Revitalizing Civil Rights Removal Jurisdiction

Martin H. Redish
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In recent years, courts and commentators have debated the potential effects on the federal system of federal injunctions against the conduct of state judicial proceedings in order to protect federal rights. On the whole, the antisuit injunction has proven to be, at best, of sporadic and limited value as a protector of civil rights.1 Although in the last fifteen years the primary focus of both judicial and academic efforts on the subject of judicial federalism has been the federal injunction, there is a less frequently discussed alternative method of policing state judicial enforcement of certain federal rights—one that, at least on its face, appears to grant the federal courts sweeping authority. The civil rights removal statute, currently codified in 28 U.S.C. § 1443,2 provides this alternative.

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2. Section 1443 provides:

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.


Professor Amsterdam has described the statute as a "text of exquisite obscurity." Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed

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The civil rights removal statute authorizes removal of a case from state to federal court in three different contexts: (1) where a person has been "denied or cannot enforce in the courts of [a] State" a civil right of equality (the "denial" clause); (2) where a defendant is being sued or prosecuted for performing "any act under color of authority derived from any law providing for equal rights" (the "authority" clause); or (3) where a defendant is the subject of suit for refusing to perform an act that would be inconsistent with such a law (the "refusal" clause).3 By far the most extensive judicial attention has been given to the "denial" clause.4 As will be discussed below, the


4. According to one commentator, the "authority" clause traditionally "suffered chiefly from lack of attention." Note, A Reexamination of the Civil Rights Removal Statute, 51 Va. L. Rev. 950, 954 (1965). While the "authority" clause did become the subject of a fair degree of judicial attention in the 1960s, see, e.g., New York v. Galamison, 342 F.2d 255 (2d Cir.), cert. denied, 380 U.S. 977 (1965), it was given an extremely narrow construction by the Supreme Court in City of Greenwood v. Peacock, 394 U.S. 808 (1969). Professor Amsterdam, emphasizing that "the 'color of authority' clause of the 1866 act applies to 'persons' without explicit limitation to persons acting under federal officers," has argued that the current version of the statute should be construed to include private individuals who are acting under the "color" of protective federal statutes. Amsterdam, supra note 2, at 877. He has further noted that in 1948, the federal officer removal provision, 28 U.S.C. § 1442(a)(1), was expanded from its previously limited applicability to revenue officers to allow removal from state court by any federal "officer . . . or person acting under him, for any act under color of such office." He suggested that if section 1443(2) reaches only federal officers or those working under them, the section would be rendered superfluous by the broadened language of section 1442(a)(1). Amsterdam, supra note 2, at 878.

The Supreme Court in Peacock, however, rejected these arguments, adopting a much narrower construction of the "authority" clause than the one urged by Professor Amsterdam. The Court acknowledged that the language of the current version of the "authority" clause in section 1443(2) "is . . . appropriately to be read in the light of the more expansive language of the statute's ancestor," section 3 of the Civil Rights Act of 1866. 384 U.S. at 815-16. Nevertheless, the Court concluded that the language and legislative history of the 1866 Act demonstrated Congress' intent that the removal provision reach only federal officers and those acting directly under them.

The Court in Peacock acknowledged that the expansion of federal officer removal in 1948 may have rendered the "authority" clause as construed by the Court largely superfluous. Id. at 820 n.17. The Court said that nevertheless, "[t]he present overlap between the provisions simply reflects the separate historical evolution of the removal provision for officers in civil rights legislation." Id. The Court may have been implying that the Revisers of the Judicial Code in 1948 simply failed to recognize the potential overlap between the two provisions, and that, in light of the Revisers' disclaimer of any intent to effect substantive change in section 1443, the expansion of section 1442(a)(1) should not
Supreme Court has improperly allowed the applicability of the "denial" clause to turn on the nature of the alleged substantive civil rights violation, while certain lower courts have relied on the motivation of the prosecutors in bringing the state prosecution.\(^5\) As a result, the courts have allowed resort to the "denial" clause only in the rare instances when a state statute or constitutional provision invades a federal civil right, or when a federal statute immunizes certain conduct from prosecution and an individual has been prosecuted for the very conduct protected by that statute. The ultimate irony of the courts' construction is that while, as a practical matter, civil rights removal will be denied in the overwhelming majority of cases, allowance of removal in the narrow areas in which it has been authorized is directly contradictory to the tenets of classical judicial federalism, a system premised on the integrity of the state court's role as enforcer and interpreter of federal law.\(^6\)

It is the premise of this Article that traditions of both federalism and statutory language require that applicability of the "denial" clause should depend neither on the substance of the state alleged violation nor on the motivation of the prosecutor in bringing a state prosecution. The "denial" clause should instead be construed to authorize pretrial removal when established state judicial practices and procedures\(^7\) violate a federal civil right of equality,\(^8\) or, if the conduct which is subject to suit is protected by a federal civil right of equality, when state procedures are so defective or the applicable state precedents so in conflict with federal law that the defendant will be unable adequately to vindicate his applicable federal substantive rights in the state judicial system. Such a construction would admittedly create the potential for an enormous increase in the number of removal petitions filed and a concomitant disruption

\(^{5}\) See text accompanying notes 54-55, 79-93 infra.
\(^{6}\) See text accompanying notes 34-37 infra; text following note 59 infra.
\(^{7}\) The word "established" is intended to add the prerequisite that the improper state procedures are not merely aberrations, to be found only in the court of a particular state judge, but rather are widely accepted in the state judicial system, unless, of course, the state appellate courts have in the past shown themselves unwilling or unable to rectify the improprieties of the judge in question.

\(^{8}\) For a discussion of the definition of the statutory phrase "any law providing for the equal civil rights of citizens of the United States," contained in the "denial" clause, see text accompanying notes 164-176 infra.
of the state judicial process. This Article suggests, however, that the use of both procedural and substantive limitations would enable the federal courts to revitalize the civil rights removal statute while reducing the potential dangers inherent in an expanded construction of the "denial" clause. Before analyzing the different constructions given the denial clause, this Article describes the historical development of civil rights removal jurisdiction from its origins in the 1866 Civil Rights Act to its current status in section 1443.

I. HISTORICAL DEVELOPMENT

Section 1 of the Civil Rights Act of 1866 provided former slaves 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.

Section 3, the removal section, provided:

[T]he district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, 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 arrest or imprisonment, trespasses, 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 or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three.

Enacted as a means of implementing the then recently adopted thirteenth amendment, the statute provided for removal, according to one commentator, primarily to afford the newly enfranchised blacks access to a more sympathetic federal

9. See text accompanying note 104 infra.
10. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.
12. Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27.
A major change in the scope of the removal jurisdiction was made in the Revised Statutes of 1875. The removal provision became section 641, which, while embodying the substance of section 3 of the 1866 Civil Rights Act, in certain ways significantly modified previous practice. Under the 1866 Act, removal was to be utilized initially according to the Habeas Corpus Suspension Act of 1863, which permitted removal after judgment as well as before trial, and subsequently according to the Act's 1866 amendment, which continued to permit postjudgment removal but which allowed pretrial removal only prior to the impaneling of a jury. The Revised Statutes of 1875, however, made postjudgment removal unavailable, even though "it was post-judgment removal which the Thirty-ninth Congress envisioned as the primary means of effectuation of the purposes of Section 3." In 1948, the civil rights removal...
provision\textsuperscript{22} was recodified into the current section 1443,\textsuperscript{23} a change that apparently was not intended to alter the provision's meaning.\textsuperscript{24}

The elimination of postjudgment removal in the Revised Statutes of 1875 has proven to be the cause of the current limited use of civil rights removal jurisdiction. No longer may a federal court examine the past conduct of a state court in order to determine whether a defendant has been denied or was unable to enforce a federal right in state court. Such a determination, if it is to be made at all, must be completed prior to the state court adjudication. Under this system, the federal court is called upon to perform the task of predicting whether a particular defendant will be unable to enforce his rights in state court, a task that the federal courts have been reluctant to perform.

\section{II. THE \textsc{strauder-rives} DOCTRINE}

In two 1879 decisions, \textit{Strauder v. West Virginia}\textsuperscript{25} and \textit{Virginia v. Rives},\textsuperscript{26} the Supreme Court first considered the difficulties in construction caused by the abolition of postjudgment removal. In \textit{Strauder}, a black indicted for murder in West Virginia attempted to remove the prosecution from state court to federal court. Strauder argued that his equal rights would be denied in state court, since only white males were allowed by state statute to serve on a grand or petit jury.\textsuperscript{27} The state court denied removal,\textsuperscript{28} and Strauder was convicted. The Supreme Court held that pretrial removal should have been granted under what was then section 641, since the defendant had demonstrated that he would be unable to enforce his equal civil rights in state court because of West Virginia's juror selection statute.\textsuperscript{29} In \textit{Rives}, however, the Court distinguished \textit{Strauder}

\begin{itemize}
\item \textsuperscript{22} Section 641 was carried over into the Judicial Code of 1911. Ch. 231, § 31, 36 Stat. 1096. No substantive alterations were made.
\item \textsuperscript{23} Act of June 25, 1948, ch. 646, § 1, 62 Stat. 938.
\item \textsuperscript{24} The Supreme Court has stated, "There is no suggestion that the modifications in the statute since 1874 were intended to effect any change in substance." Georgia v. Rachel, 384 U.S. 780, 802 (1966).
\item \textsuperscript{25} 100 U.S. 303 (1879).
\item \textsuperscript{26} 100 U.S. 313 (1879).
\item \textsuperscript{27} 100 U.S. at 304.
\item \textsuperscript{28} State courts no longer have authority to review the validity of a defendant's removal. For an enumeration of the procedural mechanics of removal, see 28 U.S.C. § 1446 (1976 & Supp. I 1977).
\item \textsuperscript{29} 100 U.S. at 310-11. The Court found that the West Virginia statute violated the fourteenth amendment, \textit{id.} at 310, and therefore violated a statute codifying in part this amendment. \textit{See id.} at 311-12. This statute is currently codified at 42 U.S.C. § 1981 (1976):}

and denied removal. Defendants had sought removal, arguing that, although there was no statute excluding blacks from jury service, because of community racial prejudice blacks had never been allowed to serve on county juries in cases concerning a black, and that their requests that blacks be included on the jury had been rejected by both the state court and the prosecution.

According to the Supreme Court, the key distinction between the two cases was that a state statute had been involved in Strauder, while there was no statute involved in Rives. The Court stated that when such a statute is present,

the presumption is fair that [the state courts] will be controlled by it in their decisions . . . . But when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which the statute law accords to him, . . . it can hardly be said that he is denied, or cannot enforce, "in the judicial tribunals of the State" the rights which belong to him.

The Court thus "established a relatively narrow, well-defined area in which pre-trial removal could be sustained." The distinction that gave rise to this "well-defined area," however, is puzzling in light of long-established principles of judicial federalism.

Since Justice Story's decision in Martin v. Hunter's Lessee, it has been accepted that state courts are bound by
the supremacy clause of the Constitution\(^{35}\) to enforce applicable principles of federal statutory and constitutional law in state proceedings.\(^{36}\) Indeed, the assumption that state courts are fully competent to adjudicate and enforce federal rights underlies the Madisonian Compromise, under which Congress is not required to establish lower federal courts.\(^{37}\) Given this principle, it should be expected that a state court will invalidate a state law that violates federal statutory or constitutional rights. By allowing removal from state to federal court when a state statute violates federal law, the Supreme Court in \textit{Strauder} seems to have been casting aspersions on both the competence and good faith of state courts. Furthermore, the distinction drawn between \textit{Strauder} and \textit{Rives} is not logically convincing: if state courts are not competent to apply overriding federal law when a state statute is involved, why can they be trusted to correct nonstatutory state practices that have, in the past, violated federal law?\(^{38}\)

The language in \textit{Rives} suggests a possible, but unlikely, alternative rationale for the distinction. The Court may have been implying that, until state practice is either codified by statute or approved by the state's highest court, it is not "state action" for purposes of the fourteenth amendment. Although the Court had, on occasion, endorsed such a position in other contexts,\(^{39}\) the view has long since been discredited.\(^{40}\) A more pragmatic explanation of the \textit{Strauder-Rives} distinction lies in the fact that it provides a limited, easily applied standard to define the scope of civil rights removal jurisdiction. If the Court

\begin{footnotes}
35. U.S. Const. art. VI, cl. 2.
38. According to Professor Amsterdam,
\[T\]he case in which there exists a state statutory or constitutional provision barring enforcement of a federal right is the case in which removal to a federal trial court is \textit{least} needed. The existence and effect of such an obvious, written obstruction of federal law are relatively easily perceived and coped with on direct review of a state court judgment by the Supreme Court of the United States. Where removal is most needed is the case in which the impingement on federal rights is more subtle, more immune against appellate correction, as where state court hostility and bias warp the process by which the facts underlying the federal claim are found.
Amsterdam, supra note 2, at 837-58 (emphasis in original) (footnote omitted).
\end{footnotes}
had authorized removal in *Rives*, it would have been allowing federal courts to engage in a detailed, case-by-case examination of both customary state practice and a specific state court's willingness to depart from practices found to violate federal law.

Although there is nothing in either the language or history of the civil rights removal laws to justify the distinction, the *Rives* doctrine was nevertheless consistently adhered to by the Supreme Court in a series of decisions from 1880 to 1906. The final decision in that series, *Kentucky v. Powers*, illustrates the awkwardness of the *Rives*-Strauder dichotomy. The de-

41. Furthermore, it is questionable whether friction in the federal system is avoided by the blanket assumption implicit in *Strauder* that all state courts will disregard overriding federal law when an invalid state statute applies. Professor Amsterdam has argued that *Rives* might be read as holding "no more than that the removal petitioners' allegations were insufficient to state a case of unconstitutional jury discrimination under the standards then prevailing, and its comments on the existence or nonexistence of discriminatory legislation are merely speculation on sorts of allegations which would be sufficient." Amsterdam, *supra* note 2, at 845. He acknowledged, however, that "the case may also be read rather loosely as saying that unless a state constitution or statute on its face denies a defendant's federal constitutional rights, his case is not removable under present subsection 1443(1)." *Id.* One year after Professor Amsterdam's article, the Supreme Court, in *City of Greenwood v. Peacock*, 384 U.S. 808, 828 (1966), reaffirmed the latter construction. *See* text accompanying notes 61-62 infra.

42. *Kentucky v. Powers*, 201 U.S. 1, 30-32 (1906); *Williams v. Mississippi*, 170 U.S. 213, 219-20 (1898); *Murray v. Louisiana*, 163 U.S. 101, 105-06 (1896); *Smith v. Mississippi*, 162 U.S. 592, 600 (1896); *Gibson v. Mississippi*, 162 U.S. 565, 582-83 (1896); *Bush v. Kentucky*, 107 U.S. 110, 116 (1882); *Neal v. Delaware*, 103 U.S. 370, 386-87 (1880). This line of decisions may be summed up by the holding in *Smith v. Mississippi*, 162 U.S. 592 (1896), that removal was to be denied because "[n]either the constitution nor the laws of Mississippi, by their language reasonably interpreted, or as interpreted by the highest court of the State, show that the accused was denied or could not enforce [his civil rights] in the judicial tribunals of the State." *Id.* at 600.

In *Neal v. Delaware*, 103 U.S. 370 (1880), the state constitution on its face unconstitutionally did discriminate against blacks in voting. *See* *id.* at 387. Although a state statute provided that jury selection was based on voter lists, *id.* at 388, the Supreme Court affirmed the state court's denial of removal. *Id.* at 393. The Court reasoned that while the state constitutional provision in question had never actually been repealed or overturned, "[b]eyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution or render inoperative, that provision which restricts the right of suffrage to the white race." *Id.* at 399. The Court emphasized that since adoption of the fifteenth amendment, there had been no legislation or state case law inconsistent with the terms of that provision. *Id.* at 390.

43. 201 U.S. 1 (1906). 44. It is probable that if the *Powers* case were to arise today, removal could be denied on the ground that no right guaranteeing racial equality was involved. *See* text accompanying notes 168-169 infra. The actual analysis employed by the Court in *Powers*, however, turned on the conclusion that petitioner had failed to demonstrate that *any* right would be "denied" in state
defendant in *Powers* was charged in state court as an accessory to
murder, despite his contention that he had received a full par-
don from the state's lawfully elected governor. The victim had
been the Democratic candidate for governor, the opponent of
the Republican governor who issued the pardon. The defend-
ant had been prosecuted and convicted three times, and al-
though the conviction was reversed each time, he was never
allowed to introduce the pardon into evidence. Prior to the
fourth trial, the defendant attempted to remove the prosecution
to federal court, describing this history and further arguing that
in his past trials the jury had been purposely selected from
among members of the Democratic Party. Although, in the
words of a modern court, "[i]f anyone was ever able to show
unfairness in advance of the trial, *Powers* was,"45 the Supreme
Court denied removal.

The Court recognized that "the suggestion is, in effect, that
there was a deliberate purpose on the part of those charged
with the administration of justice in that locality to take [the
accused's] life, under the forms of law, even if the facts did not
establish his guilt of the crime charged."46 Yet the Court, con-
tinuing to adhere to the doctrine articulated in *Rives*, held that
removal was inappropriate simply because "[i]t is not con-
tended, 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."47

The empty formalism of the *Rives* doctrine becomes glar-
ingly apparent when applied in *Powers*. Distorted fact-finding
by a prejudiced jury is one of the most difficult improprieties
for the Supreme Court to police. If the petitioner was to be be-
lieved, there could be little doubt that he had been and would
continue to be the victim of serious political discrimination in
state court. It is patently unrealistic to suggest that the state
court will enforce federal protections under such circum-
stances.

### III. RACHEL, PEACOCK AND BEYOND

The Supreme Court did not return to the question of the

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45. Baines v. City of Danville, 357 F.2d 756, 769 (4th Cir.), *aff’d per curiam*,
46. 201 U.S. at 33.
47. *Id.* at 35.
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scope of the "denial" clause until 1966, after a statutory change in the nature of appellate review of remand orders was adopted by Congress for the very purpose of facilitating Supreme Court reconsideration of the issue. The Court's reconsideration came in two decisions handed down the same day, Georgia v. Rachel and City of Greenwood v. Peacock. In Rachel, black individuals who had sought service at certain Atlanta hotels and restaurants were indicted under a local trespass statute for refusing to leave when requested to do so. The defendants sought removal to federal court, arguing that their federal rights could not be enforced in state court. Although the Supreme Court allowed removal, it continued to adhere to the Strauder-Rives distinction, despite the fact that no state constitutional or statutory provision on its face denied the defendants their federal rights. The Court emphasized the Rives language that "denial" meant "primarily, if not exclusively, a denial . . . resulting from the Constitution or laws of the State." By emphasizing a phrase that was quite probably intended as a throwaway in Rives, the Court managed to stretch Strauder beyond the limited situation of a directly applicable invalid state statute or constitutional provision. In the case before it, said the Rachel Court, the "denial" could be found by other means. The key was in the nature of the federal right defendants were asserting—the right of access to public accom-
In the narrow circumstances of this case, any proceedings in the courts of the State will constitute a denial of the rights conferred by the Civil Rights Act of 1964, as construed in Hamm v. City of Rock Hill [379 U.S. 306 (1964)], if the allegations of the removal petition are true.55

According to the Rachel Court, Hamm made clear that the 1964 Civil Rights Act—held to apply retroactively—protected those who asserted the right to be served in public accommodations "not only from conviction in state courts, but from prosecution in those courts."56 Both Rachel and Hamm emphasized the terms of section 203(c) of the Act,57 which prohibits "any attempt to punish" individuals for exercising their statutory rights. This section led the Rachel Court to conclude that "[i]t is no answer in these circumstances that the defendants might eventually prevail in state court. The burden of having to defend the prosecutions is itself the denial of a right explicitly conferred by the Civil Rights Act of 1964 . . . ."58 Since the prosecution itself was a violation of a federal right, there was no difficulty in "predicting" whether a federal right would be denied in state court; it already had been.

Difficulties plague the Court's analysis in Rachel. The federal right to be served in public accommodations was violated only if the request to leave had been motivated by racial considerations. If, for example, the defendants were asked to leave, not for racial reasons but because the store was closing, their refusal to leave would, of course, not be immune from prosecution for trespass. In that situation, there would have to be a judicial hearing to determine the motivation for, and the circumstances surrounding, the request to leave. The Supreme Court acknowledged this fact.59 What the Court did not seem
to recognize, however, was that since the defendants had to be subjected to judicial action at least to the extent of the factual hearing, presumably the same factual inquiry could be made in state court as in federal court.

The Court's logic thus fails: the fact that defendants have a right not to be prosecuted for their refusal to leave if asked to do so solely for racial reasons does not automatically lead to the conclusion that the defendants will be denied that right in state court, any more than it means they will be denied that right by the holding of a factual hearing in federal court. By necessary implication, then, the grant of removal in Rachel reflects the Supreme Court's lack of trust in the ability of state courts to engage in the same factual inquiry that the Court authorized to be made by the federal court. Yet it is the avoidance of such an implication that had prompted the Supreme Court to refuse removal in Rives, a decision that the Court purported to adhere to in Rachel.

The Court's adherence to Rives was made in even stronger terms in Peacock. In that case, people who had engaged in civil rights work in Mississippi during the spring and summer of 1964 were charged with various offenses in violation of Mississippi law. Specifically, they were charged with obstructing the public streets, assault, disturbing the peace, creating a public disturbance, inciting to riot, biting a policeman, and various other crimes. All sought removal to federal court pursuant to section 1443, arguing that they had been prosecuted because of their efforts to register black voters. The Court of Appeals for the Fifth Circuit allowed removal, distinguishing the Rives line of decisions on the ground that those cases had involved the operation of the heart of the state judicial process. The Supreme Court reversed,60 and in doing so attempted to distinguish Rachel. The Court stated that while in Rachel the fed-

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[the] State' the right to be free of any 'attempt to punish' them for protected activity.

Id. (quoting 28 U.S.C. § 1443(1)) (bracketed word added in Rachel). The Court then concluded that "[s]ince the Federal District Court remanded the present case without a hearing, the defendants as yet have had no opportunity to establish that they were ordered to leave the restaurant facilities solely for racial reasons." 384 U.S. at 805.

60. We would not expand the teaching of these cases to include state denials of equal civil rights through the unconstitutional application of a statute in situations which are not a part of the state judicial system but which, on the contrary, arise in the administration of a statute in the arresting and charging process.


61. Justice Douglas, writing for four Justices, dissented. 384 U.S. at 835. He argued that "the language 'cannot enforce' [in 28 U.S.C. § 1443(1)] has refer-
eral statutory right was a protection against even an "attempt to prosecute them for their conduct," in *Peacock* "no federal law confers an absolute right on private citizens . . . to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman." Additionally, the Court continued, "no federal law confers immunity from state prosecution on such charges."62

The Court appeared to be drawing two distinctions between *Peacock* and *Rachel*: first, the petitioners in *Peacock*, unlike the respondents in *Rachel*, were charged with acts that were unprotected by federal law; and second, unlike the corresponding law in *Rachel*, the federal law that the petitioners in *Peacock* claimed to be unable to enforce in state court did not immunize them from prosecution. The petitioners in *Peacock* could therefore rely on the state courts to protect them from improper conviction, and, if convicted, could ultimately obtain review in the Supreme Court.63

While, as will be seen in subsequent discussions, the Court's first basis for distinction is subject to doubt,64 its second ground is even more questionable. The federal statute thought by the Court in *Rachel* to "immunize" defendants from prosecution, it should be recalled, prohibited "any attempt to punish" individuals who exercised their rights. Yet the statute relied on by petitioners in *Peacock* to justify removal prohibited anyone from "attempt[ing] to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose."65 If the very act of bringing a prosecution constitutes an "attempt to punish" the exercise of the statutory right, it is unclear why the same act does not also constitute an "attempt to intimidate, threaten, or coerce." True, the bringing of a prosecution is *by definition* an "attempt to punish," though a desire to intimidate can be only its *motivation*. Such conceptualizations, however, should not be allowed to obscure the fact that, if the allegations of the *Peacock* petitioners were accurate, the very act of bringing the prosecutions constituted an attempt to

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62. 384 U.S. at 826-27.
63. *Id.* at 828.
64. *See* text accompanying notes 94-101 infra.
intimidate the petitioners.\textsuperscript{66}

Judicial opinions have attempted to explain the\textit{Peacock} Court's second ground in ways that substantially limit its effect. Shortly after\textit{Peacock}, the Court of Appeals for the Fifth Circuit suggested two narrowing explanations. First, the court argued, the similarity in language between the statutes in\textit{Rachel} and \textit{Peacock} "was not urged upon the court."\textsuperscript{67} This fact, however, is of little assistance in limiting\textit{Peacock}. On the very same day that\textit{Peacock} was decided, the Supreme Court fashioned its theory of removal in\textit{Rachel}. It would not seem to have been difficult for the Court itself—even without the aid of petitioners' brief—to recognize the potential applicability of the theory to the facts of\textit{Peacock}. In fact, as the\textit{Peacock} opinion demonstrates, the Court considered and rejected the possible relevance of\textit{Rachel}'s analysis to\textit{Peacock}.\textsuperscript{68}

The Fifth Circuit's second proffered explanation of the\textit{Rachel/Peacock} "immunity from prosecution" distinction was that the Supreme Court may simply have concluded that section 1971, the statute primarily relied on by petitioners for removal in\textit{Peacock}, "did not cover the factual situation alleged in the removal complaint."\textsuperscript{69} Section 1971(b) prohibited intimidation "for the purpose of interfering with the right of [another person] to vote or to vote as he may choose."\textsuperscript{70} Yet the conduct in which the\textit{Peacock} petitioners claimed they were engaged was not the act of voting.\textsuperscript{71} Although Congress broadened the law in 1965 by enacting section 1973i(b), which prohibited intimidation for purposes of interfering with the act of urging others to vote,\textsuperscript{72} that statute was not in effect at the time of removal, and therefore could not have been relied on by the Pea-

\textsuperscript{67} Whatley v. City of Vidalia, 399 F.2d 521, 525 (5th Cir. 1968).
\textsuperscript{69} 399 F.2d at 528.
\textsuperscript{70} 42 U.S.C. § 1971(b) (1976).
\textsuperscript{71} 384 U.S. at 826.
\textsuperscript{72} See Voting Rights Act of 1965, Pub. L. No. 89-110, § 11(b), 79 Stat. 443 (current version at 42 U.S.C. § 1973i(b) (1976)). The current statute provides:

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 1973a(a), 1973d, 1973f, 1973g, 1973h, or 1973j(e) of this title.
According to the Fifth Circuit's interpretation, the "intimidation" language in statutes such as sections 1971(b) and 1973i(b)—when those statutes are applicable—could be equated with the "attempt to punish" language relied on in Rachel to justify removal. Since those statutes were not applicable in Peacock, according to the Fifth Circuit, removal was properly denied. However, the Court in Peacock did not, at least explicitly, rely on the theory that the statute cited by the petitioners was substantively inapplicable to the facts. The Court instead emphasized that the statute did not contain the "attempt to punish" language of the public accommodations law involved in Rachel. Thus, the Fifth Circuit did not adequately explain an important rationale offered by the Supreme Court for distinguishing Peacock from Rachel—in Peacock, the federal law that the petitioners claimed they could not have enforced in state court did not immunize them from prosecution.

The other ground for the denial of removal in Peacock, it should be recalled, was that the petitioners, unlike those in Rachel, had been charged with the commission of acts that in themselves were unprotected by federal law. Although this rationale may be criticized on several grounds, it was clearly relied on by the Court in Peacock and has been subsequently reaffirmed. Before considering these criticisms, then, it is necessary to determine how this element of Peacock's analysis is to be applied in order to be able to predict when removal will be allowed in the future under the "denial" clause. Such a task is not an easy one, given the difficulty in reconciling this ground for the Peacock decision with the rationale of Rachel in allowing removal. As could be expected, there was considerable controversy in the lower federal courts in the ensuing years over the proper line to be drawn between applicability of the two decisions.

The controversy was over which of the two factors relied on to distinguish Peacock from Rachel was to take precedence. The issue becomes important in cases in which only one of the two distinguishing factors is present. Such a situation would arise in a case in which defendants seek removal on grounds that the prosecution violates their immunity under the 1964

73. 399 F.2d at 522.
74. 384 U.S. at 827 n.25.
75. See text accompanying notes 94-101 infra.
Civil Rights Act, but the state charge is for purported illegal conduct other than that protected by the statute. For example, suppose individuals attempting to exercise their rights under the 1964 Civil Rights Act are arrested, not for trespass after refusing to leave when asked, but for disorderly conduct. Just as in Peacock, where there was no federal right to obstruct the streets or to bite a policeman, there is also no right to be disorderly. Of course, the charge may be false, merely an attempt to harass defendants for exercising their federal rights, but the same could also have been said of the charges in Peacock. The situation becomes even more complicated if one assumes that hours or even days after asserting their rights to be served at public accommodations, the individuals are arrested for robbery, or murder, and those individuals allege that the charges are merely a pretext for punishing them for the exercise of their rights under the Civil Rights Act of 1964. Would such a case be controlled by Rachel, because the federal right claimed by the defendants to be “denied” was the right under the 1964 Civil Rights Act, which immunizes them from prosecution, or would it be controlled by Peacock, because the state charges allege conduct not protected by a federal right?

One approach to these questions, the “scope of conduct” test, has been identified most closely with the Second and Third Circuits. Under this theory, Rachel is construed narrowly to apply only when the state has, in effect, substituted a crime for a right, or when, as one commentator has phrased it, “the conduct necessary for conviction under the state statute is specifically insulated by a federal equal rights law.” In Hill v. Pennsylvania, for example, the Third Circuit held:

The statutes relied upon in Rachel necessarily displaced any state laws which would proscribe the act of remaining in public accommodations when asked to leave on account of race by prohibiting attempted punishment for this act. However, when statutes, such as those relied upon in Peacock, grant one a right not to be intimidated for efforts to accomplish a particular goal or while asserting a specific right, we cannot ascribe to Congress an intent to displace state laws which regulate one's conduct while attempting to exercise the right unless, of course, the federal right permits specific acts which are proscribed by state law, or the state law, in effect, forecloses a reasonable possibility of en-

77. See text accompanying note 62 supra.
78. These questions are raised and considered in detail in Note, Civil Rights Removal After Rachel and Peacock: A Limited Federal Remedy, 121 U. Pa. L. Rev. 351 (1972).
79. The approach was given this label by a dissenter to its application. Perkins v. Mississippi, 455 F.2d 7, 29-30 (5th Cir. 1972) (Brown, C.J., dissenting).
80. Note, supra note 78, at 366.
The court construed *Peacock* as holding that specious arrests on false charges "would not provide a basis to predict that the claimed right would inevitably be denied in a state court." Ș83

The Second Circuit adopted a similar position in *New York v. Davis*, Ș84 as did the Fourth Circuit in *Frinks v. North Carolina*. Ș85 *Frinks* illustrates that, under the "scope of conduct" approach, the mere fact that the public accommodations provisions of the 1964 Civil Rights Act are asserted as a basis for removal will not bring the case within *Rachel*. Petitioners in *Frinks* had been charged with engaging in a riot and inciting to riot. They claimed that they had been engaged only in legitimate and peaceful civil rights marches and boycotts and were being prosecuted for having exercised their federal rights, in particular those guaranteed by the 1964 Civil Rights Act. The Fourth Circuit denied removal, distinguishing the charge of inciting to riot from the trespass charge in *Rachel*, Ș86 and concluding that "[t]he 1964 Civil Rights Act does not in any sense void the anti-riot laws of North Carolina." Ș87

The Fifth Circuit has traditionally taken a broader view of *Rachel*, as illustrated by its decision in *Achtenberg v. Mississippi*. Ș88 The petitions for removal in that case asserted that the "charges of vagrancy were based exclusively on attempts by the appellants to exercise rights guaranteed them under the 1964 Civil Rights Act." Ș89 The court concluded that "[t]he utterly

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82. 439 F.2d at 1021.
83. *Id*.
85. *Frinks* illustrates that, under the "scope of conduct" approach, the mere fact that the public accommodations provisions of the 1964 Civil Rights Act are asserted as a basis for removal will not bring the case within *Rachel*. Petitioners in *Frinks* had been charged with engaging in a riot and inciting to riot. They claimed that they had been engaged only in legitimate and peaceful civil rights marches and boycotts and were being prosecuted for having exercised their federal rights, in particular those guaranteed by the 1964 Civil Rights Act. The Fourth Circuit denied removal, distinguishing the charge of inciting to riot from the trespass charge in *Rachel*, Ș86 and concluding that "[t]he 1964 Civil Rights Act does not in any sense void the anti-riot laws of North Carolina." Ș87

86. In *Frinks*, the court reasoned that
88. 468 F.2d at 643.
89. *Id* at 642-43.
90. 393 F.2d 46 (5th Cir. 1968).
91. *Id* at 469.
baselessness of any conceivable contention that the vagrancy statutes prohibited any conduct in which these persons were engaged, merely buttresses the undisputed evidence . . . that these protected acts constituted the conduct for which they were then and there being arrested."90 Since the charges in Achtenberg, unlike those in Rachel, were not on their face for conduct protected by federal law, the "scope of conduct" approach would seem to have dictated the denial of removal.91 The Fifth Circuit—unlike other circuits92—relied on whether the petitioner was prosecuted for the exercise of federal rights immune from prosecution, not on "the characterization given to the conduct in question by a state prosecutor."93

Both the language and thrust of Peacock seem to support the narrower construction given the "denial" clause by the Second, Third, and Fourth Circuits,94 though such a construction

90. Id. at 474. See also City of Baton Rouge v. Douglas, 446 F.2d 874 (5th Cir. 1971); Walker v. Georgia, 417 F.2d 1 (5th Cir. 1969); Whatley v. City of Vidalia, 399 F.2d 521 (5th Cir. 1969).

91. Judge Godbold concurred in part and dissented in part in Achtenberg. He concurred as to three petitioners arrested for vagrancy while sitting in the Hattiesburg, Mississippi, public library. As to those individuals, he reasoned,

The use of the label "vagrancy" in the charges against them instead of the label "trespass" does not require a result different from Rachel. The inquiry is to the scope and character of the conduct engaged in by the accused, not to categorizations, accurate or inaccurate, given to that conduct in the making of criminal charges.

393 F.2d at 476.

However, Judge Godbold believed that Peacock controlled a fourth petitioner, who was arrested for vagrancy after she had left both the public library and a public lunch counter. "There is," he said, "no federal right to be a vagrant or a federal immunity from groundless arrest on a vagrancy charge." Id. But the same could, of course, have been said of the other petitioners, who had also been charged with vagrancy. In any event, the formalism of Judge Godbold's suggested distinction—between arrests made at the time the federal rights were asserted and those made shortly after their exercise—renders the distinction unhelpful.

92. See text accompanying notes 79-87 supra. The Second Circuit, in New York v. Davis, 411 F.2d 750 (2d Cir.), cert. denied, 396 U.S. 855 (1969), left open in a footnote the question "whether, despite what seems to be the contrary thrust of Peacock, a prosecution may be removable under § 1443(1) if the defendant claims he was engaged in conduct so closely related to that protected by the federal equal rights statute that the criminal charges are only 'convenient tags.'" 411 F.2d at 754 n.4 (citing Achtenberg v. Mississippi, 393 F.2d 468, 475 (5th Cir. 1968), in which the court referred to a criminal statute as a "convenient tag").

93: Walker v. Georgia, 417 F.2d 1, 5 (5th Cir. 1969).

94. The Court stated in Peacock:

The motives of the officers bringing the charges may be corrupt, but that does not show that the state trial court will find the defendant guilty if he is innocent, or that in any other manner the defendant will be "denied or cannot enforce in the courts" of the State any right under a federal law providing for equal civil rights.
renders *Rachel* all but useless. Under the "scope of conduct" approach, all that local authorities acting in bad faith need do to avoid removal is to charge the defendant with an act not protected by federal law, even though that charge is false and merely a camouflage for the authorities' real motive, which is to punish the defendant for exercising his federally protected rights. To ensure the avoidance of federal removal, the authorities would be advised to bring the false charge at a time shortly after the defendant has exercised his federal right.95

Although the language in *Rachel* seems to support the narrow "scope of conduct" approach to the distinction between *Rachel* and *Peacock*, the reasons thought to justify it are unpersuasive.96 In *Frinks*, the Fourth Circuit emphasized in support of this approach that "the facts are not ascertainable without a hearing—either in a federal or state court,"97 and that *Peacock* had been designed to avoid such an inquiry. While the court acknowledged that a hearing would have to be held under *Rachel*, such a hearing "was justified . . . by the great probability that a federal right would be denied if the prosecution were not removed,"98 a probability not present when the prosecution was for inciting a riot, rather than for trespass. This asserted distinction is difficult to comprehend. There appears to be neither a statistical nor an intuitive basis for the court's assertion "that there is a far greater probability that a trespass warrant will be flawed by a policy of invidious discrimination than that a riot warrant will be similarly invalidated."99

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95. For an articulate attack on a narrow construction of *Rachel* and a broad reading of *Peacock*, see Chief Judge Brown's dissent in Perkins v. Mississippi, 455 F.2d 7, 11 (5th Cir. 1972).

Note, however, that the dangers described in text are present, even under a broader reading of *Rachel*. While courts adopting such an approach are more willing to attempt to ascertain the true motive for the prosecution, regardless of the label used, their factual findings may nevertheless be influenced by a temporal or geographical distance between the protected conduct and the prosecution. *See* Perkins v. Mississippi, 455 F.2d 7, 11 (5th Cir. 1972) ("It is important, in our view, that the disturbance at the jail was neither geographically nor periodically incidental to the marches . . . .") Thus, maliciously motivated local officials could, through fairly elaborate planning, circumvent even a broader construction of *Rachel*.

96. This is not to suggest that it was not the distinction intended by the Supreme Court. In fact, examination of the Court's opinion in *Peacock* tends to demonstrate that, despite its illogical foundation, the "scope of conduct" analysis was the one intended by the Court. *See* text accompanying notes 105-109 infra.

97. 468 F.2d at 642.

98. Id.

99. Id. at 643.
It is true, of course, that "the riot warrant will be valid if violence (the essential element) occurred, whereas the trespass warrant may be void even though presence over the protest of the owner (the essential element) is admitted."\textsuperscript{100} But this in no way requires the conclusion that the former charge is less likely to be false or the product of racial prejudice. Moreover, while the factual inquiry into the validity of the charge might, on occasion, be less intricate when the charge is for trespass, this makes even more questionable the \textit{Rachel} Court's decision to withdraw this less involved factual inquiry from the state courts.\textsuperscript{101}

\section*{IV. A REVISED CONSTRUCTION OF THE "DENIAL" CLAUSE}

Although the arguments against the "scope of conduct" theory effectively demonstrate the logical fallacies of the distinction drawn between \textit{Rachel} and \textit{Peacock}, they are largely beside the point. Under section 1443(1), the issue is not whether the charges are false or have been brought in bad faith. Rather, the inquiry must be directed to whether or not an individual's equal federal rights will be denied "in the courts of [a] State."\textsuperscript{102} It is logically irrelevant to that inquiry whether the prosecution has been brought in bad faith. If the state courts are as capable and willing as their federal counterparts to enforce federal rights, they will presumably dispose of the

\begin{itemize}
\item \textsuperscript{100} \textit{Id.}
\item \textsuperscript{101} The Court's most recent statement on the scope of \textit{Peacock} came in \textit{Johnson v. Mississippi}, 421 U.S. 213 (1975). But while that decision reaffirmed the narrow construction given the civil rights removal statute in \textit{Peacock}, \textit{id.} at 227-28, it has no relevance to the controversy over the line of demarcation between \textit{Peacock} and \textit{Rachel}, since the civil right relied on in \textit{Johnson} did not derive from the public accommodations provision of the 1964 Civil Rights Act or from any other statute deemed to immunize defendants from the very act of prosecution.
\item \textsuperscript{102} 28 U.S.C. § 1443(1) (1976). Justice Douglas, dissenting in \textit{Peacock}, argued that the words "who is denied" and "cannot enforce" in the removal statute must be distinguished. He would read the words "in the Courts of such State" as modifying only the "cannot enforce" language. The result is that removal would be allowed if a state defendant had been "denied" his rights by any state official, not just by the state courts. 384 U.S. at 843-44 (Douglas, J., dissenting). Thus, a right may be "denied" by the state "at any time—before, as well as during, a trial." \textit{id.} at 844. Removal would be allowed under his analysis "when 'disorderly conduct' statutes, 'breach of the peace' ordinances, and the like are used as the instrument to suppress [a defendant's] promotion of civil rights." \textit{id.} at 842. But while Justice Douglas believed "that this reading of the provisions is more in keeping with the spirit of 1866," \textit{id.} at 844, he cites no legislative history to support his seemingly artificial separation of the "is denied" and "cannot enforce" language of the removal statute.
\end{itemize}
false prosecution, as would the federal court.\textsuperscript{103} The most serious difficulty with Peacock, then, is not that it permits prosecutors easily to avoid Rachel—though it certainly does that. The crucial problem is the continued adherence to the same mistaken assumption made in Rives and Powers—in the absence of an unconstitutional state statute, state courts will necessarily adhere to federal substantive and procedural standards. A more appropriate construction of the "denial" clause would dictate that removal be allowed when a state defendant is asserting a right under a law providing for equal rights,\textsuperscript{104} and he can establish that, either because of the procedures employed in the court or because of applicable substantive holdings in the state court system, he will be denied that right in the state proceeding.

It is true, of course, that the Rachel-Peacock and Strauder-Rives distinctions have the effect—admittedly intended by the Supreme Court—of substantially limiting the number of successful civil rights removal petitions. This fact alone, however, cannot justify the distinctions, even if one were to accept the idea that such a limitation is advisable. A rule allowing removal only by those defendants with red hair would have the same effect, yet no one would countenance such an irrational line of demarcation. It remains to be seen whether the distinctions drawn between Rachel and Peacock on the one hand, and Strauder and Rives on the other, have much more relevance to either the language or policies of the removal statute.

In Peacock, petitioners argued that the state courts, as well as local law enforcement officials, "were prejudiced against them because of their race or their association with Negroes, and because of the commitment of the courts and officers to the State's declared policy of racial segregation."\textsuperscript{105} They also claimed that

\begin{quote}
the trial would take place in a segregated courtroom, that Negro witnesses and attorneys would be addressed by their first names, that Negroes would be excluded from the juries, and that the judges and prosecutors who would participate in the trial had gained office at elections in which Negro voters were excluded.\textsuperscript{106}
\end{quote}

If these allegations were true, it is difficult to believe that peti-

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\textsuperscript{103} This point is similar to the criticism directed at the logic behind a "bad faith" prosecution exception to the Younger doctrine. See Redish, The Doctrine of Younger v. Harris: Deference in Search of a Rationale, 63 CORNELL L. REV. 463, 473-74 (1978).
\textsuperscript{104} For a discussion of the meaning of this phrase, see text accompanying notes 164-176 infra.
\textsuperscript{105} 384 U.S. at 813 n.6.
\textsuperscript{106} Id.
\end{flushright}
tioners would have been able to enforce their rights in the state courts.

The Court in Peacock construed the "denial" clause narrowly, because it feared that any broader reading of the civil rights removal statute might seriously disrupt the state judicial process:

> [E]very criminal case in every court of every State—on any charge from a five-dollar misdemeanor to first-degree murder—would be removable to a federal court upon a petition alleging (1) that the defendant was being prosecuted because of his race and that he was completely innocent of the charge brought against him, or (2) that he would be unable to obtain a fair trial in the state court.107

"The civil rights removal statute," said the Court, "does not require and does not permit the judges of the federal courts to put their brethren of the state judiciary on trial,"108 despite the fact that, as noted previously, by allowing removal in both Strauder and Rives the Court necessarily presumed that the state judiciary would be unwilling or unable to fulfill its duty to enforce federal law.109

But the Court's concerns cannot be summarily dismissed. If the Court had rejected the limits imposed by the Rives-Powers line of cases, the results would have been: (1) that federal judges would be forced to sit in judgment on the good faith of their state counterparts; and (2) that state defendants could seriously disrupt the state judicial system simply by removing, asserting that their rights could not be enforced in state court. While in many of the cases the federal courts would ultimately remand after determining that the contentions were baseless, the disruptive delay in state prosecutions might be significant.

Perhaps the easier of the two arguments to deal with is the first. The simple answer to the contention that a broader reading of section 1443(1) requires the federal courts to hold their state brethren up to scrutiny is that the statute's language dictates that such an inquiry be made. Removal is to be allowed if a defendant "is denied or cannot enforce" his federal rights in the state court. This language seems to dictate that the federal court inquire whether the state court will "deny" defendant that right.110 If its procedures are improper or discriminatory,

107. Id. at 832 (footnote omitted).
108. Id. at 828.
109. But see text accompanying notes 34-37 supra; text following note 59 supra.
110. The Court's argument that removal need not be granted because of the availability of ultimate review in the Supreme Court, 384 U.S. at 828-29, is not dispositive, since by its terms, section 1443(1) makes clear that, at least under certain circumstances, Congress did not believe that ultimate Supreme Court
or its view of the substantive law inconsistent with federal standards, the state court will "deny" defendant his federal right. That the Court would not allow removal under such extreme circumstances as those in *Rives* and *Powers* demonstrates the impropriety of the Court's current construction of the "denial" clause. If the Court is not to abrogate congressional will by effectively rendering useless a federal statute, the only alternative is to make a case-by-case inquiry into whether or not a particular defendant will be denied his rights in the state court.112

There is, in any event, an air of "Catch 22" about the argument that the examination of state trial procedures in a case-by-case fashion unduly increases federalistic tension. Jurists who have opposed the use of federal injunctions against state prosecutions have done so largely on the basis of the historic fungibility of state and federal courts. Justice Harlan, for example, dissenting in *Dombrowski v. Pfister*, rejected what he considered to be the majority's "unarticulated assumption that state courts will not be as prone as federal courts to vindicate constitutional rights promptly and effectively." He argued that "[s]uch an assumption should not be indulged in the absence of a showing that such is apt to be so in a given case."114

Though Justice Harlan's statement was made in dissent in *Dombrowski*, his view has triumphed in a series of decisions, beginning with *Younger v. Harris*, which severely limit the power of the federal courts to enjoin state prosecutions.

The "denial" clause of the civil rights removal statute seems to fit well with the traditional concept of the "fungibil-
ity" of state and federal courts as enforcers of federal rights. Unlike commentators who urge a sweeping federal usurpation of state court power to adjudicate federal civil rights,116 the drafters of the statute seemed to proceed under the assumption that state courts are, on the whole, fully capable of vindicating federal rights. Only in those instances in which it can concretely be shown that state courts, for whatever reason, will not be able to enforce certain federal rights does the statute direct the federal court to intervene. The statute, then, does not engage in the assumption condemned by Justice Harlan. On the contrary, the statute is fully compatible with his rejection of the assumption that the state court adjudication will be inadequate, in the words of Justice Harlan, "in the absence of a showing that such is apt to be so in a given case."117 Yet those who oppose a case-by-case application of the "denial" clause will not even allow a state defendant to attempt to make such a showing "in a given case." The case-by-case scrutiny of the "denial" clause, far from increasing federalistic tensions, will likely reduce such tensions in most cases by enabling the federal courts to vindicate the legitimacy of state court competence and procedures. In the comparatively rare instance in which the case-by-case approach results in the usurping of state court jurisdiction, such vindication would be unwarranted in any event.

The fear of a case-by-case examination of state court action is somewhat puzzling, in light of the long-standing practice of the federal courts to review the decisions and rulings of state courts in habeas corpus proceedings.118 While the Supreme Court has in recent years limited the availability of this remedy in certain instances,119 it has also significantly expanded the scrutiny that federal courts give to state court findings in habeas proceedings. Most recently, in Jackson v. Virginia,120 the Court stated that in reviewing a state conviction on habeas, a federal court could determine whether a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."121 Certainly this question is one that state courts are traditionally called upon to answer. Yet, because

116. See, e.g., Amsterdam, supra note 2. See text accompanying notes 127-132 infra.
117. 380 U.S. at 499 (Harlan, J., dissenting).
120. 99 S. Ct. 2781 (1979).
121. Id. at 2789.
due process rights are bound up in making that decision, the federal courts in habeas proceedings are able to review this state court determination.

There are, of course, a number of differences between the review exercised on habeas corpus on the one hand and a case-by-case application of the civil rights removal statute on the other. Habeas corpus occurs after completion of the proceedings in the state courts, while civil rights removal will be allowed only prior to the conduct of state judicial proceedings. Because of this distinction, civil rights removal causes potentially greater disruption to the state judicial process than the disruption attendant to habeas proceedings. The removal statute by its terms, however, contemplates a certain amount of disruption. By explicitly calling for pretrial removal, the civil rights removal statute represents a congressional determination that those denied specified civil rights in state court need not suffer the physical, financial, and emotional expense of a state trial. While such a value judgment was not the only conceivable one Congress could have made, the fact remains that it is the one Congress did make.122

The other problem caused by pretrial removal, a problem not present in the postjudgment habeas corpus context, is the difficulty facing the federal court in predicting whether or not the defendant will be unable to enforce his rights in state court. This problem, however, can be alleviated by placing a heavy burden on the defendant to demonstrate that state practices will prevent him from effectively enforcing his rights in state courts.123 To meet this burden, petitioner would be required to establish a historic pattern of denial in the particular state court system,124 by proving either well-established practice or the presence of traditionally followed court rules that prevent an individual from enforcing his rights.125

Even if it were conceded that such a case-by-case analysis

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122. As will be seen in subsequent discussion, there are ways to minimize the disruptive effect caused by increased resort to the civil rights removal remedy. See text accompanying notes 153-156 infra.
123. As Justice Douglas argued, dissenting in *Peacock*: "A district judge could not lightly assume that the state court would shirk its responsibilities, and should remand the case to the state court unless it appeared by clear and convincing evidence that the allegations of an inability to enforce equal civil rights were true," 384 U.S. at 852 (Douglas, J., dissenting).
124. In making the inquiry into whether an individual will be denied his rights in state court, it would probably be inappropriate to consider the likelihood that a particular state judge would act improperly, unless the state appellate courts have in the past refused to correct that judge's improper practices.
125. Under this approach, if petitioners in *Peacock* had been able to prove
might produce a certain degree of friction within the federal system, it would not follow that the approach should be rejected. By recognizing even the possibility that federal rights could not be enforced in state court, the drafters of section 1443(1) and its predecessors apparently concluded that the creation of such friction is a necessary by-product of the statute. 126

In his seminal work on civil rights removal, 127 Professor Amsterdam advocates a construction of the statute in certain ways broader and in other ways narrower than the one advocated here. He would allow removal when a state defendant makes "a colorable showing that the conduct for which he is prosecuted was conduct protected by the federal constitutional guarantees of civil rights." 128 In such instances, "the appropriate federal district court [is] to entertain and dispose . . . of the whole prosecution . . . in advance of state trial—and this without regard to whether [petitioner] also claims that the state courts are hostile, biased, conspiratorial, or incompetent." 129 However, where the asserted basis for removal is not constitutional protection of the conduct that is the subject of prosecution but rather only a constitutional infirmity in the state's procedures, Professor Amsterdam would reluctance 130 allow removal only when, as under the Strauder-Rives doctrine, a state statute or constitutional provision on its face violates a federal constitutional guarantee. 131 Professor Amsterdam is thus never willing to trust to state courts the task of initially in-

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126. In any event, the blanket insult to state judicial systems that underlies the allowance of removal in both Strauder and Rachel cannot help but cause federal-state friction. Strauder implicitly assumes that all state courts will be unable or unwilling to obey the command of the supremacy clause to invalidate state laws in conflict with federal statutory or constitutional provisions, and Rachel implicitly assumes that all state courts will be unable or unwilling to recognize the impropriety of certain prosecutions as quickly as would a federal court. Recall that removal will be allowed under Rachel only if, after a factual hearing, it is determined that the sole basis for prosecution was the defendant's exercise of his federal right to be served at public accommodations. See text accompanying notes 50-59 supra. But the Supreme Court allowed the federal court to make this factual inquiry without any consideration of whether or not the state court could have made the same inquiry.

127. Amsterdam, supra note 2.
128. Id. at 804.
129. Id.
130. Id. at 912 ("I am far from satisfied with that result.").
131. Id. at 869, 911-12. Professor Amsterdam does recognize that "Strauder might perhaps be extended to cases in which the highest court of a State has previously rejected federal procedural claims identical to petitioner's, and no intervening decisions of that court or of the federal courts suggest that the previous ruling will be reconsidered." Id. at 912. In a certain sense, this extension
validating state prosecutions that attack constitutionally protected conduct, but he is always willing to give them this opportunity—in the first instance, at least when the federal challenge is merely to one of their own judicially established procedures.

Professor Amsterdam justifies his distinction not on the basis of congressional intent in drafting the removal statute but rather on pragmatic grounds. He rejects a case-by-case inquiry because the investigation necessary in each instance would be both inconvenient for and embarrassing to the state courts. But removal should automatically be allowed if and only if a colorable showing is made of constitutional protection of the conduct for which prosecution has been brought, he argues, because such instances are relatively rare and in any event there is greater need of early federal intervention in such cases.

For several reasons, the construction suggested by Professor Amsterdam must be rejected. The first obstacle to his construction is the language of the removal statute itself. By its terms, the “denial” clause allows removal only to those who are “denied or cannot enforce [specified federal rights] in the courts of” a state. Though state judges may on occasion lack the experience, independence, or competence of most federal judges, they continue to provide, under the supremacy clause,

at least begins to approach the case-by-case analysis, combined with the heavy burden of proof imposed on petitioner, urged here.

132. Professor Amsterdam implicitly recognizes, of course, the availability of review by the United States Supreme Court on direct review and by the lower federal courts on habeas corpus. See id. at 861.

133. In the words of one commentator, “the legislative history is sparse and ambiguous as to the intended scope of this removal remedy.” Note, supra note 19, at 171. Professor Amsterdam himself seems to acknowledge the unhelpful nature of the legislative history in providing a basis for any particular construction of the statute. Amsterdam, supra note 2, at 814. Certain evidence from the legislative history may, in fact, undermine Professor Amsterdam’s construction. Senator Trumbull, chief drafter of the Act of 1866, stated in his response to President Johnson’s veto:

Now, [a person] is not necessarily discriminated against, because there may be a custom in the community discriminating against him, nor because a Legislature may have passed a statute discriminating against him; that statute is of no validity if it comes in conflict with a statute of the United States, and it is not to be presumed that any judge of a State court would hold that a statute of a State discriminating against a person on account of color was valid when there was a statute of the United States with which it was in direct conflict . . . .

Cong. Globe, 39th Cong., 1st Sess. 1759 (1866) (emphasis added). It thus does not appear that Senator Trumbull, at least, questioned the ability of state courts in all cases to enforce federal rights.

134. Amsterdam, supra note 2, at 858.

135. Id. at 861.

at least a technically adequate forum for the enforcement of federal rights.\textsuperscript{137} It therefore cannot be said—at least without more concrete legislative history than seems to be available\textsuperscript{138}—that Congress believed that a defendant would be inherently unable to enforce his substantive civil rights in state court. If Congress had intended the result urged by Professor Amsterdam, it could easily have enacted a statute so stating. It did not, and it is difficult to distort its language to achieve that result.

It is equally difficult to read into the statutory language the dichotomy suggested by Professor Amsterdam between prosecutions of constitutionally protected conduct and constitutional infirmities in state procedures. The statute provides simply that removal is authorized when a defendant is denied in state court "a right under any law providing for the equal civil rights of citizens of the United States."\textsuperscript{139} There appears to be nothing in the legislative history—and there certainly is nothing in the statutory language—to justify a distinction between procedural and substantive rights.

Similarly unpersuasive are the pragmatic justifications cited by Professor Amsterdam to support his overly broad reading of the removal statute for substantive constitutional violations and his unduly narrow reading for challenges to state procedures. To justify a blanket allowance of removal when a colorable showing is made that the state prosecution is for constitutionally protected conduct, he argued that a case-by-case examination of the state court's ability to enforce federal guarantees would cause significant federal-state friction.\textsuperscript{140} Yet it certainly does not seem solicitous of state sensibilities to make the implicit assumption that a state court will in every case be an inadequate protector of substantive constitutional rights.\textsuperscript{141}

\begin{footnotesize}
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\item See, e.g., Testa v. Katt, 330 U.S. 386 (1947).
\item See note 133 supra.
\item Amsterdam, supra note 2, at 858.
\item Professor Amsterdam argues that "[n]ot all intrusions are equally abrasive." Id. at 855. He points out that little federal-state friction is caused by the availability of diversity and federal question jurisdictions, despite the fact that "the assumptions supporting these jurisdictions are a quite unpleasant reflection on the state judiciary." Id. The lack of friction results, he says, because such cases "are clearly, cleanly, and completely excluded from the state courts' ken." Id. But the exercise of these jurisdictions by the federal courts is very different from the exercise of civil rights removal jurisdiction. The availability of the federal courts as a forum for the adjudication of federal questions may merely reflect the conclusion that a litigant should be given the option of having his case heard in the forum most familiar with the relevant principles of law. It would not seem to insult the state judiciary to suggest that its primary
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Moreover, under Professor Amsterdam's construction, once a colorable showing is made that defendant's conduct is constitutionally protected, the entire prosecution is to be disposed of in the federal court. Even if the federal issue is ultimately decided against the removal petitioner, the federal court will thus usurp the state court's traditional function of finding facts and applying state law to vindicate the policies of the state's criminal statutes. This is a potential incursion into the state's legitimate province not present under the case-by-case analysis urged here.

An important pragmatic justification relied on by Professor Amsterdam to support his extremely narrow reading of the removal statute as applied to alleged procedural infirmities is the sheer number of removal petitions a broader reading would allow. But Professor Amsterdam's fear must be viewed in light of his very expansive reading of the nature of the federal right that would justify removal. Though the statutory language speaks only of "a right under any law providing for the equal civil rights of citizens of the United States," Professor Amsterdam assumed "that the civil rights removal statute protects all civil rights guaranteed by the fourteenth amendment." If this were the accepted reading of the statute, the number of cases subject to removal under the case-by-case analysis would be truly significant. As Professor Amsterdam correctly pointed out, "[t]he register of federal procedural claims which might be isolated before trial—jury prejudice, denial of speedy trial, coerced confession, illegal search and seizure, deprivation of counsel at pretrial stages—has expanded considerably." As function is the adjudication of state, rather than federal law. By contrast, civil rights removal is to be permitted only when a petitioner "is denied or cannot enforce" his civil rights in state court. 28 U.S.C. § 1443(1) (1976). If the Supreme Court were to authorize removal in every case in which a substantive constitutional defense was raised, the Court would thus inescapably be saying, not merely that a federal forum may be preferable, but that in such situations the state courts are simply unable or unwilling to enforce federal rights.

Nor is the existence of diversity jurisdiction comparable to Professor Amsterdam's construction of the "denial" clause in its potential for causing federal-state friction. Whatever the origins of the diversity jurisdiction, its existence has been known from the nation's beginnings. Regardless of whether or not state judges were miffed at the time of the jurisdiction's creation, it is thus unlikely that its continued existence today can or will have such an effect. The same cannot be said, of course, of Professor Amsterdam's construction of the civil rights removal statute.

142. See text accompanying notes 128-129 supra.
143. See Amsterdam, supra note 2, at 912.
145. Amsterdam, supra note 2, at 863 (footnote omitted).
146. Id. at 912.
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will be seen in subsequent discussions, however, neither before nor after the publication of Professor Amsterdam’s article has the category of rights authorizing removal been so broadly construed. The Supreme Court reaffirmed in Rachel that it is only rights of racial equality to which the civil rights removal statute extends. While such a construction appears unduly begrudging in its limitation of the statute to rights of racial equality, the statutory language does seem limited to rights against discriminatory treatment. Thus the only state procedural infirmities that would trigger the need for a case-by-case analysis—at least when the conduct that forms the basis for the prosecution is not itself protected by a right included in the removal statute—are those claimed to discriminate improperly. This substantially reduces the number of instances in which removal may be successfully sought.

Professor Amsterdam’s construction, then, is rife with problems. But neither is the revised construction advocated in this Article free from difficulty. For any expansion of the “denial” clause would present at least some danger of increased interference with the operation of the state judiciary. The current interpretation of the “denial” clause makes clear to the overwhelming majority of state defendants that removal is unavailable. Unless the defendant has been immunized from prosecution by a federal statute or there exists an applicable unconstitutional state statute, a state court defendant may not rely on the “denial” clause to obtain removal. Under the revised construction urged here, a defense attorney may reasonably seek removal if he or she believes there is any possibility of establishing the inadequacy of state practices. It may subsequently be determined that the state practices are valid, but a defense attorney could well have concluded at the outset that there existed sufficient doubt to justify the attempt. Though the case will then be remanded, the removal process will have caused significant interference in the operation of the state judicial process. Nevertheless, it cannot be concluded with certainty that the altered construction of the “denial” clause will,

147. See text accompanying notes 164-176 infra.
148. 384 U.S. at 792. See text accompanying note 169 infra.
149. See text accompanying notes 171-176 infra.
150. When the basis for civil rights removal is not that state procedures are improperly discriminatory but that the conduct subject to prosecution is protected by a federal right of equality, it would presumably be necessary for the federal court to consider whether the state's procedures are so inadequate that the petitioner will be unable to enforce his federal right in the state court.
151. See text accompanying note 104 supra.
in fact, substantially increase the number of removal petitions, given the substantial burden the construction advocated in this Article would place upon the removing party to establish the existence of improper state practice. 152

If a substantial increase in the number of removal petitions does prove to be the result of the case-by-case analysis, it is possible to devise a method that will guarantee a state defendant access to federal review of his claim that he will be unable to enforce his equal rights in state court while, at the same time, avoiding substantial disruption of the state judicial process. Both goals could be substantially achieved through a combined use of a suit injunction and civil rights removal. 153 By this process, a state defendant would first be required to seek a preliminary injunction of his state prosecution, on the ground that he will be unable to enforce his federal equal rights in state court. If, and only if, the federal court grants the preliminary injunction would the defendant be allowed to invoke removal under section 1443(1). This procedure would likely reduce the number of frivolous or overzealous attempts to remove and thereby diminish the disruption of the state judicial process. Under the current scheme, when a defendant files a petition for removal, the proceedings in state court are required to stop automatically. 154 Though the federal court may con-

152. At least one commentator has questioned the conclusion that a danger to the state judicial process might result from broader use of civil rights removal:

Because the initiative in seeking removal lies with the defendant, the number of cases removed would largely depend on expectations that particular state courts will not dispense equal justice. A defendant will not incur the expense and delay of removing to federal court if he is confident of the fairness of the local court. Removal would be useful primarily in those states in which there is a problem of discrimination on the part of the police and the local courts.


153. In denying removal in Peacock, the Court noted that "there are many other remedies available in the federal courts to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they allege in their removal petitions," and cited in particular the possible availability of a suit injunction under Dombrowski v. Pfister, 380 U.S. 479 (1965). 384 U.S. at 829. While Dombrowski has been limited dramatically by the Court's decisions in Younger v. Harris, 401 U.S. 37 (1971), and its progeny, it is at least arguable that Dombrowski would still allow an injunction against the Peacock prosecutions. Younger recognized a limited vitality for Dombrowski-type injunctions when the state prosecution has been brought in bad faith. Id. at 47-49. The allegations in Peacock appear to meet these criteria.

154. Under 28 U.S.C. § 1446(e) (Supp. I 1977), when a petition for removal is filed in federal court, "the State court shall proceed no further unless and until the case is remanded."
clude, after a hearing, that removal is improper and that the case should therefore be remanded, the state proceeding may already have suffered significant disruption. If a state defendant is required first to obtain a federal injunction, the state proceedings will not be forced to cease until the federal court has made an initial determination of the probable merit of the state defendant's contentions. In this manner, clearly meritless removal petitions may be disposed of without causing significant and unnecessary interference in the state system.

There are a number of questions to which this suggested approach gives rise. The first—and most significant—is whether the federal judiciary may itself establish the prerequisite of preliminary injunctive relief, or whether such action must come from Congress. Although the federal removal statutes are currently quite clear that no injunctive relief is required for the cessation of state proceedings, an argument might be fashioned to support the judicial authority to interpose this procedural barrier. In a line of cases most closely as-

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155. It might be argued that insertion of an injunction requirement would not significantly reduce the disruption of the state judicial process because, even under the current framework, the state may seek an immediate remand. The injunction requirement, however, would alter the current situation in two important respects. First, it would shift the burden of seeking federal judicial assistance from the state to the removal petitioner. The "inertia" would be in favor of the case remaining in state court, and it is the petitioner who would have to seek out federal court aid to have the case removed to federal court, rather than the reverse. Secondly, under the current system, even if the state were to seek an immediate remand, there can be no assurance that the federal court will rule on that motion with alacrity. The state judicial process will therefore remain halted until the federal court rules on the remand. With the injunction requirement, the removal petitioner would seek either a temporary restraining order or a preliminary injunction, and if the state continues to proceed with the prosecution pending the federal court's ruling on the petitioner's motion, the federal court would be all but forced to issue a speedy ruling.

156. In ruling upon a motion for a temporary restraining order or a preliminary injunction, a federal court will usually be presented with a dilemma. On the one hand, the petitioner may persuasively argue that he should not be required at such an early stage to make a detailed showing of the invalidity of state practices; extensive discovery might be required before petitioner could conclusively establish the relevant supporting facts. On the other hand, the injunction requirement would have little value as a limit on overuse of the removal remedy if unsupported allegations concerning the unconstitutionality of state practices would supply a sufficient basis for the issuance of preliminary federal injunctive relief.

To resolve this dilemma, the federal court would presumably attempt to strike a middle ground. The petitioner would probably be required to present something more than mere conclusory assertions, such as supporting affidavits. However, the court would not require definitive proof before issuing preliminary injunctive relief.

associated with Younger v. Harris, the Supreme Court has recognized the power of the federal courts to interpose procedural barriers to the enforcement of otherwise unencumbered federal rights in the interest of comity within the federal system. Although, as I have noted in another article, the Younger doctrine goes too far in its efforts to avoid federal-state friction, the Court was quite probably correct in recognizing its broad authority in this area. The insertion of a preliminary injunction prerequisite to the use of the civil rights removal remedy could arguably be viewed as the exercise of the same inherent authority.

The primary difficulty with this argument is the fact that the injunction requirement does not merely procedurally limit an otherwise unencumbered statute; it directly contradicts the terms of 28 U.S.C. § 1446(e), which expressly provides that, upon filing of the removal petition and bond, "the State court shall proceed no further unless and until the case is remanded." It is therefore doubtful that a preliminary injunction prerequisite could be inserted without congressional action.

It may seem unlikely that Congress would take such action in the foreseeable future, but it should be recalled that the injunction prerequisite is recommended only if it is ultimately determined that the increase in the number of removal petitions under the revised construction urged here is of such a magnitude as to burden the federal courts significantly or to seriously disrupt the state judicial process. If these consequences did result, it is possible that Congress would consider amendment of the civil rights removal statute to avoid these dangers. The preliminary injunction prerequisite is suggested as a procedural means of accomplishing these goals without limiting the substantive reach of the removal statute.

159. See generally Redish, supra note 103; Whitten, Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion, 53 N.C. L. Rev. 591 (1975). This is referred to as a "procedural" barrier because, under the doctrine of Younger, the substantive right under section 1983 is not limited. Rather, the Court is merely limiting the procedural avenues open to the litigant to enforce that right by requiring that he raise his contentions in the state court proceeding.
160. Redish, supra note 103, at 488.
161. It might be thought that a judicially created preliminary injunction requirement would run afoul of the Younger doctrine, which prohibits federal courts under most circumstances from enjoining state prosecutions. But Younger should not be a problem, once it is recalled that the injunction requirement is suggested here as a substitute for an automatic cessation of state judicial proceedings.
It might be thought that the preliminary injunction prerequisite would not satisfactorily avoid the disruptive impact of a broadened reading of the civil rights removal statute, since the preliminary injunction prerequisite requires state prosecutors to wage a "two-front" war, by prosecuting defendants in state court while at the same time being called on to defend state practices in a federal court proceeding. But state prosecutors must defend every time a state defendant removes to federal court, no matter how frivolous the attempt. Furthermore, it is unlikely that state interests would be advanced if the prosecutor had to litigate only in the federal forum, since this would mean that the state judicial process would come to a grinding halt. Ultimately, the extra litigation burdens that may be imposed on state prosecutors are a relatively small price to pay to ensure the early protection of federal rights.

A final question is whether removal is even necessary if an injunction has been granted. It should be recalled, however, that under the revised interpretation of the "denial" clause suggested in this Article, removal may be allowed under certain circumstances, even if the prosecution is a perfectly appropriate one. For example, removal would be allowed if the state court procedures and practices are such that federal rights cannot be enforced there. The state court procedures, then, would be the subject of federal inquiry in the injunction proceeding. The issuance of a preliminary injunction in federal court would thus mean only that the state judicial procedures have been called into question. The actual substantive prosecution would still have to be adjudicated, after the case has been removed to federal court.

It should be emphasized that the approach described here is very different from accepted practice. The Rives-Powers line of decisions, in addition to Rachel and Peacock, represents firmly established federal law, not likely to be questioned in the near future. This Article's proposed alterations of that accepted practice are designed to provide an alternative if and when the Supreme Court reconsiders the scope of the "denial" clause.

V. A FINAL NOTE: THE DEFINITION OF LAWS PROVIDING FOR "EQUAL RIGHTS"

One continuing controversy over the meaning of both the

163. See text accompanying note 104 supra.
"denial" clause and other sections of the civil rights removal statute has concerned the proper definition to be given the phrase "law providing for . . . equal civil rights." The "denial" clause applies only when a state defendant cannot enforce "a right under any law providing for the equal civil rights of citizens of the United States." Thus, even in the limited circumstances under which civil rights removal has been authorized, removal can be obtained only if the federal right involved is a right of equality.

This reference to "equal rights" was not contained in section 3 of the Civil Rights Act of 1866. That Act provided for removal only when the specific rights of racial equality guaranteed in the Act itself were involved. It was not until the Revised Statutes of 1875 were enacted that the broader language concerning equal rights was added. Even this more expansive language has been narrowly interpreted, however. In *Rachel*, while recognizing that the "equal rights" language was not limited to protection of civil rights enacted prior to 1875, the Court stated: "On the basis of the historical material that is available, we conclude that the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality." Therefore, according to the Court, assertions of first amendment free speech and fourteenth amendment due process rights cannot trigger civil rights removal.

Though the explicit language of section 1443 would seem to support the Court's exclusion of free speech and due process rights from the statute's scope, the accuracy of the Court's limitation of civil rights removal to rights of racial equality is not as clear. While it is true that the original removal statute spoke solely in terms of racial equality, the statute's current

165. See Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27, quoted in text accompanying note 12 supra.
168. 384 U.S. at 789. It was on this basis that the Court in *Rachel* allowed removal under the Civil Rights Act of 1964.
169. Id. at 792.
170. Id. These rights do not fall within the terms of the civil rights removal statute, said the Court, "because the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that § 1443 demands." Id.
language contains no such limitation. Furthermore, the Court itself has recognized that the drafters of subsequent versions of the civil rights removal statute did not intend to limit the applicable substantive rights to preexisting ones: "Congress' choice of the open-ended phrase 'any law providing for . . . equal civil rights' was clearly appropriate to permit removal in cases involving 'a right under' both existing and future statutes that provided for equal rights."\textsuperscript{172} The Court continued, however: "In spite of the potential breadth of the phrase 'any law providing for . . . equal civil rights,' it seems clear that in enacting § 641 [of the Revised Statutes of 1875], Congress intended in that phrase only to include laws comparable in nature to the Civil Rights Act of 1866."\textsuperscript{173} However, the accuracy of the Court's interpretation of the drafters' intent to limit civil rights removal to rights protecting racial equality is open to question.\textsuperscript{174}

The Court has come a long way from its original assumption that the fourteenth amendment guarantee of equal protection was limited to racial equality.\textsuperscript{175} Since the language of section 1443 is not limited to racial equality, and the legislative history of the section's predecessors is unclear, perhaps a similar recognition of the expanding concept of equality should be imposed upon construction of the civil rights removal statute. Unless the Supreme Court reconsiders this further narrowing of the scope of section 1443, however, it appears that the lower courts will continue to reject attempts to invoke civil rights removal to protect federal rights guaranteeing nonracial forms of equality.\textsuperscript{176}

VI. CONCLUSION

Because of a narrow construction justified neither by statu-

\begin{footnotes}
\footnote{172. Georgia v. Rachel, 384 U.S. 780, 789 (1966).}
\footnote{173. \textit{Id.} at 789-90.}
\footnote{174. According to one commentator, the racial criterion \textcite{Rachel} is particularly suspect in view of the legislative history of the Civil Rights Acts of 1866 and 1870. While the principal rights provided with removal protection by these statutes are admittedly expressed in terms of racial equality, it is also true that one specifically defined right in the 1870 Act relating to the protection of aliens was not couched in terms of racial equality nor was a determination of racial discrimination requisite to its invocation. Note, \textit{supra} note 19, at 158-59 (footnote omitted).
\footnote{175. Compare the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) \textit{with} Frontiero v. Richardson, 411 U.S. 677 (1973).}
\footnote{176. See, \textit{e.g.}, Delavigne v. Delavigne, 530 F.2d 598 (4th Cir. 1976) (sex discrimination).}
\end{footnotes}
tory language, legislative history, nor the traditions of judicial federalism, the "denial" clause of the civil rights removal statute has atrophied to the point of virtual uselessness. The goal of this Article has been to redefine the terms of the statute in order to make possible a more rational interpretation of the statutory language that will revitalize civil rights removal as a mechanism for ensuring the vindication of federal rights through adoption of a case-by-case analysis of the adequacy of the state judicial process to protect those rights.

Although this revised interpretation may in certain ways increase tension between the federal and state courts, the statute by its very terms contemplates at least a certain degree of friction. The drafters apparently believed that such increased tension was justified by the need to avoid the undermining of specified federal rights by the state judiciary. In any event, whatever tensions might develop as a result of a more expansive construction of the removal statute can be reduced or wholly avoided in several ways. First, imposition of a heavy burden on the removal petitioner to establish the existence of improper state practices or procedures should deter many would-be removal petitioners, thereby avoiding undue and substantial federal disruption of the state judicial process. Second, if it were determined that this proposed revised construction caused a significant increase in the number of frivolous or overzealous removal petitions, insertion of a requirement of federal preliminary equitable relief prior to the cessation of the state proceeding could substantially reduce the disruptive effect of the removal device. While it is at best uncertain whether the judiciary could interpose such a requirement, the establishment by Congress of an injunction prerequisite would be an appropriate modification of the civil rights removal statute. If this were done, then the removal statute could, for the first time, perform a significant role in establishing a proper allocation of authority within the federal judicial system.