congress has provided various means of placing jurisdiction in federal hands, *i.e.*, the writ of habeas corpus,[93] equitable injunction of state prosecutions,[94] and removal under section 1443(1). But because of Supreme Court interpretations, the successful use of any of these remedies has become almost impossible. Habeas corpus suffers from the exhaustion requirement,[95] injunction from the abstention rule,[96] and removal from the *Rives-*

[88] *E.g.*, CONG. GLOBE, 39th Cong. 1st Sess., 475, 602, 1366 (1866). See generally RANDAL, THE CIVIL WAR AND RECONSTRUCTION 734-35 (1953); HICK & MOWREY, A SHORT HISTORY OF AMERICAN DEMOCRACY 339 (2d ed. 1956).

[89] See generally U. S. CODE CONG. & AD. NEWS 287 (1964).

[90] U.S. CONST. amend. VI & VII.

[91] See for example the protracted litigation involving the Rev. Mr. Fred Shuttlesworth in which five years and nineteen separate appearances in federal and state courts were required to vindicate federally guaranteed rights. For a brief summary of the *Shuttlesworth* litigation see 9 RACE REL. L. REP. 107 (1964); 8 RACE REL. L. REP. 422 (1963); 7 RACE REL. L. REP. 114 (1963).

[92] (a) Those who claim new rights can be induced to resort to the courts and legislatures rather than the streets only if they believe no delays will occur that are not reasonably necessary to the effective operation of our lawmaking system. And (b) if those claimants are to wait until the lawmaking process is complete before receiving full judicial protection of their interests, they must have confidence that they need not wait *longer* than that. In short, there must be an objectively determined end to the process, as well as something worth waiting for when the end is reached.

Lusky, *Racial Discrimination and the Federal Court: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1166 (1963).

[93] 28 U.S.C. § 2241 (1948).

[94] REV. STAT. § 1979, 42 U.S.C. § 1983 (1958).

[95] *Ex parte* Royal, 117 U.S. 241 (1886). *Royal* holds that federal habeas corpus cannot be exercised until a state prisoner has exhausted his available state judicial remedies. 28 U.S.C. § 2254 (1964). *But see* Fay v. Noia, 372 U.S. 391 (1963); *In re* Shuttlesworth, 369 U.S. 35 (1962).

[96] See *e.g.*, Alabama Pub. Serv. Comm'n v. Southern Ry. Co., 341 U.S. 341 (1951); Meredith v. City of Winter Haven, 320 U.S. 228 (1943); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Railroad Comm'n v.

Powers doctrine. Recognizing the dilemma faced by citizens in various parts of its own circuit, the Court of Appeals for the Fifth Circuit has taken the initiative and by means of section 1443(1) sought to provide speedy access to the federal forum. Faced with the *Rives-Powers* doctrine this was no easy task.

Rachel v. Georgia[97] involved the prosecution of twenty persons under a Georgia anti-trespass statute. Petition for removal was denied by the district court. The court of appeals granted removal and reversed the prosecutions on the basis of section 1443(1) and *Hamm v. City of Rock Hill.*[98] The court held that the allegations of the removal petition of discriminatory application of the statute were sufficient to support removal to a federal forum. Moreover, sufficient without the necessity of showing that the state courts of Georgia would not entertain petitioner's claim of unconstitutional application of the statute. The *Power's* requirement that a state statute be unconstitutional on its face was evaded by the court.[99] Instead the court cited *Rives* as authorizing removal where "the denial of protected rights be made to appear in the advance of trial."[100] Since the petitioners did allege that federally protected rights were denied by state legislation the requirement of removal stated in *Rives* was satisfied. The court of appeals had, in other words, adopted the realistic interpretation possible in *Rives* that the Supreme Court had refused to recognize.[101] Unwilling to put all its

Pullman, Co., 312 U.S. 496 (1941). *But see,* Dombrowski v. Pfister, 380 U.S. 479 (1965).

[97] 342 F.2d 336 (5th Cir. 1965). *Accord,* Robinson v. Florida, 345 F.2d 133 (5th Cir. 1965).

[98] The court, upon reversing, remanded the case to the district court for a hearing upon the validity of the allegations of the removal petition. The court directed the action be dismissed on the basis of *Hamm* if it was established that petitioners were removed from the places of public accommodation for racial reasons. Judge Bell dissented due to this latter direction. He states that in not requiring petitioners to prove that the Georgia courts will refuse to follow *Hamm,* "the theory of the majority must be that *Hamm* has tainted these prosecutions *ab initio,* and hence jurisdiction in the federal court has been established retroactively by the very fact the prosecutions were ever commenced." 342 F.2d at 344.

[99] The majority states only that it has been argued that the Supreme Court would today recognize the right to removal under subsection (1) where no legislative denial of rights is shown. This interpretation in the court's opinion would "reemphasize the putative essence of Virginia v. Rives—that the denial of equal rights must be susceptible of demonstration before trial . . . ." *Id.* at 339. No attempt is made to distinguish the *Powers* case.

[100] 342 F.2d at 339.

[101] See text accompanying note 33 *supra.*

eggs in one basket, the court turned to the 1964 Civil Rights Act and *Hamm.* Like *Galamison, Rachel* held that the civil rights removal statute is an adjunct to the 1964 act.[102] Title II of that act prohibits punishment of any persons exercising or attempting to exercise any right guaranteed under that title. Petitioner's allegation that a state statute was being used to deny federal rights, according to the interpretation of Title II in *Hamm,* justified removal or dismissal. Thus *Rachel* allowed removal based only on the alleged application of a state statute contrary to an act of Congress.

What hesitation the Fifth Circuit had shown in *Rachel* regarding the requirements for removal established in the *Rives-Powers* doctrine was met head on in *Peacock v. City of Greenwood.*[103] Petitioners, engaged in a voter registration drive, were prosecuted for obstructing a public street in violation of a Mississippi statute. As in *Rachel,* the petition for removal was denied by the district court. The Court of Appeals for the Fifth Circuit reversed and remanded, citing *Rachel,* which the court construed as holding that "1443(1) allows removal where a state statute, though valid and nondiscriminatory on its face, is applied in violation of some equal right of the accused."[104] In adhering to the holding of *Rachel* the court also adopted the *Galamison* ruling that the equal protection clause is a "law providing for equal civil rights" within the meaning of subsection (1). However, the due process clause does not fall within the statute.[105] The court then addressed itself to determining what a petitioner must show to demonstrate that he "is denied or cannot enforce" his equal civil rights. After recognizing the *Rives-Powers* doctrine (that a state statute be unconstitutional on its face) and reviewing those decisions the court concluded:

> We do not read these cases as establishing that the denial of equal civil rights must appear on the face of the state constitution or statute rather than in its application where the alleged denial of rights, as here, had its inception in the arrest and charge. They dealt only with the systematic exclusion question, a question which in turn goes to the very heart of the state judicial process,

[102] 342 F.2d at 342. "It cannot be doubted that § 1443(1) is today an adjunct of the Civil Rights Act of 1964." *Rachel* cited legislative history of the 1964 act demonstrating that the 88th Congress also regarded the removal statute as an adjunct for substantive civil rights statutes.

[103] 347 F.2d 679 (5th Cir. 1965).

[104] *Id.* at 681.

[105] *Accord,* City of Chester v. Anderson, 347 F.2d 823, 824 (2d Cir. 1965) *on rehearing.*

> and federalism may have indicated that the remedy in such situations in the first instance should be left to the state courts.[106]

In short, all petitions presented to the Supreme Court involved a question of unconstitutional trial procedure. Never had the Court been presented with an allegation that a substantive criminal statute on which the prosecution was based was invalid, whether on its face or by application, because of federal limitation. A petitioner, such as Peacock, who attacks the underlying criminal charge does not base his action on unconstitutional trial procedure, but on the fact that if convicted at all under the particular state statute such conviction will be illegal.[107] Thus, in the instant case, the court held that petitioner's allegation of application of a state statute contrary to the equal protection clause would support removal.

It is submitted that the distinction drawn in *Peacock* and *Rachel* between unconstitutional trial procedure and unconstitutional application of a state statute is valid. This distinction gathers support not only from the original statute and legislative history but also from the Supreme Court cases. *Strauder* and *Rives,* literally construed, pronounce that the existence of an unconstitutional state statute demonstrates a denial of a protected right, not that such a statute is a necessary prerequisite to removal. *Strauder* in fact holds that the basis for removal is the likelihood that state courts will ignore those federal rights protected by section 1443(1), *i.e.,* those laws couched in egalitarian terms.

These two circuit court decisions give to the Negro a long-awaited and greatly needed access to the federal court. But they do more than just revitalize section 1443(1), for they make removal possible on the basis of no more than "bear-bones allegation" of the existence of a right of removal.[108] This broad statement is qualified by the requirements of federal pleading rules requiring

[106] 347 F.2d at 684.

[107] Amsterdam 853.

[108] Rachel v. Georgia, 342 F.2d 336, 340 (1965). In *Rachel* the pertinent portion of the removal petition alleged that

> (4) The petitioners are denied and/or cannot enforce in the Courts of the State of Georgia rights under the Constitution and Laws of the United States providing for the equal rights of citizens of the United States and all persons within the jurisdiction thereof, in that, among other things, the State of Georgia by *statute,* custom, usage, and practice supports and maintains a policy of racial discrimination.

Id. at 339. These allegations were held sufficient to support removal to the district court.