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CRIMINAL PROSECUTIONS AFFECTING FEDERALLY GUARANTEED CIVIL RIGHTS: FEDERAL REMOVAL AND HABEAS CORPUS JURISDICTION TO ABORT STATE COURT TRIAL *

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It is no hyperbole to say that the critical issues of human liberty in this country today are not issues of rights, but of remedies. The American citizen has had a right to a desegregated school since 1954 and to a desegregated jury since 1879, but schools and juries throughout vast areas of the country remain segregated. The American citizen has a right of free expression, but he may be arrested, jailed, fined under guise of bail and put to every risk and rancor of the criminal process if he expresses himself unpopularity. The "right" is there on paper; what is needed is the machinery to make the paper right a practical protection.††

* This Article grows out of my study of problems to which I was initially exposed in the preparation of a manual published by the NAACP Legal Defense and Education Fund for the use of civil rights lawyers. Much of the underlying research was done in that connection. I have also represented and now represent in various pending litigation state criminal defendants, prosecuted on charges growing out of civil rights activity, whose cases raise some of the issues treated in general form in the Article.

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†† Brief for NAACP Legal Defense and Education Fund as Amicus Curiae, pp. 17-18, *Dombrowski v. Pfister*, 377 U.S. 976 (1964) (No. 941, 1963 Term; renumbered No. 52, 1964 Term) (noting probable jurisdiction).

I. INTRODUCTION: THE PROBLEM AND THE THESIS

A. The Problem

Summer 1964, or 1965, or 1966. In a Mississippi town, population 10,000, several hundred locally resident Negroes meet at 9:00 a.m. in a Negro church. They will pray; a voter registration worker and several local Negro leaders will speak to them; then groups of them will walk to the county courthouse to attempt to register to vote. Negroes going alone to the registrar's office have been beaten by white citizens on the streets of this town. Negroes who have reached the office have been denied registration for failure to satisfy the registrar that they are able to give a reasonable interpretation of his chosen section of the Mississippi constitution, a prerequisite to registration whose federal constitutionality has been challenged by the United States in a civil action presently pending in the Supreme Court, on appeal from a ruling of a three-judge federal district court which sustained the provision.¹ The United States has also sued the county registrar for an injunction against discriminating racially in the administration of Mississippi's registration provisions, asking the federal district court to infer discrimination from the fact that in a county having 7,000 whites and 7,000 Negroes of voting age more than 5,000 whites but less than a dozen Negroes are registered.² This suit is dragging through the district court with all deliberate procrastination,³ but the civil rights organizations have pressed a voter registration drive in the county and more than forty Negroes in the church this morning will attempt to register. They will walk to the courthouse in small groups, each group composed of ten registration applicants and a half-dozen Negro minors bearing placards protesting discrimination in registration. The minors plan to remain on the

¹ Miss. CONST. art. 12, § 244 (challenged and sustained in *United States v. Mississippi*, 229 F. Supp. 925 (S.D. Miss. 1964) (three judge district court), *rev'd without reaching the constitutional issue*, 33 U.S.L. WEEK 4258 (U.S. March 8, 1965). Recitation of the pendency of such a litigation in connection with my hypothetical case for 1965 and thereafter is not an anachronism. Experience suggests it is not unlikely, in the event of invalidation of present § 244, that constitutional amendments will bring new problems to the courts. See *Lane v. Wilson*, 307 U.S. 268 (1939); *United States v. Louisiana*, 225 F. Supp. 353 (E.D. La. 1963) (three judge district court), *aff'd*, 33 U.S.L. WEEK 4262 (U.S. March 8, 1965); *cf.* *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.) (three judge district court), *aff'd mem.*, 336 U.S. 933 (1949). [The Supreme Court's decisions in the *Mississippi* and *Louisiana* litigations, *supra*, were handed down after this Article was set in type. Although the Court did not reach the constitutional merits in *Mississippi*, its decision striking down a "constitutional interpretation" requirement in *Louisiana* appears conclusive of the unconstitutionality of Miss. CONST. art. 12, § 244.]

² See, e.g., *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964); *United States v. Mississippi*, 339 F.2d 679 (5th Cir. 1964).

³ See Comment, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90 (1963).

sidewalk outside the courthouse while the applicants enter the registrar's office.

Lining the street outside the church are more than a hundred armed blue-helmeted law enforcement officers. A first group of less than twenty Negroes leaves the church and proceeds double-file along the sidewalk toward the courthouse. The group occupies half the width of the sidewalk and goes in silence. A few of the minors hold up their placards. The police move in.

A local police officer tells the Negroes that they are violating an ordinance prohibiting parading without a license. He orders them to go back where they came from. A member of the group says that they are not parading, that they are going to register to vote. The minors fold their placards. The Negro who has spoken asks the officer if they may continue to the courthouse in groups of three or four, provided that the signs are put away. The officer replies that they may not, that more than one nigger in this town is a parade. A number of Negroes come out of the church into the churchyard to watch what is going to happen in the street. The Negroes outside are outnumbered better than two to one by the police. The leader of the Negro group on the sidewalk asks again whether they may go in small groups to register. The officer says no. Police advance on the Negroes in the churchyard.

The Negro leader on the sidewalk says then they will have to go together. A few minors lift their placards. The police officer waves an arm, says they are under arrest, and a police-driven open truck topped with a chicken-wire pen pulls to the curb. The Negroes on the sidewalk are jostled into the truck; Negroes in the churchyard murmur; police wade into the churchyard swinging billy clubs; another truck pulls up; twenty Negroes are dragged out of the churchyard by police and thrown into it. At the jail the first group of Negroes is charged with (1) parading without a license under a local ordinance which is clearly unconstitutional on its face by force of the first and fourteenth amendments;⁴ (2) willfully obstructing a public sidewalk by impeding passage thereon under a state statute valid on its face but whose

⁴ Lovell v. City of Griffin, 303 U.S. 444 (1938); Hague v. CIO, 307 U.S. 496 (1939); Schneider v. State, 308 U.S. 147 (1939) (*Schneider's case*); Cantwell v. Connecticut, 310 U.S. 296 (1940); Largent v. Texas, 318 U.S. 418 (1943); Marsh v. Alabama, 326 U.S. 501 (1946); Tucker v. Texas, 326 U.S. 517 (1946); Saia v. New York, 334 U.S. 558 (1948); Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951); Staub v. City of Baxley, 355 U.S. 313 (1958); Jones v. Opelika, 316 U.S. 584, 600-03 (Stone, C.J., dissenting), 611, 615 n.5 (Murphy, J., dissenting) (1942), *vacated and previous dissenting opinions adopted per curiam*, 319 U.S. 103 (1943) (*Jones' case*). The ordinance authorizes the licenser to consider the "character" of applicants and the "general order and welfare of the community" and thus is well without the scope of *Cox v. New Hampshire*, 312 U.S. 569 (1941), and *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

application to the facts described above (provided that the court which tries the charge finds those to be the facts) is impermissible under the same amendments;⁵ and (3) resisting arrest, a charge which falls on federal grounds together with the preceding two charges.⁶ Conviction would also be federally precluded because these charges have the design and effect of enforcing the state officers' policy of racial discrimination in access to the public street, thereby violating the equal protection clause of the fourteenth amendment,⁷ of racial disenfranchisement violating the fifteenth,⁸ and of impeding the federal privilege of voting in national elections.⁹ (To sustain these defenses, of course, a trier of fact would have to find the facts as they were.) The Negroes arrested in the churchyard are charged with (1) creating a disturbance in a public place by loud and offensive talk, an accusation which the State cannot without perjury support by any evidence sufficient to satisfy the due process clause,¹⁰ and (2) conspiracy to commit an act injurious to public morals, to wit: to curse and insult law enforcement officers in the performance of their duty, a charge vulnerable to the same federal objection and in addition laid under a statute arguably void for vagueness.¹¹ Bond is set at \$500 per man per charge.

If these prosecutions are now to be processed under ordinary Mississippi practice, the following proceedings will be had. (A) Defendants will be represented by one of the three members of the

⁵ The statute is Miss. CODE ANN. § 2296.5 (Supp. 1962), enacted in 1960. Maximum punishment is \$500 fine and six months in jail. The conclusion that it is unconstitutional as applied to the hypothesized facts is supported by *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Fields v. South Carolina*, 375 U.S. 44 (1963) (per curiam); *Henry v. Rock Hill*, 376 U.S. 776 (1964) (per curiam). On other facts the statute would doubtless be sustained. See *Cox v. Louisiana*, 85 Sup. Ct. 453, 463-65 (1965).

⁶ Resisting a lawful arrest is punishable under Miss. CODE ANN. § 2292.5 (Supp. 1962), enacted in 1960, by a maximum fine of \$500 and six months in jail. "Obviously, however, one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." *Wright v. Georgia*, 373 U.S. 284, 291-92 (1963); see *Taylor v. Louisiana*, 370 U.S. 154 (1962).

⁷ *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Robinson v. Florida*, 378 U.S. 153 (1964).

⁸ Consider the cases cited in note 7 *supra* in connection with, e.g., *United States v. Raines*, 362 U.S. 17 (1960).

⁹ Consider the cases cited in note 7 *supra* in connection with, e.g., *United States v. Classic*, 313 U.S. 299 (1941).

¹⁰ The statute is Miss. CODE ANN. § 2090.5 (1956), enacted in 1956, having a maximum penalty of \$500 fine and six months in jail. Its application to the hypothesized facts is forbidden by *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Fields v. City of Fairfield*, 375 U.S. 248 (1963) (per curiam); *Barr v. Columbia*, 378 U.S. 146 (1964).

¹¹ The statute is Miss. CODE ANN. § 2056(6) (1956), as amended in 1954, punishable by fine of not less than \$25 or imprisonment not less than one nor more than six months, or both. Its unconstitutionality is suggested by *State v. Musser*, 118 Utah 537, 223 P.2d 193 (1950), voiding the statute criticized for vagueness in *Musser v. Utah*, 333 U.S. 95 (1948).

Mississippi bar (all Negroes) who are willing to handle civil rights cases,¹² or by one of a handful of outstate civil rights lawyers.¹³ Whatever valid state-law defenses individual defendants may have on the facts of their cases will be abandoned by their counsel, for counsel have no time to develop such matters and know that particular defendants' stories will disappear in the bog of mass trial. Severance, even could a right to sever be established, is an impossibly time-consuming luxury to lawyers already grievously overworked; in any event, state-law defenses are futile because they are at the mercy of local judges and juries. (B) Defendants will be convicted on all charges by a justice of the peace, and (C) after some delay convicted again at a trial *de novo* in the circuit court for the county by a jury from which Negroes have been systematically excluded by reason of race. The justice of the peace and circuit judge will flout the Constitution of the United States by holding court in segregated courtrooms in segregated courthouses¹⁴ and by addressing Negro defendants, witnesses, and often lawyers by their first names;¹⁵ these officials are elected, frequently following

¹² There appear to be only four Negroes admitted to the Mississippi bar, of whom three handle civil rights cases. White Mississippi lawyers will not touch such cases. I appreciate that this last statement is contradicted by the Mississippi State Bar Ass'n, Resolution, July 15, 1964, p. 2, which asserts that the members of that bar have always been ready to represent all persons "popular or unpopular . . . and regardless of race, creed, [etc.] . . .," and resolves that they will continue to represent such persons. Perhaps this resolution will be followed. I cannot help, however, but be struck by the characteristics which it shares with Hamlet's royal mother, and I find its timing interesting. The resolution was passed fast on the heels of (1) the Fifth Circuit's opinion in *Lefton v. Hattiesburg*, 333 F.2d 280 (5th Cir. 1964), which clearly told the federal district courts in Mississippi that outstate counsel must be permitted to represent state criminal defendants attempting removal to the district courts in any case in which local counsel would not serve; (2) the beginning of inclusion as a regular matter in removal petitions of the allegation that Negro defendants could not effectively assert their federal rights in the state courts of Mississippi because only a few lawyers were willing to take such cases and these few were overworked; and (3) the passage by the Mississippi legislature of a statute precluding the appearance of outstate counsel before a Mississippi court when challenged by petition of any two members of the Mississippi bar. Absent a convincing appearance that local counsel are available, the unconstitutionality of this last statute in a criminal case is clear. See *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹³ There are now about a half-dozen outstate lawyers more or less permanently established in Mississippi working in cooperation with the three members of the Mississippi bar who handle civil rights cases. Another handful of outstate lawyers—for example, staff lawyers of the NAACP Legal Defense and Education Fund—come into Mississippi from time to time to handle special matters. During the summer of 1964, a considerably larger number of outstate volunteer lawyers entered Mississippi, most for a two-week hitch. Their departure at the end of the summer left the few permanent civil rights lawyers in the State a workload more staggering than ever.

Outside Mississippi the shortage of legal manpower to defend persons charged with crime arising out of civil rights activities is less starkly evident but, throughout the South, pervasive. See *NAACP v. Button*, 371 U.S. 415, 443 (1963).

¹⁴ See *Johnson v. Virginia*, 373 U.S. 61 (1963) (per curiam).

¹⁵ See *Hamilton v. Alabama*, 376 U.S. 650 (1964) (per curiam) (reversing contempt conviction of Negro witness who refused to answer prosecutor's questions so long as prosecutor addressed her by first name); Silver, *Mississippi: The Closed Society*, 30 J. SOUTHERN HISTORY 3, 18 (1964).

segregationist campaigns, by local electorates from which Negroes again have been systematically excluded by reason of race, electorates which are rabidly hostile to Negro voter registration or any other civil rights activity. (D) Following further delay, defendants' convictions will be affirmed by the Mississippi Supreme Court which will, if possible, avoid the federal issues by reliance on state procedural grounds—a tactic in which it will be aided by the overwork of local, and the inexperience of outstate, counsel for the defense. (E) Defendants will ask the Supreme Court of the United States to dig their federal contentions out of a thornbush of adequate and independent state grounds and to reverse their convictions on a record in which every factual issue has been resolved against them.

Provided that the Court can best the thornbush,¹⁶ convictions under statutes unconstitutional on their faces will now be reversed, but federal challenges to the application of facially constitutional statutes will probably fail by reason of adverse fact findings.¹⁷ Even if federal claims succeed, their vindication will have been delayed by years,¹⁸ at enormous cost. Defendants will have done time in a Mississippi jail, sometimes a few hours or days, sometimes more. To buy their freedom pending trial and each separate appeal they will have posted cash bail—the only means of release for civil rights defendants in Mississippi, where sureties will not or cannot write bonds in civil rights cases¹⁹—bail set in amounts calculated to bankrupt the

¹⁶ Resourceful, the Supreme Court has sometimes succeeded in extricating the federal issue. *E.g.*, *Wright v. Georgia*, 373 U.S. 284 (1963); *Barr v. City of Columbia*, 378 U.S. 146 (1964). Often, inevitably, it has failed. *E.g.*, *Arceneaux v. Louisiana*, 376 U.S. 336 (1964); *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963) (per curiam), 378 U.S. 539 (1964) (per curiam); *cf.* *Henry v. Mississippi*, 85 Sup. Ct. 564 (1965).

¹⁷ See, *e.g.*, *Feiner v. New York*, 340 U.S. 315 (1951).

¹⁸ See Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1179-85 (1963) [hereafter cited as Lusky]; *Brown v. Rayfield*, 320 F.2d 96 (5th Cir.), *cert. denied*, 375 U.S. 902 (1963), discussed in Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U.L. REV. 78, 100-01 (1964). Elapsed time between arrest and reversal of demonstration defendants' convictions in *Edwards v. South Carolina*, 372 U.S. 229 (1963), was a week shy of two years; in *Fields v. South Carolina*, 375 U.S. 44 (1963), where the Supreme Court deferred to state justice by an initial remand for reconsideration in light of *Edwards*, the time was more than three and a half years; in *Henry v. Rock Hill*, 376 U.S. 776 (1964), which took the same course as *Fields*, it was more than four years.

¹⁹ Recently Negro defendants charged with state offenses arising out of civil rights activities in Mississippi have been able to obtain professional bonds by arrangements made with a bonding company out of the State after their removal of the prosecutions to a federal district court. To my knowledge, the Mississippi state courts have never accepted any but cash bonds in civil rights cases. Outside Mississippi Southern state courts have from time to time required cash bail in sit-in and demonstration cases. In other cases they have frustrated release on bail by demanding bond in forms which could not practicably be obtained: *e.g.*, unencumbered realty bonds. On occasion, state bail-setting authorities (ordinarily sheriffs or chiefs of police) have retained arrested sit-ins or demonstrators for days by demanding first professional bonds, then realty bonds, then cash bonds, then professional bonds again.

civil rights organizations.²⁰ (If commercial bonds were available, these would present the defendants an unattractive alternative: payment of repeated fines, in the form of irrecoverable bond premiums, as the price of liberty while litigating their federal claims state court by state court.) In addition to appearance bonds, appeal bonds in substantial amounts will be demanded, and although the latter may be waived on filing of a proper pauper's oath, *forma pauperis* practice is both costly and dangerous. Countless lawyer's hours are spent obtaining the required affidavits—(in Mississippi and often elsewhere in the South notaries will not notarize forms in civil rights cases, or will make the process of notarization impracticably inconvenient)—and the filing of any affidavit with a state court in Mississippi (and in some other regions of the South) is an invitation to subsequent perjury charges. In any event unresolved criminal charges hang over defendants for years, affecting their mobility, their acceptance at educational or other institutions,²¹ their eligibility for state benefits such as unemployment compensation,²² and, most important, their willingness to risk repeated exercise of federally guaranteed rights. So long as the controversy remains unsettled, state power is confidently asserted, and only the hardiest of souls will dare do what the defendants have done and risk following them into the tangles of Mississippi justice. Beyond these risks, these hardships, these repressions and delays, the ultimate message of the state court process to the Negro comes through loud and clear: "litigation is not a meaningful avenue to the enjoyment of federal rights."²³ He is no Cassandra who sees that there can be but one response to such a message.

²⁰ The studies of the reporters of FREED & WALD, *BAIL IN THE UNITED STATES: 1964—A REPORT TO THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE* 53 (1964) led them to conclude that high bail had been employed in civil rights cases "as punishment or to deter continued demonstrations." See, with respect to exorbitant amounts of bail demanded, Galphin, *Judge Pye and the Hundred Sit-Ins*, *The New Republic*, May 30, 1964, 8, 9; Lusky 1180, 1185.

²¹ Miss. Laws, 1st Extra. Sess. 1962, ch. 6, at 14 makes ineligible for admission to any Mississippi institution of higher learning any person who has pending against him any criminal charge of moral turpitude, "whether or not the prosecution under such case may have been continued or stayed by the court of original jurisdiction or any other court," and punishes by maximum penalty of \$300 fine and one year in jail any attempt by such a person to enroll. In other States, schools appear to have institutional rules of similar tenor. For example, shortly after the matriculation of Sarah Louise McCoy, a Negro woman, at white Northeast Louisiana State College under a preliminary integration order of the Court of Appeals for the Fifth Circuit, *McCoy v. Louisiana State Bd. of Educ.*, 332 F.2d 915 (5th Cir. 1964), Miss McCoy allegedly was assaulted by 15 or 20 white adults, beaten, and subsequently charged with battery on the son of one of her white assailants. Three days later she was informed by the dean of student services that, without notice or hearing, she had been indefinitely suspended from the college pending the outcome of proceedings against her, purportedly pursuant to a regulation requiring automatic suspension of students who have been arrested and incarcerated.

²² See, e.g., *Lewis v. Bennett*, reported with *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964).

²³ Lusky 1182.

B. The Thesis

My purpose in this Article is to demonstrate that federal trial courts can and must put a stop to state criminal prosecutions such as those against these Mississippi Negro defendants at or before the time of state court trial. This power and obligation of federal courts to intervene exists whether one views the state criminal process in these cases as one enormous malignant conspiracy of all official state organs leagued in massive resistance and dedicated to the destruction of federal civil rights, or merely as the product of prosecutorial perversity coupled with the heavy-fisted clumsiness and inefficiency that is characteristic of American state criminal administration (and not alone in the South), or as the mindless and inevitable, unhappy creature of pervasive bigotry and popular intolerance, tugging along alike state prosecutors, juries and judges (again, not alone in the South), or sometimes one or another or a combination of these things. Only very far from practicality and from the necessity of proof are such distinctions meaningful. I do not know myself—but do know I could not show as a fact to a federal district judge for the Southern District of Mississippi—that Mississippi justice is conspiratorial rather than incompetent. I do not know that the Supreme Court of the United States itself would be willing formally to find Mississippi justice *either* conspiratorial or incompetent, were such a finding required as a condition of authorizing timely federal intervention into state criminal prosecutions destructive of federal rights. But I do not need to try these factually and politically untriable issues in order to conclude that in its normal processes Mississippi justice too unbearably clogs the freedoms indispensable to a free society. In this regard it differs only in degree from the justice administered in other southern States, and in States outside the South.

For, institutionally, the processes of state criminal administration are designed to ignore or destroy such federal guarantees of civil liberty as free speech, free resort to the ballot, free access to the streets. Realistically, these and kindred guarantees are guarantees only to cast-offs and undesirables, deviates, Negroes. In essence all are guarantees of equal protection of the laws. The mayor and the chief of police of Canton, Mississippi or Chicago, Illinois would never be arrested if they picketed a courthouse. Of course, the mayor and the police chief never will picket the courthouse;²⁴ therefore the problem presented when Negroes are arrested for picketing the courthouse does not seem

²⁴ Among generalizations, one would suppose this one of the least likely to have its exceptions. *But cf.* *Egan v. City of Aurora*, 365 U.S. 514 (1961).

at first blush to be an equal protection problem. Nevertheless, the forces which assure that if the mayor and police chief picketed the courthouse they would not be arrested are the same forces which assure that the mayor and police chief will never be the sort of men who will want to picket the courthouse, and that whatever the mayor and police chief want done in the courthouse will be communicated to the courthouse in other and more effective ways than picketing.

Although abstractly accurate, it is perfectly absurd to say that the mayor and police chief have federally guaranteed immunities to make a speech, cast a vote, or walk the sidewalks of their towns. They do not need these immunities. The Constitution gives them nothing. Such protection as the Constitution gives, it gives to those in sore need, those whom other protections have failed, who are so defenseless that society may arrest them or charge them with crime. They are the powerless, the unpopular; once it is known that a man is within this class—and the fact of his prosecution is sufficient evidence of it—his fate before a state jury, an elected justice of the peace, or circuit judge is substantially decided. Prosecutors know this fact and can laugh at philosophies which ignore it. Defense counsel know it who have tried without success to make state trial judges *read* an opinion from the *United States Reports* before ruling on a motion for acquittal in a free speech case. True, state courts are competent to administer federal law, and they may by self-denial act to vindicate federal liberties. Theory casts them in this protective role,²⁵ but the battle is not over theory. The battle is for the streets, and on the streets conviction now is worth a hundred times reversal later.

Here the state authorities have the jump on the Constitution. They have the power in the streets. The Constitution purports to limit state power, but power speaks immediately and effectively until it is effectively stopped. State arrests and state prosecutions are the voice of state power. They may voluntarily cease to speak, in obedience to higher law. But where the higher law is a law for unpopulars, the probability that the popular organs of state prosecution will voluntarily cease to speak is small. In time, from locality to locality, these organs may unlearn old prejudices, but predictably they will learn new ones. In time they may unlearn some of the fear and ignorance and interest which underlie all prejudices; but federal guarantees

²⁵ See *Ex parte Royall*, 117 U.S. 241, 248 (1886) (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884)): "[U]pon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them." See also cases cited note 164 *infra*.

predictably will also develop with time,²⁶ and insofar as they are needed those guarantees will always represent the gap between the evolving ideal of freedom and the capacity of the representatives of power to let men be free. The matter is not one for dogmatism, but so far as one can predict, the probability is that the popular organs of state prosecution will never effectively protect federal civil liberties; that they will remain instruments for harassment, not vindication, of persons who dare to exercise freedoms to which the United States is Constitutionally committed, but which its majorities who speak in the state process are not constitutionally built to accept.

It is precisely to protect against probabilities of this sort that federal trial courts have been created²⁷ and much of their jurisdiction given. Since the inception of the Government, those courts have been employed in cases "in which the State tribunals cannot be supposed to be impartial and unbiassed,"²⁸ for, as Hamilton wrote in *The Federalist*, "[T]he most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes."²⁹ The federal question jurisdiction of the federal district courts in civil cases rests largely on the assumption that federal judges "are more likely to give full scope to any given Supreme Court decision, and particularly ones unpopular locally, than are their state counterparts."³⁰ The federal diversity jurisdiction has recently been authoritatively justified in terms of "the possible shortcomings of State justice," *inter alia*, the localization of trial in small

²⁶ Professor Henkin has recently spoken of "the direction of growth of the Constitution to embody flexible standards permitting the increase of individual safeguards with the growing enlightenment of contemporary civilization." Henkin, "Selective Incorporation" in the *Fourteenth Amendment*, 73 YALE L.J. 74, 88 (1963); cf. ROSTOW, *THE SOVEREIGN PREROGATIVE* 124-27 (1962).

²⁷ In the federal convention, just before Madison and Wilson, pursuant to Dickinson's suggestion, successfully moved the Committee of the Whole to authorize the national legislature to create inferior federal courts, 1 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 125 (1911),

Mr. [Madison] observed that unless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a remedy. What was to be done after improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the Court. An effective Judiciary establishment commensurate to the legislative authority, was essential. A Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move.

Id. at 124.

²⁸ *THE FEDERALIST* No. 80, at 429 (Warner ed. 1818) (Hamilton).

²⁹ *Id.* No. 81, at 439.

³⁰ Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 158 (1953).

constituencies where "justice is likely to be impeded by the provincialism of the local judge and jury, the tendency to favor one of their own against an outsider, and the machinations of the local 'court house gang.'" ³¹ Particularly, in civil cases involving civil rights, "Congress has declared the historic judgment that within this precious area, often calling for a trial by jury, there is to be no slightest risk of nullification by state process." ³² I believe that Congress made the same judgment in criminal cases; that here, too, it saw and acted on the probability that state courts would not adequately protect federally guaranteed civil rights; that here, too, it authorized and commanded federal trial courts to anticipate and supersede state court trials for the complete and timely enforcement of interests "of the highest national concern." ³³

Two grants of jurisdiction to the federal district courts are specifically addressed to the problem: the civil rights removal jurisdiction, 28 U.S.C. § 1443 (1958), and the federal habeas corpus jurisdiction, 28 U.S.C. § 2241 (1958). The lower federal courts, with some support in Supreme Court decisions, are giving unduly narrow scope to both. In cases like that of the Mississippi Negro defendants described above, federal district courts have disallowed removal and refused to entertain habeas corpus. Section 1443 is plagued by unlikely constructions which leave it impotent to cope with any state infringements of civil rights save those which state ingenuity outgrew three-quarters of a century ago. Section 2241, disfigured by the doctrine requiring exhaustion of state remedies, has become largely the exclusive prerogative of long-term state felony convicts claiming trial error. I shall attempt to minister to these ills. I mean to study the background of the two jurisdictional grants (part II *infra*), then to discuss the appropriate scope of removal (part III *infra*) and habeas corpus (part IV *infra*) in civil rights cases. I shall not treat questions of substantive law concerning the federal constitutional guarantees which these two jurisdictions implement,³⁴ or questions of procedure in removal or habeas corpus cases.³⁵ Nor shall I discuss as independent matter the third major source of federal trial court power which might

³¹ ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Commentary, General Diversity Jurisdiction, at 41 (Tent. Draft No. 1, 1963).

³² Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 230 (1948).

³³ *Ibid.*

³⁴ The substantive issues posed at notes 4-11 *supra* are a fair sample of the sort of issues involved in the cases with which I shall be concerned.

³⁵ I have considered procedural matters in detail in AMSTERDAM, THE DEFENSIVE TRANSFER OF CIVIL RIGHTS LITIGATION FROM STATE TO FEDERAL COURTS 116-55, 371-413 (1964) [hereinafter cited as AMSTERDAM].

be made effective to protect my Mississippi Negroes and others similarly situated: the federal equity power to enjoin state prosecution.³⁶ Like removal and habeas corpus, the civil rights injunction jurisdiction presently suffers assorted doldrums, among which the most devitalizing are the abstention principle (whose present status is more than a little obscure)³⁷ and the doctrine of *Douglas v. City of Jeannette*³⁸ (which is in the same mire).³⁹ These deserve a separate article.⁴⁰ I shall speak here of the injunction only to the extent necessary to round out my consideration of removal and habeas corpus.

My principal thesis is that under the federal removal and habeas corpus statutes a petition filed before state trial by a state criminal defendant making a colorable showing that the conduct for which he is prosecuted was conduct protected by the federal constitutional guarantees of civil rights⁴¹ authorizes and requires the appropriate federal district court to entertain and dispose of his federal contention (in the case of habeas corpus) or of the whole prosecution against him (in the case of removal) in advance of state trial—and this without regard to whether he also claims that the state courts are hostile, biased, conspiratorial, or incompetent. I would allow removal in certain other cases as well,⁴² although I am less sure about the fit result in such cases. For those who cannot accept my principal thesis in its full breadth, I suggest possible narrower alternatives,⁴³ but I should be sorry to see them adopted. I appreciate that some will regard my

³⁶ 28 U.S.C. § 1343 (1958); REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958).

³⁷ *Baggett v. Bullitt*, 377 U.S. 360 (1964), and *McNeese v. Board of Educ.*, 373 U.S. 668 (1963), have made inroads of undefined contour and interrelationship into the abstention principle.

³⁸ 319 U.S. 157 (1943).

³⁹ The Fifth Circuit thought in *Morrison v. Davis*, 252 F.2d 102, *cert. denied*, 356 U.S. 968 (1958), that *Douglas* had been substantially modified by subsequent per curiam decisions of the Supreme Court. A divided Court of Appeals for the Fourth Circuit disagreed in *Baines v. Danville*, 337 F.2d 579, 591-92 (1964).

⁴⁰ The Supreme Court will face abstention and *Douglas v. City of Jeannette* problems in *Dombrowski v. Pfister*, 377 U.S. 976 (1964) (No. 941, 1963 Term; renumbered No. 52, 1964 Term) (noting probable jurisdiction). Doubtless review by that Court will also be sought of *Baines v. Danville*, 337 F.2d 579 (4th Cir. 1964). Other significant cases are on the horizon. *E.g.*, *NAACP v. Thompson*, No. 21741, 5th Cir., 1964.

⁴¹ The phrase "civil rights" is used advisedly here, despite the possibility of unclarity at its fringes, to designate what Mr. Justice Stone described as a "right or immunity . . . of personal liberty, not dependent for its existence upon the infringement of property rights." *Hague v. CIO*, 307 U.S. 496, 518, 531 (1939) (plurality opinion on the point). Justice Stone was defining the scope of the civil rights jurisdiction given federal trial courts by the Ku Klux Act of 1871, now codified in 28 U.S.C. § 1443(3) (1958), and his definition is as good as any to describe the principal concern of Reconstruction legislation (including the civil rights removal and habeas corpus statutes) designed to implement the post-War amendments. Congress has more recently used the words "civil rights" with, apparently, the same meaning. 28 U.S.C. § 1343(4) (1958).

⁴² See p. 912 *infra*.

⁴³ See discussion of the range of possible constructions at pp. 908-09 *infra*.

proposal as an end of federalism. I fully share their concern for the preservation of an appropriate federal balance, but I think the complaint exaggerated.⁴⁴ I am also concerned by the opportunities for abuse which extension of pretrial federal intervention may allow state criminal defendants whose cases do not come within the scope of allowable removal or habeas corpus as I understand those jurisdictions, but who may attempt to use federal petitions as a means for delaying or disrupting state trials. I think that the danger of these abuses may be minimized,⁴⁵ and so much danger as remains is a price I am willing to pay for protection of federal constitutional liberties. More to the point, I think the price is one which Congress was willing to pay.⁴⁶

II. BACKGROUND: STATUTORY HISTORY AND THE PATTERN OF FEDERALISM IN MATTERS OF CIVIL RIGHTS

A. Statutory History

During more than seventy years following the First Judiciary Act, of 1789,⁴⁷ Congress acted substantially on the principle "that private litigants must look to the state tribunals in the first instance for vindication of federal claims, subject to limited review by the United States Supreme Court."⁴⁸ It was not then supposed that the necessary and proper place for the trial litigation of all issues of federal law was in the lower federal courts, and no general federal question jurisdiction was given those courts.⁴⁹ Original civil diversity jurisdiction was given,⁵⁰ and civil removal jurisdiction was allowed in three classes of cases⁵¹ where it was particularly thought that local prejudice would impair national concerns.⁵² But care was taken to exclude the federal

⁴⁴ See pp. 833-40 *infra*.

⁴⁵ See p. 832 *infra*.

⁴⁶ See notes 173, 476-77, 489-90 *infra* and accompanying text.

⁴⁷ Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

⁴⁸ HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 727 (1954).

⁴⁹ Except by the short-lived federalist Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, repealed by the Act of March 8, 1802, ch. 8, 2 Stat. 132.

⁵⁰ Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78.

⁵¹ Prior to 1887, judiciary legislation stated the requisites for removal jurisdiction independently of those for original federal jurisdiction. The Act of March 3, 1887, ch. 373, 24 Stat. 552, amended to correct enrollment by the Act of Aug. 13, 1888, ch. 866, 25 Stat. 433, inaugurated the present pattern of federal removal jurisdiction, which in general authorizes removal of cases over which the lower federal courts have original jurisdiction (with minor exception) and, in addition, of special classes of cases particularly affecting national concerns. See 28 U.S.C. §§ 1441-44 (1958).

⁵² The Act of Sept. 24, 1789, ch. 20, § 12, 1 Stat. 79, authorized removal in the following classes of cases where more than \$500 was in dispute: suits by a citizen of the forum state against an outstater; suits between citizens of the same state in which the title to land was disputed and the removing party set up an outstate land grant against his opponent's land grant from the forum state; suits against an alien.

trial courts from involvement in the state criminal process,⁵³ and section 14 of the Judiciary Act expressly excepted state prisoners from the federal habeas corpus power.⁵⁴

From time to time, however, limited incursions were made in criminal cases where there was more than ordinary reason to distrust the state judicial institutions. In 1815, in the face of New England's resistance to the War of 1812,⁵⁵ Congress provided in a customs act for removal of suits or prosecutions

against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeable to the provisions of this act, or under colour thereof, for any thing done, or omitted to be done, as an officer of the customs, or for any thing done by virtue of this act or under colour thereof.⁵⁶

In 1833 it enacted the celebrated Force Act, designed to crush South Carolina's opposition to the tariff.⁵⁷ That act gave the President extensive power to use the military forces of the United States to protect federal customs officers and suppress resistance to the customs laws;⁵⁸ it extended the civil jurisdiction of the federal courts to all cases arising under the revenue laws;⁵⁹ it authorized removal of any suit or prosecution

against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under colour thereof, or for or on account of any right, authority, or title, set up or claimed by such officer, or other person under any such law of the United States;⁶⁰

The first two classes were specifically described by Hamilton as situations "in which the state tribunals cannot be supposed to be impartial," *THE FEDERALIST* No. 80, at 432 (Warner ed. 1818). Madison, speaking of state courts in the Virginia convention, amply covered the third: "We well know, sir, that foreigners cannot get justice done them in these courts . . ." 3 *ELLIOT'S DEBATES* 583 (1836).

⁵³ Indeed, considerable furor was aroused by *Supreme Court* assumption of jurisdiction to review federal questions in state criminal cases as late as 1821. See the discussion of *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), in 1 *WARREN, THE SUPREME COURT IN UNITED STATES HISTORY* 547-59 (rev. ed. 1932).

⁵⁴ Save where it was necessary to bring them into court to testify. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81.

⁵⁵ See 1 *MORISON & COMMAGER, GROWTH OF THE AMERICAN REPUBLIC* 426-29 (4th ed. 1950).

⁵⁶ Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198; Act of March 3, 1815, ch. 93, § 6, 3 Stat. 233. Both enactments were temporary legislation. Their removal provisions were extended four years by Act of March 3, 1817, ch. 109, § 2, 3 Stat. 396.

⁵⁷ See 1 *MORISON & COMMAGER, op. cit. supra* note 55, 475-85.

⁵⁸ Act of March 2, 1833, ch. 57, §§ 1, 5, 4 Stat. 632, 634.

⁵⁹ Act of March 2, 1833, ch. 57, § 2, 4 Stat. 632.

⁶⁰ Act of March 2, 1833, ch. 57, § 3, 4 Stat. 633. Section 2 of the act envisioned that under certain circumstances private individuals, as well as federal officers, might take or hold property pursuant to the revenue laws.

and it added to the habeas corpus jurisdiction of the federal courts and judges

power to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof.⁶¹

Congressional discussion of the jurisdictional provisions of the act was scant, but the clear purpose of the lot seems to be wholly to supersede state court jurisdiction in cases affecting the tariff⁶² and to give the federal courts power effectively to enforce the tariff against concerted state resistance, including state judicial resistance; for, as Mr. Wilkins, who reported the bill and was its manager in the Senate,⁶³ said in the debates concerning the grant of federal civil jurisdiction, it was "apparent that the constitution of the courts in South Carolina makes it necessary to give the revenue officers the right to sue in the federal courts."⁶⁴

⁶¹ Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634.

⁶² This purpose is apparent as respects the removal jurisdiction, which in *Tennessee v. Davis*, 100 U.S. 257 (1879), was sustained against constitutional complaints that "it is an invasion of the sovereignty of a State to withdraw from its courts into the courts of the general government the trial of prosecutions for alleged offenses against the criminal laws of a State." *Id.* at 266. The revenue officer removal provisions were continued in successive judiciary acts until 1948, when they were extended to encompass all federal officers and persons acting under them. 28 U.S.C. § 1442(a)(1) (1958). As for the habeas corpus grant, continued in substance in present 28 U.S.C. § 2241(c)(2) (1958), this has always been construed as directing the federal courts to entertain petitions for the writ in advance of state trial in cases where federal officers are prosecuted, see the authorities collected in the briefs and opinion in *In re Neagle*, 135 U.S. 1 (1890); *e.g.*, *Reed v. Madden*, 87 F.2d 846 (8th Cir. 1937); *In re Fair*, 100 Fed. 149 (C.C.D. Neb. 1900); *United States ex rel. Flynn v. Fuellhart*, 106 Fed. 911 (C.C.W.D. Pa. 1901); *United States v. Lipsett*, 156 Fed. 65 (W.D. Mich. 1907); *Ex parte Warner*, 21 F.2d 542 (N.D. Okla. 1927); *Brown v. Cain*, 56 F. Supp. 56 (E.D. Pa. 1944); *Lima v. Lawler*, 63 F. Supp. 446 (E.D. Va. 1945) (writ allowed after justice court conviction); or where private citizens acting under federal officers are prosecuted, *Anderson v. Elliott*, 101 Fed. 609 (4th Cir. 1900), *appeal dismissed*, 22 Sup. Ct. 930 (1902); *West Virginia v. Laing*, 133 Fed. 887 (4th Cir. 1904). Discharge of federal officers has sometimes been denied after evidentiary hearing where the evidence did not preponderately show that the officer was acting within the scope of his federal authority. *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906); *Birsch v. Tumbleson*, 31 F.2d 811 (4th Cir. 1929); *Castle v. Lewis*, 254 Fed. 917 (8th Cir. 1918); *Ex parte Tilden*, 218 Fed. 920 (D. Idaho 1914). The evidentiary standard is discussed in *Brown v. Cain*, *supra*, and *Lima v. Lawler*, *supra*. These cases do not reflect hesitation to use the federal writ to abort state trial in any case in which the interests of the federal government are affected; they indicate only that, in each case, the federal interest was not sufficiently shown on the facts. See *In re Matthews*, 122 Fed. 248 (E.D. Ky. 1902); *In re Miller*, 42 Fed. 307 (E.D.S.C. 1890); *cf. Ex parte United States ex rel. Anderson*, 67 F. Supp. 374 (S.D. Fla. 1946) (decided on same grounds without a hearing).

⁶³ See 9 CONG. DEB. 150 (Jan. 21, 1833), 246 (Jan. 28, 1833). Hereinafter all citations to CONG. DEB., CONG. GLOBE, and CONG. REC. are to the bound volumes with the specific dates of the debates. A date will not be indicated when it is the same as that in the preceding citation.

⁶⁴ *Id.* at 260 (Jan. 29, 1833). See also *id.* at 329-32 (Feb. 2, 1833) (remarks of Senator Frelinghuysen).

The habeas corpus jurisdiction was extended again in 1842 to authorize federal release of foreign nationals and domiciliaries held under state law or process on account of any act claimed to have been done under color of foreign authority depending on the law of nations.⁶⁵ This extension was occasioned by *People v. McLeod*,⁶⁶ in which the New York courts provoked considerable international friction by refusing to relinquish jurisdiction over a British subject held for murder who claimed that he had acted under British authority. McLeod was acquitted at his trial, but the need for an expeditious federal remedy to abort the state court process in such cases was strongly felt: "If satisfied of the existence in fact and validity in law of the [plea in] bar, the federal jurisdiction will have the power of administering prompt relief."⁶⁷ Again, as in 1815 and 1833, the scope of federal intrusion was narrow. And so things stood until the Civil War.

During and after the War, Congress multiplied the intrusions. When, by the Act of March 3, 1863, chapter 81,⁶⁸ it authorized presidential suspension of the writ of habeas corpus and immunized from civil and criminal liability persons making searches, seizures, arrests, and imprisonments under presidential orders during the existence of the rebellion, it provided in section 5 of the act for removal of all suits and prosecutions

against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress.⁶⁹

The debates on passage of this 1863 act reflect congressional concern that federal officers could not receive a fair trial in hostile state courts, and that the appellate supervision of the Supreme Court of the United States would be inadequate to rectify the decisions of lower state

⁶⁵ Act of Aug. 29, 1842, ch. 257, 5 Stat. 539.

⁶⁶ 25 Wend. 482 (N.Y. Sup. Ct. 1841).

⁶⁷ CONG. GLOBE, 27th Cong., 2d Sess. 444 (April 26, 1842) (remarks of Senator Berrien). Mr. Berrien, chairman of the Senate Judiciary Committee, reported and managed the bill which became the act. *Id.* at 443. See the discussion of the act in *In re Neagle*, 135 U.S. 1, 71-72, 74 (1890).

⁶⁸ 12 Stat. 755.

⁶⁹ 12 Stat. 756.

tribunals having the power to find the facts.⁷⁰ The act was to be broadened and procedurally strengthened in 1866.⁷¹

By acts of 1864 and 1866,⁷² Congress also extended the customs-officer removal provisions of the 1833 Force Act ⁷³ to cover civil and

⁷⁰ A provision confirming the application of the act to criminal as well as civil proceedings was added by amendment on the Senate floor after the favorable reporting of the House Bill, as amended (so substantially as to amount to a substitute bill) by the Senate Committee on the Judiciary. The House Bill is set out at CONG. GLOBE, 37th Cong., 3d Sess. 21 (Dec. 8, 1862), as introduced, *id.* at 20, and as passed, *id.* at 22. The bill as reported by the Senate Committee on the Judiciary, *id.* at 321 (Jan. 15, 1863), is set out, *id.* at 529 (Jan. 27, 1863). Senator Harris moved to amend it by adding to the removal provision, qualifying the description of removable actions, the words: "civil or criminal." *Id.* at 534. The chairman of the Judiciary Committee, Senator Trumbull, did not support the amendment. *Ibid.* Senator Clark, who did, supposed the case of state officers killed by the federal marshal in an attempt to execute state-court habeas corpus process in respect of a prisoner held by the marshal under authority of the Secretary of War; "what sort of fair trial could the marshal have had in the State court, where the authorities of the State were arrayed on one side and the United States on the other?" *Id.* at 535. Senator Cowan also supported the amendment in the brief debate which immediately preceded its adoption. Hypothesizing the case of a federal officer who killed a man he was attempting to arrest under presidential warrant, Cowan took the view that the officer ought to have the right to remove a state indictment. *Id.* at 537-38. Senator Carlile inquired why a trial in the state court, subject to a right of review in the Supreme Court of the United States, would not suffice to protect the officer. *Id.* at 538. Senator Cowan replied:

Mr. President, only the indictment goes into the court upon a special *allocatur*. The testimony could not go; nothing but the indictment and the simple plea would go; and upon that the court could not determine the character of his defense. Besides, the character of this defense is one of fact to a great extent, and might depend on probable cause, and that has to be passed upon by a jury under the direction of the court; because if the court could pass upon the question of fact, there is an end of it; no appeal lies from a tribunal which is intrusted with the determination of questions of fact. In the first place, the question on which the defense rests must exist in criminal cases, as a general rule, in parol—this order of the President may have been by parol—and it must be submitted to the jury, and determined by the jury under the direction of the court, with authority to try it. I do not undertake to say that the criminal might not submit himself to that jurisdiction, because the jurisdiction of the United States is not exclusive. He might submit to it; but if he was desirous to have the question determined in the courts of the United States, he has unquestionably a clear right to have it so determined.

Ibid. (Senator Cowan is reported as voting against the amendment, *ibid.*, although he voted for passage of the bill as amended, *id.* at 554.)

⁷¹ See text accompanying notes 114-19 *infra*.

⁷² Act of March 7, 1864, ch. 20, § 9, 13 Stat. 17; Act of June 30, 1864, ch. 173, § 50, 13 Stat. 241; Act of July 13, 1866, ch. 184, 14 Stat. 98. By the 1866 act Congress (a) generally amended the revenue provisions of the Act of June 30, 1864; (b) in § 67, 14 Stat. 171, authorized removal of any civil or criminal action

against any officer of the United States appointed under or acting by authority of [the Act of June 30, 1864, and amendments thereto] . . . or against any person acting under or by authority of any such officer on account of any act done under color of his office, or against any person holding property or estate by title derived from any such officer, concerning such property or estate, and affecting the validity of [the revenue laws] . . . ;

and (c) in § 68, 14 Stat. 172, repealed the removal provisions (§ 50) of the Act of June 30, 1864, and provided for the remand to the state courts of all pending removed cases which were not removable under the new 1866 removal provisions.

⁷³ See text accompanying note 60 *supra*.

criminal cases involving internal revenue collection. In their final 1866 form, these provisions authorized federal removal of suits and prosecutions "against any officer of the United States appointed under or acting by authority of [the revenue laws] . . . or against any person acting under or by authority of any such officer on account of any act done under color of his office," or against persons claiming title from such officers, where the cause concerned the property and affected the validity of the revenue laws.⁷⁴

During the last months of 1865 and early in 1866, Union military commanders in the defeated South transferred from the state courts to national military tribunals civil and criminal jurisdiction over cases involving Union soldiers, loyalists, and Negroes.⁷⁵ April 9, 1866, Congress enacted the first major civil rights act.⁷⁶ Its third section, the progenitor of the present civil rights removal jurisdiction codified in 28 U.S.C. § 1443 (1958), provided:

SEC. 3. *And be it further enacted*, That the 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, and all acts

⁷⁴ See note 72 *supra*.

⁷⁵ See General Sickles' order, set out at CONG. GLOBE, 39th Cong., 1st Sess. 1834 (April 7, 1866), providing that military courts "shall have, as against any and all civil courts, exclusive jurisdiction in all cases where freedmen and other persons of color are directly or indirectly concerned, until such persons shall be admitted to the State courts as parties and witnesses with the same rights and remedies accorded to all other persons," unless the Negroes concerned filed a written stipulation submitting the proceeding to the state court. Cf. *id.* at 320 (Jan. 19, 1866) (General Grant's order); note 102 *infra*.

⁷⁶ Act of April 9, 1866, ch. 31, 14 Stat. 27.

amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.⁷⁷

The pertinent congressional materials⁷⁸ do not illuminate the intended scope of this removal provision.⁷⁹ The broad purpose of the

⁷⁷ Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27.

⁷⁸ The bill was S. 61 of the Thirty-ninth Congress. It was introduced by Senator Trumbull, who was chairman of the Judiciary Committee, and referred to his committee. CONG. GLOBE, 39th Cong., 1st Sess. 129 (Jan. 5, 1866). Senator Trumbull reported the bill from committee, *id.* at 184 (Jan. 11, 1866), in the form in which it is set out *id.* at 211-12 (Jan. 12, 1866), and managed it on the Senate floor. See *id.* at 474 (Jan. 29, 1866). The Senate debated, *id.* at 474-81, 497-507, 522-30, 569-78, 594-606 (Jan. 29, 1866 to Feb. 2, 1866), and passed the bill, *id.* at 606-07 (Feb. 2, 1866). Referred to the House Judiciary Committee, *id.* at 646 (Feb. 5, 1866), it was brought to the House floor by means of a motion by Representative Wilson, the Judiciary Committee chairman, to reconsider the reference, *id.* at 688 (Feb. 6, 1866), which motion was agreed to, *id.* at 1115 (March 1, 1866). After debate of the merits, *id.* at 1115-25, 1151-62, 1262-72 (March 1, 1866 to March 9, 1866), the bill was recommitted, *id.* at 1296 (March 9, 1866), reported by Wilson from the committee with amendments, *id.* at 1366 (March 13, 1866), and passed by the House, *id.* at 1366-67, with the amendments. Only one amendment is enlightening, and that in a minor regard. See note 79 *infra*. The House amendments were referred to the Senate Judiciary Committee, *id.* at 1365, from which Trumbull reported them with the recommendation that the Senate concur, *id.* at 1376 (March 14, 1866). The Senate concurred. *Id.* at 1413-16 (March 15, 1866).

President Johnson vetoed the bill in a message which is set out *id.* at 1679-81 (March 27, 1866), 1857-60 (April 9, 1866). After debate, *id.* at 1755-61, 1775-87, 1801-09 (April 4, 1866 to April 6, 1866), the Senate passed it over the veto, *id.* at 1809 (April 6, 1866). The House did the same without debate. *Id.* at 1857-61 (April 9, 1866).

⁷⁹ Except for the words which now appear as the last clause of 28 U.S.C. § 1443(2) (1958), allowing removal of actions or prosecutions "for refusing to do any act on the ground that it would be inconsistent with [federal] . . . law [providing for equal civil rights]."

The language "or for refusing to do any act on the ground that it would be inconsistent with this act" was added to the Senate bill by a House amendment. CONG. GLOBE, 39th Cong., 1st Sess., 1366 (March 13, 1866); see *id.* at 1413 (March 15, 1866). Compare *id.* at 211 (Jan. 12, 1866) (original Senate bill). The purpose of the amendment was stated by Representative Wilson, House Judiciary Committee chairman and floor manager of the bill, in reporting it from his committee, as follows:

Mr. WILSON, of Iowa.

I will state that this amendment is intended to enable State officers, who shall refuse to enforce State laws discriminating in reference to these rights

1866 act was, of course, to repudiate *Dred Scott*⁸⁰ by declaring the Negroes citizens, to affirm as an incident of that citizenship "the same right" to contract, hold property, etc., and "to full and equal benefit of all laws and proceedings for the security of person and property" as was enjoyed by whites (section 1),⁸¹ to deter by criminal penalties the deprivation of that "right" (section 2),⁸² and to give the Negroes access to the federal courts for protection of the right (section 3).⁸³ Since the right secured was conceived basically as one of equal treatment under state laws and proceedings,⁸⁴ it was natural to summarize the federal judicial jurisdiction given as jurisdiction "over the cases of persons who are discriminated against by State laws or customs,"⁸⁵ persons "whose equal civil rights are denied [them] . . . in the State courts,"⁸⁶—and this was the description offered of section 3 by Senator Trumbull,⁸⁷ who speaks with particular authority on the meaning of the legislation and who gave the only systematic exposition of its judiciary provision to be found in the debates. Trumbull, how-

on account of race or color, to remove their cases to the United States courts when prosecuted for refusing to enforce those laws

Id. at 1367 (March 13, 1866). There was no other pertinent discussion of the provision.

⁸⁰ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁸¹ Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, provided:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

⁸² Act of April 9, 1866, ch. 31, § 2, 14 Stat. 27, made it criminal for any person, acting under color of law, to subject another to deprivation of any right secured or protected by the act (see § 1, note 81 *supra*), or to different punishments, pains, or penalties by reason of race, color, or previous servitude. The section is the forbearer of present 18 U.S.C. § 242 (1958).

⁸³ Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27, see text accompanying note 77 *supra*.

⁸⁴ See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 15-18, 37-41 (1949); Maslow & Robison, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. CHI. L. REV. 363, 367-68 (1953). But since the grant to Negroes of the "same right" to certain basic protections as enjoyed by whites doubtless supposed that the States would preserve those protections to whites, I would agree with tenBroek's broader statement that the 1866 act "effected a complete nationalization of the civil or natural rights of persons." tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CALIF. L. REV. 171, 187 (1951).

⁸⁵ CONG. GLOBE, 39th Cong., 1st Sess. 475 (Jan. 29, 1866) (remarks of Senator Trumbull).

⁸⁶ *Ibid.*

⁸⁷ See notes 85-86 *supra* and accompanying text. These are passages from Trumbull's speech opening debate on the bill in the Senate. A fuller discussion of

ever, appears quite clearly to have used this language to paraphrase only the grant of original and removal jurisdiction respecting persons "who are denied or cannot enforce" their rights in the state courts (section 3, *supra*, now 28 U.S.C. § 1443(1) (1958), p. 843 *infra*);⁸⁸ the Senator said nothing to clarify the additional grant of removal jurisdiction in suits and prosecutions against persons "for any arrest

§ 3 is found in Trumbull's key speech urging the bill's passage over the veto. Cong. GLOBE, 39th Cong., 1st Sess. 1759 (April 4, 1866):

The President objects to the third section of the bill . . . [H]e insists [that it] gives jurisdiction to all cases affecting persons discriminated against, as provided in the first and second sections of the bill; and by a strained construction the President seeks to divest State courts, not only of jurisdiction of the particular case where a party is discriminated against, but of all cases affecting him or which might affect him. This is not the meaning of the section. I have already shown, in commenting on the second section of the bill, that no person is liable to its penalties except the one who does an act which is made penal; that is, deprives another of some right that he is entitled to, or subjects him to some punishment that he ought not to bear.

So in reference to this third section, the jurisdiction is given to the Federal courts of a case affecting the person that is discriminated against. Now, he 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, and the case would not therefore rise in which a party was discriminated against until it was tested, and then if the discrimination was held valid he would have a right to remove it to a Federal court—or, if undertaking to enforce his right in a State court he was denied that right, then he could go into the Federal court; but it by no means follows that every person would have a right in the first instance to go to the Federal court because there was on the statute-book of the State a law discriminating against him, the presumption being that the judge of the court when he came to act upon the case, would, in obedience to the paramount law of the United States, hold the State statute to be invalid.

If it be necessary in order to protect the freedman in his rights that he should have authority to go into the Federal courts in all cases where a custom prevails in a State, or where there is a statute-law of the State discriminating against him, I think we have the authority to confer that jurisdiction under the second clause of the constitutional amendment, which authorizes Congress to enforce by appropriate legislation the article declaring that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or in any place subject to their jurisdiction." That clause authorizes us to do whatever is necessary to protect the freedman in his liberty. The faith of the nation is bound to do that; and if it cannot be done without, would have authority to allow him to come to the Federal courts in all cases.

⁸⁸ It will be noted that the structure of § 3 is (1) to create original federal jurisdiction in the case of persons who are denied or cannot enforce their § 1 rights in the state courts; (2) to create removal jurisdiction in cases where any "such person" is sued or prosecuted in a state court; and (3) to create additional removal jurisdiction over suits or prosecutions against persons on account of wrongs committed under color of the 1866 act or the Freedmen's Bureau Acts. Trumbull's language quoted in the text accompanying note 85 *supra*, taken in context, appears to refer to the original, not removal jurisdiction (case 1 *supra*), and his language quoted in the text accompanying note 86 *supra* tracks the statutory phraseology common to original and removal jurisdictions (cases 1 and 2 *supra*). Similarly, his speech quoted in note 87 *supra* covers without distinction original and removal jurisdiction and seems to speak only of those statutory provisions (cases 1 and 2 *supra*) common to them.

or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act" or the Freedmen's Bureau Acts (section 3 *supra*; now 28 U.S.C. § 1443(2) (1958), p. 843 *infra*). Thus we are told little about one half the removal grant of section 3, and nothing at all about the other half.

But if the debates fail to provide building materials for an affirmative construction of this far from self-explanatory statute (what conditions, for example, establish that a person is "denied or cannot enforce" rights in a state court? when is a wrong "committed by virtue or under color of authority derived from" the act?), they do provide a few bricks to be tossed through the windows of the one construction which, as we shall see, the Supreme Court was later to put on a portion of the statute. In what I shall call the *Rives-Powers* line of cases,⁸⁹ decided between 1880 and 1906, the Court gradually developed the principle that, in order to come within the removal provision respecting persons "who are denied or cannot enforce" their rights, a state criminal defendant must show that some state constitution or statute *on its face* infringes his federal guarantees. Now, it is doubtless true that the first wave of Southern resistance to emancipation and Reconstruction took the form of Black Codes—laws of the Southern legislatures directed expressly against the freedman.⁹⁰ It is also true that a major purpose of the act of 1866 was to counteract the Black Codes,⁹¹ and although the *Rives-Powers* doctrine has never been put explicitly on this ground, congressional concern over the Codes might be thought to support the doctrine. I think that it does not, for several reasons.

In the first place the Black Codes were viewed by the 1866 Congress as convincing evidence that the Southern States, unless restrained by the federal government, would discriminate against the Negro and deprive him of his rights; in this light they were discussed as proof of the need for federal action, but not as its exclusive target.⁹² See particularly Mr. Cook's speech in the House:

⁸⁹ See pp. 843-50 *infra*.

⁹⁰ For typical Black Code provisions, see 2 COMMAGER, DOCUMENTS OF AMERICAN HISTORY 2-7 (6th ed. 1958); 1 FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 273-312 (photo reprint 1960); MCPHERSON, POLITICAL HISTORY OF THE UNITED STATES DURING THE PERIOD OF RECONSTRUCTION 29-44 (1871).

⁹¹ The Codes were often referred to in debate. In the Senate: CONG. GLOBE, 39th Cong., 1st Sess. 474 (Jan. 29, 1866) (Trumbull), 602 (Feb. 2, 1866) (Lane), 603 (Wilson), 605 (Trumbull), 1759 (April 4, 1866) (Trumbull); in the House: *id.* 1118 (March 1, 1866) (Wilson), 1123-24 (Cook), 1151 (March 2, 1866) (Thayer), 1160 (Windom), 1267 (March 8, 1866) (Raymond). See also *id.* at 340 (Jan. 22, 1866) (remarks of Senator Wilson on the amendatory freedmen's bureau bill).

⁹² See the portions of the debates cited in note 92 *supra*, especially CONG. GLOBE, 39th Cong., 1st Sess. 603, 605, 1118, 1160. See also *id.* at 744-45 (Feb. 8, 1866) (remarks of Senator Sherman on the amendatory freedmen's bureau bill).

Can any member here say that there is any probability, or any possibility, that these States will secure him in those rights? They have already spoken through their Legislatures; we know what they will do; these acts, which have been set aside by the military commanders, are the expressions of their will.

. . . .

. . . . Every act of legislation, every expression of opinion on their part proves that these people would be again enslaved if they were not protected by the military arm of the Federal Government; without that they would be slaves to-day.⁹³

Congress anticipated massive Southern resistance to the thirteenth amendment, resistance not alone by legislation but by every means at southern state command.

It was easy to foresee, and of course we foresaw, that in case this scheme of emancipation was carried out in the rebel States it would encounter the most vehement resistance on the part of the old slaveholders. It was easy to look far enough into the future to perceive that it would be a very unwelcome measure to them, and that they would resort to every means in their power to prevent what they called the loss of their property under this amendment. We could foresee easily enough that they would use, if they should be permitted to do so by the General Government, all the powers of the State governments in restraining and circumscribing the rights and privileges which are plainly given by it to the emancipated negro.⁹⁴

Second, the Black Codes which concerned Congress were not all discriminatory and hence unconstitutional⁹⁵ on their face. Much mention was made in the debates of the Southern vagrancy laws⁹⁶ and particularly of the vagrancy law of Virginia,⁹⁷ for example, which was

⁹³ *Id.* at 1124, 1125 (March 1, 1866).

⁹⁴ *Id.* at 503 (Jan. 30, 1866) (remarks of Senator Howard).

⁹⁵ The legislators who enacted the 1866 act regarded discriminatory legislation as unconstitutional by force of the thirteenth amendment.

⁹⁶ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1123-24 (March 1, 1866) (remarks of Representative Cook), 1151 (March 2, 1866) (remarks of Representative Thayer).

⁹⁷ *Id.* at 1160 (March 2, 1866) (remarks of Representative Windom), 1759 (March 4, 1866) (remarks of Senator Trumbull). The speech in which Trumbull refers to the Virginia vagrancy law was his speech as floor manager asking the Senate to pass the bill over presidential veto—a critical speech for the bill's passage.

It is also apparent that the vagrant law described but not identified in Thayer's speech, cited note 96 *supra*, is Virginia's.

a color-blind statute⁹⁸ whose evil lay in its systematically discriminatory administration.⁹⁹

Third, there is affirmative evidence that Congress was aware of and intended to redress nonstatutory denials of federal constitutional rights. Senator Trumbull told the Senate in his principal speech urging passage of the bill over President Johnson's veto:

In some communities in the South a custom prevails by which different punishment is inflicted upon the blacks from that meted out to whites for the same offense. Does [section 2 of the 1866 act] . . . propose to punish the community where the custom prevails? Or is it to punish the person who, under color of the custom, deprives the party of his right? It is a manifest perversion of the meaning of the section to assert anything else.¹⁰⁰

As Congress knew, the military commanders in the Southern States had already recognized that Southern laws which were fair on their face were susceptible of unfair and discriminatory application, and had taken steps to protect the freedmen against such maladministration. One of these steps was the provision of military courts to supersede the civil courts in cases involving freedmen.¹⁰¹ Congress itself made

⁹⁸ See Acts of Virginia, 1865-1866, at 91 (1866) (Act of Jan. 15, 1866).

⁹⁹ Senator Wilson told the Senate that General Terry, as commander in Virginia, "seeing that the vagrant laws of that State were used to make slaves of men whom we have made free," had prohibited the enforcement of the law against Negroes. CONG. GLOBE, 39th Cong., 1st Sess. 603 (Feb. 2, 1866). Terry's order is found in McPHERSON, *op. cit. supra* note 90, at 41-42.

¹⁰⁰ CONG. GLOBE, 39th Cong., 1st Sess. 1758 (April 4, 1866). See also *id.* at 623 (Feb. 3, 1866) (remarks of Representative Kelley on the amendatory freedmen's bureau bill).

¹⁰¹ Particularly significant is an order of General Terry in Virginia, March 12, 1866, set out at CONG. GLOBE, 39th Cong., 1st Sess. 1834 (April 7, 1866). The Virginia legislature on February 28, 1866, had passed a statute providing that all laws respecting crimes, punishments, and criminal proceedings should apply equally to Negroes and whites, and that Negroes should be competent witnesses in all cases in which Negroes were involved. General Terry's order thereupon restored to the civil courts the jurisdiction theretofore exercised by the military tribunals in all criminal matters affecting the freedmen, but provided an elaborate system of protection to assure that the Virginia laws would be fairly administered as they were written. Under part III of the order, assistant superintendents of the Freedmen's Bureau were required to attend in person all criminal trials or preliminary hearings in which Negroes were parties or witnesses. Under part IV, the duties of the assistants were spelled out: they were not to interfere with the court, or act as attorneys, although they might make friendly suggestions to the Negroes concerned. "They will, however, make immediate report of any instance of oppression or injustice against a colored party, whether prosecutor or defendant, and also in case the evidence of colored persons should be improperly rejected or neglected." Under part V, the assistants were to examine and report if in any instance a prosecutor, magistrate, or grand jury had refused justice to a colored person by improperly neglecting a complaint or refusing to receive a sworn information, so that by reason of partiality a trial or prosecution was avoided. Part VI required the assistants to make monthly detailed reports concerning the effect of the order on the interests of Negroes, "whether they have been treated with impartiality and fairness, and the law respecting their testimony carried out in good faith or otherwise." General Grant's order of

the same provision by the Amendatory Freedmen's Bureau Act of July 16, 1866,¹⁰² and it is implausible to imagine that in the removal provisions of the 1866 Civil Rights Act, Congress intended to give the freedmen less substantial protection.¹⁰³ Section 3 provided that removal might be had by 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." (Emphasis added.) This reference to locality strongly suggests that something less than statutory obstruction to the enforcement of federal rights in the state courts was thought sufficient to support removal.¹⁰⁴

January 12, 1866, had directed the commanders to protect Negroes from prosecution in the rebel States "charged with offenses for which white persons are not prosecuted or punished in the same manner and degree." *Id.* at 320 (Jan. 19, 1866). Senator Trumbull, questioned concerning Grant's order, said that he did "indorse the order and every word in it." *Ibid.*

¹⁰² Act of July 16, 1866, ch. 200, § 14, 14 Stat. 176. Concerning supersession of state civil and criminal jurisdiction by military tribunals under the act, see DUNNING, *ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION* 147, 156-63 (1898).

¹⁰³ Section 14 of the Amendatory Freedmen's Bureau Act, note 102 *supra*, provided that in every State where "the ordinary course of judicial proceedings has been interrupted by the rebellion," or where the State's "constitutional relations to the government have been practically discontinued by the rebellion," certain enumerated rights—an enumeration substantially identical to that of § 1 of the Civil Rights Act—should be secured to all citizens without respect to race or color. Where the course of judicial proceedings had been interrupted, the President through the Freedmen's Bureau was to "extend military protection and have military jurisdiction over all cases and questions concerning the free enjoyment of such immunities and rights," this jurisdiction to cease in every State when the state and federal courts therein were no longer disturbed in the peaceable course of justice, and after the State was restored to its constitutional relations and its representatives seated in Congress. The jurisdiction appears of slightly different scope than that given by the first amendatory freedmen's bureau bill, S. 60 of the Thirty-ninth Congress, a companion bill to the civil rights bill, see note 286 *infra*, which failed of passage over President Johnson's veto. The predecessor bill authorized military jurisdiction over all cases affecting the Negroes, but only when in a State the ordinary course of judicial proceedings had been interrupted by the rebellion and the same enumerated rights were discriminatorily denied to Negroes; this jurisdiction to cease "whenever the discrimination on account of which it is conferred ceases," and in any event so soon as the state and federal courts were no longer disturbed and the State's constitutional relations were restored.

In debate on the first bill, Senator Trumbull, who introduced, reported, and managed it, *CONG. GLOBE*, 39th Cong., 1st Sess. 129 (Jan. 5, 1866), 184 (Jan. 11, 1866), 209 (Jan. 12, 1866), resisted attacks on the jurisdiction by repeated insistence that the bill operated only where the civil courts were overthrown. *Id.* at 320-22 (Jan. 19, 1866), 347 (Jan. 22, 1866), 937-38 (Feb. 20, 1866). In this he manifested no deference to the state courts, for the principal attack was upon the institution of military tribunals, as distinguished from federal civil tribunals, see, e.g., the President's veto messages set out *id.* at 915-17 (Feb. 19, 1866), 3849-50 (July 16, 1866), and it was to this attack that Trumbull replied, see *id.* at 322 (Jan. 19, 1866), 937-38 (Feb. 20, 1866). He explained that the civil rights bill applied, and could be enforced, only in parts of the country where the civil courts were functioning; that the amendatory freedmen's bureau bill applied only where they were not. *Id.* at 3412 (June 26, 1866) (debate on the second bill). See also *id.* at 2773 (May 23, 1866) (remarks of Representative Eliot, who reported and managed the second bill, *id.* at 2743 (May 22, 1866), 2772 (May 23, 1866)). And in a speech concerned with both the civil rights and first amendatory freedmen's bureau bills, Trumbull appears to view them as having substantially similar scope. *Id.* at 322-23 (Jan. 19, 1866).

¹⁰⁴ The "locality" provision was rephrased in *REV. STAT.* § 641 (1875), note 148 *infra*, which turned removal on the inability to enforce federal rights "in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending" This wording was carried forward in § 31 of the Judicial Code

The rights enumerated in section 1 included "full and equal benefit of all laws and *proceedings* for the security of person and property, as is enjoyed by white citizens . . . , any law, statute, ordinance, regulation, or *custom*, to the contrary notwithstanding." (Emphasis added.)¹⁰⁵ "Proceedings" was certainly intended to add something to "laws," and the inclusion of reference to "custom" was not inadvertent. Senator Trumbull several times told the Senate that it was intended to allow removal "in all cases where a custom prevails in a State, or where there is a statute-law of the State discriminating against [the freedmen]" ¹⁰⁶ The Senator expressly said that it was not the existence of a statute, any more than of a custom discriminating against the freedman, that constituted such a failure of state process as would authorize removal; but in each case, custom, or statute, it was the probability that the state court would fail adequately to enforce federal guarantees.¹⁰⁷ Senator Lane of Indiana similarly said that the evil to be remedied was not unconstitutional state legislation, but the probability that the state courts would not enforce the constitutional rights of the freedmen.¹⁰⁸ As we shall soon see, this Thirty-ninth Congress thoroughly distrusted the State courts and expected nothing from them but resistance and harassment.

of 1911, and appears in 28 U.S.C. § 74 (1940). In the 1948 revision it was "omitted as unnecessary," Reviser's Note, note 150 *infra*, presumably on the theory that one who may remove from "a State court" may thereby remove from the court of any locality of a State. The omission tokens no substantive change in the statute.

¹⁰⁵ Section 1 of the 1866 act was re-enacted, with its "notwithstanding" clause, by §§ 16 and 18 of the Enforcement Act of 1870, Act of May 31, 1870, 16 Stat. 144. It appears in REV. STAT. § 1977 (now 42 U.S.C. § 1981 (1958)), without the "notwithstanding" clause. A similar clause was omitted by the revisers in carrying forward § 1 of the Act of April 20, 1871, 17 Stat. 13, as REV. STAT. § 1979 (now 42 U.S.C. § 1983 (1958)). In neither case does any intention appear to effect a substantive change. The "notwithstanding" clauses, although indicative of legislative purpose in respect of some applications of the statute—as here—never were effective provisions, since the supremacy clause of the Constitution made them unnecessary.

¹⁰⁶ CONG. GLOBE, 39th Cong., 1st Sess. 1759 (April 4, 1866); *id.* at 475 (Jan. 29, 1866); *cf. id.* at 1758 (April 4, 1866). See also *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 593 (1871).

¹⁰⁷ See note 87 *supra*.

¹⁰⁸ CONG. GLOBE, 39th Cong., 1st Sess. 602-03 (Feb. 2, 1866). I can reproduce here only a small portion of a speech which should be read in full:

One of the distinguished Senators from Kentucky [Mr. GUTHRIE] says that all these slave laws have fallen with the emancipation of the slave. That, I doubt not, is true, and by a court honestly constituted of able and upright lawyers, that exposition of the constitutional amendment would obtain.

But why do we legislate upon this subject now? Simply because we fear and have reason to fear that the emancipated slaves would not have their rights in the courts of the slave States. The State courts already have jurisdiction of every single question that we propose to give to the courts of the United States. Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts. That is the necessity for this provision.

See also *id.* at 1265 (March 8, 1866) (Representative Broomall's condemnation of the state courts).

The habeas corpus jurisdiction which is now codified in 28 U.S.C. § 2241(c)(3) (1958) is also legislation of the Thirty-ninth Congress. The Act of February 5, 1867, chapter 28,¹⁰⁹ in its first section, extended the federal habeas power to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . .," made elaborate provision for summary hearing and summary disposition by the federal judges, and provided that

pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.¹¹⁰

Its second section gave another and different remedy to state criminal defendants having federal constitutional defenses: review of the highest state court judgment by the Supreme Court of the United States on writ of error.¹¹¹ In view of the juxtaposition of these remedies, the inclusion of provisions expressly recognizing that federal habeas corpus courts would anticipate and forestall state judicial processes, and the pre-1867 usage with the writ, one need hardly plumb the legislative debates to conclude, as the Supreme Court recently has, that

Congress seems to have had no thought . . . that a state prisoner should abide state court determination of his constitutional defense—the necessary predicate of direct review

¹⁰⁹ 14 Stat. 385.

¹¹⁰ Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386. The successor to this provision is present 28 U.S.C. § 2251 (1958), which authorizes any federal justice or judge before whom a habeas corpus proceeding is pending, to "stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding," before judgment, pending appeal, or after final judgment of discharge in the habeas case. State proceedings after granting of a stay are declared void, but if no stay is granted state proceedings are "as valid as if no habeas corpus proceedings or appeal were pending."

¹¹¹ Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 387. The changes which this statute made in the jurisdiction of the Supreme Court as established by the first Judiciary Act are shown in FRANKFURTER & SHULMAN, *CASES ON FEDERAL JURISDICTION AND PROCEDURE* 627-28 (rev. ed. 1937). There is no need to discuss them here, save to say that while I think *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875), was wisely as well as shrewdly decided, I have serious doubt (as did the Justices) whether the result in that case was purposed by Congress; and this very doubt whether Congress might not have meant to turn Supreme Court review into a sort of *post hoc* removal suggests the extreme disfavor in which the Thirty-ninth Congress held the state courts. (The holding in *Murdock*, turning as it does on circumstances unique to Supreme Court review, cannot of course be regarded as a wholesale judicial repudiation of the congressional attitude.)

by [the Supreme Court] . . .—before resorting to federal habeas corpus. Rather, a remedy almost in the nature of *removal* from the state to the federal courts of state prisoners' constitutional contentions seems to have been envisaged.¹¹²

The legislative materials, however, tend to support the Supreme Court's view.

The genesis of the act was a resolution offered by Representative Shellabarger shortly after the convening of the Congress in December 1865 and immediately agreed to by the House:

Resolved, That the Committee on the Judiciary be directed to inquire and report to this House, as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States under the joint resolution of Congress of March 3, 1865, and also to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery.¹¹³

There is no pertinent "joint resolution" of "March 3, 1865," and the evidence is persuasive that the "March 3" action referred to is the Act of March 3, 1863, chapter 81,¹¹⁴ a statute protecting Union officers and other persons from civil or criminal liability for acts or omissions during the rebellion under presidential order or law of Congress, and authorizing removal from the state to federal courts of civil or criminal actions against such persons. That this was Shellabarger's reference appears from the House Judiciary Committee's subsequent reporting of a bill¹¹⁵ which became the Act of May 11, 1866, chapter 80,¹¹⁶ substantially amending the removal procedures of the 1863 act to prevent

¹¹² *Fay v. Noia*, 372 U.S. 391, 416 (1963).

¹¹³ CONG. GLOBE, 39th Cong., 1st Sess. 87 (Dec. 19, 1865).

¹¹⁴ See text accompanying notes 68-71 *supra*. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 476 n.80 (1963), also reaches this conclusion. March 3, 1865, was the date of House concurrence in a Senate concurrent resolution requesting the President to transmit the proposed thirteenth amendment to the executives of the States, CONG. GLOBE, 38th Cong., 2d Sess. 1416 (March 3, 1865), but Shellabarger could hardly have meant to refer to this resolution, which had no substantive import. March 3, 1865, was also the date of enactment of the Freedmen's Bureau Act, ch. 90, 13 Stat. 507, but matters involving implementation of that act would doubtless have been referred to the House Select Committee on Freedmen, established by resolution, CONG. GLOBE, 39th Cong., 1st Sess. 14 (Dec. 6, 1865), and which reported, for example, the Amendatory Freedmen's Bureau Act of July 16, 1866, ch. 200, 14 Stat. 173. See CONG. GLOBE, 39th Cong., 1st Sess. 2743 (May 22, 1866).

¹¹⁵ The bill was apparently numbered H.R. 238 of the Thirty-ninth Congress, although some pages of the *Globe* refer to it as H.R. 298. It was the product of a House Judiciary Committee amendment in the nature of a substitute to a bill introduced by Representative Welker. Introduced at CONG. GLOBE, 39th Cong., 1st Sess. 196 (Jan. 11, 1866); reported *id.* at 1368 (March 13, 1866); taken up *id.* at 1387 (March 14, 1866).

¹¹⁶ 14 Stat. 46.

their obstruction by the state courts,¹¹⁷ an act which was in turn amended by the Act of February 5, 1867, chapter 27,¹¹⁸ authorizing the issuance of writs of habeas corpus cum causa by the federal courts to bring before them the bodies of defendants whose cases had been removed from the state courts under the 1863 removal provisions.¹¹⁹

On March 15, 1866, in debate on the bill which became the May 11 act, Shellabarger returned to what appears the theme first sounded in his resolution of the preceding December:

Mr. SHELLABARGER. I wish to inquire of some member of the Judiciary Committee whether they intend by this bill, or any other which they may have in preparation, to provide for such cases as one which I am about to describe, a case which came to my knowledge about the time of the convening of this Congress, and which I now state in order to attract to it the attention of the committee, as it is one of a very large class of similar cases.

In Grant county, I believe, in the State of Kentucky, a provost marshal of the United States ordered certain citizens

¹¹⁷ Section 1 of the Act of May 11, 1866, declared that any act or omission under authorized military order came within the purview of the sections of the act of 1863 which made acts or omissions under presidential order immune from civil and criminal liability and allowed removal to the federal courts by defendants charged in state courts in respect of such acts. 14 Stat. 46. The section was responsive to state court decisions requiring that a defendant produce an order from the President himself in order to come within the 1863 act. CONG. GLOBE, 39th Cong., 1st Sess. 1387 (March 14, 1866) (remarks of Representative Cook, who reported the bill, *id.* at 1368 (March 13, 1866), and was its floor manager, *id.* at 1387 (March 14, 1866)). Section 2 of the 1866 act specified the means by which the military order relied on might be proved. Section 3 extended the time for removal up to the point of empanelling a jury in the state court, and eliminated the 1863 requirement of a removal bond. Section 4 directed that upon the filing of a proper removal petition all state proceedings should cease, and that any state court proceedings after removal should be void and all parties, judges, officers, or other persons prosecuting such proceedings should be liable for damages and double costs to the removing party. 14 Stat. 46. Section 5 directed the clerk of the state court to furnish copies of the state record to a party seeking to remove, and permitted that party to docket the removed case in the federal court without attaching the state record in case of refusal or neglect by the state court clerk. 14 Stat. 46. These latter provisions were intended to alter procedural requirements upon which the state courts had seized to obstruct removal. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1387-88 (March 14, 1866) (remarks of Representative Cook), 2054 (remarks of Senator Clark, who reported the bill, *id.* at 1753 (April 4, 1866), and was its floor manager, *id.* at 1880 (April 11, 1866)).

¹¹⁸ 14 Stat. 385.

¹¹⁹ The act was reported by the Judiciary Committee in each house. CONG. GLOBE, 39th Cong., 1st Sess. 4096 (July 24, 1866) (House), 4116 (Senate). Its purpose was to take from state custody defendants whose cases had been removed into the federal courts, *id.* at 4096 (July 25, 1866) (remarks of Representative Wilson, who reported the bill and was its floor manager, *ibid.*); CONG. GLOBE, 39th Cong., 2d Sess. 729 (Jan. 25, 1867) (remarks of Senator Trumbull, chairman of the Judiciary Committee, who reported the bill, CONG. GLOBE, 39th Cong., 1st Sess. 4116 (July 24, 1866), and was its floor manager, CONG. GLOBE, 39th Cong., 2d Sess. 729 (Jan. 25, 1867)), and thereby to permit the federal court to determine the validity of the defendant's detention under the arrest, *ibid.* (remarks of Senator Johnson).

It should be remembered that the civil rights removal provisions of the Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27, pp. 810-11 *supra*, adopted the procedures of the 1863 removal sections "and all acts amendatory thereof."

to take to the jail of that county two persons who were arrested and held as notorious guerrillas. While executing this order the persons in charge of these guerrillas, in order to prevent their attempted escape, were obliged to fire at them; and by that volley one of the guerrillas was killed and the other wounded. The persons who took part in that transaction have been indicted by the grand jury of the county for murder in the first degree; and one or two of them, in order to avoid trial and the conviction which they regarded as inevitable in that county, have been compelled to escape from the State.¹²⁰

On July 25, 1866, Representative Lawrence of Ohio explicitly referred to Shellabarger's resolution of the preceding December in reporting from the House Judiciary Committee the bill which was subsequently to be enacted as the habeas corpus Act of February 5, 1867, chapter 28. Questioned concerning a passage in the bill which excluded from its operation certain military prisoners, he said:

Mr. LAWRENCE, of Ohio. I will explain. On the 19th of December last, my colleague [Mr. SHELLABARGER] introduced a resolution instructing the Judiciary Committee to inquire and report to the House as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wife and children of soldiers of the United States, and also to enforce the liberty of all persons. Judge Ballard, of the district court of Kentucky, decided that there was no act of Congress giving courts of the United States jurisdiction to enforce the rights and liberties of such persons. In pursuance of that resolution of my colleague this bill has been introduced, the effect of which is to enlarge the privilege of the writ of *habeas [sic] corpus*, and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty, and does not interfere with persons in military custody, or restrain the writ of *habeas corpus* at all. I am satisfied there will not be a solitary objection to this bill if it is understood by the House.¹²¹

The bill passed the House without further explanation.¹²² In the Senate it was reported by Senator Trumbull from his Judiciary Committee.¹²³ As in the House, the question was raised of the bill's

¹²⁰ CONG. GLOBE, 39th Cong., 1st Sess. 1426 (March 15, 1866).

¹²¹ *Id.* at 4151 (July 25, 1866).

¹²² *Ibid.*

¹²³ *Id.* at 4228 (July 27, 1866).

exception of military prisoners from its scope.¹²⁴ Senator Trumbull replied:

I will state to the Senator from Kentucky, which he is probably aware of, that the *habeas corpus* act of 1789, to which this bill is an amendment, confines the jurisdiction of the United States courts in issuing writs of *habeas corpus* to persons who are held under United States laws. Now, a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have in such a case the benefit of the writ, and we agree that he ought to have recourse to United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States.¹²⁵

This was the only discussion of the bill's substance in the upper house. The Senate passed it with a procedural amendment in which the House concurred without debate.¹²⁶

Floor discussion of the act of 1867 was thus quite limited. But its proponents told the Congress all that seemed necessary when they explained its purpose to give "recourse to the United States courts" in cases of federally illegal detention, and to expand the habeas corpus jurisdiction to its constitutional limits. There was no need to canvass again the many reasons why the state courts could not be trusted to enforce federal rights, or the many needs for a supervening, imperative federal judicial remedy. Those matters had recently been debated extensively in consideration of the Act of May 11, 1866, *supra*. The condition of affairs in the state courts was well known. "Now, it so happens, as the rebellion is passing away, as the rebel soldiers and officers are returning to their homes, that I may say thousands of suits are springing up all through the land, especially where the rebellion prevailed, against the loyal men of the country who endeavored to put the rebellion down."¹²⁷ "[S]uits are springing up from one end to

¹²⁴ *Id.* at 4229 (remarks of Senator Davis of Kentucky).

¹²⁵ *Id.* at 4229.

¹²⁶ Senator Johnson, who favored the bill, showed concern over the absence of territorial limitations on the power of the federal judges to issue habeas corpus. CONG. GLOBE, 39th Cong., 2d Sess. 730 (Jan. 25, 1867). To meet his objection, the bill was amended to restrict the habeas grant to the courts and judges "within their respective jurisdictions." *Id.* at 790 (Jan. 28, 1867). It was so passed by the Senate, *ibid.*, and the House concurred in the amendment without debate, *id.* at 899 (Jan. 31, 1867).

¹²⁷ CONG. GLOBE, 39th Cong., 1st Sess. 2021 (April 18, 1866) (remarks of Senator Clark). The excerpts of debate cited in this and notes 128-34 *infra* are on consideration of the Act of May 11, 1866, pp. 820-21 *supra*. Senator Clark reported and managed the bill which became the act. Note 117 *supra*.

The oppressive volume of state litigation against Union men was frequently noted in debate. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1880 (April 11, 1866) (remarks of Senator Clark), 1983 (April 17, 1866) (remarks of Senator Trumbull, Chairman

the other; and these rebel courts are ready to decide against your Union men and acquit the rebel soldier." ¹²⁸ "A great many vexatious suits have been brought, and they are still pending, and instances have been known—they exist now—where Federal officers have been pushed very hard and put to great hardships and expense, and sometimes convicted of crime, for doing things which were right in the line of duty, and which they were ordered to do and which they could not refuse to do." ¹²⁹ In Kentucky, "they are harassing, annoying, and

of the Judiciary Committee). It was said that there were over 3000 cases pending in Kentucky alone. *Id.* at 1526, 1529 (March 20, 1866) (remarks of Representative McKee, of Kentucky), 1983 (April 17, 1866) (remarks of Senator Clark), 2021 (April 18, 1866) (remarks of Senator Clark), 2054 (April 20, 1866) (remarks of Senator Wilson).

¹²⁸ *Id.* at 2021 (April 18, 1866) (remarks of Senator Clark).

¹²⁹ *Id.* at 1880 (April 11, 1866) (remarks of Senator Clark). Recognition that the cost of defending suits and prosecutions might itself be ruinous to defendant Union men found strong expression in the comments of Senators Edmunds, *id.* at 2063, 2064 (April 20, 1866), and Howe, *id.* at 2064, in debate of an amendment offered by Edmunds providing that the Secretary of War should defend all actions within the scope of the bill at government expense, and should indemnify the individual defendant for damages, costs, fines, and expenses. The amendment was opposed on the ground that it would overburden the Government's financial resources, encourage litigation, encourage collusive actions, result in larger jury verdicts in damage actions, and that defendants could be adequately protected by private indemnifying bills. Both Edmunds' amendment and one by Howe providing for government defense of removed actions, were defeated. *Id.* at 2064-66. Apart from questions of expense, the injury to state-court defendants resulting from delay in the vindication of their federal rights was pointed up by the debate between Senators Doolittle and Hendricks, who opposed the provision making state judges civilly liable for proceeding after removal of a cause to the federal court, and Senators Stewart and Clark, who supported it. Senator Doolittle said that it should not be presumed state judges would flout the federal removal statute. Senator Stewart asked, in effect, what relief there was for an indicted defendant if the state court did flout removal, pointing out that a state judge could force an indictment to trial even without the cooperation of the state prosecutor:

Mr. HENDRICKS. The Senator as a lawyer knows that this will be the effect of it: if the application takes away the jurisdiction of the State courts then the remedy, of course, if the plaintiff persists in the case, is in the appellate courts, and finally, on an appeal, in the Supreme Court of the United States, inasmuch as the validity of this law, an act of Congress, would be in question.

Mr. STEWART. But suppose the judge goes on and convicts the man and sends him to the penitentiary, he must lie there until the case can be heard in the Supreme Court, three or four years hence.

Mr. DOOLITTLE. How can he send him to the penitentiary? No officer is allowed to do it. Will the judge put him there himself?

Mr. STEWART. The judge can order the officer to put him there.

Mr. DOOLITTLE. What if he does if the officer cannot put him there? If every officer to execute a decree of the court is made responsible, how can the judge do it?

Mr. STEWART. The judge has jurisdiction over the officer, and he can order him to do it, and if he does not do it the judge can call upon the power of the State if he has jurisdiction.

Mr. CLARK. I desire to make but one suggestion in answer to the Senator from Wisconsin, and that is one of fact. He says if it were necessary that these judges should be proceeded against he would not object. I hold in my hand a communication from a member of the other House from Kentucky, in which he says that all the judicial districts of Kentucky, with the exception of one, are in the hands of sympathizing judges. They entirely disregard the

even driving out of the State the men who stood true to the flag by suits under the legislation and judiciary rulings of Kentucky. There no protection is guaranteed to a Federal soldier."¹³⁰ "[I]n another county of that State the grand jury indicted every Union judge, sheriff, and clerk of the election of August, 1865. In addition to that every loyal man who had been in the Army and had, under the order of his superior officer, taken a horse, was indicted."¹³¹ Discrimination against the Union men "is the rule in Kentucky, except in one solitary district, and the Legislature at its last session inaugurated means of removing that judge, simply because he dared to carry out this act of the Federal Congress [the 1863 removal statute]."¹³² "There must be some way of remedying this crying evil, and these men who have been engaged in the defense of the country cannot be permitted to be persecuted in this sort of way. Their life becomes hardly worth having, if, after having driven the rebels out of their country and subdued them, those rebels are to be permitted to return and harass them from morning until night and from night till morning, and make their life a curse for that very defense which they have given your country."¹³³ It is impossible to read these debates of the Thirty-ninth Congress without concluding that the federal legislators were intensely aware of the hostility and anti-Union prejudice of the Southern state courts¹³⁴ and of the use of state court proceedings to harass those whom the Union had an obligation to protect.

act to which this is an amendment. They refuse to allow the transfer, and proceed against these men as if nothing had taken place. Here is not the assumption that these judges will not do this; here is the fact that they do not do it, and it is necessary that these men should be protected.

Id. at 2063 (April 20, 1866). Senators Stewart and Clark prevailed in the vote on an amendment seeking to strike the provision making the state judges liable. *Ibid.*

¹³⁰ *Id.* at 1526 (March 20, 1866) (remarks of Representative McKee, of Kentucky).

¹³¹ *Id.* at 1527 (remarks of Representative Smith, of Kentucky); see *id.* at 1526 (remarks of Representative McKee, of Kentucky).

¹³² *Id.* at 1526; see *id.* at 2063 (April 20, 1866) (remarks of Senator Clark).

¹³³ *Id.* at 2054.

¹³⁴ *E.g.*, *id.* at 1526 (March 20, 1866) (remarks of Representative McKee, of Kentucky), 1527 (remarks of Representatives Garfield and Smith, of Kentucky), 1529 (remarks of Representative Cook, who reported the bill and was its floor manager, see note 117 *supra*), 2054, 2063 (April 20, 1866) (remarks of Senator Clark). Clark pointed out that hostile state legislatures could not be looked to for redress of the discriminations practiced by hostile state judges. *Id.* at 2054. The only relief for the Union men was access to the federal courts: "There is where they are most likely to have their rights protected. There is where local prejudices are frowned down." *Id.* at 1526 (March 20, 1866) (remarks of Representative McKee, of Kentucky); see *id.* at 1528 (remarks of Representative Smith, of Kentucky), 1529-30 (remarks of Representative Cook); *cf. id.* at 1387 (March 14, 1866) (remarks of Representative Cook). See also the debates on the amendatory freedmen's bureau bills: *id.* at 320 (Jan. 19, 1866) (remarks of Senator Trumbull), 339 (Jan. 22, 1866) (remarks of Senator Cresswell), 744 (Feb. 8, 1866) (remarks of Senator Sherman), 941 (Feb. 20, 1866) (remarks of Senator Trumbull), 657 (Feb. 5, 1866) (remarks of Representative Eliot), 2774-77 (May 23, 1866) (remarks of Representative Eliot).

Three and four years later, Congress enacted the Second and Third Civil Rights Acts.¹³⁵ The 1870 statute was concerned principally with enforcing the fifteenth amendment; it declared the right of all otherwise qualified citizens to vote without racial discrimination,¹³⁶ penalized various acts of interference with the exercise of the franchise,¹³⁷ and created federal civil and criminal jurisdiction in all cases arising under the act.¹³⁸ In its sixteenth and seventeenth sections, it reenacted with some extensions the first and second sections of the Civil Rights Act of 1866;¹³⁹ and in its eighteenth section, it reenacted by reference the whole of the 1866 act, "sections sixteen and seventeen hereof [to] . . . be enforced according to the provisions of said act."¹⁴⁰ The 1871 statute also adopted the remedial provisions of the 1866 act, but put them to broader uses, enacting in its first section:

That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.¹⁴¹

¹³⁵ Act of May 31, 1870, ch. 114, 16 Stat. 140; Act of April 20, 1871, ch. 22, 17 Stat. 13.

¹³⁶ Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140.

¹³⁷ Act of May 31, 1870, ch. 114, §§ 2-7, 16 Stat. 140.

¹³⁸ Act of May 31, 1870, ch. 114, § 8, 16 Stat. 142.

¹³⁹ Act of May 31, 1870, ch. 114, §§ 16-17, 16 Stat. 144. Section 1 of the 1866 act is set out in note 77 *supra*. Section 2 of that act is described in note 82 *supra*.

¹⁴⁰ Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144.

¹⁴¹ Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. These provisions are carried forward in part in present 28 U.S.C. § 1343(3) (1958); REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958). Section 2 of the 1871 act, 17 Stat. 13, imposed criminal liability for conspiracies to overthrow the Government of the United States, oppose its authority by force, hinder the execution of its laws by force, intimidation or threat, etc.; to deprive any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws, prevent or hinder state authorities from securing to all persons the equal protection of the laws, impede, hinder, obstruct, or defeat the due course of justice in any State, with intent to deny any citizen the

The legislative background of the statute is canvassed in the opinions in *Monroe v. Pape*,¹⁴² where the Court concluded that its purpose was the creation of a broad civil rights jurisdiction superseding state judicial processes without respect to exhaustion of state remedies, "because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."¹⁴³ Again in 1871, Congress amended the Second Civil Rights Act of 1870 by adding extensive provisions for the enforcement of voting rights, and in so doing authorized removal of suits or prosecutions against officers or persons acting under the amendatory statute.¹⁴⁴

In 1875 the last major Civil Rights Act of the century was passed, purporting to assure Negroes equal access to places of public accommodation and containing, like its predecessors, jurisdictional provisions which made the federal trial courts the agencies of its enforcement.¹⁴⁵ In the same year the Judiciary Act created general federal question jurisdiction in original and removed civil actions¹⁴⁶ and thereby for the first time wrote permanently into national law the provision of a federal trial forum for every litigant engaged in a significant civil controversy based on a claim arising under the federal constitution and laws.¹⁴⁷ The *Revised Statutes of 1875* thus carried forward extensive new grants of federal trial jurisdiction created during the preceding dozen years, among them the civil rights removal statutes codified with some change of language in section 641,¹⁴⁸ and

due and equal protection of the laws, etc. Any person injured by an act in furtherance of such conspiracies was given a right of civil action for damages, "such action to be prosecuted in the proper district or circuit court of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts under the provisions of the act of April ninth, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication.'" 17 Stat. 14. These latter provisions are carried forward in part in 18 U.S.C. § 241 (1958); 28 U.S.C. § 1343(1), (2) (1958); REV. STAT. § 1981 (1875), 42 U.S.C. § 1985 (1958).
¹⁴² 365 U.S. 167 (1961).

¹⁴³ *Id.* at 180. The purpose of the 1871 act to provide a federal forum for the vindication of federal civil rights notwithstanding failure to exhaust state remedies was reaffirmed in *McNeese v. Board of Educ.*, 373 U.S. 668 (1963) (alternative ground).

¹⁴⁴ Act of Feb. 28, 1871, ch. 99, § 16, 16 Stat. 438.

¹⁴⁵ Act of March 1, 1875, ch. 114, 18 Stat. 335.

¹⁴⁶ Act of March 3, 1875, ch. 137, §§ 1-2, 18 Stat. 470.

¹⁴⁷ See 28 U.S.C. §§ 1331, 1441 (1958).

¹⁴⁸ SEC. 641. When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or

the 1867 habeas corpus statute codified with some change of language in sections 751 to 753.¹⁴⁹ These provisions were to remain substantially unchanged thereafter.¹⁵⁰

B. The Pattern of Federalism in Matters of Civil Rights

From this sweep of history it appears the Civil War radically altered the view which the national legislature had previously taken, that generally the state legislatures, courts, and executive officials were the sufficient protectors of the rights of the American people. The assumption was abandoned that the state courts were the normal place for enforcement of federal law save in rare and narrow instances where they affirmatively demonstrated themselves unfit or unfair. Now the federal courts were seen as the needed organs, the ordinary and natural agencies, for the administration of federal rights. This is apparent in the grant of general federal question jurisdiction in 1875.¹⁵¹ But it is in the realm of civil rights, prime concern of the Reconstruction Congresses and to them the patent sempiternal battleground of state and national authority, that the reversal of attitude was complete and completely expressed in law. The thirteenth, fourteenth, and fifteenth amendments wrote into the Constitution broad new guarantees of liberty and equality in which the federal government committed itself to protect the individual against the States. The four major civil rights acts undertook to elaborate and effectively establish the new

other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided.

REV. STAT. § 641 (1875).

¹⁴⁹ The *Revised Statutes* carry forward substantially unchanged the language of the jurisdictional grants of 1789, 1833, 1842, and 1867. REV. STAT. §§ 751-53 (1875).

¹⁵⁰ In 1911, in the course of abolishing the old circuit courts, Congress technically repealed REV. STAT. § 641 (Judicial Code of 1911, ch. 231, § 297, 36 Stat. 1168), but carried its provisions forward without change (except that removal jurisdiction was given the district courts in lieu of the circuit courts) as § 31 of the Judicial Code (Judicial Code of 1911, ch. 231, § 31, 36 Stat. 1096). Section 31 verbatim became 28 U.S.C. § 74 (1940), and in 1948, with changes in phraseology, it assumed its present form as 28 U.S.C. § 1443 (1958), pp. 842-43 *infra*. The reviser's note to § 1443 indicates that no substantive changes were intended. H.R. REP. No. 308, 80th Cong., 1st Sess. A134 (1947).

REV. STAT. §§ 751-53 remained basically unchanged until recodified in 28 U.S.C. § 2241 (1958), pp. 882-83 *infra*, in 1948. The reviser's note to the 1948 revision indicates that again the changes in phraseology intended no substantive change. H.R. REP. No. 308, 80th Cong., 1st Sess. A177-78 (1947). The alteration of the stay procedure in 1934 and the addition in 1948 of present 28 U.S.C. § 2254 (1958), are discussed at pp. 902-04 *infra*.

¹⁵¹ FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 64-65 (1928).

liberties and, significantly, each of the acts contained jurisdictional provisions making the federal courts the front line of federal protection. Power was given those courts in civil actions to enjoin or redress every deprivation by the States of "rights, privileges, or immunities secured by the Constitution," using every remedial device known to federal law.¹⁵² Habeas corpus, "the most celebrated writ in the English law,"¹⁵³ "the great and efficacious writ in all manner of illegal confinement,"¹⁵⁴ was given the federal judges "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law."¹⁵⁵ "It is impossible to widen this jurisdiction."¹⁵⁶ No longer chary of interfering in state criminal prosecutions which had proved potent instruments of harassment, Congress enacted criminal removal statutes in 1863 and 1866 covering cases arising out of the War, in 1864 and 1866 covering cases arising out of enforcement of the wartime revenue acts, in 1866 covering cases of all persons prosecuted for acts under color of authority of civil rights law and all persons who could not enforce their newly given civil rights in the state courts, in 1871 covering voting enforcement cases. Indeed, in 1866, it took the extraordinary step of opening the federal courts to original criminal prosecutions under state law where the prosecutions affected persons who could not enforce those rights in the state courts.¹⁵⁷

The sum of this legislation is eloquent as respects the meaning of its parts. I shall come to detailed questions of statutory construction in the next two sections of this Article. The questions are difficult, and I am not confident of their answers. But I come disposed to resolve fair doubts in favor of the assumption of federal trial jurisdiction and its timely, efficacious exercise to protect the freedoms secured against state action by the post-War amendments. Ample extension of such protective jurisdiction was the critical concern of the Reconstruction Congresses. In matters of civil rights, it was their considered resolution of the federal problem. One may agree or disagree with their conception of the appropriate relationship

¹⁵² Section 1 of the Ku Klux Act of 1871, text accompanying note 141 *supra*. See also the broad authorization of REV. STAT. § 722 (1875), 42 U.S.C. § 1988 (1958), deriving from § 3 of the First Civil Rights Act, text accompanying note 77 *supra*; *Lefton v. Hattiesburg*, 333 F.2d 280 (5th Cir. 1964); *Brazier v. Cherry*, 293 F.2d 401 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961); *Pritchard v. Smith*, 289 F.2d 153 (8th Cir. 1961).

¹⁵³ 3 BLACKSTONE, COMMENTARIES *129.

¹⁵⁴ *Id.* at 154.

¹⁵⁵ Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, text accompanying notes 109-10 *supra*.

¹⁵⁶ *Ex parte McCordle*, 73 U.S. (6 Wall.) 318, 326 (1867).

¹⁵⁷ Section 3 of the First Civil Rights Act, text accompanying note 77 *supra*; see *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 593 (1871).

of the Nation and the States. Nonetheless, under the Constitution Congress is given primary responsibility¹⁵⁸ for designing the shape of American federalism and for defining the role of the federal courts in effectuating its goals.¹⁵⁹ This responsibility forbids winking away the plain nationalizing purposes of the Reconstruction legislation, even on the firm conviction—which the Supreme Court has sometimes not quite managed to conceal¹⁶⁰—that bad Tad Stevens and his rads were a bit of a transient aberration not to be taken seriously.

The bad Tad attitude must be constantly guarded against because it is insidious and the more persuasive as it remains the less conscious. Doubtless it has had its effect on judicial developments, but I do not pretend to write off on so simple a ground the series of Supreme Court decisions beginning in the 1880's and continuing into the twentieth century which severely restrained the exercise of the several federal civil rights jurisdictions. The restrictive construction of the civil rights removal statute in the *Rives-Powers* opinions¹⁶¹ and the expanding development of the exhaustion doctrine—that modern-day *alias* and *pluries*¹⁶² of the federal habeas corpus jurisdiction—following *Ex parte Royall*¹⁶³ are aspects of a more general reluctance of the Court to allow federal judicial involvement in state criminal administration until state prosecutions have gone to ultimate conclusion in the state courts.¹⁶⁴ Clearly, there are excellent, often compelling, reasons for the reluctance.

Most important is that leaving federal defensive issues to the state criminal courts in the first instance gives those courts a promising opportunity for partnership in the administration of federal law. Hopefully, engagement in that partnership will cause the state courts to look upon the developing register of federal protections to the individual less as alien decrees imposed from distant Washington and more as

¹⁵⁸ U.S. CONST. arts. I, III, § 1, amend. XIV, § 5.

¹⁵⁹ Constitutional limitations on the power of Congress to intrude the federal courts into matters of state concern are not involved in the constructions I would put on the federal removal and habeas corpus statutes. See *Tennessee v. Davis*, 100 U.S. 257 (1879); *In re Neagle*, 135 U.S. 1 (1890).

¹⁶⁰ For an example of this attitude, see *Collins v. Hardyman*, 341 U.S. 651, 656-58 (1951).

¹⁶¹ See pp. 843-50 *infra*.

¹⁶² See 3 BLACKSTONE, COMMENTARIES *135, describing the early *alias* and *pluries* practice among the "many . . . vexatious shifts" obstructing the function of the great writ prior to the Habeas Corpus Act.

¹⁶³ 117 U.S. 241 (1886); see pp. 887-89 *infra*.

¹⁶⁴ See *Douglas v. City of Jeannette*, 319 U.S. 157 (1943) (disallowing federal injunction of threatened state prosecutions claimed to infringe the plaintiffs' federal rights of free speech and religion); *Stefanelli v. Minard*, 342 U.S. 117 (1951); *Cleary v. Bolger*, 371 U.S. 392 (1963) (disallowing federal suppression of evidence claimed obtained in violation of federal rights and proposed to be offered at state criminal trial); *Harrison v. NAACP*, 360 U.S. 167 (1959) (requiring that a federal district court, asked to hold state criminal laws federally unconstitutional, abstain pending testing of the construction and validity of the laws in the state courts).

indispensable conditions for the integrity of local justice, for which they bear responsibility.¹⁶⁵ Considering federal guarantees, as the state courts must, in conjunction with cognate state-law guarantees, those courts may be impelled to developments of state law which give better than federal constitutional protection.¹⁶⁶ Developments of this nature are essential to the evolution of civilized state criminal administration, for, in many of its restrictions upon the state criminal process, the federal constitution purports only to guarantee against outright barbarism.¹⁶⁷

Denying federal intervention into unconcluded state criminal proceedings also avoids possibly unnecessary decisions of federal constitutional law.¹⁶⁸ Some number of cases will be resolved in defendants' favor on informal or state-law grounds in the state process, and in still other cases the course of state proceedings will simplify or narrow federal issues. The same state winnowing process will decrease the bulk volume of litigation with which the federal courts must occupy themselves. And it will thereby decrease the number of potential points of friction between the federal courts and state authorities.

Finally, it is undeniable that the interlocutory intrusion of federal process may be used or abused by state criminal defendants to disrupt orderly state proceedings. Federal removal procedure is particularly susceptible of this sort of abuse, since by filing a removal petition, defense counsel can unilaterally stop the state prosecution in its tracks.¹⁶⁹ Filed on the eve of trial,¹⁷⁰ the petition is a relatively sure

¹⁶⁵ Cf. Reitz, *Federal Habeas Corpus and State Prisoners*, 32 F.R.D. 88, 93-98 (1963).

¹⁶⁶ See the encouraging decision of a division of the Georgia Court of Appeals in *Allen v. State*, 110 Ga. App. 56, 137 S.E.2d 711 (1964), reversing conviction of a white civil rights worker on grounds of systematic exclusion of Negroes from the jury list. The decision appears to be put on both state and federal grounds.

¹⁶⁷ Cf. *Rogers v. Richmond*, 365 U.S. 534, 547-48 (1961). The progressing incorporation of Bill of Rights guarantees into the fourteenth amendment, of course, makes it somewhat less true, even in theory, that the due process clause embodies only minimum standards of justice. Compare *Escobedo v. Illinois*, 378 U.S. 478 (1964), with *Lisenba v. California*, 314 U.S. 219, 236 (1941). But the Bill of Rights guarantees themselves frequently enforce substantially lower standards of criminal administration than enlightened procedure allows, e.g., in matters of speedy trial or competency of counsel.

¹⁶⁸ See the discussion and authorities collected in *Poe v. Ullman*, 367 U.S. 497, 502-05 (1961) (Frankfurter, J.); cf. Note, 109 U. PA. L. REV. 67, 115 (1960).

¹⁶⁹ Under 28 U.S.C. § 1446(e) (1958), filing of a removal petition with the appropriate federal district court, followed by filing of a copy of the petition with the clerk of the state court and service of a notice of removal on the opposing party ousts the state court of jurisdiction without action by the federal judge. See, e.g., *Lowe v. Jacobs*, 243 F.2d 206 (5th Cir.), cert. denied, 355 U.S. 842 (1957); *Adair Pipeline Co. v. Local 798, Pipeliners Union*, 325 F.2d 206 (5th Cir. 1963). Filing of a federal habeas corpus petition, by contrast, does not affect the validity of subsequent state court proceedings against the petitioner, unless the federal judge entertaining the petition orders those proceedings stayed. 28 U.S.C. § 2251 (1958).

¹⁷⁰ Under 28 U.S.C. § 1446(c) (1958), a removal petition in a criminal case may be filed at any time before state trial.

bet for at least a short continuance, at the expense of any certainty in the state court calendar.

These are considerations of moment to which I have only partially satisfying answers. The danger of improper disruption of state by federal process is not so great in federal habeas corpus as in removal, because the pendency of a federal habeas petition does not effect the state proceedings unless and until the federal judge entertaining the petition acts affirmatively to issue a stay.¹⁷¹ If the bounds of the federal anticipatory habeas jurisdiction can be defined with tolerable clarity, and made to turn on as few and as easily litigable issues of fact as possible, the likelihood that stays will issue in any substantial number of cases not rightfully within those bounds is slight, for the federal district judges are ordinarily anxious to avoid unnecessary interference with the state courts. As for the unilateral power to stop state proceedings given to defendants by federal removal procedure, the danger of abuse is to some extent inherent in the procedure and not markedly increased by broadening the scope of the removal jurisdiction. So long as any civil rights removal jurisdiction remains on the statute books, however narrowly construed, resourceful counsel will file petitions in some cases without (but arguably within) the jurisdiction, and unscrupulous counsel will file petitions in cases still further out. The practice is difficult to police, because the possibility that the Supreme Court at any time may overturn old books and broaden the scope of the jurisdiction effectively insulates petition-filing counsel from charges of professional impropriety, and imposition of costs is an insignificant deterrent where considerable numbers of removal petitioners are rightfully proceeding in forma pauperis.¹⁷² Here again, as with habeas corpus, the best bulwark against abuse is the clearest practicable definition of the scope of the federal jurisdiction, coupled with procedures in the federal courts which assure a quick ruling on removability and remand of cases not properly removed. The risk of unjustified state court disruption remains, but it is a risk perfectly obvious and obviously acceptable as the least of evils to the Congress which enacted the automatic stay procedure. In civil rights removal cases Congress has recently signified its willingness to accept the risk of substantial delays to state proceedings by expressly affirming the appealability of remand orders.¹⁷³

¹⁷¹ See note 169 *supra*.

¹⁷² 28 U.S.C. § 1915 (1958), as amended, 28 U.S.C. § 1915 (Supp. III, 1961). The Fifth Circuit has recently held—rightly, I think, for the reasons stated in its opinion—that no filing fee or cost bond is required in criminal removal cases. *Lefton v. Hattiesburg*, 333 F.2d 280 (5th Cir. 1964).

¹⁷³ Civil Rights Act of 1964, § 901, 78 Stat. 266, amending 28 U.S.C. § 1447(d) (1958), expressly to authorize appellate review of remand orders in cases removed

With regard to those undesirable results which, it may be thought, will likely follow the suppositious increase in volume of federal litigation if the scope of federal interlocutory intrusion is broadened—congestion in the federal courts, premature federal constitutional decision, greater incidence of federal-state friction—certain unknown factors affect the underlying dire prognoses. The decision whether federal judicial proceedings should be permitted to abort prospective or pending state prosecutions is not, of course, a choice between interlocutory federal litigation and no federal litigation. It is a choice between various forms of interlocutory federal litigation and litigation in the form of United States Supreme Court review of state conviction proceedings and/or federal postconviction habeas corpus.¹⁷⁴ By delaying the exercise of federal jurisdiction until the termination of state court proceedings, the federal courts are undeniably disembarassed of whatever number of prosecutions end favorably to the defendant in the state courts. This number is a function of uncertain probabilities, and there is reason to suspect that the state-court probabilities are strongly stacked against the defendants in prosecutions

under 28 U.S.C. § 1443 (1958). Prior to the 1964 act, it was commonly believed that remand orders in criminal cases removed under § 1443 were within the broad appeal bar of § 1447(d). See Lusk 1189-90. Arguably, that belief was wrong because (1) various savings clauses exclude civil rights removals from the appeal bar; and (2) the appeal bar does not apply in criminal removal cases. Argument (1) was rejected in *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964), where the Fourth Circuit overlooked, see *id.* at 597, sections 294 and 297 of the Judicial Code of 1911, 36 Stat. 1167, 1169. Argument (2) is summarized in AMSTERDAM 147-49, and both arguments (1) and (2) are fully developed in Brief for Respondents Rachel *et al.* in Opposition, *Georgia v. Tuttle*, 377 U.S. 987 (1964), following filing of which the Supreme Court refused to issue a writ of prohibition to restrain the Fifth Circuit from hearing a criminal civil rights removal appeal.

The risk and inconvenience of disrupting state proceedings during the possibly extended period of appeal from a remand order was vigorously argued to Congress by the opponents of the Civil Rights Act of 1964, *e.g.*, 110 CONG. REC. 1517-20 (Feb. 1, 1964) (remarks of Representative Tuck), and the argument evidently failed.

¹⁷⁴ The evolution from *Medley*, Petitioner, 134 U.S. 160 (1890), through Justice Holmes' dissent in *Frank v. Mangum*, 237 U.S. 309, 345 (1915), through *Moore v. Dempsey*, 261 U.S. 86 (1923), through *Ex parte Hawk*, 321 U.S. 114 (1944), through *Brown v. Allen*, 344 U.S. 443 (1953), to *Fay v. Noia*, 372 U.S. 391 (1963), has now arrived at the point where it is clear that all federal defenses available to a state criminal defendant and not intentionally waived by him in the state prosecution, see *Henry v. Mississippi*, 85 Sup. Ct. 564 (1965), may be raised on post-conviction federal habeas corpus. This development is traced in *e.g.*, AMSTERDAM 204-16; Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Brennan, *Judicial Supervision of Criminal Law Administration*, 9 CRIME & DELINQUENCY 227 (1963); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 101-21 (1959); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960); Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657 (1948); Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U.L. REV. 78 (1964). The Supreme Court's opinions in *Fay v. Noia*, 372 U.S. 391 (1963), and *Townsend v. Sain*, 372 U.S. 293 (1963), are exhaustive.

arising out of activities which arguably claim federal civil rights protection.¹⁷⁵ The federal courts are also disembarrassed of the cases in which, by reason of the hardships and vicissitudes of state court litigation,¹⁷⁶ the state criminal defendant is exhausted before his state court remedies are. Obviously, this sort of disembarrassment is no justification for delay in federal remedial action; it is the strongest reason for action without delay. True, by delay the federal courts may sometimes be relieved of the necessity of holding an evidentiary hearing in cases which end unfavorably to the defendant since, under present practice, a postconviction federal habeas corpus court is authorized to rely on the state court transcript wherever its petitioner received a "full and fair evidentiary hearing" in the state court.¹⁷⁷ I tend to doubt the propriety of this practice generally¹⁷⁸ and, again, I am more than a little skeptical concerning the number of state prosecutions for arguably fourteenth-amendment protected activity in which an appropriately solicitous federal district judge could conclude with some assurance that the state trial was "full and fair." However this may be, the argument that delayed federal relief diminishes the volume of federal litigation leaves out of account the strong possibility that many prosecutions which now pass through the state courts to the Supreme Court or into federal habeas corpus would never be brought if the prosecutor knew that they would have to be tried, in whole or in part, in the first instance in a federal district court. Prosecutions maintained for harassment or public relations purposes are not likely to be pressed where it appears they will be quickly and definitively lost; and it is not so comfortable or convenient for the prosecutor to take his case to the district courthouse as to the justice of the peace or state circuit court across the hall. The extent to which an anticipatory federal jurisdiction would repress the commencement of prosecutions that should not responsibly be brought¹⁷⁹ is, of course, speculative; but I am not prepared to assume that the decrease in litigation—and

¹⁷⁵ See pp. 800-02 *supra*.

¹⁷⁶ See pp. 796-99 *supra*.

¹⁷⁷ *Townsend v. Sain*, 372 U.S. 293, 312 (1963).

¹⁷⁸ See note 193 *infra*.

¹⁷⁹ Of course, the relative inconvenience of proceeding in a federal district court might also repress some prosecutions whose institution and maintenance are well justified. This does not seem to me a considerable argument against anticipatory federal jurisdiction. On the whole, the prosecution holds the great balance of advantage throughout criminal proceedings, see Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960); the decision to prosecute is made by the State at far less cost than it entails to the defendant; to increase this cost somewhat in a limited class of cases potentially deserving federal protection, while leaving the ultimate decision to the prosecutor's enlightened self-interest, is not an unreasonable price to pay for the extension of a protective federal jurisdiction otherwise deemed advisable for the protection of substantial federal rights.

in federal constitutional decision—which might thereby come about is insufficient to counterbalance whatever increase is occasioned by the exercise of the jurisdiction in some cases which would wash out in the state court process.

Nor do I think it follows that, if the number of federal court intrusions is increased by anticipatory action, federal-state friction is necessarily increased. Not all intrusions are equally abrasive. The diversity and federal question jurisdictions of the federal district courts intrude considerably upon the state courts, and the assumptions supporting these jurisdictions are a quite unpleasant reflection on the state judiciary.¹⁸⁰ Yet state judges do not appear to be affronted when a diversity or federal question case is tried in federal court. Those sorts of cases are clearly, cleanly, and completely excluded from the state courts' ken (at the election of a party); federal jurisdiction is assumed without making waste time of prior state proceedings or engaging in a touchy inquiry into whether the state judges did or could fairly try and correctly decide issues before them. Post-conviction federal habeas corpus, on the other hand, has been an incessantly high-voltage source of irritation to the state courts. Much of the irritation is due to the substantive law administered in the post-conviction cases, and much to the consideration that whatever law the federal courts administer operates against the august authority of the State to deal with "criminals," but a good part of irritation comes, too, from the postconviction timing of the writ: its characteristic as a sporadic intermeddler into provinces which by habit, blessed by the exhaustion doctrine,¹⁸¹ the state courts regard as uniquely theirs; its potential for obliterating solemn state judicial proceedings; its presumption in reviewing and holding in error the decisions of the state judges.¹⁸² I mean to express nothing stronger than conjecture in this regard; however, it surely is not self-evident that a carefully delineated

¹⁸⁰ See text accompanying notes 30-31 *supra*.

¹⁸¹ See pp. 884-92 *infra*.

¹⁸² The enduring grievance of state judges against federal habeas corpus has been the "overruling" of state judicial decisions—particularly state appellate decisions—by the federal trial judges. See, e.g., Thompson, *Abuses of the Writ of Habeas Corpus*, 18 AM. L. REV. 1 (1884); the resolution of the Conference of State Chief Judges, quoted in Report of the Committee on Habeas Corpus of the Conference of Chief Justices, 1954, in H.R. REP. NO. 1293, 85th Cong., 2d Sess. 6, 7 (1958); Report of the Habeas Corpus Committee to the Judicial Conference of the United States, appended to H.R. REP. NO. 548, 86th Cong., 1st Sess. 15-16 (1959); Testimony of Hon. John Parker, *Hearings on Habeas Corpus Before Subcommittee No. 3 of the House Committee on the Judiciary*, 84th Cong., 1st Sess., ser. 6, at 4-5 (1955); Testimony of Hon. Orie Phillips, *Hearings on Habeas Corpus Before Subcommittee No. 3 of the House Committee on the Judiciary*, 86th Cong., 1st Sess., ser. 2, at 20 (1959); Testimony of Hon. Luther Swygert, *id.* at 24; Testimony of Professor Louis Pollak, *id.* at 28. See also Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 466, 513-16 (1960).

anticipatory federal jurisdiction, working to remove early and entirely from the state process¹⁸³ a class of criminal cases defined without patent affront to the state courts and judges, would occasion greater federal-state friction than do postconviction federal review and habeas corpus.¹⁸⁴

The argument which asserts the value of maintaining a partnership of state courts in the administration of federal rights is, I think, the most persuasive and least easily rebutted objection to federal judicial action anticipating state process. Nevertheless, enthusiasm for the partnership as an ideal ought not to obscure recognition that it is an ideal which state judges will never more than imperfectly approximate—and probably more imperfectly than elsewhere in cases where fourteenth amendment protection is invoked to insulate unpopular activity from the power of the States to restrain.¹⁸⁵ Stated as an unqualified preference for state administration of federal law which takes its shape within a matrix of state law regulation, the argument evidently proves too much; for every congressionally created federal trial jurisdiction constitutes to some extent a subordination of that value to the values of federal law enforcement by nationally responsible tribunals. And if it is true that constitutional restrictions on the state criminal process present a particularly fertile field for valuable interaction of federal and state law in the state courts, it is also true that they present a particularly strong adversity of state and federal interests, and hence a particularly strong risk that federal rights will suffer if left in state hands.

The argument undoubtedly counsels caution in taking entirely out of the state courts federal defensive contentions which become isolable at interlocutory stages, particularly where those federal con-

¹⁸³ Unlike the collateral sniping device condemned in *Stefanelli v. Minard*, 342 U.S. 117 (1951), federal removal takes a case out of the state system before trial and disposes of it definitively without return to the state courts. Anticipatory federal habeas corpus, in the use recommended by this Article, see pp. 882-912 *infra*, tests the authority of the State to proceed in the prosecution and thus also ends the matter once for all by federal decree if the habeas petitioner succeeds. If he fails, he returns to the state courts, which may then proceed without interruption in the matter.

¹⁸⁴ Reporting in the Senate the bill which became the Force Act of 1833, see pp. 806-07 *supra*, Senator Wilkins said of its removal provision: "It gives the right to remove at any time before trial, but not after judgment had been given; and thus affects in no way the dignity of the State tribunals." 9 CONG. DEB. 260 (Jan. 29, 1833). Cf. Senator Choate, in debate on the 1842 habeas corpus bill, p. 808 *supra*:

The single question submitted to the national tribunals . . . may as well be extracted from the entire case, and presented and decided in those tribunals before any judgment in the State court, as it can be revised afterwards, on a writ of error. Either way, they pass on no other question. Either way, they do not administer the criminal law of a State. In one case as much as in the other, and no more, do they interfere with the State judicial power.

CONG. GLOBE, 27th Cong., 2d Sess., app. 541 (May 1842).

¹⁸⁵ See pp. 800-02 *supra*.

tentions arise out of the state judicial procedures themselves (*e.g.*, racial discrimination in jury selection, failure to accord the defendant a speedy trial, jury prejudice by reason of inflammatory publicity). However, where the federal contention is that the activity underlying the criminal charges is federally immune from state inhibition, the importance and the practicability of preserving a role for the state courts as federal law enforcers are considerably diminished, and the countervailing need for interlocutory federal intervention considerably increased. If this sort of federal immunity is to be made reasonably effective, the State must eventually relinquish or be deprived of the power to *begin* criminal proceedings which repress it. Arrest, charge, pretrial detention, or release on bond to compel appearance for hearing are effective methods of repression even where the charge is dismissed or dropped at the first court appearance. These repressive devices can be disarmed only if the state prosecutor and the chief of police can themselves be brought into the federal partnership, impressed with their responsibility for the protection or at least the recognition of federal guarantees. Ideally, the state justice of the peace or circuit judge might impress them with this responsibility. But among state judges he is the least likely and the least capable to do the job, however prodded by his appellate superiors. The direct power of the state appellate courts is limited in this regard, reaching the prosecutor only some considerable time after he has secured his conviction, and the police chief not at all. The likely willingness of the state appellate courts to assume the function is also limited: their judgments on particular federal issues and the general sensitivity to federal rights which grows out of the sum of particular judgments—and out of impressions concerning the factual contexts in which federal rights operate—are the creatures of cold records shaped by the state trial courts. For these reasons it is dubious wisdom to look to the state court system for efficient schooling of the prosecutor and police chief in their federal responsibilities; the necessary lesson can best be transmitted through the knowledge that both may be required to appear in a federal district court, at the outset of a prosecution, to justify the charges within federal constitutional requirements.¹⁸⁶ Fed-

¹⁸⁶ In saying this, and throughout this Article, I am not making the naive assumption that all federal district judges are appropriately sympathetic to the enforcement of all or any federal rights. I am well aware that some are more hostile to certain federal rights than the mine run of state judges; and, of course, there are individual state judges who are more sensitive to federal rights than the mine run of the federal district bench. Institutions must be designed in view of generalities; as a generality, I have no doubt that the federal judges are more enlightened concerning, more tolerant toward, and more courageous to protect, federal rights than are their state counterparts. And, were this not so now, the means by which federal and state judges respectively are selected and educated give national concerns decidedly better likely future audience in the national courts.

eral anticipatory jurisdiction demands of the State's attorney that he think in terms of federal law from the inception of proceedings, not merely when he is called upon to sustain an easy conviction on appeal; and it demands of the police chief that he appear and testify before a court whose very authority in the case demonstrates the immediacy of federal law.

Such an anticipatory federal jurisdiction would not, in any event, strip the state courts of all cases within its scope. The jurisdiction could be exercised only on application by the state defendant; substantial considerations of convenience would ordinarily discourage application except where reason existed for defense counsel to fear that federal claims would in fact receive short shrift from the state judges.¹⁸⁷ I suppose that at the present time most civil rights lawyers would take as many prosecutions as possible out of the southern state courts—with good reason. Enough cases will certainly remain to test the temper of those courts, and if their actions restore confidence in the adequacy of state process, a balance will probably be struck at what is in fact, as well as theory, concurrent state and federal trial jurisdiction. Any estimate is guesswork: but again, the possibility exists that in the long run this sort of concurrent jurisdiction would provide a healthier climate for the growth of both state and federal law in the state courts than would the entire exclusion of federal intervention at preliminary stages of the state process.

Let me stop here for summary and an aside. In the arguments and counterarguments, speculations and counterspeculations of the immediately preceding pages, I have attempted to state and to evaluate in a general and preliminary way all of the material objections to a federal anticipatory jurisdiction. The objections have substantial thrust which will inevitably and properly affect interpretation of the pertinent judiciary legislation, and to which I shall return later. But on the whole, even when considered in isolation from the case in chief for an anticipatory jurisdiction, these objections emerge without the overwhelming force that one might expect them to display. Surely the undisturbed functioning of the state criminal courts—that most charismatic object of the federal mystique¹⁸⁸—has some stronger support than I have allowed it. Have I not understated its claims?

¹⁸⁷ Transfer of the locus of trial to the nearest federal district courthouse is ordinarily as great an inconvenience to the defense as to the prosecution. And it is the defense which bears the paperwork burden of initiating the federal removal or habeas corpus proceedings—a burden usually greater than that involved in disposing of a petty prosecution informally in a tolerably sympathetic state court.

¹⁸⁸ As good a recent example as any of the mystique is the framing of the issue of removability in *New York v. Galamison*, Nos. 29166-75, 2d Cir., Jan. 26, 1965, at s.o. 965 [hereinafter cited to slip opinion (s.o.) page in short citation form],

I think I have not; for while I admit having adopted a pair of understating perspectives, I believe their use is wholly justified. First, I have accepted as given the existence in its present form of post-conviction federal review of state criminal judgments, both by the Supreme Court and by the lower federal courts on habeas corpus. Each of these methods of review has been assailed, time out of mind, by varied, vociferous criticism. If they were again opened to debate—if the question encompassed reconsideration root and branch of the institution of federal review in state criminal cases—the spectrum of argument over a federal anticipatory jurisdiction would of course be broadened. It would then be in order to discuss the large issue whether it is not too unseemly that a sovereign State, pursuing by its highest officers a criminal against its own peace and dignity, should be required to ask leave of a United States court to dispose of its prisoner. But where federal questions are involved, at least since 1821 state criminal cases have been subject to the oversight of the Supreme Court,¹⁸⁹ and since the 1940's or 1950's, of the district courts.¹⁹⁰ I am not going to reopen those decisions.¹⁹¹ To the extent that the fabled *noli me tangere* of the state criminal courts suffers by recognition of the obvious embrace in which the federal judges already hold state prosecutions, I prefer to forget the fable, not ignore the embrace.

Of course, an anticipatory federal jurisdiction would to some extent tighten that embrace. Although it might occasion no increased frequency of federal adjudication, it would increase federal judicial involvement, federal presence, in the States' affairs. Precisely to the

discussed *infra* at notes 267-360. To Judge Friendly, "one choice [denying removal] may somewhat impair expectations entertained by persons of good will whose objectives we admire, and the other [allowing removal], in our view, would do violence to institutions and relations we hold equally dear, the continued efficient functioning of which has far greater long-run importance to minorities than the special relief here sought." *Id.* at 970. This latter allusion is thought self-explanatory; it is the only arguably pertinent concept to escape analysis in a characteristically incisive opinion. But escape analysis it does—and prevails.

¹⁸⁹ See note 53 *supra*.

¹⁹⁰ See note 174 *supra*.

¹⁹¹ First, like Margaret Fuller, I accept the universe. Second, I do not see how American federalism, as it has evolved since the Civil War, could survive in any universe which did not make some provision for the sort of thorough-going federal court review of state criminal convictions which is presently supplied by "direct" Supreme Court review plus federal habeas corpus. Cf. Frankfurter, *Oliver Wendell Holmes*, in 21 *DICTIONARY OF AMERICAN BIOGRAPHY* 417, 423 (Supp. 1, 1944). I have elsewhere indicated my disagreement with Professor Bator in this regard. See Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 379-80, 384-85 n.33 (1964) (discussing Bator, *supra* note 174). In my view, Bator neglects the overriding purpose of the Act of Feb. 5, 1867, ch. 28, *supra* notes 109-11, to give all state prisoners both a federal trial forum and access to the Supreme Court for litigation of their federal claims, whatever those claims might be.

extent that it serves the function of protecting federal liberties, it would curb state independence, state sovereignty. So do the thirteenth, fourteenth and fifteenth amendments insofar as these are enforced. What is at issue here is the balance to be struck between degrees of effectiveness in their enforcement and the impingement on state sovereignty which varying degrees of enforcement entail.

Second, throughout these last pages, I have taken up a "show me" method of argumentation whose effect is to throw the burden of persuasion on the party objecting to federal intervention. In view of the strong historical evidence of a hundred-year-old determination by Congress to intervene, I have no doubt that is exactly where the burden belongs. I can show concretely enough the need for federal intervention, and am disposed to demand that any objections to it be shown with some concreteness as well. Rumblings of a vague federal armageddon are not dismaying; we have got to the point, I think, in bearing of the ills we have, where it behooves us try the shape of others that we know not of.

The ills we have—the reasons *for* a federal anticipatory jurisdiction—I have tried to put in microcosm in the hypothetical Mississippi prosecution described at the opening of this Article. There are thousands of such prosecutions in the South today. There are fewer outside the South, but not few. Today the defendants are Negroes. Thirty years ago they were Jehovah's Witnesses or labor union organizers. Sixty years ago, Orientals on the Coast. Before that, the Unionists, the Cherokees—the condition is not of recent coinage.

These defendants depend on the federal constitution *faute de mieux*. Its guarantees turn on questions of fact. The defendants are tried in state courts, and the facts are found against them. It was known that the facts would be found against them, and they are. If this were an end of factfinding, the Constitution would be worthless.

Worthless is not too strong a word. I have given civil rights demonstrators advice before a demonstration. I have told them what I thought they might permissibly do within the limits marked by Supreme Court decisions for the exercise of their liberties to assemble and protest. Then I have told them that the cop might lie, the magistrate would believe the cop, and they had better steer far clear the limits or have their bail premiums arranged. How should this result be different? The magistrate is a familiar of the cops, but knows the Supreme Court only through the newspapers.

For these reasons, doubtless the state court trial cannot be an end of factfinding. After the ritual of state appeals, any imprisonment of the defendants which the State is not wise enough to terminate

prior to a federal habeas corpus hearing¹⁹² will entitle them to a full evidentiary trial of federal questions in the district court. Although this last proposition is not now as clear in law as it should be,¹⁹³ I shall assume it to be accurate. How should that affect the advice I give my demonstrators? Time is still entirely against them. They must still steer far clear or face the immediate consequences.

The county attorney of a north Mississippi town presses charges for a time under a handbill ordinance identical with one the Supreme

¹⁹² State prosecutors seem understandably loath to be tested in the federal district courts. A classic recent example of avoidance is the *Dresner* litigation, involving prosecution of ten freedom-riding clergymen for unlawful assembly, *i.e.*, refusing to leave a Tallahassee, Florida airport where their presence attracted hostile crowds. Convicted in the Tallahassee Municipal Court and sentenced to \$500 or sixty days, the clergymen appealed to the circuit court for the county, which affirmed over federal first amendment, equal protection, and commerce clause contentions. Further direct review proceedings failed on procedural grounds, see *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963) (questions of law certified to Florida Supreme Court), *cert. dismissed*, 378 U.S. 539 (1964); the clergymen surrendered for service of sentence and filed a federal habeas corpus petition; the district court denied relief on grounds of failure to exhaust state remedies; the Court of Appeals for the Fifth Circuit heard an expedited appeal and modified the judgment to allow hearing on the claims raised by the federal petition unless a state court discharged the petitioners or released them on nominal bail within three days. *Dresner v. Stoutamire*, No. 21802, 5th Cir., Aug. 5, 1964. Thereupon, the Municipal Court of Tallahassee sua sponte reconsidered the sentences which it had imposed, reduced them to the time already served, and discharged the prisoners, thus mooting the habeas proceeding.

¹⁹³ *Townsend v. Sain*, 372 U.S. 293 (1963), restricts considerably the circumstances under which a federal postconviction habeas court can dispose of its petitioner's claims by relying on his state court record. *Townsend* nevertheless allows the district judges "discretion" to refuse an independent evidentiary hearing whenever they are satisfied that previous state court hearing of the issue has been full and fair. See text accompanying note 177 *supra*. This position doubtless reflects the Court's concern lest the district courts be flooded with prisoners' hearings. I share that concern, but reluctantly think the position wrong, and that an evidentiary hearing is required on every well-pleaded federal contention raising a factual dispute. I am persuaded by the reasoning in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416-17 (1964) (holding that where a plaintiff who invokes the original federal question jurisdiction of a United States District Court to challenge the constitutionality of a state statute is remitted to the state courts under the abstention doctrine, he may return to the district court for trial de novo following adverse state court decision):

Limiting the litigant to review here [the Supreme Court] would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. "It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues." *Townsend v. Sain*, 372 U.S. 293, 312. "There is always in litigation a margin of error, representing error in fact finding" *Speiser v. Randall*, 357 U.S. 513, 525. . . . The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts.

I find inconvenience no answer against the imperative of this logic, and I fail to see why it does not (1) compel a full evidentiary hearing following abstention (an issue not posed in *England*); and (2) compel the same result in habeas corpus following exhaustion of state remedies. A footnote in *England* seems to offer the explanation that in habeas corpus, as distinguished from a civil federal question litigation, the federal issues are "in the first instance" for the state courts. *Id.* at 417 n.8. If this is so, it is so by virtue of the exhaustion doctrine only; exhaustion, like abstention, being a court-created practice to delay the exercise of a congressionally given jurisdiction.

Court voided in 1938.¹⁹⁴ This will break the back of a boycott now, put the civil rights leaders at a disadvantage in negotiations during this summer; and when, in a few years, the ordinance is held invalid, it will require two hours to convene the council and ordain a slightly different one. The slightly different version is already in effect in a machine-run municipality in a northern State. There the prosecutor admits *sotto voce* that it is unconstitutional, but says he will continue to enforce it for a time until a court tells him to stop. So, with the closing date for voter registration five weeks off, he prosecutes pamphleteers of the opposition party. I forego multiplying examples and pass to possible remedies.

III. REMOVAL¹⁹⁵

A. The Statute¹⁹⁶

Title 28 U.S.C. § 1443 (1958) contains the recodified¹⁹⁷ civil rights removal provisions based on the Act of April 9, 1866, chapter 31, § 3,¹⁹⁸ as subsequently extended. The section reads:

§ 1443. *Civil rights cases.*

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

¹⁹⁴ I have not by any means chosen the most shocking available examples. See, e.g., *Aelony v. Pace*, 32 U.S.L. WEEK 2215 (M.D. Ga. Nov. 1, 1963) (prosecution on nonbailable capital charge of insurrection under the same statute held void on its face by the Supreme Court in *Herndon v. Lowry*, 301 U.S. 242 (1937)).

¹⁹⁵ Removal is a procedure by which an entire litigation is taken from a state trial court into a United States district court, where it proceeds for virtually all purposes as though it were a litigation initially commenced in the federal court. The posture of the parties, the nature of the issues, and, in general, the law applied to the controversy remain the same as they would have been if the case were tried in the state court. For discussion of the nature of the jurisdiction and of the minor choice-of-law problems raised by REV. STAT. § 722 (1875), 42 U.S.C. § 1988 (1958), and FED. R. CRIM. P. 54(b)(1), see AMSTERDAM 45-52.

¹⁹⁶ The extant removal provisions of the Judicial Code are collected in 28 U.S.C. §§ 1441-50 (1958). See note 51 *supra*. It is possible that in a rare handful of criminal prosecutions coming within the concerns of this Article removal might be sought under § 1442(a)(1), survivor of the aged federal-revenue-officer removal statutes, pp. 806-10 *supra*, which were broadly enlarged in 1948 to reach any

civil action or criminal prosecution . . . against . . .

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

Apart from this handful—characterized by the colorable involvement of a federal officer and too rare to merit further discussion—the only serviceable section is § 1443.

¹⁹⁷ See notes 148, 150 *supra*.

¹⁹⁸ See pp. 810-11 *supra*.

(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. (June 25, 1948, ch. 646, 62 Stat. 938.)

Obviously, here is a text of exquisite obscurity.

B. The Cases

The removal provision which is now subsection 1443(1) first reached the Supreme Court in 1880.¹⁹⁹ *Strauder v. West Virginia*²⁰⁰ sustained its constitutionality and held that under it a sufficient case for removal was stated by the petition of a Negro indicted for murder in a West Virginia court, which alleged that by reason of an 1873 West Virginia statute restricting eligibility for jury service to white males, Negroes were excluded from grand and petit juries in the courts of that State. This seems a plausible enough case of a person "denied" or who "cannot enforce" his civil rights. But surely the result is not evident under the statute. Strauder's removal petition was filed (as it had to be) before state trial;²⁰¹ it was sufficient, if ever, at that time; yet how could it then be said that West Virginia had

¹⁹⁹ The provision was then REV. STAT. § 641 (1875), note 148 *supra*. In the concept presently material—the concept of a person "denied or [who] cannot enforce" rights in the state courts—the statute has remained unchanged from 1866 to the present.

²⁰⁰ 100 U.S. 303 (1880).

²⁰¹ REV. STAT. § 641 (1875), note 148 *supra*, required that a petition for removal be filed "at any time before the trial or final hearing of the cause." Present 28 U.S.C. § 1446(c) (1958) requires filing "at any time before trial," apparently with the same meaning. See AMSTERDAM 116-20. This pretrial character of the removal procedure, which played a significant part in the construction given the civil rights removal statute in and following *Virginia v. Rives*, 100 U.S. 313 (1880), appears not to have been an incident of the procedure authorized by the original 1866 act. That act, set out in text accompanying note 77 *supra*, contained no independent procedural provisions, but adopted by reference the removal procedures of the Habeas Corpus Suspension Act of March 3, 1863, ch. 81, § 5, 12 Stat. 755, 756, discussed in text accompanying notes 68-70 *supra*. The 1863 act had authorized removal either before trial, 12 Stat. 756, or after judgment, 12 Stat. 757; and it seems from the 1866 language that both of these forms of removal were meant to be carried over to civil rights cases. See Senator Trumbull's speech set out in note 87 *supra*. The Act of May 11, 1866, ch. 80, § 3, 14 Stat. 46, discussed in notes 116-17 and accompanying text *supra*, amended the 1863 procedures to authorize pretrial removal at any time before empaneling of a jury in the state court, and this seems to be the procedure intended to be codified in REV. STAT. § 641 (1875). But although the Act of May 11, 1866, explicitly provided that it did not affect postjudgment removal, REV. STAT. § 641 failed to carry that form of removal forward in civil rights cases.

"denied" Strauder anything?²⁰² How could it then be said that he could not enforce his rights in the state courts? The state judges of course could avoid the unconstitutional state legislation; the supremacy clause obliged them to do so; why should it be assumed that they would not? The *Strauder* opinion resolves these difficulties by ignoring them.

Glimmerings of the difficulties appear, however, in *Virginia v. Rives*,²⁰³ decided the same day, and which was to become a critical case in the evolution of the removal statute. In *Rives* a federal trial court assumed removal jurisdiction on a petition alleging that petitioners were Negroes charged with murder of a white man; that there was strong race prejudice against them in the community; that the grand jury which indicted them and the jurors summoned to try them were all white; that the prosecutor and judge had refused petitioners' request that one-third of the trial jury be composed of Negroes; that, notwithstanding the state laws required jury service of males without discrimination of race, Negroes had never been allowed to serve as jurors in the county in any case in which their race was interested. The State of Virginia sought a writ of mandamus in the Supreme Court to compel the lower federal court to remand the case, and the Supreme Court issued the writ. Its opinion, read narrowly, found that petitioners' allegations "fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected."²⁰⁴ There was wanting, as a matter of pleading (in those early days before the Court's experience in the trial of jury discrimination claims bred the "prima facie" showing doctrine),²⁰⁵ an allegation of purposeful or intentional discrimination, and the Court said that this might have

²⁰² True, Strauder had been indicted by an unconstitutionally selected grand jury. But indictment "denied" him nothing until his trial and final judgment of conviction on it. It does not appear from the Court's opinion whether or not, prior to filing his petition for removal, Strauder had filed an unsuccessful motion to quash the indictment. I would not, in any event, attribute much force to the interlocutory ruling denying such a motion as establishing that the defendant has been "denied" his equal civil rights, for the ruling is subject to reconsideration on posttrial motions and state appeal. In *Williams v. Mississippi*, 170 U.S. 213 (1898); *Smith v. Mississippi*, 162 U.S. 592 (1896); *Murray v. Louisiana*, 163 U.S. 101 (1896); and *Bush v. Kentucky*, 107 U.S. 110 (1883), motions to quash, made and denied prior to filing of the removal petitions, were not seen by the Court as adding anything to the petitioners' claims that they were denied or could not enforce their rights in the state courts.

²⁰³ 100 U.S. 313 (1880).

²⁰⁴ *Id.* at 322.

²⁰⁵ See, e.g., *Norris v. Alabama*, 294 U.S. 587 (1935); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Reece v. Georgia*, 350 U.S. 85 (1955); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Arnold v. North Carolina*, 376 U.S. 773 (1964).

been supplied by averment that a statute law of the State barred Negroes from jury service. "When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal."²⁰⁶ Thus, by reason of the requirement of factual showing under the removal statute that a defendant could not enforce his federal rights in the state court,²⁰⁷ the Court said that the inability to enforce federal rights of which the removal statute speaks "is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case."²⁰⁸

So construed, *Rives* holds 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. But 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).²⁰⁹ Without adequate consideration of the point, the Court in *Neal v. Delaware*²¹⁰ took this latter view of *Rives*. Like *Rives*, the *Neal* case involved a Negro defendant indicted for a capital offense. His removal petition alleged that Negroes were systematically excluded from grand and petit juries in the state courts, and that this exclusion was by reason of an 1831 constitutional provision of the State of Delaware disqualifying Negroes as electors, hence as jurors. The Delaware court in which, pursuant to the removal practice then in force, *Neal* filed his removal petition²¹¹ took the view that the 1831

²⁰⁶ 100 U.S. at 321.

²⁰⁷ But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him. When he has only an apprehension that such rights will be withheld from him when his case comes to trial he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to remove his case.

Id. at 320. Elsewhere the Court treats the problem as one of showing that defendant's rights are denied "in the judicial tribunals of the State," *id.* at 321 (emphasis in original), within the meaning of the statute; this is evidently merely another manner of stating the same concern.

²⁰⁸ *Id.* at 319.

²⁰⁹ Following the sentence quoted in text accompanying note 208 *supra*, the Court concludes: "In other words, the statute has reference to a legislative denial or an inability resulting from it." *Id.* at 319-20. See also note 207 *supra*.

²¹⁰ 103 U.S. 370 (1881).

²¹¹ Prior to 1948 removal procedure differed under the various federal removal statutes. In a civil rights case the petition for removal was filed in the state court

provision had been rendered void by the supervention of the fourteenth and fifteenth amendments, so that, if there were any jury discrimination in Delaware—which, in any event, the Delaware court found that Neal had failed to prove—such discrimination was unauthorized by state constitution or statute. On writ of error to the Delaware court, the Supreme Court of the United States disagreed that Neal had failed to show systematic exclusion of Negroes from the grand jury, and it reversed Neal's conviction for error in overruling his motion to quash the indictment and jury panels. But the Supreme Court agreed with the court below that this discrimination was unauthorized by statute and, in extended dictum, sustained denial of the removal petition. As the Court read *Strauder* and *Rives*, those cases held

that the constitutional amendment was broader than the provisions of sect. 641 [present subsection 1443(1)] . . . ; that since that section only authorized a removal before trial, it did not embrace a case in which a right is denied by judicial action during the trial, or in the sentence, or in the mode of executing the sentence; that for denials, arising from judicial action, after the trial commenced, the remedy lay in the revisory power of the higher courts of the State, and, ultimately, in the power of review which this court may exercise over their judgments, whenever rights, privileges, or immunities, secured by the Constitution or laws of the United States, are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the States, rights secured by any law providing for the equal civil rights of citizens of the United States, to which sect. 641 refers, is, primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. We held that Congress had not authorized a removal where jury commissioners or other subordinate officers had, without authority derived from the Constitution and laws of the State, excluded colored citizens from juries because of their race.²¹²

in which the case originated. See REV. STAT. § 641 (1875), note 148 *supra*, continued by Judicial Code of 1911, § 31, 36 Stat. 1096. If the state court declined to allow the removal, exception to that ruling could be preserved for examination by the Supreme Court of the United States on review of the final state court judgment, as in *Neal*. Alternatively, petition could be made to the federal trial court to which removal had been sought and disallowed by the state court; and that court might effect the removal by issuance of process which terminated the state proceeding, as in *Rives*. See the description of similar procedures in *Metropolitan Cas. Ins. Co. v. Stevens*, 312 U.S. 563 (1941). The 1948 Code revision made removal practice uniform; under the uniform procedure the petition for removal is filed in the first instance in the federal district court to which removal is sought, and this filing (with appropriate service on the state court and opposing party) effects removal, ousting the state court of jurisdiction unless and until the federal court remands. 28 U.S.C. §§ 1446-47 (1958).

²¹² 103 U.S. at 386-87.

"The essential question, therefore," said the Court, was whether Negroes were excluded from Delaware juries "by reason of the Constitution and laws of Delaware";²¹³ and, finding that "the alleged discrimination in the State of Delaware, against citizens of the African race, in the matter of service on juries, does not result from her Constitution and laws,"²¹⁴ the Court ruled removal unauthorized. This ruling was repeated in a series of substantially identical cases at the end of the nineteenth century.²¹⁵

²¹³ *Id.* at 387.

²¹⁴ *Id.* at 389.

²¹⁵ In each case the defendant was a Negro charged with murder in a state court and based his removal petition upon allegations of systematic exclusion of Negroes from the grand and petit juries. In *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Smith v. Mississippi*, 162 U.S. 592 (1896); and *Murray v. Louisiana*, 163 U.S. 101 (1896), it was alleged that this exclusion was practiced by local officials without authority of statute or state constitution. *Smith* and *Murray* moved to quash the indictment, petitioned the state court for removal, and challenged the venire or panel of trial jurors, all on the same equal protection grounds. *Gibson* did not move to quash the indictment but did petition for removal and challenged the petit jury. In all three cases the Supreme Court affirmed the convictions, sustaining denial of the removal petitions on the ground that no state statute or constitution denied the defendants their equal civil rights, and sustaining denial of the respective motions to quash or challenges to the petit jury on the ground that no sufficient case of discrimination was established. The *Gibson* and *Murray* opinions repeated substantially the passage from *Neal* quoted in text accompanying note 212 *supra*, and *Smith* rested briefly on *Gibson*.

In *Bush v. Kentucky*, 107 U.S. 110 (1883), the exclusion of Negro jurors was allegedly practiced under an 1873 Kentucky statute making only whites competent to serve as grand and petit jurors. Motions to quash the indictment, petitions for removal, and a challenge to the panel of petit jurors (the last being formally inadequate to raise a federal claim) were made and overruled. The Supreme Court found that prior to *Bush*'s indictment and trial the Kentucky Court of Appeals had declared the 1873 statute unconstitutional and void; this put *Bush* in a posture identical to *Neal*'s in Delaware, and the Court sustained denial of the removal petition on authority of *Neal*. As in *Neal*, the Court found the claim of grand jury discrimination supported on the record and reversed the conviction for error in denying the motion to quash.

In *Williams v. Mississippi*, 170 U.S. 213 (1898), defendant claimed not merely that administrative officials had systematically excluded Negroes from juries, but also that the provisions of the Mississippi constitution and statute prescribing the procedures for qualifying electors and jurors (only electors being competent jurors) were

but a scheme on the part of the framers of that constitution to abridge the suffrage of the colored electors in the State of Mississippi on account of the previous condition of servitude by granting a discretion to the said officers as mentioned in the several sections of the constitution of the State and the statute of the State adopted under the said constitution, the use of said [*sic*: which] discretion can be and has been used in the said . . . County to the end complained of.

Id. at 214. It was alleged that the constitution was drawn by a constitutional convention of 133 white and one Negro members, which refused to submit the new constitution to popular vote for adoption, because of the heavy preponderance of Negro voters qualified under prior law; and that the legislature acted immediately under the new constitution, with a purpose to discriminate against Negroes in the franchise, by passing a statute which gave local election managers wide discretion in judging the qualifications of persons registering to vote. Motions to quash the indictment and for removal were made and denied. *Williams* was convicted; the Mississippi Supreme Court and the Supreme Court of the United States affirmed. Sustaining denial of the motion for removal, the Court began by quoting from *Gibson* the standard paragraph from *Neal*, text accompanying note 212 *supra*; it noted that no claim was made that the Mississippi constitution or statute was discriminatory

Kentucky v. Powers,²¹⁶ in 1906, is the Court's most recent,²¹⁷ and most restrictive, construction of the removal section. Following three trials for murder in a Kentucky court, each resulting in conviction reversed on appeal by the Kentucky Court of Appeals, Powers prior to his fourth trial filed his petition for removal. The petition alleged (1) that the killing with which he was charged had occurred during the course of a factional dispute, accompanied by widespread political excitement and animosity, involving contested elections for all of the major state offices; (2) that Powers had been the Republican candidate for secretary of state; one Taylor the Republican candidate for governor; and Goebel, the man with whose murder Powers was charged, the Democratic candidate for governor; (3) that Goebel's killing aroused intense hostility toward Powers on the part of Goebel Democrats and inflamed them against him; and that this hostility continued throughout his three trials and still existed; (4) that in each of Powers' three trials the sheriff and deputies charged with jury selection, all being Goebel Democrats, connived with the trial judge to violate the regular state procedures for selecting juries, and instead systematically excluded Republicans and Independents from the jury panels and selected Goebel Democrats for the purpose of assuring Powers' conviction; (5) that the judge at each trial denied Powers' requests that the jury be selected equally from both political parties (approximating the roughly equal popular vote each had polled at the last election), or that the jury be selected without reference to party, and overruled Powers' objections to jurors selected by systematic exclusion of Republicans and Independents; (6) that on each appeal, by force of a Kentucky statute which made certain trial court rulings unreviewable, the Kentucky Court of Appeals had held it had no

on its face; and it concluded that the well-pleaded factual averments of the defendant's motions failed to present "sufficient allegation of an evil and discriminating administration" of the State's laws. 170 U.S. at 222. On these grounds, the motion to quash, as well as that for removal, was held correctly denied.

Obviously, as a technical matter, none of these cases held or could hold anything on the question of construction of the removal statute. Each case came to the Supreme Court from state court judgments of conviction (see note 211 *supra*); in each, the same jury-exclusion claim which was the basis for a removal petition was, on an identical record, the basis for a motion to quash or other attack on the grand or petit jury; where (as in all cases save *Bush*) the Supreme Court affirmed, it necessarily rejected the jury-exclusion claim on substantive grounds and therefore made it unnecessary to decide whether a valid claim of this sort would sustain removal; and where (as in *Bush*) the Supreme Court reversed on grounds that the substantive claim supported a motion to quash, rejection of the removal claim was equally unnecessary to decision. Technical niceties apart, however, it is clear that by 1898 the Court supposed it had long ago settled that removal under present § 1443(1) was allowable only on a claim of facial unconstitutionality of a state statute or constitutional provision.

²¹⁶ 201 U.S. 1 (1906).

²¹⁷ Between 1887 and 1964 it was generally supposed that orders of a lower federal court remanding to a state court proceedings sought to be removed from it

power to upset the trial judge's rulings on the jurors—which decisions were the law of the case and as binding on the Kentucky courts as statutes; (7) that at each trial, Powers had pleaded in bar a pardon issued to him by Governor Taylor, who at the time of its issuance was the duly elected and acting governor of the State; that the trial judge had refused to admit the pardon as a defense (this being the first time in Kentucky jurisprudence that a Kentucky court refused to give effect to an executive pardon); and that on each appeal the court of appeals had sustained this ruling—which decisions also were the law of the case and binding on the Kentucky courts; (8) that Powers was confined in jail without bail awaiting a fourth trial²¹⁸ and for all the foregoing reasons was unable to obtain a fair trial in the Kentucky courts.²¹⁹ The lower federal court assumed jurisdiction on removal, concluding

that the prior action of the Scott Circuit Court denying the defendant the equal protection of the laws is a real hindrance and obstacle to his asserting his right thereto in a future trial therein—just as real as an unconstitutional statute would be—and that the defendant is denied the equal protection of the laws in said court, within the meaning of said section, and entitled to a removal on account thereof.²²⁰

On the State's appeal and petition for mandamus, the Supreme Court held that this was error, that removal was improper, and it ordered the case remanded to the state court. The Court noted that, notwithstanding the state court of appeals would not entertain Powers' claims of error in denial of his federal rights, review of those claims could be had by writ of error issued from the Supreme Court to the

were not reviewable by the federal appellate courts. See Act of March 3, 1887, ch. 373, § 2, 24 Stat. 553, as amended, Act of Aug. 13, 1888, ch. 866, 25 Stat. 435; discussion in authorities cited note 173 *supra*. Preservation of a removal point through state appeals following adverse final judgment, see note 211 *supra*, was generally bootless, for the reason that it added nothing to other federal claims so preserved. See the last paragraph of note 215 *supra*. When the lower courts began to deny civil rights removal generally on the authority of *Powers* and its immediate predecessors, there was therefore no occasion for Supreme Court consideration of the issues decided below.

²¹⁸ It is unclear whether Powers made any particular point of his detention without bail as a ground for removal. The Supreme Court mentions in passing that he was so detained. 201 U.S. at 5.

²¹⁹ Although this fact is not mentioned in the Supreme Court's opinion, it appears that each of the previous reversals of Powers' convictions by the Court of Appeals of Kentucky had been by 4-3 vote of that court; that, following the third reversal, one judge who had on each occasion voted to reverse retired from the bench, and was succeeded by the judge who had presided at each of Powers' first two trials. See *Kentucky v. Powers*, 139 Fed. 452, 458-59 (C.C.E.D. Ky. 1905), *rev'd*, 201 U.S. 1 (1906).

²²⁰ 139 Fed. at 487.

state trial court after conviction. And as the Court read its earlier cases, those cases

expressly held that there was no right of *removal* under section 641, where the alleged discrimination against the accused, in respect of his equal rights, was due to the illegal or corrupt acts of administrative officers, unauthorized by the constitution or laws of the State, as interpreted by its highest court. For wrongs of that character the remedy, it was held, is in the state court, and ultimately in the power of this court, upon writ of error, to protect any right secured or granted to an accused by the Constitution or laws of the United States, and which has been denied to him in the highest court of the State in which the decision, in respect of that right, could be had.²²¹

Before and following *Powers*, the lower federal courts have consistently held that unless a state constitutional or statutory provision unconstitutional on its face is alleged to deprive a defendant of his federal rights, removal under present section 1443(1) is unauthorized.²²²

²²¹ 201 U.S. at 31.

²²² *Hull v. Jackson County Circuit Court*, 138 F.2d 820 (6th Cir. 1943) (alternative ground) (prejudiced judge in state postconviction proceeding, *semble*); *Maryland v. Kurek*, 233 F. Supp. 431 (D. Md. 1964) (denial of speedy trial); *North Carolina v. Alston*, 227 F. Supp. 887 (M.D.N.C. 1964) (trespass charges unconstitutional under equal protection clause as applied to sit-ins; state supreme court has previously rejected this claim); *City of Clarksdale v. Gertge*, 33 U.S.L. WEEK 2363 (N.D. Miss. Dec. 23, 1964) (prosecution of civil rights worker for taking photographs in city hall without mayor's permission is designed to harass voter registration; hostile and racially discriminatory state courts; Negro exclusion from juries and from electorate electing state judges); *In re Kaminetsky*, 234 F. Supp. 991 (E.D.N.Y. 1964) (state contempt proceeding will compel self-incriminating testimony); *Arkansas v. Howard*, 218 F. Supp. 626 (E.D. Ark. 1963) (hostile and racially prejudiced prosecutor and community; discriminatory prosecution; Negro jury exclusion; offense charged for conduct protected by federal court order); *City of Birmingham v. Croskey*, 217 F. Supp. 947 (N.D. Ala. 1963) (state policy of racial discrimination; Negro exclusion from juries and electorate electing state judges; jury hostility; charges void for vagueness and unconstitutional as applied, *semble* on first amendment and equal protection grounds); *Van Newkirk v. District Attorney*, 213 F. Supp. 61 (E.D.N.Y. 1963) (trial delay and pretrial hospital commitment without hearing); *Petition of Hagewood*, 200 F. Supp. 140 (E.D. Mich. 1961) (prejudiced jury and trial judge; discriminatory enforcement of recidivist statute; various procedural errors); *Rand v. Arkansas*, 191 F. Supp. 20 (W.D. Ark. 1961) (prejudiced jury); *Hill v. Pennsylvania*, 183 F. Supp. 126 (W.D. Pa. 1960) (alternative ground) (denial of speedy trial); *Louisiana v. Murphy*, 173 F. Supp. 782 (W.D. La. 1959) (charge under licensing statute discriminatorily administered); *Texas v. Dorris*, 165 F. Supp. 738 (S.D. Tex. 1958) (prosecutor, judge, and jury controlled by complainant); *California v. Lamson*, 12 F. Supp. 813 (N.D. Cal.), *petition for leave to appeal denied*, 80 F.2d 388 (Wilbur, Circuit Judge, 1935) (prejudiced jury); *New Jersey v. Weinberger*, 38 F.2d 298 (D.N.J. 1930) (prejudiced trial judge); *California v. Chue Fan*, 42 Fed. 865 (C.C.N.D. Cal. 1890) (discriminatory enforcement of lottery statute); *Ex parte Wells*, 29 Fed. Cas. 633 (No. 17368) (Bradley, Circuit Justice, 1878) (politically and racially hostile legislature, prosecutor, and jury; Negro exclusion from jury pursuant to statute allowing commissioners discretion for the purpose of facilitating Negro exclusion). Claims that the statute under which the defendant was charged was facially unconstitutional were held insufficient to support removal in *Snypp v. Ohio*, 70 F.2d 535 (6th Cir. 1934) (alternative ground) (*Blue Sky law*), and *North Carolina v. Jackson*, 135 F. Supp. 682 (M.D.N.C. 1955) (statute requiring racial segregation on buses), on the ground that it was not shown that the state courts would not fairly entertain the federal claim.

C. Possible Constructions of the Language

1. Subsection 1443(1): Inability To Enforce Federal Rights

Subsection 1443(1) poses two principal problems of construction. First, what federal rights, privileges, or immunities are protected by the statute: that is, what kind of "right" must a removal petitioner show he is denied or cannot enforce in the state courts in order to sustain removal? This difficulty arises from the circumlocution: "a right under any law providing for . . . equal civil rights" Second, what must the removal petitioner show, before state trial, to demonstrate that he "is denied or cannot enforce" his protected rights in the state courts? This difficulty is inherent in a statute which appears to require (but not to guide) a pretrial inquiry into how the state courts likely would respond to the protected federal claims if the case were left in the state courts. Exegesis fitly begins with the decisions from *Strauder* and *Rives* to *Powers*, which constitute the Supreme Court's whole corpus juris on these questions.

(a) The cases barely advance inquiry on the first question, as to the nature of the "right" whose denial or unenforcibility in the state courts will sustain removal. *Strauder* apparently holds that a right of equality in the judicial proceeding sought to be removed, given by the equal protection clause of the fourteenth amendment and by section 1 of the Civil Rights Act of 1866, is this kind of "right,"²²³ but none of the decisions reflects on the more important issue whether constitutional or statutory rights whose gravamen is other than equality also come within the removal provision.²²⁴ I shall postpone

²²³ *Strauder* bases the right of a Negro defendant not to be tried by a jury from which Negroes have been systematically excluded upon the equal protection clause and REV. STAT. § 1977 (1875) (now 42 U.S.C. § 1981 (1958)), which codified § 1 of the First Civil Rights Act of 1866, note 81 *supra*.

²²⁴ In each of the cases from *Strauder* and *Rives* to *Powers*, the only ground seriously put forward for removal was systematic exclusion of a class from the grand and/or petit jury. In *Powers*, the additional claim was made that the state courts were denying Powers the benefit of a state-granted pardon; but this claim, which was dressed out in equal protection garb by allegations of *discriminatory* nullification of the pardon, was treated by the Court as an equal protection clause contention (to the extent that it was other than frivolous), and so adds nothing to the Court's disposition of the cognate jury-exclusion equal protection clause claim. In *Gibson* the jury-exclusion equal protection clause contention was embellished by the argument that the jury selection statute under which the discrimination was practiced was also applied ex post facto in Gibson's case, since Gibson's charged offense predated the statute. The Court properly treated this ex post facto claim as extravagant on the merits, and additionally said that it did not come within the protection of the removal section, apparently for the same reason that Gibson's jury-exclusion claim itself did not—that is, because neither attacked the face of the statute. 162 U.S. at 585-86. I do not find in *Gibson* support for the view taken by Judge Friendly in *New York v. Galamison*, Nos. 29166-75, 2d Cir., Jan. 26, 1965, at s.o. 990, see note 312 *infra*, to the effect that *Gibson* excludes ex post facto claims, as a class, from the scope of § 1443(1).

further consideration of this issue to pp. 863-74 *infra*, and assume for present discussion that all fourteenth amendment civil rights are protected by subsection 1443(1).

(b) Taken at its word, *Strauder* supports the view that whenever a state statute on its face (by which I mean in every possible application to a statutorily defined class) deprives a class of persons of federal rights protected by subsection 1443(1), those persons may remove their prosecutions without making any showing beyond the face of the statute itself that the state courts are likely to sustain the statute against the federal claim. Negroes prosecuted under a statute requiring segregated seating on busses and penalizing seating in violation of the segregation pattern could therefore on this ground alone remove the prosecution under 1443(1); for, although it is true that the *Strauder* statute deprived Negroes of equal protection in a matter of trial procedure, while the bus segregation statute deprives them of equal protection in the out-of-court conduct which is the subject matter of the prosecutions sought to be removed, this appears a distinction without a difference. Conviction in either case denies the defendants their federally guaranteed right; in both cases it is the facially unconstitutional statute which dictates to the state courts the illegal conviction.²²⁵ Under the same theory, and on the assumption made in the preceding paragraph that subsection 1443(1) protects due process as well as equal protection guarantees, the prosecutions of my hypothetical Mississippi defendants for parading without a license and for conspiracy to commit an act injurious to public morals (pp. 795-96 *supra*) are *eo ipso* removable if the federal courts agree with me that these statutes are void respectively under the first-fourteenth amendments and for vagueness; and, of course, the same preliminary ruling which establishes federal removal jurisdiction on this ground effectively terminates the prosecutions by laying a foundation for the defendants' immediate motions to dismiss. In a number of unreported decisions, district courts have remanded such cases;²²⁶ but I do not see that these decisions can stand if *Strauder* is still the law.²²⁷

(c) Indeed, I think it tenable to argue under *Strauder* that each of the other charges against the Mississippi Negroes—obstructing the

²²⁵ But see *North Carolina v. Jackson*, 135 F. Supp. 682 (D.N.C. 1955) (disallowing removal in a bus-segregation statute case like the one hypothesized in text), note 222 *supra*.

²²⁶ E.g., several of the cases presently consolidated in the pending appeal in *Brown v. City of Meridian*, No. 21730, 5th Cir.

²²⁷ That is, of course, assuming that §1443(1) protects due process claims, see pp. 863-74 *infra*, and that the claims of facial unconstitutionality of the statutes involved in these several cases are correct on the merits.

sidewalk, resisting arrest, creating a disturbance, pp. 795-96 *supra*—is removable on the theory that the statutes on which these charges are based, although not facially unconstitutional, have the same effect as facially unconstitutional statutes in denying the defendants their protected federal rights. It is tenable to claim, that is, that these prosecutions are removable once it is shown that the *application* of the statutes to defendants' conduct would be unconstitutional. For is not the *Strauder* test of removability whether state statutory law directs the federally unconstitutional result complained of, so that that result is produced by statute and not simply by state judicial action unconstrained by the State's legislation? If this be so, it should not matter whether the state statute involved is unconstitutional on its face (*i.e.*, in all applications to a described class) or unconstitutional as applied (*i.e.*, insofar as it condemns particular defendants' federally protected conduct): in both cases, equally, it is the statute which compels the state courts to the constitutionally impermissible result and thus brings it about that the defendant "cannot enforce in the courts of [the] . . . State" his federally protected rights. True, the decisions from *Rives* to *Powers* seem to require a facially unconstitutional state statute to support removal. But each of these cases involved claims of denial of federal rights by reason of an unconstitutional *trial procedure*: specifically, systematic exclusion in the selection of jurors. In none of the cases did the defendant claim that the substantive criminal statute on which the prosecution was bottomed was invalid, either on its face or as applied, by reason of federal limitations on the kind of conduct which a State may punish. This latter sort of claim asserts that, under the Constitution, *no matter what procedures may be forthcoming at trial*, the State cannot constitutionally apply the statute relied on to the conduct with which the defendant is charged. *Neal v. Delaware* and subsequent cases explain the *Rives-Powers* line as holding that "since [the removal] . . . section only authorized a removal before trial, it did not embrace a case in which a right is denied by judicial action during the trial" ²²⁸ But a defendant who attacks the underlying criminal statute as unconstitutional does not predicate his attack on "judicial action during the trial." He says that if he is convicted at all under the statute his conviction will be federally illegal. Nothing about his contention is contingent upon the nature of "judicial action, after the trial commenced" ²²⁹

²²⁸ *Neal v. Delaware*, 103 U.S. 370, 386 (1881); see, *e.g.*, *Gibson v. Mississippi*, 162 U.S. 565, 581 (1896).

²²⁹ *Neal v. Delaware*, *supra* note 228, at 387. Of course, the state court *may* hold that the statute does not apply, or *may* hold it unconstitutional and enforce the de-

When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of [present subsection 1443(1)]

. . . .²³⁰

Whether this plausible verbalism is acceptable reasoning or a bad pun depends upon a somewhat more critical examination of *Strauder* and the *Rives-Powers* cases than I have yet made. The cases submit to examination only with strain, and I cannot be certain that I am not importing the concerns which I think they display. Still, I can find no other explanation of them, and have concluded that they possess the following or none.

The problem with which the cases struggle is that designated question Second at p. 851 *supra*: namely, what constitutes an adequate pretrial showing that a defendant is denied or cannot enforce his protected rights in the state courts? Properly seen, this inquiry is the product of three others: (1) what circumstances occurring in the state court process did Congress envision as amounting to a denial or inability to enforce protected federal rights; (2) by what degree of probability must these circumstances appear before state trial; and (3) what facts, shown before state trial, sufficiently demonstrate the requisite degree of probability? From the outset, the Court was influenced in its answer to the first subquestion by what it saw as practical limitations on the possible range of answers to the third: that is, it took the view that Congress could not have meant to authorize removal in prospect of any circumstances of the state trial process which could not practicably be proved before state trial. This was wrong reasoning, as a matter of statutory construction, for the authority to remove whenever a defendant is "denied or . . . cannot enforce" his federal rights in the state courts was given by the First Civil Rights Act of 1866;²³¹ that act allowed removal either before trial or after judgment;²³² and although the procedure of postjudgment removal was not carried forward in the *Revised Statutes* section which came before the Court in *Strauder* and thereafter, the *Revised Statutes*

defendant's federal claims. But it is always possible that a state court may do these things, and if the possibility precludes removal, the removal statute is read entirely off the books. This would require repudiation of *Strauder* and rejection of the assumption on which the *Rives-Powers* line of cases was decided: that if an unconstitutional state statute were found, removal would be proper.

²³⁰ *Virginia v. Rives*, 100 U.S. 313, 321 (1880).

²³¹ See pp. 810-11 *supra*.

²³² See note 201 *supra*.

did continue the authorization to remove whenever a defendant is "denied or . . . cannot enforce" his federal rights, apparently with the same meaning that phrase had had in 1866. The result of this initial error was that the Court began by assimilating and ended by confusing the distinct questions what state court conditions warrant removal, and how those state court conditions may sufficiently be proved. For, whenever the Court found a particular mode of pretrial proof inconvenient, it comfortably concluded that Congress had not meant to allow removal under the circumstances proved by this mode.

All of the Court's cases involved the jury-exclusion claim. Now, the appropriate method of approach to a removal petition making this claim would evidently be, as indicated above: (A) to determine whether this was one of the sorts of claims whose denial by the state courts was intended to furnish a ground of removal under present subsection 1443(1); (B) to determine what degree of probability of the claim's denial by the state courts was intended to be sufficient for removal—the issue necessarily being posed as one of probabilities under the pretrial removal practice of the *Revised Statutes*;²³³ and (C) to determine whether the particular petition stated facts from which a court should infer that the requisite degree of probability existed that this petitioner would be denied the jury nondiscrimination right by the state courts. In passing on question (C), the court might legitimately consider not merely the probative value of the facts alleged by the petitioner, but also the convenience or inconvenience of permitting proof of the requisite degree of probability to be made in the fashion in which the petitioner sought to make it, in light of the relative availability and desirability of other means of proof. The probability being proved is itself, of course, a compound, comprised of the probability that Negroes will be systematically excluded from the panels and of the probability that the state courts will leave this illegality uncorrected. Concern about a facially unconstitutional state statute first entered the Court's opinions as an evidentiary consideration pertinent to both of these last questions of probability. Confusion of proof with what is being proved then erected the facially unconstitutional statute into a requirement for removability on a jury exclusion claim.

Strauder, it seems clear, held that the jury exclusion claim was one for whose protection removal was authorized. Assuming that

²³³ Under pretrial removal procedure, the removal petition is sufficient, if ever, before state trial; before state trial it can never be shown, save as a matter of greater or smaller probability, that the defendant will be denied his federally protected rights in the state court process; if probability is insufficient basis for removal, removal can never be allowed.

both state jury-selection officials and state courts would prefer an unconstitutional state statute to the Constitution, *Strauder* further held that the existence of such a statute sufficiently demonstrated probable exclusion *and* probable refusal of the state courts to correct it. The removal petition in *Rives* stated no facts supporting the inference of either probability, and the Court, adverting to *Strauder*, suggested that involvement of a facially discriminatory statute would have aided the petitioner in both regards. As an evidentiary matter, this is plausible, though not compelling, logic: for although state officials and judges *might* avoid unconstitutional state legislation, they were unlikely in 1879 to do so easily—and this unlikelihood was thought in *Strauder* and *Rives* sufficient to support pretrial removal.

True, *Strauder* might instead have been put on the ground that a statute had some innate efficacy to deny a defendant's rights irrespective of the probability that it would be applied in his case. But *Neal v. Delaware* and *Bush v. Kentucky*²³⁴ refute or repudiate this conception; for *Neal* declined to give *Strauder*-like effect to state legislation that predated the federal constitutional provision which rendered it void; and *Bush*, to state legislation that a state court had declared unconstitutional prior to the filing of the removal petition. These decisions confirm the principle of *Strauder* that the touchstone of removability is the likelihood that state courts will disregard the guarantees of federal law which the removal statute protects. At the same time, the opinions in *Neal* and *Bush* stand this principle on its head by reading the discussion in *Rives*—which asserts the evidential value of a facially unconstitutional state statute in proving that state courts will likely disregard federal guarantees—as though *Rives* stated that the *only* sufficient evidence of this likelihood was the existence of a facially unconstitutional state statute. And in *Powers*, where the lower federal court reasonably found a clearly demonstrated probability that the state courts would deny defendant's federal rights—a probability every bit as great, that court expressly said, as an unconstitutional state statute could have created—the Supreme Court quoted its *Neal-Bush* dicta and applied *Rives* in the teeth of the *Strauder-Rives* rationale.

This result can be supported neither as a matter of substantive law nor as a matter of evidence. Substantively, the limitation of removability to cases in which state legislation denies federally protected rights finds no basis in the text of the removal statute;²³⁵

²³⁴ See note 215 *supra*.

²³⁵ The statute speaks generally of a defendant who is denied or cannot enforce his rights in the state courts; it shows no concern for the agency of the denial or unenforceability.

rather it affronts that text as originally written.²³⁶ It affronts whatever can be gleaned from the legislative history;²³⁷ indeed, the statute as construed in *Powers* works precisely arsy-arsy the manner in which the manager of the 1866 bill explained its operation to the Senate in an important speech.²³⁸ The suggestion in the Court's opinions that nonstatutory denials of rights occur only after trial has begun, whereas statutory denials predate trial,²³⁹ is patently absurd (whether law be conceived as a brooding omnipresence or a prediction of what courts will in fact do)—save as this suggestion reflects an estimate of probabilities. And, as the facts of *Powers* demonstrate, unconstitutional state legislation has no monopoly of the probability that federal rights will be disregarded. To support the *Powers* doctrine as an evidentiary principle, it is necessary to make one of two untenable assumptions: that state judges are unlikely to be hostile to federal rights unless a state statute tells them to be (an assumption particularly alien to the thinking of the Congresses which created the civil rights removal jurisdiction²⁴⁰), or that no form of proof except positive law will sustain a relatively sure prediction of judicial conduct (an assumption which belies common-law tradition and daily legal experience). Indulging these assumptions defeats the principal purposes of the removal jurisdiction. For, certainly, the 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 *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.²⁴¹ Where removal is most needed is the case

²³⁶ See text accompanying notes 104-05 *supra*.

²³⁷ See text accompanying notes 90-108 *supra*.

²³⁸ See note 87 *supra*; text accompanying note 106 *supra*. Senator Trumbull's speech assumes postjudgment as well as pretrial removability. See note 201 *supra*.

²³⁹ See text accompanying notes 212, 228 *supra*.

²⁴⁰ See text accompanying notes 68-149 *supra*.

²⁴¹ The Supreme Court's jurisdiction on direct review was mandatory in such cases under the First Judiciary Act, of 1789, and continued so under the 1867 amendatory act. See note 111 *supra*. Since the Act of Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726, the Court has mandatory jurisdiction by appeal to review the judgment of the highest court of a State in which decision can be had in any case in which that court sustains a state statute against federal constitutional challenge, 28 U.S.C. § 1257(2) (1958); the Court's jurisdiction to review cases in which a state court has rejected a federal constitutional claim not involving challenge to a state statute is limited to certiorari, 28 U.S.C. § 1257(3) (1958). Under this pattern, there is all the more reason why a state criminal defendant who demonstrates that there exists a non-statutory bar to effective enforcement of his federal rights in the state courts should be permitted removal; unlike the defendant whose claim of deprivation of federal rights is directed against a state statute, he has no review as of right by the Supreme Court if he remains in the state system. (These practical workings of the Supreme Court's appeal and certiorari jurisdiction, dating from 1916, were given significant consideration by the Court in *Pay v. Noia*, 372 U.S. 391, 412-13 (1963), in applying 1867 habeas corpus legislation.)

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.²⁴² This is the case where local prejudice, local resistance, pitch the risk of error, always incident in fact finding,²⁴³ strongly against federal contentions; it was to meet such situations that Congress had utilized removal prior to 1866²⁴⁴ and utilized it in civil rights cases in and after that year.²⁴⁵

So the rule of *Powers* has no very obvious justification. Yet it is not inexplicable. Perhaps it draws altogether the wrong line; nevertheless, the need for drawing some line is clear. The problem lies in litigating the intractable issues of probability described in the preceding paragraphs. Where removal is sought on the claim of an unconstitutional trial procedure (*e.g.*, jury exclusion), pretrial inquiry must be made into the probability that the conditions giving rise to the claim will occur (*i.e.*, that Negroes will be excluded), and into the probability that the state courts will reject a valid claim (*i.e.*, overrule objections to the juries). The inquiry needs be made because unconstitutional trial procedures *may* occur in any case; if the mere possibility sustains removal, all state cases are removable. But this sort of inquiry is inconvenient and judicially embarrassing in the extreme: inconvenient because the complex factual issues underlying the questions of probabilities must be tried in advance of the state trial; embarrassing because, unless the involvement of the federal claim in a state case is taken *eo ipso* as presenting sufficient risk of its denial, one of the questions to be litigated is the probability of its actual improper denial in the state courts—an issue which smacks of trying the loyalty of the state judges to their constitutional obligations. Disinclination to disrupt and delay the state proceedings by preliminary factual litigation in the federal courts²⁴⁶ and unwillingness to adjudicate the loyalty of the state judiciaries doubtless pressed the Court strongly toward development of an easily administrable and relatively impersonal test for removability. Facial unconstitutionality of a State's written law provided such a test and—because the Court had

²⁴² See notes 27-33 *supra* and accompanying text.

²⁴³ See note 193 *supra*.

²⁴⁴ See notes 55-64, 68-74 *supra* and accompanying text.

²⁴⁵ See notes 75-148 *supra* and accompanying text.

²⁴⁶ Prior to 1948, litigation of the issue of removability in the federal court did not automatically require a stay of the state proceedings. See note 211 *supra*. However, a state court would ordinarily find it inexpedient to proceed while its jurisdiction was being litigated in the federal courts. Since 1948, state proceedings are stayed automatically pending disposition by the federal district court of the issue of removability. 28 U.S.C. §§ 1446-47 (1958).

made the mistake of supposing that Congress defined the conditions of removability with pretrial administration alone in view ²⁴⁷—administrative practicality was allowed in *Powers* to determine the removal statute's construction.

I shall return later to the question of the continuing viability of the *Powers* rule. My purpose at the moment is to determine whether, accepting the rule and the foregoing explanation of it,²⁴⁸ *Powers'* requirement of a facially unconstitutional state statute to support removal on a trial-procedure claim necessarily compels the same requirement to support removal on a claim of unconstitutionality of the underlying criminal charge. I conclude that it does not; that, consistently with *Powers*, the federal unconstitutionality of the underlying charge as applied suffices for removal under subsection 1443(1).^{248a}

As I have pointed out, the statutory issue whether a defendant is denied or cannot enforce his federal rights in the state courts subsumes decisions (1) whether the right he asserts is one which Congress meant removal to protect; (2) what degree of probability of its denial

²⁴⁷ See text accompanying notes 231-32 *supra*.

²⁴⁸ I have heard it suggested that the *Rives-Powers* line is explicable principally as a reflection of the restricted concept of state action held by the Court at the turn of the century, see, e.g., *Barney v. City of New York*, 193 U.S. 430 (1904), and that the subsequent demise of that concept undermines *Rives-Powers*. If the *Rives-Powers* doctrine began with the *Powers* case, the explanation might be tenable; but the *Rives* opinion itself is the classic exposition of the principle that the fourteenth amendment reaches state executive and judicial action, and I cannot imagine that cases purporting to follow *Rives* on its own immediate issues forgot that lesson. Compare *Texas v. Gaines*, 23 Fed. Cas. 869 (No. 13847) (C.C.W.D. Tex. 1874). Besides, *Strader* put the federal jury exclusion claim not merely on the fourteenth amendment, but on the codified provisions originating in § 1 of the Civil Rights Act of 1866, which was thirteenth amendment legislation. In all, I think the explanation of *Rives-Powers* offered in text accompanying notes 246-47 *supra* is the correct one.

^{248a} *Rachel v. Georgia*, No. 21354, 5th Cir., March 5, 1964, so held. That decision, handed down after this Article was set in type, allowed removal under § 1443(1) of Georgia trespass prosecutions which the removal petitioners asserted could not be maintained consistently with the public accommodations sections of the Civil Rights Act of 1964, §§ 201-03, 78 Stat. 243, as construed in *Hamm v. City of Rock Hill*, 85 Sup. Ct. 384 (1964). The *Rachel* opinion, conformably to the conclusions reached at pp. 852-61 & p. 910 *infra*, demanded as a condition of removability neither the facial unconstitutionality of the trespass statute nor any showing that the Georgia courts would not likely fairly entertain petitioners' claim that the statute was unconstitutional as applied. It was sufficient that the Federal Civil Rights Act forbade application of Georgia's statute to the conduct for which petitioners were charged.

Congress, while carving out rights and immunities in the area of civil rights, has provided a jurisdictional basis for efficiently and appropriately protecting those rights and immunities in a federal forum. The provision of this protective forum is not limited by the States' obligation, under the Supremacy Clause, to protect federally guaranteed civil rights as zealously as would a federal court. That there is such an obligation on State tribunals is true, and vital, but it is irrelevant here. Theoretically, there is no need for any federal jurisdiction at all—except that of the Supreme Court—because State courts are required to protect federally created rights. Nevertheless, the power of Congress to provide a federal forum also to protect such rights is undoubted. Such power was exercised in enacting § 1443(1).

Rachel v. Georgia, *supra* at s.o. 14.

justifies pretrial removal; and (3) what sort of factual showing sufficiently demonstrates that degree of probability. *Powers* (1) accepted the *Strauder* decision that jury exclusion was a protected claim; (2) decided, as regards this claim, that the mere probability of its involvement in a state case did not constitute sufficient probability of its denial to warrant removal; but that a showing was to be demanded that the claim would likely be improperly rejected by the state courts; and (3) for administrative reasons refused to permit this latter likelihood to be proved in any other way than by the showing of a facially unconstitutional state statute. But nothing in the case or in its predecessors suggests that, with respect to all claims that pass muster as protected under subquestion (1), the same degree of probability of denial is required to support removal under subquestion (2). Various federal rights differ in their importance within our pattern of constitutional liberties and in their vulnerability to destruction by state process. Differentially, as regards different rights, the risk that they will not be recognized amounts to the right's practical destruction. These differences must necessarily be taken into account in construction of 1443(1), which speaks generally of the denial of or inability to enforce various rights. So too must differences in the amounts of disruption of state proceedings which are caused by making the inquiry whether different federal rights are colorably involved in those proceedings. Disruption occasioned by inquiry may preclude inquiring into every case, yet not preclude inquiring into a more limited class of cases presenting special justifications for the inquiry.

The claim that a federal guarantee of civil rights immunizes the defendant's conduct against state criminal charges can colorably be made in a far smaller number of cases than that in which a guarantee regulating the States' criminal procedure can colorably be invoked.²⁴⁹ Accepting *arguendo* the judgment made in *Powers* and its predecessors that these latter, federal trial-procedure claims would be too numerous to take wholesale into the federal courts without preliminary inquiry concerning both the probability of their arising and the probability of their being improperly rejected in the state courts—and too numerous to justify the disruptions and delays incident to factual inquiry concerning these probabilities in connection with all such claims—I think that that judgment does not compel a like one

²⁴⁹ This is obviously true today. It was probably thought to be true, as well, during the period of development of the *Powers* doctrine following *Neal* in 1881 and *Bush* in 1883. Neither the substantive nor the procedural impact of the fourteenth amendment had yet been much explored at that period, but the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), did not augur extensive developments on the substantive side.

with respect to claims of immunity against the state criminal charge. Instances where claims of immunity have enough paper substance to call for factual hearing will likely be infrequent: free speech and religious freedom cases, cases involving the few nonfrivolous claims of "substantive" equal protection and the "substantive" due process rights of individual liberty.²⁵⁰ Hearings on these claims to determine whether the facts on which the criminal charge is based do colorably support the claim would not disrupt the bulk of state criminal litigation. And if these claims are colorable in fact, the relative importance and vulnerability of the rights involved justify allowance of removal without the further inquiry (which would be no less politically impractical in these cases than in trial-procedure cases) concerning the probability of improper state court rejection. The federal substantive guarantees, unlike trial-procedure rights, are principally aimed at prohibiting the States from repression of certain kinds of conduct. Their design is immediately to allow, to liberate from state inhibition and deterrence, the conduct which they protect; they are not meant merely to restrict the forms through which state procedure may abut at judgment. Federal trial-protection rights are ordinarily sufficiently protected if they are ultimately recognized in the criminal process, if convictions got without observing them are finally disallowed. But the very maintenance, the mere pendency, of criminal proceedings directed at substantively protected conduct has repressive force anterior to and independent of final judgment; and the risk that prosecutions may succeed deters the substantively protected activities which the Constitution has resolved shall not be deterred.²⁵¹ For these reasons, peculiar to substantive claims of immunity, it will not do to conceive the federal constitutional right—for example, freedom to conduct a protest demonstration—merely as a right to a favorable judgment at the conclusion of a state prosecution for demonstrating. The right is the right of freedom to demonstrate, nothing less: an immunity against, not an indemnification for, repressive state process. As to *that* right,²⁵² the right on the streets where it counts, it may fairly be said that the pendency alone of the state court prosecution for protected conduct denies the demonstrator his right, and makes him unable to enforce that right, within the meaning of 1443(1).

This argument is the stronger where, as in the case of the Mississippi Negro defendants, pp. 794-96 *supra*, first-fourteenth amend-

²⁵⁰ See note 41 *supra*.

²⁵¹ See pp. 796-802, 823-25, 836-38, 840-42 *supra*.

²⁵² I have used the term "right" in this discussion because it is the term used in § 1443(1). I do not think it worth the effort to maintain Hohfeldian rectitude for present purposes.

ment freedoms of expression are in issue. The Supreme Court has traditionally accorded those freedoms a constitutionally "preferred position."²⁵³ It has recognized that "the threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."²⁵⁴ Touching these freedoms particularly, the Court has been concerned with the danger of biased fact findings by the state courts:²⁵⁵ a danger which not only threatens to destroy the federal protections of those criminal defendants who actually go to trial, but also—through the knowledge that effective freedom of expression is committed largely to the unreviewable power of state magistrates and judges—tends broadly to deter its exercise in the service of locally unpopular causes. Finally, the Court has seen the need for early, quickly effective federal judicial remedies in first amendment cases,²⁵⁶ lest state repression even during brief periods render speech valueless as an instrument of democratic political action. These principles solidly support a construction of the removal statute to hold that a defendant is denied or cannot enforce his first-fourteenth amendment freedoms whenever he is prosecuted in a state court for conduct colorably protected by the amendments.

(d) With regard to various trial procedure claims—systematic jury exclusion, trial before judges elected by an electorate from which Negroes have been systematically excluded, etc.—I see no tenable way to take the case of the Mississippi Negro defendants out of the operation of the *Powers* rule. Removal sought on the basis of these claims alone would therefore fail, unless the claims could be referred to a facially unconstitutional state statute.²⁵⁷ Technically, the argument is open that in none of the decisions from *Rives* to *Powers* were

²⁵³ *Marsh v. Alabama*, 326 U.S. 501, 509 (1946); *Saia v. New York*, 334 U.S. 558, 562 (1948); *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944) (dictum); see *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964). For a demonstration of the consensus of the Justices in this preference, notwithstanding disputes about terminology, see McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182 (1959).

²⁵⁴ *NAACP v. Button*, 371 U.S. 415, 433 (1963); cf. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-70 (1963); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 286-88 (1961); *Smith v. California*, 361 U.S. 147, 151 (1959).

²⁵⁵ See *NAACP v. Button*, 371 U.S. 415, 432-33 (1963); Lewis *The Sit-In Cases: Great Expectations*, [1963] SUPREME COURT REV. 101, 110; Note, 109 U. PA. L. REV. 67 (1960).

²⁵⁶ See *Baggett v. Bullitt*, 377 U.S. 360, 378-79 (1964), rejecting an abstention contention in a federal suit for declaration of the first-fourteenth amendment unconstitutionality of a state loyalty oath statute. The Court said that abstention would work to delay "ultimate adjudication on the merits for an undue length of time, . . . a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms." *Ibid.*

²⁵⁷ Under *Louisiana v. United States*, 33 U.S.L. WEEK 4262 (U.S. March 8, 1965), it appears that the Mississippi legislation fixing the qualifications of electors is unconstitutional on its face. See note 1 *supra*. See also the excellent Case Note, 113 U. PA. L. REV. 587 (1965). If this legislation falls, it carries down the jury qualification legislation as well, for in Mississippi jurors must be either qualified electors or resident freeholders. MISS. CODE ANN. § 1762 (Supp. 1962).

substantial allegations made of state judicial hostility, and that such allegations might supply the place of a facially unconstitutional statute in demonstrating before trial that the defendant will likely be unable to enforce his protected rights in the state courts. Technically, also, it may be urged that a facially unconstitutional state statute is sufficiently implicated for *Rives-Powers* purposes if, although it does not control the issues dispositive of the prosecution, it tends to create an atmosphere of hostility against the defendant sufficiently strong that the state judges and juries are likely to be carried along in the state-wide swell.²⁵⁸ (The Mississippi statute books, of course, are honey-combed with facially unconstitutional racial legislation.²⁵⁹) But in view of the purposes of the *Rives-Powers* doctrine as I see it,²⁶⁰ these somewhat more sophisticated modes of trying the loyalty of the state judiciary ought not be allowed unless and until the doctrine as a whole is reexamined and repudiated.²⁶¹

2. Subsections 1443(1) and (2): Protected Rights and Acts Under "Any Law Providing for . . . Equal Civil Rights"

I return to explore the assumption which I have previously made,²⁶² that the civil rights removal statute protects all civil rights²⁶³ guaranteed by the fourteenth amendment. Subsection 1443(1) allows removal by a defendant who is denied or cannot enforce in the state courts "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."²⁶⁴ This language first appears in substance in the *Revised Statutes of 1875*.²⁶⁵ Several courts have said that it means nothing more than equal protection of the laws, and that removal is unauthorized unless the petitioner can show that a constitutional right of *equality* is withheld in the state courts.²⁶⁶ This seems incredible: the text is "a right under" any law providing for equal civil rights, etc.; the twenty-five word phrase surely goes to unreasonable lengths

²⁵⁸ Cf. the first paragraph of Senator Trumbull's speech set out in note 87 *supra*, which does not appear to refer to legislation having the pervasive atmospheric effect which I suppose. Compare the approach in the cases collected in note 7 *supra*.

²⁵⁹ See the partial collection in *United States v. Mississippi*, 229 F. Supp. 925, 984-85 n.33 (S.D. Miss. 1964) (three-judge district court) (dissenting opinion), *rev'd*, 33 U.S.L. WEEK 4258 (U.S. March 8, 1965).

²⁶⁰ See pp. 854-59 *supra*.

²⁶¹ See pp. 911-12 *infra*.

²⁶² See text following note 224 *supra*.

²⁶³ See note 41 *supra*.

²⁶⁴ The statute is set out in text at pp. 842-43 *supra*.

²⁶⁵ See REV. STAT. § 641 (1875), note 148 *supra* (discussed at text accompanying notes 281-319 *infra*).

²⁶⁶ *Steele v. Superior Court*, 164 F.2d 781 (9th Cir.) (alternative ground), *cert. denied*, 333 U.S. 861 (1948); *Hill v. Pennsylvania*, 183 F. Supp. 126 (W.D. Pa. 1960); *Maryland v. Kurek*, 233 F. Supp. 431 (D. Md. 1964).

to say "equal protection of the laws." Since these cases offer no supporting reasoning, I think they deserve no further concern.

A more redoubtable effort to identify the range of rights protected by section 1443 is made in *New York v. Galamison*,²⁶⁷ in the Second Circuit, the first major decision by a federal appellate court exercising the jurisdiction given by the Civil Rights Act of 1964 to review remand orders in civil rights removal cases.²⁶⁸ *Galamison* presented an attempt to remove prosecutions under a miscellany of state charges (disorderly conduct, simple assault, nuisance, unlawful assembly, loitering at a school building, inducing truancy, etc.) growing out of car and subway stall-ins, city hall sit-ins and schoolyard leafleting to protest racial discrimination. Judge Friendly, who wrote the principal opinion for the majority disallowing removal, found the facts alleged in the petitions raised colorable claims that federal free-speech protection immunized the petitioners' conduct from the state charges. Removal was sought to be sustained solely under subsection 1443(2), on the ground that the prosecutions were for acts "under color of authority derived from any law providing for equal rights."²⁶⁹ The language "any law providing for equal rights" in subsection 1443(2) clearly means the same thing as the longer expression in subsection 1443(1), "any law providing for the equal civil rights of citizens . . . or of all persons . . .,"²⁷⁰ and the court was asked to hold that petitioners' prosecutions for protests against discrimination came within the statute on the theories (a) that free speech conduct was per se conduct under color of authority of law providing for equal rights (namely, the due process clause of the fourteenth amendment or statutes, 42 U.S.C. § 1983²⁷¹ and 18 U.S.C.

²⁶⁷ Nos. 29166-75, 2d Cir., Jan. 26, 1965.

²⁶⁸ See notes 173, 217 *supra*.

²⁶⁹ The statute is set out in text at pp. 842-43 *supra*.

²⁷⁰ As will appear below, the concept of a law providing for equal civil rights originated in the codification of the removal statutes by § 641 of the *Revised Statutes of 1875*. In that section, which is set out in note 148 *supra*, the removal provision extended to any person who could not enforce in the state courts "any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States," and to officers or persons charged with wrongs done under color of authority "derived from any law providing for equal rights as aforesaid." These two removal authorizations (now respectively subsections (1) and (2) of § 1443) appeared in the 1911 Judicial Code, § 31, 36 Stat. 1096, exactly as they had appeared in the *Revised Statutes*, with the "color of authority" passage referring explicitly back to the "aforesaid" laws described in the "cannot enforce" passage. Omission of "as aforesaid" in the 1948 revision effected no substantive change, for as indicated by the reviser's note, *supra* note 150, the 1948 revision intended only "changes . . . in phraseology."

²⁷¹ REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958), provides that any person who, under color of state law, subjects any citizen or person to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," shall be liable to the injured party in a legal or equitable action or other proper proceeding for redress. The section originates in § 1 of the Third Civil Rights Act, the Ku Klux Act of 1871, set out in text accompanying note 141 *supra*.

§ 242,²⁷² creating civil and criminal liability for deprivation of due process rights); or (b), more narrowly, that at least the exercise of free speech to protest racial discrimination came under color of authority of such law (namely, the equal protection clause of the fourteenth amendment and statutes²⁷³ implementing it).²⁷⁴ Judges Friendly and Kaufman rejected the second theory on the ground that the equal protection provisions of the Constitution and statutes did not give color of authority to protest discrimination (a ground I shall discuss at pp. 879-80 *infra*), and rejected the first theory on the same ground, as respects due process guarantees, and also on the alternative (hence unnecessary²⁷⁵) ground that "§ 1443(2) applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights."²⁷⁶ The latter holding, which affects sub-

²⁷² 18 U.S.C. § 242 (1958) is the criminal parallel to 42 U.S.C. § 1983, note 271 *supra*. The section originates in § 2 of the First Civil Rights Act of April 9, 1866, ch. 31, § 2, 14 Stat. 27, and § 17 of the Second Civil Rights Act, the Enforcement Act of May 31, 1870, ch. 114, § 17, 16 Stat. 144.

²⁷³ REV. STAT. §§ 1977-80 (1875), 42 U.S.C. §§ 1981-83, 1985 (1958); 18 U.S.C. § 241 (1958). Present 42 U.S.C. § 1981 is the recodified form of § 16 of the Second Civil Rights Act, the Enforcement Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144, which extended to "all persons" most of the rights of equality given to "citizens" by § 1 of the pre-fourteenth amendment First Civil Rights Act, set out in note 81 *supra*. Present § 1982 codifies the remaining equal rights of "citizens" originating in the 1866 act. Present § 1983 is described in note 271 *supra*. Present § 1985, giving a civil right of action for damages against persons who conspire to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws," derives from § 2 of the Third Civil Rights Act, the Ku Klux Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13. Present 18 U.S.C. § 241, the criminal parallel of § 1985, has the same derivation.

²⁷⁴ The removal petitioners in *Galamison* made no allegation of discriminatory enforcement of the criminal laws under which they were charged; they did not, that is, assert that New York prosecuted Negroes for offenses for which it would not have prosecuted whites similarly circumstanced, in order to deprive Negroes of the "right to equal protection of the laws, in the exercise of those freedoms of speech . . . protected by the First and Fourteenth Amendments." *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); *cf.* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Hague v. CIO*, 307 U.S. 496 (1939); *Fowler v. Rhode Island*, 345 U.S. 67 (1953). Doubtless the allegation was not made because the fact could not be proved: discrimination exists, of course, but it is discrimination between privileged groups on the one hand and underprivileged groups (including Negroes) on the other, and enforcement discrimination is unprovable because the privileged groups do not (and do not have to) engage in the protest demonstrations in which the underprivileged groups engage. See pp. 800-01 *supra*.

²⁷⁵ It is not my purpose here to criticize the prevailing *Galamison* opinion; I should ordinarily regard disagreement with Judge Friendly as the best evidence that my position was untenable. Nevertheless, the range of unnecessary discussion in the opinion seems exceptionable, particularly because it has the effect of truncating important congressional legislation. Disposition of the removal petitioners' claims on the ground that the conduct for which they were prosecuted was not "under color of authority" of any federal law, within the meaning of § 1443(2), ends the case; the alternative ground, involving the meaning of "any law providing for equal rights," reaches out to affect § 1443(1) as well.

²⁷⁶ S.O. at 992. See the court's conclusion, s.o. at 995:

When the removal statute speaks of "any law providing for equal rights," it refers to those laws that are couched in terms of equality, such as the

section 1443(1) as well as subsection 1443(2), is placed in part on statutory language and history and in part on the view that federalism will be wounded if federal courts are permitted to enforce too many federal rights too early. Let us explore these concerns in order.

(a) On its face the phrase "any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof" might mean by "law" only federal statutory law, or both federal statutory and constitutional law. In either case it might refer (i) to certain specific statutes (and/or constitutional provisions), such as the Civil Rights Acts of 1866, 1870, and 1871 (and the thirteenth, fourteenth, and fifteenth amendments); or (ii) generically to statutes (and/or constitutional provisions) explicitly guaranteeing equality of rights; or (iii) generically to statutes (and/or constitutional provisions) whose purpose was to protect the Negro and assure him in his civil rights, whether or not the statute (or constitutional provision) speaks explicitly in terms of equality; or (iv) generically to statutes (and/or constitutional provisions) protecting civil rights universally (ergo, "equally" to all). The petitioners in *Galamison* appear to have stood on constructions (i) and (iv), including within each the due process clause of the fourteenth amendment and section 1 of the Third Civil Rights Act, the Ku Klux Act of 1871, present 42 U.S.C. § 1983,²⁷⁷ which protects all fourteenth amendment civil rights,²⁷⁸ among them the first amendment freedoms of expression.²⁷⁹ The majority of the court rejected construction (iv) as rendering the word "equal" tautological; and I find this reasoning plausible enough. But the court also rejected the inclusion of 42 U.S.C. § 1983 within construction (i), saying that it did so for the same reason that it rejected construction (iv).²⁸⁰ This is wholly implausible. "Equal" may be tautological if read to include all universally given civil rights; it is not tautological if read as limiting section 1443 to protection of the several Civil Rights Acts, including that of 1871, comprising present 42 U.S.C. § 1983. The court then settled on construction (ii), preferring it to construction (iii), which the court did not explicitly consider. I see no reason for this preference. As

historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. § 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all.

²⁷⁷ See text accompanying note 141 *supra*; note 271 *supra*.

²⁷⁸ See *Monroe v. Pape*, 365 U.S. 167 (1961); note 41 *supra*.

²⁷⁹ *Egan v. City of Aurora*, 365 U.S. 514 (1961); *Douglas v. City of Jeannette*, 319 U.S. 157, 161-62 (1943) (relief denied on other grounds); *Hague v. CIO*, 307 U.S. 496, 518, 527 (1939) (Stone, J.).

²⁸⁰ See s.o. at 985.

a matter of language, constructions (i), (ii), or (iii) are equally probable; and it is equally probable, also, that "law" means statute or that it means statute and Constitution.

(b) Historically, the language referring the scope of section 1443 to laws providing for equal civil rights is the product of the *Revised Statutes of 1875*. Section 3 of the Civil Rights Act of 1866 had created original and removal jurisdiction in cases affecting or against persons who were denied or could not enforce "any of the rights secured to them by the first section of this act," and additional removal jurisdiction in suits or prosecutions for trespasses or wrongs under color of authority derived from the 1866 act or the Freedmen's Bureau Act of 1865, "and all acts amendatory thereof."²⁸¹ The first section of the 1866 act declared the Negroes citizens and gave all citizens the same rights as whites in specified regards;²⁸² the Freedmen's Bureau Act of 1865²⁸³ created for the duration of the war a bureau to supervise abandoned lands and control "all subjects relating to refugees and freedmen from rebel states,"²⁸⁴ the bureau being empowered, *inter alia*, to convey abandoned or confiscated lands to the refugees and freedmen;²⁸⁵ the Amendatory Freedmen's Bureau Act of 1866,²⁸⁶ *inter alia*, continued the 1865 act for two years;²⁸⁷ confirmed certain sales of land and directed others by federal tax commissioners to the freedmen;²⁸⁸ and provided that, until the restoration of the ordinary course of judicial proceedings and resumption of constitutional relations with the central Government (including the seating of Representatives in Congress) in any State in which these had been disrupted by the war, the identical rights enumerated in section 1 of the Civil Rights Act of 1866 should be secured to all citizens without respect to race or color, and the President through the Bureau should "extend military protection and have military jurisdiction over all cases and questions concerning the free enjoyment of such immunities and rights."²⁸⁹ The Second Civil Rights Act of 1870 extended to "all persons" the guar-

²⁸¹ The section is set out in text at pp. 810-11 *supra*.

²⁸² The section is set out in note 81 *supra*.

²⁸³ Act of March 3, 1865, ch. 90, 13 Stat. 507.

²⁸⁴ Act of March 3, 1865, ch. 90, § 1, 13 Stat. 507.

²⁸⁵ Act of March 3, 1865, ch. 90, § 4, 13 Stat. 508.

²⁸⁶ Act of July 16, 1866, ch. 200, 14 Stat. 173. The act was H.R. 613 of the Thirty-ninth Congress. A predecessor bill, S. 60, was introduced by Senator Trumbull and reported by the Senator from the Judiciary Committee contemporaneously with S. 61, which became the Civil Rights Act of 1866. CONG. GLOBE, 39th Cong., 1st Sess. 129 (Jan. 5, 1866), 184 (Jan. 11, 1866); see note 103 *supra*.

²⁸⁷ Act of July 16, 1866, ch. 200, § 1, 14 Stat. 173.

²⁸⁸ Act of July 16, 1866, ch. 200, §§ 6-7, 14 Stat. 174-75.

²⁸⁹ Act of July 16, 1866, ch. 200, § 14, 14 Stat. 176.

antee of equality in most of those enumerated rights secured to "citizens" by the Civil Rights Act of 1866 and the Amendatory Freedmen's Bureau Act;²⁹⁰ to protect the new guarantee, the 1870 act adopted by reference the procedural provisions (including removal) of the 1866 act.²⁹¹ Section 1 of the Third Civil Rights Act of 1871—the genesis of present 42 U.S.C. § 1983²⁹²—provided that any person who deprived another, under color of state law, of "any rights, privileges or immunities secured by the Constitution" should "be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress," the proceeding to be prosecuted in the federal courts "with and subject to the same rights of appeal, review upon error, and other remedies" of the 1866 Civil Rights Act, "and the other remedial laws of the United States which are in their nature applicable in such cases."²⁹³ Codifying the civil rights removal jurisdiction, section 641 of the *Revised Statutes of 1875* allowed removal by any defendant who was denied or could not enforce "any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States," and also by any defendant sued or prosecuted for trespasses or wrongs under color of authority derived from such law.²⁹⁴

Against this background, how do the various verbally possible constructions of the statute fare? Alternative (i), referring section 1443 only to certain specific provisions of law enacted prior to 1875, emerges as quite plausible, and the most likely statutory references are the Civil Rights Acts of 1866 and 1870 alone. These were the only precodification statutes unambiguously allowing removal in civil rights cases; the 1866 act assured the equal rights of "citizens" and the 1870 act, those of "persons."²⁹⁵ It is possible, though less plausible, that the 1871 act was also meant to be included. Because its first section speaks in terms of liability, I would tend to read the "other proper proceeding for redress" which it allows to persons deprived of any constitutional civil right, with the remedies given by the 1866 act, as limited to original civil actions. But it would not be unreasonable to read the section as authorizing removal, under the 1866 procedures, whenever state suits or prosecutions deprived the state defendants of

²⁹⁰ See note 273 *supra*.

²⁹¹ See text accompanying notes 136-40 *supra*.

²⁹² See note 271 *supra*.

²⁹³ The section is set out in text at note 141 *supra*.

²⁹⁴ The section is set out in note 148 *supra*.

²⁹⁵ The plausibility of this construction is enhanced by the marginal references to § 641 appearing in the print of the *Revised Statutes*. These cite the 1866 and 1870 acts, with their procedural precursors and amendments, exclusively.

constitutional rights,²⁹⁶ and the revisers may have so read it. Or the *Revised Statutes* may have been intended to allow removal under the 1871 act, although not theretofore allowed, on the theory that the codification should make uniform the remedies for rights given under statutes having a common purpose to protect the Negroes.²⁹⁷ If such an expansion of the removal jurisdiction was intended, it is also plausible to read "law providing for . . . equal civil rights" as including the post-War amendments, particularly the fourteenth, whose principal purpose was to validate and constitutionally enshrine the Civil Rights Act of 1866.²⁹⁸

The court in *Galamison*, however, rejects theory (i),²⁹⁹ I think correctly. The provisions of the pre-1875 civil rights acts were all carried forward in sections of the *Revised Statutes*, and if the removal section were meant to refer exclusively to specific provisions of law so codified, explicit cross-reference by chapter and section could have been employed (as it was, for example, in codifying the federal-officer removal provisions).³⁰⁰ Instead, generic language was used: indeed, generic language so awkward that I cannot suppose it was preferred over a simple cross-reference without conscious choice to generalize. Like the *Galamison* court, I would give it generalized application. The problem is to determine the appropriate principle of generalization.

It would not be implausible to conclude that the revision adopted the same principle of generalization that the fourteenth amendment had followed in constitutionalizing the Civil Rights Act of 1866; hence, that that amendment and its implementing statutes are the measure of the "laws" referred to in section 1443. This conclusion, which abuts at alternative construction (iv), involves the difficulty stated above of nullifying the word "equal." *Galamison* rejects it for this reason and

²⁹⁶ The court in *Galamison* summarily rejects such a reading on the ground that "when Congress wished to expand the removal provisions, it used much more explicit language, as in the Act of Feb. 28, 1871, § 16, 16 Stat. 438." S.O. at 987 n.12. This generalization is incorrect, for the Civil Rights Act of 1870 obviously expanded the removal provisions of the 1866 act merely by a general reference. See text accompanying notes 136-40, 291 *supra*. Moreover, the question is not how the 1871 act alone should be construed, but how the revisers and Congress in 1875 might have construed it.

²⁹⁷ See note 314 *infra* and accompanying text.

²⁹⁸ See authorities cited in note 84 *supra*.

²⁹⁹ See s.o. at 990:

We do not wish to be misunderstood as saying that the cross-reference today covers only those equal rights laws that existed in 1866. As Congress enacts new laws relating to equal rights, the cross-reference in § 1443 takes them in; unquestionably the Civil Rights Act of 1964 is a law providing for equal rights within the removal statute.

³⁰⁰ REV. STAT. § 643 (1875). Such explicit cross-references are common in the judiciary title of the *Revised Statutes*. See, e.g., REV. STAT. § 629, sixth, eleventh, seventeenth, nineteenth (1875).

for others that I find less persuasive. First, it is said (in accord with the canons) that substantial effect in altering prior law should not be given to a codification, that Congress "was so intent on avoiding substantive alterations that it designated a lawyer for the purpose of eradicating any such changes made by the codifying commission."³⁰¹ This surely proves too much: under the *Galamison* court's own construction (ii), referring section 1443 to "all laws stated in egalitarian terms,"³⁰² Congress' lawyer did a strikingly poor job; for the construction very substantially adds to the pre-1875 civil rights removal jurisdiction, as the same Congress which was shortly to enact the egalitarian Civil Rights Act of 1875 would not have failed to see. The lawyer did a still worse job with other civil rights provisions of the revision. The *Revised Statutes* in unequivocal terms broadened civil remedies for civil rights violations.³⁰³ It broadly rewrote the *criminal* statute punishing rights violations under color of state law, extending its coverage beyond deprivations of egalitarian rights under the Civil Rights Acts of 1866 and 1870 to reach deprivations of "any rights, privileges, or immunities, secured or protected by the Constitution and laws."³⁰⁴ Moreover, *Galamison's* reasoning that construction (iv) would attribute to the revision a "drastic . . . alteration in judicial jurisdiction"³⁰⁵ leaves out of account that the habeas corpus act of 1867 had given the federal trial courts jurisdiction coextensive with the federal constitution and laws to abort state criminal trials, and that they were using their jurisdiction in precisely that fashion prior to the date of the revision.³⁰⁶ Second, *Galamison* argues, the "Reconstruction Congress knew how to speak more broadly"³⁰⁷ when it wished to protect all fourteenth amendment rights: witness the first section of the Civil Rights Act of 1871.³⁰⁸ Perhaps, but the Reconstruction Congress also knew how to speak more specifically of equality when that was all it meant to protect: witness the second section of the same act.³⁰⁹ These arguments boil down to the proposition that the removal statute, present section 1443, is far from lucid, a proposition no one disputes. *Gala-*

³⁰¹ S.O. at 988.

³⁰² *Ibid.*

³⁰³ Compare § 1 of the Third Civil Rights Act of 1871, note 141 *supra* and accompanying text, protecting deprivation of rights secured by the "Constitution," with REV. STAT. § 1979 (1875), protecting deprivation of rights secured by the "Constitution and laws."

³⁰⁴ Compare the provisions cited in note 272 *supra*, with REV. STAT. § 5510 (1875).

³⁰⁵ S.O. at 988.

³⁰⁶ See notes 386-91 *infra* and accompanying text.

³⁰⁷ S.O. at 989.

³⁰⁸ See note 141 *supra* and accompanying text.

³⁰⁹ See note 273 *supra*.

mison's best comparative argument against construction (iv) is that one of the *Revised Statutes'* judiciary provisions, section 629, sixteenth,³¹⁰ does seem to distinguish rights secured by the Constitution, on the one hand, from rights "secured by any law providing for equal rights," on the other. Though this is not compelling,³¹¹ it is a point of some weight, and together with the inclusion of the word "equal" in section 1443, leads me to agree with the court in rejecting construction (iv).³¹²

It does not follow that the court's construction (ii), referring section 1443 to laws stated in egalitarian terms, is correct. There remains construction (iii), not considered in the *Galamison* opinion, extending the section to laws whose purpose is egalitarian. The historical arguments which the court advances to support preference of construction (ii) over construction (iv) provide no basis for choice between constructions (ii) and (iii). Construction (ii) is narrower; the court's general penchant for giving as slight effect as possible to the revision does favor its adoption. For the reasons set out in the preceding paragraph, however, I think that that penchant is a fundamentally unreliable basis for interpreting the statute. And I find in history some affirmative cause to prefer construction (iii).

³¹⁰ REV. STAT. § 629, sixteenth (1875), gives the federal circuit courts jurisdiction of all suits authorized by law to be brought to redress the deprivation, under color of state law, "of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

³¹¹ REV. STAT. § 629, sixteenth (1875), quoted in note 310 *supra*, governed the jurisdiction of the circuit courts. The parallel jurisdictional provision for the district courts, REV. STAT. § 563, twelfth (1875), covered suits authorized by law to be brought to redress the deprivation, under color of state law, "of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof." Applying the same logic to this section that *Galamison* applies to § 629, sixteenth, one concludes that Congress must have distinguished rights secured by the Constitution for whose redress suits were authorized by law, and rights secured by law. This seems to me improbable; I prefer to recognize what is obvious to any reader of the post-War Civil Rights Acts: that they were obscurely and sloppily drafted, and obscurely and sloppily codified, and that close intersection comparison provides at best slight illumination.

³¹² *Galamison* purports to rely on authority as well as reason in rejecting construction (iv). I think its authorities unpersuasive. *Gibson v. Mississippi*, 162 U.S. 565 (1896), is discussed in note 224 *supra*; in addition to what is said there, I doubt that the *Gibson* court thought of an *ex post facto* claim as depending on the fourteenth amendment. *Steele v. Superior Court*, 164 F.2d 781 (9th Cir.), *cert. denied*, 333 U.S. 861 (1948), is disposed of in the text accompanying note 266. The argument from *Douglas v. City of Jeannette*, 319 U.S. 157 (1943), supposes that the Supreme Court had the civil rights removal statute in mind when it decided that injunction case; I am unwilling to make the assumption. Nothing in the case was calculated to call attention to that statute, which had been a dead letter for better than thirty years prior to 1943. Its inconspicuousness is indicated by the slight notice given it in, for example, the exhaustive FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 62 n.22 (1927).

Under construction (ii), the revision took out of the removal jurisdiction certain sorts of cases previously within it, those under the Freedmen's Bureau Act. That act had authorized the conveyance of abandoned lands to the freedmen and, assuming the correctness of the construction put on subsection 1443(2) at pp. 874-80 *infra*, state prosecutions arising out of their self-help efforts to defend such property against its pre-War title-holders would have been removable under the 1866 removal section.³¹³ The Freedmen's Bureau Act had expired, of course, and most of the land had been restored to its pre-War owners prior to the date of the revision. But the act demonstrates that Congress had seen the utility of legislation which was not explicitly egalitarian to protect the Negro following the War, and that Congress had employed removal jurisdiction in connection with such legislation. The Civil Rights Act of 1871, whose first section is present 42 U.S.C. § 1983, was an instance of protective legislation of this kind;³¹⁴ the due process clause of the fourteenth amendment was another.³¹⁵ Practically, as I have tried to show at the beginning of this Article,³¹⁶ the civil rights guaranteed by the clause and the statute all amount in essence to a guarantee of equality. It is difficult to imagine that the revisers of 1875 did not take account of the ordinary and necessary flexibility of legislative means, and in their concern for statutes protecting "equal civil rights," did not understand that there had been and doubtless would continue to be statutes of egalitarian purpose which nevertheless did not proceed to their purpose simply by providing that *A*'s treatment should be equal with *B*'s. The issue is not easily resolved, but on the whole I find more tenable that construction of

³¹³ I refer to self-help resulting in personal injury to an attempted dispossessor. See *Bigelow v. Forrest*, 76 U.S. (9 Wall.) 339 (1869).

³¹⁴ The opinions in *Monroe v. Pape*, 365 U.S. 167 (1961), canvass the legislative background of the statute. Its second section is egalitarian in terms, within the requirement imposed by *Galamison*, and if I were disposed to accept the court's construction of § 1443 as requiring explicit egalitarianism, I might nonetheless conclude that § 2 of the 1871 statute qualified the entire enactment as a law providing for equal civil rights.

³¹⁵ The amendment

ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens . . .). It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?

Strauder v. West Virginia, 100 U.S. 303, 307 (1880).

³¹⁶ See pp. 800-02 *supra*.

section 1443 which refers removability to laws of egalitarian purpose, not merely those of egalitarian terms.

However—and again the issue is not easy—I think that the “law” to which section 1443 refers is statutory law alone, not statutory and constitutional law. *Strauder* seems to take this view,³¹⁷ and the use of the term “law” with the clear meaning of “statute” in several cognate judiciary provisions of the *Revised Statutes* tends at least slightly to support it.³¹⁸ Prior to the revision, removal jurisdiction had been used exclusively to implement specific congressional programs, and I see no evident reason for the revisers to go beyond this use. Section 1 the Civil Rights Act of 1871, present 42 U.S.C. § 1983, gives statutory protection to the constitutional guarantees of civil rights³¹⁹ which were the Reconstruction Congress’ concern; considerations touched in the next paragraph counsel caution against going beyond the statute the length and breadth of the fourteenth amendment.

(c) *Galamison* fears the “effects . . . on federal-state relations”³²⁰ of construing section 1443 to reach other federal guarantees than those of equality. In view of the protean developments of the due process clause during the last century, I share the court’s reluctance to allow removal in the service of all due process claims. But I do not think restriction to claims of equality is the appropriate limiting principle. In the first place, that restriction is less effective than the *Galamison* majority appears to believe. The equal protection clause of the fourteenth amendment—which the *Galamison* opinion expressly allows is a law providing for equal civil rights³²¹—has its history of imperialisms too. Even Mr. Justice Holmes could not resist finding some of Spencer’s Social Statics within it;³²² and several of the frightening examples which *Galamison* displays of cases not to be removed without destruction of federalism—Sunday law prosecutions, prosecutions for practicing a profession without a license³²³—present as colorable equal protection as due process claims.³²⁴ Second, the due

³¹⁷ The Court in *Strauder* was not content to rest on the equal protection clause of the fourteenth amendment, but placed removability on denial of a right under Rev. STAT. § 1977 (1875), the successor to § 1 of the Civil Rights Act of 1866. See note 223 *supra*.

³¹⁸ See REV. STAT. §§ 1979, 5510 (1875) (discussed respectively in note 271 *supra* and text accompanying note 304 *supra*); notes 310-11 *supra*.

³¹⁹ See note 41 *supra*.

³²⁰ S.O. at 992.

³²¹ *Id.* at 982.

³²² See *McFarland v. American Sugar Ref. Co.*, 241 U.S. 79 (1916).

³²³ S.O. at 992-93.

³²⁴ The Supreme Court’s treatment of the equal protection claims in *McGowan v. Maryland*, 366 U.S. 420 (1961), and companion Sunday-law cases, demonstrates that commodity discrimination may in some circumstances support a colorable equal protection claim. And to allow removal of Sunday-law prosecutions on the equal

process guarantees of individual liberty, although not expressly egalitarian, have substantial egalitarian effect,³²⁵ and among them are some, principally freedom of expression, in which the need for a removal jurisdiction is particularly strong.³²⁶ I think the desired limiting principle is best supplied by the construction of "law providing for . . . equal civil rights" suggested in the immediately preceding paragraphs: statutory law whose purpose is to protect minority groups in their equal enjoyment of civil rights. This construction reaches so much of the due process and equal protection clauses as 42 U.S.C. § 1983 implements: namely, rights "of personal liberty not dependent for [their] . . . existence upon the infringement of property rights."³²⁷

3. Subsection 1443(2): Acts "Under Color of Authority" of Civil Rights Law

Although subsections 1443(1) and 1443(2) both concern federal law protecting equal civil rights, the subsections operate on different principles. To support subsection 1443(2) removal, a state defendant need not show that he is denied or cannot enforce his protected rights in the state courts; it is enough that he colorably³²⁸ show he is protected by federal law. However, the federal law must protect him in the conduct underlying the prosecution, not merely in some

protection ground would, of course, carry considerably broader implications for the removability of prosecutions under state regulatory legislation generally than would allowance of removal in the Sunday cases on religious freedom grounds. As for prosecutions under state professional licensing statutes, *Galamison* cites *Hornsby v. Allen*, 326 F.2d 605 (5th Cir.), *rehearing denied*, 330 F.2d 55 (5th Cir. 1964). See s.o. at 993. *Hornsby* holds arbitrary denial of a liquor license unconstitutional on alternative due process and equal protection grounds; the equal protection claim is better grounded, I think, than is civil rights jurisdiction under 42 U.S.C. § 1983 (1958). See text accompanying note 327 *infra*.

³²⁵ See pp. 800-02 *supra*.

³²⁶ See notes 253-56 *supra* and accompanying text.

³²⁷ See note 41 *supra*.

³²⁸ Doubtless a state defendant petitioning for removal under § 1443(2) would not be required to show that he is protected by federal law: that question is the issue on the merits after removal jurisdiction has been sustained. On the preliminary question of jurisdiction, it should be sufficient to show colorable protection. This is the rule in federal-officer removal cases, e.g., *Tennessee v. Davis*, 100 U.S. 257, 261-62 (1880); *Potts v. Elliott*, 61 F. Supp. 378, 379 (E.D. Ky. 1945) (civil case); *Logemann v. Stock*, 81 F. Supp. 337, 339 (D. Neb. 1949) (civil case); *Ex parte Dierks*, 55 F.2d 371, 374 (D. Colo. 1932), *mandamus granted on other grounds sub nom.* *Colorado v. Symes*, 286 U.S. 510 (1932); *Colorado v. Maxwell*, 125 F. Supp. 18, 23 (D. Colo. 1954), *leave to file petition for prerogative writs denied sub nom.* *Colorado v. Knous*, 348 U.S. 941 (1955), and it was so held under the Habeas Corpus Suspension Act of 1863 removal provisions, see text at notes 68-70 *supra*, on which the Civil Rights Act of 1866 removal section was based. See *Hodgson v. Millward*, 12 Fed. Cas. 285 (No. 6568) (E.D. Pa. 1863) (civil case). The facts of the case appear in *Hodgson v. Millward*, 3 Grant (Pa.) 412 (Strong, J., at *nisi prius*, 1863), and Justice Grier's decision is approved in *Braun v. Sauerwein*, 77 U.S. (10 Wall.) 218, 224 (1869). *Galamison* takes this view, in dictum, under present § 1443(2). S.O. at 976. Compare *Arkansas v. Howard*, 218 F. Supp. 626 (E.D. Ark. 1963), where defendant was unable to make a colorable showing.

matter of trial procedure:³²⁹ the language of the subsection allows removal "for any act under color of authority derived from any law providing for equal rights."³³⁰ In this phrase it is the concept "color of authority" which presents a number of constructional difficulties.³³¹

(a) The District Court for the Northern District of Mississippi has recently held that in order to bring himself within subsection 1443(2) a removal petitioner must show that "the act for which the state prosecution is brought was done in at least a quasi-official capacity derived from a law providing for equal rights."³³² This narrow view of "color of authority" is frequently urged against the removal jurisdiction in cases of the sort described at the beginning of this Article.³³³ The *Galamison* opinion flirts with it, but after a few overtures leaves the question undecided.³³⁴

As a matter of language, subsection (2) might mean to cover (i) only federal officers enforcing laws providing for equal civil rights; or (ii) federal officers enforcing such laws and also private persons authorized by the officers to assist them in enforcement; or (iii) the preceding class and also all persons exercising privileges or immunities under such laws.³³⁵ Construction (i) is a horse shortly curried: the Civil Rights Act of 1866 allowed removal of suits and prosecutions "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 . . ." the act or the Freedmen's Bureau legislation;³³⁶ this "officer . . . or other person" formula survived successive codifications³³⁷ until 1948; all words limiting the nature or character of the petitioner were then dropped,³³⁸ the reviser's note disclaiming substantive change.³³⁹ Alternative construction (ii)

³²⁹ Denial or inability to enforce protected civil rights in trial procedure is, of course, a ground for removal under present § 1443(1), as *Strauder* held.

³³⁰ The statute is set out in text at pp. 842-43 *supra*.

³³¹ Present § 1443(2) has never been before the Supreme Court. *Galamison* and a sequel, *Board of Educ. v. City-Wide Comm. for the Integration of Schools*, No. 29501, 2d Cir., Feb. 18, 1965, are the only court of appeals decisions which have yet construed the subsection. The only reported district court decisions appear to be *Arkansas v. Howard*, 218 F. Supp. 626 (E.D. Ark. 1963), and *City of Clarksdale v. Gertge*, 33 U.S.L. WEEK 2363 (N.D. Miss., Dec. 23, 1964).

³³² *Ibid.* The facts of the case are set out in note 222 *supra*.

³³³ See pp. 794-96 *supra*.

³³⁴ S.O. at 976-80.

³³⁵ Private persons not authorized by federal officers to enforce federal laws could not claim "color of authority derived from" such laws in any other manner than by exercising privileges or immunities given them by the laws.

³³⁶ (Emphasis added.) The statute is set out in text at pp. 810-11 *supra*.

³³⁷ See REV. STAT. § 641 (1875), note 148 *supra*; Judicial Code of 1911, ch. 231, § 31, 36 Stat. 1096, note 150 *supra*.

³³⁸ The statute in its present form is set out in text at pp. 842-43 *supra*.

³³⁹ See note 150 *supra*.

takes color from the "arrest or imprisonment, trespasses, or wrongs" phraseology of 1866, language which at first blush seems more plausibly directed to law enforcement activity than to activity in the exercise of rights given by the law;³⁴⁰ and the plausibility of the construction is strengthened by the observation that this language is lifted virtually verbatim from the Habeas Corpus Suspension Act of 1863,³⁴¹ where it pretty clearly was addressed to actions arising out of injuries inflicted by Union officers and persons acting under them.³⁴²

However, the modeling of the 1866 statute on that of 1863 (whose procedures the later statute also adopted by reference) does not seem to me to compel congruent readings of the provisions. The wording used is closely similar, but it is in each case general language which necessarily takes its meaning from the context of the respective laws. These were very different in their substantive provisions and purposes. The 1863 legislation was concerned principally with empowering military arrests and imprisonments during the War, and with protecting properly authorized Union officers in these activities. It gave no privileges or immunities to private individuals. The Civil Rights Act of 1866 did grant extensive private privileges and immunities, including some whose exercise would foreseeably provoke state-law charges of trespasses and wrongs. Section 1, for example, gave all citizens the equal right to acquire and hold real and personal property and to full and equal benefit of all laws for the security of person and property.³⁴³ In the exercise of ordinary self-help measures to defend their property or resist arrest under the discriminatory Black Codes, freedmen asserting their equal rights under these sections would likely commit acts for which they might be civilly or criminally charged in the state courts. I think the "color of authority" clause of the removal

³⁴⁰ Section 5 of the 1866 act authorized United States commissioners to appoint private individuals to execute warrants and other process in enforcement of the act, and these latter persons were authorized to call the bystanders or posse comitatus of the county to their aid. Act of April 9, 1866, ch. 31, § 5, 14 Stat. 28.

³⁴¹ See text accompanying note 69 *supra*.

³⁴² Section 4 of the 1863 act, 12 Stat. 756, pp. 808-09 *supra*, provided that any order of the President, or under his authority, made during the rebellion, should be a defense to any suit or prosecution for any search, seizure, arrest or imprisonment done, or acts omitted to be done, under the order or act of Congress. Section 7, 12 Stat. 757, provided a two-year statute of limitations for any suit or prosecution for any arrest or imprisonment or other trespasses or wrongs done, or act omitted, during the rebellion under presidential order or act of Congress. Section 5, 12 Stat. 756, authorized removal of suits or prosecutions against any officer or other person for any arrest or imprisonment or other trespasses or wrongs done, or act omitted, during the rebellion, by virtue or under color of any authority derived from or exercised by or under presidential order or act of Congress. These provisions were obviously an integrated packet, and the Court in *Bigelow v. Forrest*, 76 U.S. (9 Wall.) 339 (1869), held that actions of ejectment were not removable under the 1863 act, but that the act reached only actions for personal wrongs.

³⁴³ The section is set out in note 81 *supra*.

section, present subsection 1443(2), covers such cases in terms; that by the clause Congress meant to authorize removal of the cases without requiring the state defendant to demonstrate in addition that he was denied or could not enforce his equal civil rights in the state courts, within the meaning of the "denial" clause which is now subsection 1443(1). The "denial" clause covers deprivations of rights in state trial procedure. Its broad terms also reach deprivations of substantive rights, but its primary concern is procedural: literally denial or obstruction of federal rights "in the courts of [the] . . . State." The "color of authority" clause isolates and separately treats cases involving substantive federal claims. Here, for reasons stated above,³⁴⁴ there is imperative need for an immediate and noncontingent federal jurisdiction, and for the confidence given by the assurance of such a jurisdiction, lest exercise of the federally guaranteed substantive rights be deterred by fear that those rights may later have to come to the test in an unsympathetic state court. Like the freedoms of speech and protest today, the privileges given the freedmen in 1866 to have an equal enjoyment of property and to move about unconstrained by racially discriminatory regulations³⁴⁵ would have been seriously impaired if the freedmen had thought that they could be haled before the state courts in the first instance on charges of exercising those freedoms.³⁴⁶ Exercise of the freedoms was, I think, within congressional contemplation an act "under color of authority" of the Civil Rights Act.

In rejecting the more restrictive construction (ii), I take some support from three technical considerations. First, the "color of authority" clause of the 1866 act applies to "persons" without explicit limitation to persons acting under federal officers. The same Congress which passed the act put such an explicit limitation in the "authority"

³⁴⁴ See pp. 859-61 *supra*.

³⁴⁵ The freedom of movement which the act of 1866 intended to assure the freedmen against the "pass" system of the Southern States is perhaps the closest 1866 analogue to the freedoms of speech, assembly, and petition which the Court has increasingly protected during the last thirty years. Senator Trumbull persistently recurred to the evils of the "pass" system, in debate on the civil rights bill, *CONG. GLOBE*, 39th Cong., 1st Sess. 474 (Jan. 29, 1866), 1759 (April 4, 1866), and on the amendatory freedmen's bureau bill, *id.* at 941 (Feb. 20, 1866).

³⁴⁶ Under *Strauder v. West Virginia*, 100 U.S. 303 (1880), pp. 843-44 *supra*, a case for pretrial removal under present § 1443(1) would be made by a showing that discriminatory state laws denied a freedman the right to hold property or to go abroad without a pass. But it is highly probable that the Thirty-ninth Congress, unlike the *Strauder* court, thought that unconstitutional state legislation would not *eo ipso* sustain removal under the "denial" clause. See Senator Trumbull's speech set out in note 87 *supra*. I cannot believe that Congress intended the freedmen to go to state court trial in such cases. *Cf.* *CONG. GLOBE*, 39th Cong., 1st Sess. 320 (Jan. 19, 1866) (remarks of Senator Trumbull on the amendatory freedmen's bureau bill). But unless the "color of authority" clause was intended to reach the cases, they could not have been removed.

clause of the revenue-officer removal statute of that year.³⁴⁷ Although I do not expect verbal tidiness of the Reconstruction Congress, I think the comparison has some persuasive force. Second, the "color of authority" provision of 1866 was carried forward with the "denial" provision in section 641 of the *Revised Statutes*.³⁴⁸ Other removal provisions applying to federal officers and persons acting under them—including the provisions of the 1871 amendatory act to the Second Civil Rights Act³⁴⁹—were carried forward in section 643.³⁵⁰ I think that this is some evidence of a relatively contemporary understanding that, unlike the section 643 provisions, the "color of authority" clause of the civil rights removal section applies to persons who are neither federal officers nor acting under federal officers. Finally, I see some evidence of a similar congressional understanding in the continuation of the civil rights "color of authority" section in subsection 1443(2) in 1948. The 1948 revision of title 28 of the *United States Code* expanded the earlier revenue-officer removal statutes to cover in section 1442(a)(1) all suits or prosecutions against any federal "officer . . . or person acting under him, for any act under color of such office."³⁵¹ If subsection 1443(2) reaches only federal officers and persons acting under them, it is wholly tautological in the 1948 Code. I would not reason from this that the Code should be given the effect of creating a civil rights removal jurisdiction broader than that theretofore given. But in view of the ambiguities in language and history of prior law, I think that the desirability of giving subsection 1443(2) some meaningful place in the context of present judiciary legislation ought be given weight.³⁵²

³⁴⁷ See text accompanying note 74 *supra*. The same limitation is found in the revenue-officer removal statute of 1815. See text accompanying note 56 *supra*. The revenue-officer statute of 1833 has no similar limitation. See text accompanying note 60 *supra*.

³⁴⁸ The section is set out in note 148 *supra*.

³⁴⁹ See note 144 *supra* and accompanying text. The 1871 provision does not contain the limitation found in the statutes cited in note 347 *supra*, probably because no such limitation was required. The 1871 act, like that of 1863, purported to create no private privileges or immunities.

³⁵⁰ REV. STAT. § 643 (1875).

³⁵¹ See note 196 *supra*.

³⁵² In *Galamison* Judge Friendly suggests several points which I have not heretofore considered in favor of construction (ii). He asks why, if the "color of authority" clause of the 1866 act were intended to reach persons acting other than under federal officers, the clause enumerated "any officer . . . or other person" instead of merely repeating the term "persons" used in the denial clause. I think the answer is twofold. First, the "color of authority" clause is lifted practically unchanged from the 1863 Habeas Corpus Suspension Act. Second, in view of the language of the denial clause, "arrest or imprisonment, trespasses, or wrongs," the use of the phrase "any officer . . . or other person" more strongly conveys coverage of non-officer persons than might the words "any person" standing alone. Judge Friendly also says that "since the first [denial] clause was directed only toward freedmen's rights, symmetry would suggest that the second clause concerned only acts of enforcement." S.O. at 977. I have suggested elsewhere the improbability of finding sym-

(b) The *Galamison* court reserves the question whether subsection 1443(2) ever reaches wholly unofficial conduct and assumes that it does. But the majority holds that a civil rights demonstrator's free speech conduct is not within the subsection, because neither the first and fourteenth amendments nor the federal civil and criminal statutes which impose liability for deprivations of first-fourteenth amendment freedoms give the demonstrator "color of authority" to speak. The subsection "refers to a situation where the lawmakers manifested an affirmative intention that a beneficiary of such a law should be able to do something and not merely to one where he may have a valid defense or be entitled to have civil or criminal liability imposed on those interfering with him."³⁵³ What the court must mean by this is that "color of authority" is not made out unless federal civil rights law *directs* the state defendant to act, as distinguished from guaranteeing him freedom to act if he chooses.³⁵⁴ In no other sense do the first and fourteenth amendments, 18 U.S.C. § 242, and 42 U.S.C. § 1983 neglect to manifest "an affirmative intention" that speech be free.³⁵⁵

To support this construction, the court says that "color of authority" in subsection 1443(2) must have a narrower meaning than "a right under" in subsection 1443(1), "since otherwise, in almost all cases covered by the first clause . . . , the requirement of showing denial or inability to enforce would be avoided by resort to the second."³⁵⁶ But under any construction of "color of authority," subsection (2) has a narrower reach than subsection (1); the "act" requirement of subsection (2) limits that subsection to cases presenting *substantive* federal claims. The court's argument therefore has several weaknesses. First, its phrase "almost all cases" makes the extraordi-

metry in reconstruction civil rights legislation; but, in any event, sufficient symmetry appears in the design of the statute to cover only substantive federal claims in the "color of authority" clause, but to reach procedural claims in the "denial" clause. Finally, Judge Friendly makes the point that original and removal jurisdiction are conferred by the "denial" clause, and only removal jurisdiction by the "color of authority" clause. This is said to be explicable on the ground that freedmen would require the aid of federal courts both to enforce and to defend claims, whereas federal officers and persons acting under them would require only defensive assistance. S.O. at 978. The argument leaves out of account the unique importance of a non-contingent federal defensive jurisdiction in encouraging self-help; federal enforcement jurisdiction need be less imperative to serve its functions.

³⁵³ S.O. at 995.

³⁵⁴ The court's qualified language appears designed not to exclude public accommodations cases under the Civil Rights Act of 1964 from the scope of § 1443(2). But, I think, in view of the issues posed in *Galamison*, that its "color of authority" holding necessarily excludes those cases.

³⁵⁵ It is patent that the civil and criminal liability of the federal statutes is designed in principal part to deter state interference with the constitutional rights which it protects. And particularly in the case of free speech is the guarantee destroyed if it is construed as a guarantee of success in a lawsuit sometime following repression.

³⁵⁶ S.O. at 981.

narily implausible assumption that the incidence of colorable substantive due process and equal protection claims far outstrips the incidence of colorable procedural claims. Second, subsection (2) might well be designed precisely to avoid "the requirement of showing denial or inability to enforce" in the case of substantive claims, for good and sufficient reason.³⁵⁷ Third, as Judge Marshall's persuasive dissent points out,³⁵⁸ the majority's insistence on a statutory directive wholly defeats its assumption that subsection 1443(2) may reach private, unofficial action. I know of no federal law providing for equal civil rights (however that phrase be construed) which directs anyone other than a federal officer to do a protected act. It is the characteristic of these laws to promote freedom, not command conduct. Hence, the majority's assumption—and my conclusion above—that "color of authority" derived from equal civil rights law protects private individuals compels a conception of "authority" as "authorization," "license," "protection"—entirely natural meanings of the term. The majority also says that because in the cases "at which § 1443(2) was primarily aimed and to which it indubitably applies—acts of officers or quasi-officers," the removal petitioner would have acted "on a specific statute or order telling him to act," a "private person claiming the benefit of § 1443(2) can stand no better; he must point to some law that directs or encourages him to act in a certain manner" ³⁵⁹ Again I find Judge Marshall's response compelling: "The manner in which a private person acts under the authority of a law need not be the same as that of an officer." ³⁶⁰ The law applies to each according to his nature; the assumption or conclusion that it applies to private individuals at all precludes the holding that it applies only when a private individual meets some condition which private individuals never meet.

(c) There remains the question of the requisite relationship between the conduct which a removal petitioner can show is colorably protected and the act on which the prosecution is based. Subsection 1443(2) allows removal of prosecutions "for" protected conduct. Clearly, the relationship is satisfied in the case of the Mississippi defendants who are charged with parading without a license and obstructing the sidewalk:³⁶¹ federally protected acts are here asserted by the State to constitute the operative elements of offenses.³⁶² Doubtless it

³⁵⁷ See pp. 859-61, 876-77 *supra*.

³⁵⁸ S.O. at 1006-07.

³⁵⁹ S.O. at 981.

³⁶⁰ S.O. at 1006.

³⁶¹ See pp. 795-96 *supra*.

³⁶² It makes no difference, I think, that the federal law upon which the petitioners rely does not immunize them absolutely against any and all state charges, but only against the charge in fact made—that my juvenile petitioners, for example, might be forbidden access to the streets under another type of regulatory legislation

is also satisfied in the case of the charges for creating a disturbance by loud and offensive talk, notwithstanding the defendants so charged deny that in fact they said anything loudly or offensively. Here again the state charge is referable to a factual situation in which the defendants exercised federal liberties and did nothing beyond the scope of those liberties; removal cannot be defeated by the State's allegation that that situation was other than in fact it was.³⁶³ The problem becomes more difficult if the defendants, en route to the registrar's office, are arrested and charged with a status crime like vagrancy, which in Mississippi makes punishable all persons capable of working who have no reasonably continuous lawful employment for reasonable compensation.³⁶⁴ It becomes more difficult still in a case where a voter registration worker for a civil rights organization is charged with drunk driving while returning home after dinner, or where the leader of a local civil rights movement is charged with illicit possession of beer or making indecent proposals to a minor.³⁶⁵ If this last sort of charge is removable, every state prosecution is subject to delay while a federal court inquires into the motives of the prosecutor. If it is not, the States are left with large resources for harassment.³⁶⁶

I do not raise this issue here in order to resolve it even tentatively. Some measure or measures of proximity between the State's charge and the removal petitioner's federally protected activities will have to be developed, but it is too early—in advance of any significant twentieth century federal appellate development of the other issues under section 1443—to suggest appropriate lines of development. Obviously, treatment of the proximity issue will be affected by the decision whether the *Rives-Powers* doctrine, whose mainspring seems to be reluctance to disrupt state trials by preliminary federal factual inquiry into issues not unlike that of the prosecutor's motive, should be continued, limited, or overruled. It will be affected by the scope of removal allowed under subsection 1443(1) on the ground of state procedural impediments to enforcement of federal rights, because if that subsection is given

than the parading without a license ordinance. See *Prince v. Massachusetts*, 321 U.S. 158 (1944). Federal guarantees generally operate in this partial manner, depriving the States of power to move in certain ways against individual conduct, rather than affirmatively sanctioning the conduct. This was true of the rights to equal treatment conferred by § 1 of the 1866 Civil Rights Act: the States were left free to regulate contractual capacity, capacity to hold land, to sue, etc., on any other ground than race.

³⁶³ Cf. *Maryland v. Soper* (No. 1), 270 U.S. 9, 32-33 (1926) (considered dictum), a federal officer case arising under the statute authorizing removal of prosecutions against officers "on account of any act done under color of . . . office or of [specified federal] . . . law."

³⁶⁴ MISS. CODE ANN. § 2666(c) (1956).

³⁶⁵ See *Henry v. Mississippi*, 85 Sup. Ct. 564 (1965); *Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965).

³⁶⁶ In a federal-officer case, apparently, this sort of harassment prosecution would not be removable. See *Maryland v. Soper* (No. 2), 270 U.S. 36 (1926).

ample ambit, many cases in States where harassment is a serious problem will be removable on other grounds than harassment. It will be affected by the development of presently embryonic areas of substantive federal constitutional law: particularly, development of the question when, if ever, the federal constitution precludes state conviction on a well-founded and otherwise unassailable state charge by reason of an illicit purpose of the prosecutor to harass persons for the exercise of federal liberties. It will be affected by the development of other protective federal procedures, particularly the injunction.³⁶⁷ These matters can only be left to the future.

D. Choosing Among the Possible Constructions

In this part III, I have tried to identify the critical issues of construction of 28 U.S.C. § 1443, to explicate critically the few pertinent judicial decisions, and to explore the range of possible constructional choice. I have rejected several possible constructions, and elsewhere indicated some preference among constructions none of which I could conclusively reject. Further refinements of choice must wait upon discussion of an alternative remedy to removal: federal habeas corpus.³⁶⁸

IV. HABEAS CORPUS³⁶⁹

A. The Statute³⁷⁰

Title 28 U.S.C. § 2241(c)(3) (1958), containing the recodi-

³⁶⁷ See notes 37-40 *supra* and accompanying text. The injunction is, in some regards, a more likely remedy for the drunk-driving or possession-of-beer type of harassment prosecution than is removal. Substantiation of the substantive claim of harassment will ordinarily be difficult to make without showing a pattern or practice of prosecution, and if this is shown, class relief seems appropriate. On the other hand, there are obvious problems in putting state officials under injunction in respect to enforcement of a state's general drunk driving law.

³⁶⁸ See pp. 908-12 *infra*.

³⁶⁹ Federal habeas corpus is an original civil proceeding technically independent of the state criminal prosecution whose validity it questions. The action is brought by the criminal defendant, as petitioner, against the state official who has him in custody, as respondent, to challenge under federal law respondent's authority to detain petitioner. Respondent returns the state charges against the petitioner as justification for the detention; the only issue tried in the habeas proceeding is the validity of those charges against petitioner's federal law claim. If the claim prevails, the federal court orders petitioner discharged, and the prosecution is thereafter barred; if the claim fails, petitioner is remanded, and the State may proceed to trial in the state courts. Thus, unlike removal which transfers the entire state proceeding to the federal court for trial on all issues, habeas corpus isolates and provides an anticipatory federal trial of the state defendant's federal defenses. See AMSTERDAM 201-20. This sort of habeas corpus jurisdiction, exercised under 28 U.S.C. § 2241 (1958), and which I shall call anticipatory habeas corpus, should be distinguished from the employment of habeas corpus cum causa under 28 U.S.C. § 1446(f) (1958) incident to removal. The latter is merely a mechanism by which a federal court takes from state custody the body of a prisoner whose prosecution has been removed under one of the removal statutes, *e.g.*, 28 U.S.C. § 1443 (1958), discussed in part III *supra*.

³⁷⁰ Habeas corpus power is conferred on the federal courts and judges by 28 U.S.C. § 2241 (1958), and the procedure in habeas corpus regulated by 28 U.S.C.

fied³⁷¹ provisions of the Act of February 5, 1867, chapter 28,³⁷² empowers the federal courts and judges to discharge a prisoner when: "(3) He is in custody in violation of the Constitution or laws or treaties of the United States." Unlike the removal statute, this provision does not wear its troubles on its face. There is some question what is meant by "custody," particularly as applied to a bailed defendant,³⁷³ but that problem is largely³⁷⁴ tangential to my purpose and I shall not treat it here. As a matter of mere language, I suppose there might also be some question whether a state criminal defendant is held "in violation of the Constitution" when he is held for a trial at which he will have the opportunity to make his constitutional defense to the charges against him. But the Supreme Court has long held that the habeas corpus statute empowers pretrial release of prisoners held on charges which the State cannot constitutionally apply to their conduct;³⁷⁵ as a matter of language read in context and historical perspective, the Court could not have held otherwise.³⁷⁶ Subsection 2241(c)(3), then, clearly authorizes a federal habeas court to discharge my hypothetical Mississippi arrestees.³⁷⁷ The sole difficulty in the case arises from a doctrine promulgated by the Court without

§§ 2242-54 (1958). Section 2241 has five subdivisions which codify the four principal habeas corpus enactments, of 1789, 1833, 1842, and 1867. Some cases within the scope of this Article may be reached by § 2241(c)(2), the descendant of the 1833 Force Act, see notes 57-64 *supra* and accompanying text, which now authorizes release of persons "in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States." But virtually all such cases will also fall within the broader provisions of § 2241(c)(3) and, because the problems under the subsections are not dissimilar, I shall discuss only the latter.

³⁷¹ See notes 149-50 *supra*.

³⁷² See notes 109-34 *supra* and accompanying text.

³⁷³ The older cases hold that bail status is not custody. *Johnson v. Hoy*, 227 U.S. 245 (1913); *Stallings v. Splain*, 253 U.S. 339, 343 (1920) (alternative ground). An argument that these cases have been sapped by *Jones v. Cunningham*, 371 U.S. 236 (1963), is made in *AMSTERDAM* 221-37.

³⁷⁴ If bail status is not recognized as "custody," a state criminal defendant otherwise able to secure release on bond following his arrest will be required to remain in jail as the price of invoking the anticipatory federal jurisdiction. Such a requirement would pose a serious practical obstruction to the efficacy of the anticipatory habeas remedy in many cases, but the obstruction is not insurmountable. Since the habeas corpus court has discretion to bail the petitioner, see *Johnson v. Marsh*, 227 F.2d 528 (3d Cir., 1955), and the order in *In re Shuttlesworth*, 369 U.S. 35 (1962), the time he is required to remain in jail need not be longer than a few days.

³⁷⁵ *In re Loney*, 134 U.S. 372 (1890); *In re Neagle*, 135 U.S. 1 (1890) (alternative reliance on the 1833 and 1876 habeas corpus statutes); *Hunter v. Wood*, 209 U.S. 205 (1908) (*semble*) (same); *Ex parte Royall*, 117 U.S. 241, 245-50 (1886) (dictum); *Cook v. Hart*, 146 U.S. 183, 194-95 (1892) (dictum); *Whitten v. Tomlinson*, 160 U.S. 231, 241-42 (1895) (dictum); *Baker v. Grice*, 169 U.S. 284, 290 (1898) (dictum).

³⁷⁶ See notes 57-134 *supra* and accompanying text; notes 379-85, 469-77 *infra* and accompanying text.

³⁷⁷ See pp. 794-96 *supra*.

statutory basis: the doctrine of *Ex parte Royall*,³⁷⁸ decided in 1886, requiring that the exercise of the federal habeas corpus authority be stayed until a state prisoner has exhausted his available state judicial remedies.

B. The Cases

1. Development of the Exhaustion Doctrine

Habits of thought generated by three-quarters of a century of application of the exhaustion doctrine make it difficult for American courts and lawyers today to conceive of federal habeas corpus as anything but a postconviction remedy.³⁷⁹ The nineteenth century Congresses which expanded the habeas corpus jurisdiction to its present scope thought in no such terms. Prior to the twentieth century, postconviction use of the writ was rare though not unknown;³⁸⁰ the English courts had early used it in its various forms "for removing prisoners from one court into another, for the more easy administration of justice";³⁸¹ common-law *habeas corpus ad subjiciendum*, the great

³⁷⁸ 117 U.S. 241 (1886).

³⁷⁹ Postconviction development of the writ is discussed in the sources cited in note 174 *supra*.

³⁸⁰ Examination of the texts clearly indicates that in England the writ was most commonly used, and thought of, as pretrial, not postconviction process. *E.g.*, 3 COMYNS, DIGEST OF THE LAWS OF ENGLAND 454-55 (1785); 2 HALE, PLEAS OF THE CROWN 143-47, 210-11 (1st Am. ed. 1847). See generally 4 BACON, A NEW ABRIDGEMENT OF THE LAW 563-605 (1844). One of the relatively infrequent instances of its postconviction use is the celebrated *Bushell's Case*, Vaughan 135, 6 How. St. Tr. 999, 124 Eng. Rep. 1006 (C.P. 1670), discharging petitioners from a contempt commitment. Several of the precedents cited in *Bushell's Case* similarly involve summary commitment.

In this country the Supreme Court of the United States early employed the federal writ in behalf of persons committed for trial, to release them on bail, *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795), or to discharge them for want of probable cause, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); but in *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830), the Court held that where the respondent's return to the writ showed that the petitioner was held by virtue of the judgment of a court having jurisdiction, the inquiry on habeas corpus ended and no reexamination would be made of the lawfulness of the judgment. See *Frank v. Mangum*, 237 U.S. 309, 330 (1915). *Watkins* thus restricted postconviction use of habeas corpus to a very narrow compass; it was only with *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), that expansion began via the "jurisdictional" fiction, and only with *Johnson v. Zerbst*, 304 U.S. 458 (1938), that federal habeas corpus emerged from the fiction in its modern role as a postconviction remedy. See sources cited note 174 *supra*. The state courts, too, generally disallowed postconviction use of the writ prior to the twentieth century. See cases collected in Thompson, *Abuses of the Writ of Habeas Corpus*, 18 AM. L. REV. 1, 17-18 n.1 (1884). See also Oaks, *Habeas Corpus in the States*, 32 U. CHI. L. REV. 243, 258-64 (1965).

³⁸¹ 3 BLACKSTONE, COMMENTARIES *129. Blackstone refers in this passage to other forms of the writ than *habeas corpus ad subjiciendum*. See Fox, *Process of Imprisonment at Common Law*, 39 L.Q. REV. 46 (1923); Jenks, *The Story of the Habeas Corpus*, 18 L.Q. REV. 64, 67-68 (1902).

writ, developed principally as a remedy against executive detention without, or prior to, judicial trial;³⁸² and the celebrated Habeas Corpus Act of 1679³⁸³ authorized exclusively pretrial relief.³⁸⁴ Consistently with this background, the several congressional statutes extending federal habeas corpus to state prisoners were clearly designed, in the classes of cases with which each was principally concerned, to give prisoners held by state authorities in advance of state court processes an immediate federal judicial proceeding to secure their release.³⁸⁵

The broad scope of the habeas corpus jurisdiction conferred by the 1867 act—intended, as its House manager said, to be “coextensive with all the powers that can be conferred upon” the federal courts³⁸⁶—was immediately recognized by the Supreme Court in the *McCardle* decision of the following year.³⁸⁷ “This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws.”³⁸⁸ Ironically the act was invoked in *McCardle*’s case not by a state prisoner complaining of state restraint in violation of federally guaranteed freedoms or federally protected interests, but by a Union army prisoner held for trial before a military commission. His habeas corpus petition challenged the validity of the federal Reconstruction Acts, and Congress, fearing that the Supreme Court would void the

³⁸² See 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 112-25 (3d ed. 1944); sources cited note 381 *supra*.

³⁸³ 31 Car. 2, ch. 2.

³⁸⁴ 3 BLACKSTONE, COMMENTARIES *137; COMYNS, *op. cit. supra* note 380, at 455. Section 3 of the act is explicit on the point. For the act’s history, see CHAFEE, HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION 57-61 (1952).

³⁸⁵ See notes 57-134 *supra* and accompanying text. On the 1867 act, with which we are principally concerned, see Brennan, *Federal Habeas Corpus for State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 426 (1961). My conclusion in part III *supra* that the 1866 Civil Rights Act authorized broad federal removal jurisdiction gives no ground for reasoning that the 1867 habeas corpus statute was not designed for similar pretrial relief. The removal provisions of the 1866 act protected only the rights given by that act; the habeas corpus jurisdiction covered the whole breadth of the Constitution and laws. The Reconstruction Congress had, in any event, a precedent in the Force Act of 1833, see text accompanying notes 67-74 *supra*, for the creation of both habeas corpus and removal jurisdiction to protect federal interests threatened by local resistance. The removal legislation of 1863 and 1866 was patterned on that of 1833. See CONG. GLOBE, 39th Cong., 1st Sess. 1387 (March 14, 1866) (remarks of Representative Cook). But removal proved in practice an insufficient protection against hostile state courts; subjection of defendants to the initial stages of state process offered large opportunities for harassment in the vindication of federal rights. See notes 117, 129 *supra*. See also CONG. GLOBE, 39th Cong., 1st Sess. 1526 (March 20, 1866) (remarks of Representative McKee of Kentucky), 1527 (remarks of Representative Smith of Kentucky), 2054 (April 20, 1866) (remarks of Senator Wilson). It was with this knowledge that the legislators of 1867 acted.

³⁸⁶ See text accompanying note 121 *supra*.

³⁸⁷ *Ex parte McCardle*, 73 U. S. (6 Wall.) 318 (1868).

³⁸⁸ *Id.* at 325-26.

legislation, immediately withdrew its appellate jurisdiction in cases (including *McCardle*) arising under the 1867 habeas statute.³⁸⁹ This left the lower federal courts, during eight years until Supreme Court appellate jurisdiction was restored,³⁹⁰ to construe the new habeas corpus grant without Supreme Court guidance. Significantly, these contemporary lower court decisions viewed the 1867 statute as imperatively demanding federal discharge of state prisoners held for trial or after state trial-court conviction, notwithstanding the availability of still unexhausted state remedies.³⁹¹ Particularly, in a series of cases arising out of prosecutions under legislation by which the Pacific Coast States and municipalities sought to discriminate against the immigrant Chinese, federal district and circuit courts, striking down the legislation under the fourteenth amendment, released their habeas corpus petitioners in advance of state trial or immediately following summary conviction.³⁹² Some of these holdings (particularly those in which federal judges voided municipal ordinances as ultra vires state enabling legislation) were received with consternation by the legal profession, and that consternation promoted the reestablishment of the Supreme Court's appellate jurisdiction in habeas cases in 1885.³⁹³ The consternation is quite understandable, in view of the extravagant substantive constitutional rulings in a few of the cases,³⁹⁴ and may have played a part in the *Royall* decision in 1886.

³⁸⁹ Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44; see *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

³⁹⁰ Act of March 3, 1885, ch. 353, 23 Stat. 437.

³⁹¹ *Ex parte McCready*, 15 Fed. Cas. 1345 (No. 8732) (C.C.E.D. Va. 1874) (pretrial discharge); *Ex parte Bridges*, 4 Fed. Cas. 98 (No. 1862) (C.C.N.D. Ga. 1875) (discharge following trial court conviction); *Ex parte Tatem*, 23 Fed. Cas. 708 (No. 13759) (E.D. Va. 1877) (pretrial discharge); see note 407 *infra*.

³⁹² *In re Parrott*, 1 Fed. 481 (C.C.D. Cal. 1880) (discharging petitioner held to answer a complaint for violation of a California statute forbidding corporations to employ Chinese; statute voided under the fourteenth amendment and Burlingame Treaty); *In re Quong Woo*, 13 Fed. 229 (C.C.D. Cal. 1882) (discharging petitioner arrested on a justice's warrant for violation of a San Francisco laundry-licensing ordinance; ordinance voided under fourteenth amendment and perhaps under Burlingame Treaty); *In re Lee Tong*, 18 Fed. 253 (D. Ore. 1883) (discharging petitioner arrested on warrant for violating an ordinance forbidding, *inter alia*, carrying on games of chance; ordinance held ultra vires its enabling legislation, hence violative of due process of law); *In re Wan Yin*, 22 Fed. 701 (D. Ore. 1885) (discharging petitioner convicted by police court of violating a laundry-licensing ordinance; ordinance held ultra vires its enabling legislation, hence violative of due process of law); *Ex parte Ah Lit*, 26 Fed. 512 (D. Ore. 1886) (discharging petitioner convicted in police court of violating an ordinance prohibiting smoking of opium; ordinance held ultra vires its enabling legislation, hence violative of due process of law); *In re Tie Loy*, 26 Fed. 611 (C.C.D. Cal. 1886) (discharging petitioner held on charge of violating an ordinance prohibiting operation of laundries in the city; ordinance voided under the fourteenth amendment); see note 407 *infra*.

³⁹³ See ABA, REPORT OF THE SEVENTH ANNUAL MEETING 12-44 (1884).

³⁹⁴ It is surely extreme to suppose, as the district court in Oregon held, see note 392 *supra*, that a municipal ordinance which falls without the municipality's state-delegated legislative authority per se offends the due process clause of the fourteenth amendment.

Royall, an attorney, was arrested in June 1884 on warrants issued upon indictments by a Virginia grand jury charging him with violations of state statutes, enacted in March 1884, forbidding certain dealings in Virginia bond coupons without payment of a special license tax. After being released on bond for almost a year, he surrendered into custody and filed petitions for habeas corpus in the federal circuit court at the end of May 1885, challenging the Virginia statutes under article I, section 10, of the federal constitution as impairing the obligation of contracts. The circuit court dismissed the petitions for want of jurisdiction and Royall duly appealed to the Supreme Court under the recent statute of March 3, 1885, allowing such an appeal.³⁹⁵ Royall's contracts clause case was unarguably within the broad jurisdictional language of the 1867 statute, but it had none of that urgency about it which had moved Congress in 1867 to create the summary federal habeas corpus jurisdiction for state prisoners. Not only did it present substantive issues far wide of the Reconstruction Congress' concerns, but the timing of the litigation gave every appearance that it was a test case gotten up by the habeas corpus route for the purpose of obtaining the fastest possible Supreme Court ruling on the constitutionality of the new-born Virginia bond legislation. The Court refused the bait and affirmed the judgment of the circuit court.

It did not hold that the circuit court lacked jurisdiction.³⁹⁶ It ruled explicitly to the contrary, "that the Circuit Court has jurisdiction . . . to inquire into the cause of appellant's commitment, and to discharge him, if he be held in custody in violation of the Constitution."³⁹⁷

³⁹⁵ Act of March 3, 1885, ch. 353, 23 Stat. 437.

³⁹⁶ In its subsequent opinions the Court has consistently recognized that the exhaustion doctrine is a matter of federal judicial judgment as to appropriate forum, and implies no lack of power in the federal courts to anticipate state judicial proceedings by habeas corpus. *In re Wood*, 140 U.S. 278, 289 (1891); *Cook v. Hart*, 146 U.S. 183, 194-95 (1892); *New York v. Eno*, 155 U.S. 89, 92-95 (1894); *Whitten v. Tomlinson*, 160 U.S. 231, 241-42 (1895); *Baker v. Grice*, 169 U.S. 284, 290-91 (1898); *Markuson v. Boucher*, 175 U.S. 184, 186 (1899); *Davis v. Burke*, 179 U.S. 399, 402 (1900); *Minnesota v. Brundage*, 180 U.S. 499, 501-02 (1901); *United States ex rel. Drury v. Lewis*, 200 U.S. 1, 6-8 (1906); *Pettibone v. Nichols*, 203 U.S. 192, 201 (1906); *Urquhart v. Brown*, 205 U.S. 179, 181-82 (1907); *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 18-19 (1925); *Darr v. Burford*, 339 U.S. 200, 204-05, 210 (1950); *Frisbie v. Collins*, 342 U.S. 519, 520-21 (1952); *Irvin v. Dowd*, 359 U.S. 394, 404-05 (1959); *Fay v. Noia*, 372 U.S. 391, 414-20 (1963).

³⁹⁷ 117 U.S. at 250. In holding Royall's claim cognizable on habeas corpus, the Court talks the "jurisdictional" language then in use in both federal and state prisoner cases. Compare *Ex parte Bigelow*, 113 U.S. 328 (1885), with *Ex parte Wilson*, 114 U.S. 417 (1885). Compare *In re Wood*, 140 U.S. 278 (1891), with *Medley*, Petitioner, 134 U.S. 160 (1890). This concept that the inquiry on habeas corpus is limited to "jurisdictional" questions has long since been abandoned, see authorities cited note 174 *supra*; it was earlier abandoned in pretrial than in post-conviction cases, see *In re Neagle*, 135 U.S. 1 (1890). The concept, which concerned the sort of substantive claim a habeas court could entertain, should not be confused with the exhaustion doctrine itself, which concerns a matter of timing.

"The statute evidently contemplated that cases might arise when the power thus conferred should be exercised, during the progress of proceedings instituted against the petitioner in a State court . . . on account of the very matter presented for determination by the writ of habeas corpus."³⁹⁸ But said the Court, the habeas corpus statute does not "imperatively require the Circuit Court . . . to wrest the petitioner from the custody of the State's officers in advance of his trial in the State court."³⁹⁹ A federal court retains "discretion as to the time and mode in which it will exert the powers conferred upon it,"⁴⁰⁰ a discretion which permits it to abstain from entertaining the habeas corpus petition until the state courts have had an opportunity to pass upon the petitioner's federal contentions. "That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."⁴⁰¹ The discretion should "be subordinated to any special circumstances requiring immediate action."⁴⁰² None existed in Royall's case, and the Court—exercising the discretion which the circuit court possessed but had not exercised—affirmed dismissal of the petition.

Thus, in a contracts clause case, in the post-Reconstruction calm, the exhaustion doctrine was born. Like *Royall*, the many cases which soon followed it in refusing federal habeas corpus to a prisoner in advance of his state trial involved claims which (where not altogether frivolous⁴⁰³) either did not implicate the post-War amendments⁴⁰⁴

Supreme Court opinions sometimes confounded the doctrines, e.g., *In re Duncan*, 139 U.S. 449 (1891), before the opinion in *Ex parte Hawk*, 321 U.S. 114, 117-18 (1944), clearly distinguished them. Similarly, there was for a time in the post-conviction cases considerable confusion between the exhaustion doctrine and a doctrine best described as forfeiture. *Fay v. Noia*, 372 U.S. 391 (1963), distinguished these two doctrines and severely restricted the latter.

³⁹⁸ 117 U.S. at 248-49.

³⁹⁹ *Id.* at 251.

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*

⁴⁰² *Id.* at 253.

⁴⁰³ The frivolous category includes the cases making claims of illegal extradition, *Cook v. Hart*, 146 U.S. 183 (1892); *United States ex rel. Ham v. Chapel*, 54 Fed. 140 (D. Minn. 1893); *In re Moore*, 75 Fed. 821 (D. Ore. 1896); *Ex parte Glenn*, 103 Fed. 947 (C.C.D. W. Va. 1900), claims of double jeopardy, *Whitten v. Tomlinson*, 160 U.S. 231 (1895); *Moss v. Glen*, 189 U.S. 506 (1903) (*per curiam*); *United States ex rel. Weisman v. Brown*, 281 Fed. 657 (8th Cir. 1922); *cf. Ex parte Shears*, 265 Fed. 959 (W.D. Wash. 1920), and assorted other like claims, *Ex parte Roach*, 166 Fed. 344 (N.D. Iowa 1908); *Veach v. Smith*, 42 F. Supp. 161 (M.D. Pa. 1941); *Pebbley v. Knotts*, 95 F. Supp. 283 (N.D. W. Va. 1951).

⁴⁰⁴ This category includes commerce clause cases, *United States ex rel. Silverman v. Fiscus*, 42 Fed. 395 (W.D. Pa. 1890); *In re Alexander*, 84 Fed. 633

or saw the fourteenth amendment invoked against state regulatory legislation by economic interests apparently able to bear the burdens of protracted state-court litigation.⁴⁰⁵ *Royall* was not contemporaneously viewed as disallowing anticipatory federal habeas corpus in cases raising significant fourteenth amendment claims: the lower federal courts continued in a few cases to protect the West Coast Chinese against discriminatory legislation,⁴⁰⁶ and the Supreme Court itself seems to have approved this use of the writ in a case decided shortly after *Royall*.⁴⁰⁷ In repeated applications, however, the doctrine requiring exhaustion came to be more inflexibly, more automatically invoked. The Court soon made clear what its holding in *Royall* foreshadowed: that the "discretion" of which its opinion spoke was not a "discretion" in the federal trial judge, but in the Supreme Court. And the Court began ordinarily to reverse a district or circuit judge who did not abstain from the anticipatory exercise of his habeas corpus power.⁴⁰⁸ Abstention was required not only prior to state trial, but following state conviction and prior to state appeal,⁴⁰⁹ or prior to available state collateral attack proceedings.⁴¹⁰

(W.D.N.C. 1898); *Ex parte* Martin, 180 Fed. 209 (D. Ore. 1910), cases in which the petitioner claimed that his offense was within exclusive federal criminal jurisdiction, *New York v. Eno*, 155 U.S. 89 (1894); *In re* Bradley, 96 Fed. 969 (C.C.S.D. Cal. 1898); cf. *Cunningham v. Skiriotes*, 101 F.2d 635 (5th Cir. 1939), and the class of federal officer cases cited note 62 *supra*, of which *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906), is representative.

⁴⁰⁵ *Baker v. Grice*, 169 U.S. 284 (1898); *Ex parte* Bartlett, 197 Fed. 98 (E.D. Wis. 1912).

⁴⁰⁶ *In re* Sam Kee, 31 Fed. 680 (C.C.N.D. Cal. 1887) (discharge following justice of the peace conviction); *In re* Lee Sing, 43 Fed. 359 (C.C.N.D. Cal. 1890) (pretrial discharge).

⁴⁰⁷ *Wo Lee v. Hopkins*, reported with *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (reversing circuit court's refusal to discharge a habeas petitioner convicted by a San Francisco police court of violating a laundry-licensing ordinance discriminatorily applied in violation of the equal protection clause). In discussing this case and the cases cited notes 391-92, 406 *supra*, I have not distinguished between cases in which federal habeas corpus was allowed to vindicate a substantive federal claim (a) prior to any state trial, and (b) after a magistrate's conviction, but before pursuit by the convict of any review in a state court of record. Prior to the enactment of present 28 U.S.C. § 2254 (1958) in 1948, see text accompanying notes 415-17 *infra*, there seems no reason to draw the distinction. The Supreme Court shortly following *Royall* extended the exhaustion requirement to state appeals from conviction even in a court of record, *Ex parte* Fonda, 117 U.S. 516 (1886); *In re* Duncan, 139 U.S. 449 (1891), and a fortiori, on the principles of *Royall*, a state magistrate's rejection of a substantive federal contention should not affect the willingness of a federal court to entertain the contention before its consideration by the higher state judiciary.

⁴⁰⁸ See, e.g., *Baker v. Grice*, 169 U.S. 284 (1898); *Moss v. Glenn*, 189 U.S. 506 (1903) (per curiam). More recently, the Court has shown some deference to the "discretion" of a circuit court of appeals, *Frisbie v. Collins*, 342 U.S. 519 (1952), but on the whole it is apparent that the "discretion" of the *Royall* doctrine is a discretion in the federal judicial system, rather than in the trial judge.

⁴⁰⁹ See note 407 *supra*.

⁴¹⁰ E.g., *Mooney v. Holohan*, 294 U.S. 103 (1935); *Ex parte* Hawk, 321 U.S. 114 (1944).

With the expansion of the due process clause as a limitation upon state criminal procedure and the consequent expansion of federal habeas corpus as a postconviction remedy,⁴¹¹ the focus of litigation under the *Royall* doctrine became the question of exhaustion of state collateral remedies for federal constitutional violations in the trial process.⁴¹² In these cases exhaustion was rigorously demanded of fourteenth amendment claimants—possibly because the need for immediate federal intervention seemed less compelling where the nature of state judicial proceedings (rather than the power of the State to proceed at all in a prosecution) was challenged; possibly because no federally protected conduct was jeopardized with state repression during the abstention period; possibly because the long-term state prisoners involved (who could ordinarily be retried if their federal claim succeeded) seemed to have relatively little to lose by delay; more probably because the *Royall* principle was carried over unthinkingly from contracts clause and commerce clause cases to fourteenth amendment cases having no smack of urgency about them, and thence to all fourteenth amendment cases,⁴¹³ subject to a qualifying “special circumstances” doctrine which I shall shortly discuss.⁴¹⁴ In the 1948 revision of the Judicial Code, Congress, concerned apparently only with the postconviction cases,⁴¹⁵ enacted present 28 U.S.C. § 2254 (1958), adopting the *Royall* doctrine.⁴¹⁶ Section 2254 provides that a state

⁴¹¹ See note 174 *supra*.

⁴¹² See discussions in Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U.L. REV. 78, 96-103 (1964); Note, *Exhaustion of State Remedies Before Bringing Federal Habeas Corpus: A Reappraisal of U.S. Code Section 2254*, 43 NEB. L. REV. 120 (1963). See also Annot., 97 L. Ed. 543 (1952), and earlier annotations referred to therein.

⁴¹³ See, e.g., *Sweeney v. Woodall*, 344 U.S. 86 (1952).

⁴¹⁴ See text accompanying notes 421-62 *infra*.

⁴¹⁵ Section 2254 was included in the Code at the instance of the Judicial Conference. *Hearings on H.R. 3214 Before a Subcommittee of the Senate Committee on the Judiciary*, 80th Cong., 2d Sess. 28 (1948). Chief Judge Parker, chairman of the Judicial Conference Committee which recommended the section, later described it as responsive to concerns unique to postconviction federal habeas corpus. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1949). The House report on the bill which became the revised Code said of § 2254 only that it was declaratory of the rule exemplified by *Ex parte Hawk*, 321 U.S. 114 (1944), a postconviction case. H.R. REP. No. 308, 80th Cong., 1st Sess. A180 (1947). The Senate Judiciary Committee amended the House bill by rewriting § 2254 for the express purpose, *inter alia*, of assuring that pretrial cases were not covered by its terms. See note 417 *infra*.

⁴¹⁶ Act of June 25, 1948, ch. 646, 62 Stat. 967. The Supreme Court has construed § 2254 as a codification of the preexisting decisional law of exhaustion. *Darr v. Burford*, 339 U.S. 200, 210-14 (1950); *Irvin v. Dowd*, 359 U.S. 394, 404-05 (1959); *Fay v. Noia*, 372 U.S. 391, 434-35 (1963). I find this construction somewhat questionable. The reviser's draft of the section, incorporated in the House bill, was accompanied by a reviser's note which states the purpose of the section to codify prior law. H.R. REP. No. 308, 80th Cong., 1st Sess. A180 (1947). But the Senate Judiciary Committee substantially rewrote the section into its present form, see note 417 *infra*, and that committee's report is unclear as to whether it intended the better

postconviction prisoner⁴¹⁷ shall not be granted the federal writ unless he has theretofore exhausted available state corrective process, or unless there exist "circumstances rendering such process ineffective to protect the rights of the prisoner." The statute appears to demand exhaustion (except in the "circumstances" described) irrespective of the nature or source of the federal right sought to be vindicated in the habeas proceeding. Applying it recently in *Application of Wyckoff*⁴¹⁸ and *Brown v. Rayfield*⁴¹⁹ to petitions filed following summary state convictions but prior to state appeal for trial de novo, the Court of Appeals for the Fifth Circuit has sustained refusal of a Mississippi federal district court to entertain, on habeas corpus, claims that the conduct for which petitioners were prosecuted was protected by the first and fourteenth amendments, and that the prosecutions were intended to harass them for the purpose of furthering state policies of racial discrimination. *Wyckoff* involved the breach-of-the-peace prosecution of a freedom rider arising out of her refusal to leave a segregated bus terminal waiting room in Jackson; *Brown*, the prosecution under a Jackson parading-without-a-license ordinance of two pickets protesting racial discrimination. Following the Fifth Circuit decision

to reflect or to change the court-made doctrine. S. REP. No. 1559, 80th Cong., 2d Sess. 9-10 (1948). Some indication of purpose to change the doctrine may be found in the Senate Committee's express exclusion of pretrial cases from § 2254, with the explanation that if they were included federal habeas corpus relief for federal officers held on state charges would be hampered. See note 417 *infra*. No such exclusion was necessary unless the section altered prior law, for prior law allowed the writ to go without exhaustion in federal officer cases. See note 62 *supra*; text accompanying notes 425-27 *infra*. In any event congressional intent to adopt the *Royall* doctrine in its general outlines is obvious.

⁴¹⁷ Section 2254 applies only to "a person in custody pursuant to the judgment of a State court." The legislative history makes clear what the language suggests (particularly when compared with that of 28 U.S.C. § 2253 (1958)): that the phrase "judgment of a State court" was chosen to cover postconviction habeas cases and to exclude cases in which federal habeas corpus was sought in advance of state trial. The original section in the House bill which became the 1948 Code required exhaustion of available state remedies by any habeas petitioner who was "in custody pursuant to the judgment of a State court or authority of a State officer." See H.R. 3214, 80th Cong., 1st Sess. § 2254 (1947). The Senate Committee on the Judiciary rewrote the section to make several changes, among them omission of the phrase: "or authority of a State officer." The Committee report explains the purpose of the change to

eliminate from the prohibition of the section applications on behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

S. REP. No. 1559, 80th Cong., 2d Sess. 9 (1948).

⁴¹⁸ 196 F. Supp. 515 (S.D. Miss.), *petition for immediate hearing of appeal and for leave to proceed on original papers denied*, 6 RACE REL. L. REP. 793 (5th Cir. 1961).

⁴¹⁹ 320 F.2d 96 (5th Cir.), *cert. denied*, 375 U.S. 902 (1963).

in the former case, Mr. Justice Black, with whom Mr. Justice Clark concurred, refused on exhaustion grounds to entertain an original petition for the writ.⁴²⁰

2. The "Special Circumstances" Exceptions

As conceived in *Royall*, the exhaustion principle was to be "subordinated to any special circumstances requiring immediate action."⁴²¹ That conception has been repeated throughout the history of the doctrine,⁴²² and finds expression in the broadly drawn "circumstances" proviso to section 2254. The Court's opinions have stressed the flexibility of the "special circumstances" exception,⁴²³ but doctrine has solidified in three areas which deserve notice here.⁴²⁴

(a) Dictum in *Royall* recognized that special circumstances are presented in cases "of urgency, involving the authority and operations of the General Government."⁴²⁵ The classic case is *In re Neagle*,⁴²⁶ where the Court affirmed the discharge of a federal deputy marshal committed for examination on a California murder charge for killing David Terry in defense of Mr. Justice Field. *Neagle* is ordinarily followed in federal officer cases,⁴²⁷ but its principle has been carried further.⁴²⁸ A particularly pertinent application, for present purposes,

⁴²⁰ Application of Wykcoff, 6 RACE REL. L. REP. 794 (Black, Circuit Justice, 1961).

⁴²¹ 117 U.S. at 253.

⁴²² See the authorities cited note 396 *supra*. All are dicta on the point.

⁴²³ *Frisbie v. Collins*, 342 U.S. 519 (1952); *Darr v. Burford*, 339 U.S. 200, 210 (1950) (dictum). Both are postconviction cases under § 2254. See note 416 *supra*.

⁴²⁴ The "special circumstances" language in *Royall* seems to have been used to denote only "particularizing circumstances." But "special" is a uniquely self-prophetic word, and the phrase has now come to mean "extraordinarily rare." See text accompanying notes 464-68 *infra*. The doctrine has had little play outside the three areas discussed below.

⁴²⁵ 117 U.S. at 251.

⁴²⁶ 135 U.S. 1 (1890).

⁴²⁷ See note 62 *supra*. See also *Ohio v. Thomas*, 173 U.S. 276 (1899) (writ issued after state justice of the peace conviction, prior to state appeal); *Boske v. Comingore*, 177 U.S. 459 (1900) (writ issued following state contempt commitment, prior to state appeal). The federal officer cases might have been put on the ground that they arise under the 1833 as well as the 1867 habeas corpus act. But the *Neagle* opinion does not suggest any such rationale, and *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906), indicates that the exhaustion principle has some application to the 1833 act.

⁴²⁸ In *Ex parte Wood*, 155 Fed. 190 (C.C.W.D.N.C. 1907), the circuit court entertained a habeas corpus petition, following conviction in a police justice's court but prior to state appeal, of a railroad ticket agent charged with selling tickets at rates in excess of those fixed by a statute whose enforcement the circuit court had earlier preliminarily enjoined. The court found that state authorities were willfully and openly flouting the injunction, that the dignity of the federal court was thereby affected, that the statute was unconstitutional; and it discharged the petitioner. The Supreme Court cited *Neagle* and affirmed. *Hunter v. Wood*, 209 U.S. 205 (1908). *Ex parte Conway*, 48 Fed. 77 (C.C.D.S.C. 1891), discharged the foreman of a gang

is *In re Loney*,⁴²⁹ affirming the federal circuit court's discharge of a habeas petitioner held under a state arrest warrant charging him with perjury in giving his deposition before a state notary public in the case of a contested election of a member of Congress.

(b) Special circumstances have been found by lower federal courts in cases where their habeas petitioners are held for petty offenses, and numerous prosecutions for those offenses are likely to be pressed in the state courts. An excellent opinion by Circuit Judge (later Mr. Justice) Brewer in *Ex parte Kieffer*,⁴³⁰ explains that in such cases the burden of trial and appeal is ordinarily greater than the penalty imposed for conviction,⁴³¹ hence that testing of unconstitutional state legislation by the state appeal route will often be eschewed, although widespread prosecution under the legislation may deter federally protected conduct.⁴³² This reasoning may account for a considerable line of district and circuit court decisions in the 1890's discharging peddlers engaged in interstate commerce from prosecution under state license tax regulations.⁴³³ The decisions were ignored and their authority clouded by *Minnesota v. Brundage*,⁴³⁴ in 1901, where the Court reversed release on habeas corpus of a petitioner convicted in a Minneapolis police court for violation of a statute forbidding sale of colored oleomargarine, and rejected the argument that the general repressive effect of the statute on interstate commerce justified anticipation of state appeals by federal habeas corpus. But *Brundage* was undoubtedly

engaged in constructing telegraph lines under authority of a federal statute from arrest on state charges of obstructing a public road. See also *Wildenhus's Case*, 120 U.S. 1 (1887), an alien case coming under both the 1842 and the 1867 habeas corpus statutes.

⁴²⁹ 134 U.S. 372 (1890).

⁴³⁰ 40 Fed. 399 (C.C.D. Kan. 1889), discharging after police court conviction but before appeal for trial de novo a petitioner charged with violation of meat inspection ordinances which the court held invalid for obstructing interstate commerce. Judge Brewer was apparently more willing to entertain the petition following the justice trial than before it, *id.* at 400, a position with which I disagree. See note 407 *supra*.

⁴³¹ *Accord, In re Ah Jow*, 29 Fed. 181, 183 (C.C.D. Cal. 1886).

⁴³² The need for expeditious determination of an issue arising in a large number of state prosecutions was the critical factor relied on by the circuit court of appeals in *Collins v. Frisbie*, 189 F.2d 464, 468 n.1 (6th Cir. 1951), to excuse a habeas petitioner from the requirement of exhausting state postconviction remedies. The Supreme Court accepted this exercise of the circuit court's judgment. *Frisbie v. Collins*, 342 U.S. 519 (1952). Compare *Ward v. Race Horse*, 163 U.S. 504 (1896), with *United States ex rel. Tulee v. House*, 110 F.2d 797 (9th Cir. 1940).

⁴³³ Discharge following justice court conviction but prior to appeal to court of record: *In re Kimmel*, 41 Fed. 775 (D. Minn. 1890); *In re White*, 43 Fed. 913 (C.C.W.D. Pa. 1890); *In re Houston*, 47 Fed. 539 (C.C.W.D. Mo. 1891); *In re Nichols*, 48 Fed. 164 (C.C.W.D. Pa. 1891). Discharge before justice court trial: *In re Spain*, 47 Fed. 208 (C.C.E.D.N.C. 1891); see *Ex parte Jervy*, 66 Fed. 957 (C.C.D.S.C. 1895) (coasting trade seamen). See also the West Coast Chinese cases cited notes 392, 406 *supra*.

⁴³⁴ 180 U.S. 499 (1901).

affected by the Court's unexpressed view that the petitioner's claim on the merits was unsound (as the Court held three years later).⁴³⁵ Certainly *Brundage* was not a case in which the petitioner's claim had evident merit, or where a state statute was being made the basis of a substantial number of clearly unconstitutional prosecutions. In the latter case the justification for anticipatory federal habeas corpus is particularly strong for several reasons. First, the willful flouting of federal constitutional guarantees is itself a matter of grave federal concern, touching the authority of the federal government no less significantly than the *Neagle* prosecution and its like.⁴³⁶ Second, the prospect of appellate reversal is obviously proving inadequate in these cases to deter state authorities from pressing prosecutions destructive of federal guarantees. Third, considerations which ordinarily militate against federal anticipatory intervention have slight force here: there is by hypothesis no problem of premature federal constitutional decision,⁴³⁷ and the legitimacy of the State's claim against interruption of its criminal law processes diminishes proportionately to the clarity with which the processes are being used unconstitutionally in a substantial class of cases. Notwithstanding *Brundage*, the federal courts have continued to use the writ without requiring exhaustion in these cases.⁴³⁸

(c) Where procedural obstructions make theoretically available state processes ineffective to protect the habeas petitioner's rights, he has not been required to resort to those processes.⁴³⁹ The development of this principle has come chiefly in the postconviction cases, and exhaustion has been excused only on a showing that the state procedural obstacles are nigh overwhelming: for example, state court fees beyond petitioner's means,⁴⁴⁰ or the scheduled execution of a death

⁴³⁵ *Crossman v. Lurman*, 192 U.S. 189 (1904).

⁴³⁶ *Cf. Cooper v. Aaron*, 358 U.S. 1 (1958); *Griffin v. County School Bd.*, 377 U.S. 218 (1964).

⁴³⁷ No new constitutional law will be made in these cases. Compare *Cunningham v. Skiriot*, 101 F.2d 635 (5th Cir. 1939). And, insofar as concern with premature constitutional decision is concern for the frequency of resort to the Constitution for day-by-day regulation, precisely such resort is necessitated by the prosecutorial policy here.

⁴³⁸ *Ex parte Edwards*, 37 F. Supp. 673 (S.D. Fla. 1941); *Ex parte Green*, 114 Fed. 959 (C.C.N.D. Fla. 1902) (principal alternative ground). Both cases allow the writ prior to appeal from a state justice court conviction; in each, a state licensing statute is voided as applied to interstate peddlers.

⁴³⁹ See *Young v. Ragen*, 337 U.S. 235, 238-39 (1949), echoing the concurring opinion of Mr. Justice Rutledge in *Marino v. Ragen*, 332 U.S. 561, 563 (1947).

⁴⁴⁰ *Jennings v. Illinois*, 342 U.S. 104, 109-10 (1951) (considered dictum); *United States ex rel. Farnsworth v. Murphy*, 358 U.S. 48 (1958) (per curiam) (by implication); see, e.g., *Robbins v. Green*, 218 F.2d 192 (1st Cir. 1954); *United States ex rel. Marcial v. Fay*, 247 F.2d 662 (2d Cir. 1957), cert. denied, 355 U.S. 915 (1958); *United States ex rel. Tillery v. Cavell*, 294 F.2d 12, 16 n.4 (3d Cir.

sentence too early to permit application for appellate review.⁴⁴¹ The question whether substantial delay involved in exhausting state remedies presents "special circumstances" justifying federal habeas corpus inquiry in the case of a petitioner who would otherwise have to remain in custody throughout the period of the delay was reserved by the Court in 1898;⁴⁴² it was presented, coupled with a problem of possible mootness effect of the delay, in *Markuson v. Boucher*,⁴⁴³ the following year. The *Markuson* petition alleged that even if the petitioner had sufficient financial means to obtain state appellate review of his contempt commitment—which he did not—the case could not be carried through the state system to the Supreme Court prior to the expiration of sentence. But the Court affirmed denial of the writ for nonexhaustion without discussion of the issues of delay or threatened mootness. Probably it never reached those issues; if the Court in those pre-poverty-conscious days accepted the view that a pauper's inability to appeal was no justification for habeas corpus, the case was thereby decided, and petitioner's poverty allegation pleaded him out of court on all other matters. As indicated above, *Markuson* was later overruled on the poverty point;⁴⁴⁴ the lower federal courts thereafter split on the question whether habeas corpus is available in advance of state appeal where, by reason of the shortness of sentence, the case will be mooted on its expiration before appellate decision can be had.⁴⁴⁵ Encouragingly, the Supreme Court appears to have decided this last question in the affirmative in *In re Shuttlesworth*,⁴⁴⁶ in 1962, at least

1961), *cert. denied*, 370 U.S. 945 (1962); *Dolan v. Alvis*, 186 F.2d 586 (6th Cir. 1951), *cert. denied*, 342 U.S. 906 (1952); *Geaminea v. Nebraska*, 206 F. Supp. 308 (D. Neb.), *dismissed as moot*, 308 F.2d 367 (8th Cir. 1962). *Jennings*, the leading case, was decided five years prior to *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁴⁴¹ *E.g.*, *United States ex rel. De Vita v. McCorkle*, 216 F.2d 743 (3d Cir. 1954); *Downer v. Dunaway*, 53 F.2d 586 (5th Cir. 1931) (alternative ground); *Thomas v. Duffy*, 191 F.2d 360 (Denman, Circuit Judge, 1951), approved in *Thomas v. Teets*, 205 F.2d 236 (9th Cir. 1953) (alternative ground). (For purposes of this footnote, Federal Supreme Court review of state judgments is considered a state remedy, as it was prior to *Fay v. Noia*, 372 U.S. 391 (1963)).

⁴⁴² *Baker v. Grice*, 169 U.S. 284, 293-94 (1898). See also *Ex parte Bartlett*, 197 Fed. 98, 101 (E.D. Wis. 1912).

⁴⁴³ 175 U.S. 184 (1899).

⁴⁴⁴ *Markuson* was followed in *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 19 (1925) (alternative ground). Both decisions were overruled sub silentio by *Jennings v. Illinois*, 342 U.S. 104 (1951).

⁴⁴⁵ *Boyd v. O'Grady*, 121 F.2d 146 (8th Cir. 1941), holds the writ available. *United States ex rel. Avasino v. Kross*, No. 28669, 2d Cir., Feb. 18, 1964, is to the contrary.

⁴⁴⁶ 369 U.S. 35 (1962). *Shuttlesworth* was convicted of disorderly conduct arising out of efforts to test the constitutionality of the Birmingham transit system and was sentenced to pay \$100 and costs or serve eighty-two days. His conviction was affirmed by the Alabama Court of Appeals without consideration of the merits of his challenge to the constitutionality of the ordinance as applied, because his filing of the transcript of evidence was untimely under Alabama practice. The Alabama Supreme Court and the United States Supreme Court denied certiorari. *Shuttles-*

where substantial federal equal protection issues are raised.⁴⁴⁷ Negative answer would permit the state courts to violate the Constitution with impunity by imposing short sentences and denying bail pending appeal. The question of the effect upon the exhaustion doctrine of denial or unavailability of bail where mootness is not threatened—as in the case of a pretrial petition raising substantial federal constitutional defenses to the charge on the merits and alleging appreciable pretrial delay—remains unresolved. *Brown v. Rayfield* indicates that even extended delay will not excuse exhaustion where a habeas petitioner is able to make bond;⁴⁴⁸ and *Brown* (and perhaps *Wyckoff*) reject claims of “special circumstances” bottomed on allegations of state court hostility and commitment to a state policy of racial repression.⁴⁴⁹

C. Application of the Exhaustion Doctrine in Civil Rights Cases

1. The “Special Circumstances” Exception

In differing degrees the recognized exceptions to the exhaustion doctrine support anticipatory habeas corpus in the hypothesized Mississippi cases, pp. 794-96 *supra*:

worth then filed his habeas corpus petition in the District Court for the Northern District of Alabama. That court denied relief on the ground that by untimely filing of the transcript on the state appeal he had forfeited the constitutional claim. Without reaching this question, Judge Rives denied a certificate of probable cause on the ground that state collateral relief by habeas corpus or coram nobis appeared to be available. The Supreme Court, by per curiam order, vacated Judge Rives' denial and remanded to the district court with directions to hold the matter while Shuttlesworth pursued his state collateral remedies; but if the state courts should neither grant him relief nor release him on bail within five days following his application for bail in the state collateral proceeding, the federal district court “may then consider all state remedies exhausted and proceed to hear and determine the cause, including any application for bail pending that court's final disposition of the matter.” *Ibid.* Applications for bail were made to and denied by the state courts, and thereafter the federal district court fixed bond and set the petition for hearing on the merits. *Shuttlesworth v. Moore*, 7 RACE REL. L. REP. 114, 121 (N.D. Ala. 1962).

⁴⁴⁷ In the *Dresner* case, note 192 *supra*, the Fifth Circuit followed and extended *Shuttlesworth*, directing the district court to deem state remedies exhausted if the state courts did not release petitioners absolutely or on nominal bail within three days.

⁴⁴⁸ Petitioners in *Brown*, see text accompanying notes 419-20 *supra*, sought to state a case of “special circumstances” by allegations (1) that all Mississippi public officials were committed to a policy of racial discrimination, as demonstrated by Mississippi's massive resistance legislation; (2) that judges of the various state courts (all elected officials) gave tacit if not open support to the segregation policy in their election campaigns, and that the policy was reflected in their judicial decisions and opinions; and (3) that, by reason of the congestion of civil rights prosecutions in the Mississippi courts, and delays compelled by Mississippi trial and appellate procedures, the June 1961 freedom-rider cases had not yet been disposed of by the Mississippi Supreme Court in June 1963, and a like or greater delay was in prospect for the petitioners. By the time the habeas proceeding reached the Fifth Circuit, the petitioners had made bond in the state court and, in view of this circumstance, the Court of Appeals found no sufficient reason to excuse petitioners from the exhaustion requirement.

⁴⁴⁹ As to *Brown* see note 448 *supra*. In *Wyckoff* the scope of the Fifth Circuit's holding is unclear, because the district court, following a hearing, found some of the petitioner's allegations unproved, including perhaps general allegations of state court hostility.

(a) As *Loney*'s case suggests, nothing more substantially affects "the authority and operations of the General Government" than matters touching the very voting process by which officers of the national government are elected. Upon the fair and effective operation of the voting process, including voter registration, depends the democratic character of the government established by the Constitution. That this is not a matter of mere private rights has been legislatively determined: Congress has authorized suit by the Attorney General in the public interest to protect the franchise.⁴⁵⁰ And Congress has explicitly declared the policy that the federal district courts are the appropriate forum for the litigation of matters affecting the right to vote "without regard to whether the party aggrieved shall have exhausted any . . . other remedies" ⁴⁵¹ Under the statutes the Court of Appeals for the Fifth Circuit has given the United States standing to enjoin Mississippi's prosecution of a civil rights organization voter registration worker where the Government alleged that the prosecution was calculated to harass the worker and intimidate Negroes attempting to register.⁴⁵² The prosecutions I have hypothesized have the same design and effect. Giving heed to the congressional grant of a primary jurisdiction to the federal district courts in voting cases,⁴⁵³ I think the argument is strong that, in all the hypothesized cases, federal habeas corpus need not bide exhaustion of the state criminal processes.

So to conclude, of course, a court would have to take a somewhat broader view of the relations between the federal government and the States than was necessary in *Neagle* and *Loney*. Prosecution of a federal officer, or a witness in a federal proceeding, is an immediately evident intrusion into federal affairs. Doubtless, harassment prosecution to enforce racial discrimination in voter registration is as significant an intrusion, but the process by which its significance is appraised calls for more complex judgments. Areas of federal concern must be identified, and the connection between that concern and the conduct for which prosecution is brought must be litigated. This complexity itself may make the exercise of such judgments and the trial of such issues an undesirable basis for the definition of an antici-

⁴⁵⁰ Civil Rights Act of 1957, § 131, 71 Stat. 637, as amended, Civil Rights Act of 1960, § 601, 74 Stat. 90, as amended, Civil Rights Act of 1964, § 101, 78 Stat. 241, 42 U.S.C.A. § 1971(c) (1964).

⁴⁵¹ Civil Rights Act of 1957, § 131, 71 Stat. 637, as amended, Civil Rights Act of 1960, § 601, 74 Stat. 90, as amended, Civil Rights Act of 1964, § 101, 78 Stat. 241, 42 U.S.C.A. § 1971(d) (1964).

⁴⁵² *United States v. Wood*, 295 F.2d 772 (5th Cir. 1961), *cert. denied*, 369 U.S. 850 (1962).

⁴⁵³ See text following note 492 *infra*.

patory federal jurisdiction.⁴⁵⁴ Though the principle of *Neagle* and *Loney* carries beyond the federal officer, federal witness cases, administrative practicality may require that the exception be confined to such cases.⁴⁵⁵

I weigh the administrative consideration heavily, but do not find it necessarily conclusive. Litigating the connection between the petitioner's conduct and an identifiable sphere of federal concern is commonplace even in the federal-officer cases.⁴⁵⁶ As for identification of the spheres of federal concern, it is possible to recognize that certain categories of cases clearly present sufficient federal government involvement and yet refuse to inquire on a more particularized plane outside those clear categories. If this last approach is taken, the category of cases involving attempted voter registration is one of the most compelling for exception from the exhaustion rule.

(b) The *Kieffer* principle supports anticipatory habeas corpus directed to the parading-without-a-license charge,⁴⁵⁷ which, ex hypothesi, rests on a clearly facially unconstitutional ordinance. In such a case a federal court may give relief without an evidentiary hearing and with relatively little other burden to itself; the State's interest in the uninterrupted administration of a statute which it can never constitutionally apply is minimal; and the class of case in which the interruption is authorized is self-defining.⁴⁵⁸

(c) *Shuttlesworth* and its Fifth Circuit sequel, *Dresner*,⁴⁵⁹ suggest that if the hypothesized Mississippi defendants are denied or cannot make bail on any of the charges to which they have colorable federal constitutional defenses, anticipatory habeas corpus may be allowed.

⁴⁵⁴ See text accompanying notes 171-73 *supra*.

⁴⁵⁵ In a federal officer case the mere appearance of the United States Attorney as counsel for the petitioner relieves the court in some measure from the necessity for independent determination that the case touches federal concerns. *But see* note 456 *infra*.

⁴⁵⁶ See *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906); cases cited note 62 *supra*.

⁴⁵⁷ See text accompanying note 4 *supra*.

⁴⁵⁸ If the *Kieffer* principle is the only one on which anticipatory habeas corpus lies in the hypothetical Mississippi situation, and the parading-without-a-license charge is the only offense against which the writ runs under *Kieffer*, a doctrinal problem arises in the case of any state defendant held under the parading charge and another charge or charges. Habeas corpus lore as developed in its postconviction usage holds that, because the writ's sole function is to release the petitioner from custody, it cannot be employed to challenge only one of two concurrent sentences. Should such a challenge succeed, it would not result in the petitioner's release; ergo, the writ will not lie. *E.g.*, *Wood v. Crouse*, 327 F.2d 81 (10th Cir. 1964). Accepting this, I think the pretrial situation, in some instances at least, distinguishable. If a defendant is held in default of bail and bond has been fixed cumulatively on separate charges, each exerts an independent restraining force which should be assailable by the writ. Even where bond has not been set cumulatively, other restraining incidents of a criminal charge, see *AMSTERDAM* 232-36, may attach separately to the separate charges.

⁴⁵⁹ See notes 192, 447 *supra*.

Shuttlesworth and *Dresner* do not themselves go so far. Both are postconviction cases challenging short sentences; each involved the risk of mootness if exhaustion were required. But it is not clear that the threat of mootness was dispositive of the cases. The mootness argument bootstraps considerably: unless a petitioner has some "rights" against detention for the duration of his short sentence, state process which fails to release him before sentence expires can hardly be said to be "ineffective to protect [his] . . . rights."⁴⁶⁰ It is a rather dubious ground for immediate federal judicial relief that, if relief is not immediate, it will not be needed. *Shuttlesworth* and *Dresner* seem to me to respond principally to the practical consideration that, if no federal relief is given in the situations they present, a State may mock the Constitution through the device of short sentences and dilatory process. It can do the same thing, of course, by arresting a defendant and detaining him for the period pending a trial at which it cannot constitutionally convict him: the defendant is no less punished for, and deterred in the exercise of, his federal constitutional freedoms when he is held without bail, or on bail he cannot make, during x days pending trial, than when he is sentenced to x days and his sentence runs. To the extent that this is so, *Shuttlesworth* and *Dresner* have implications for pretrial detention; it is perhaps significant that neither order speaks of mootness and that both hold state remedies ineffective for inaction during a time far short of the period required to moot the litigation.

However, if the cases are concerned only with the evil of state detention, anticipatory habeas corpus inquiry (*i.e.*, the federal court's entertaining the underlying federal claim on the merits in advance of state process) seems an unnecessary and inappropriate remedy. Adequate relief could be afforded by the federal court's admitting its petitioner to bail, or releasing him on recognizance, pending the conclusion of state proceedings. The remedy is within the habeas court's power⁴⁶¹ and would ordinarily be less intrusive than the exercise of the anticipatory jurisdiction.⁴⁶²

2. Displacement of the Exhaustion Requirement

Cases falling outside the logic of the several categories of established "special circumstances" call for more radical reconsideration of

⁴⁶⁰ I use the terminology of § 2254, text following note 417 *supra*, despite the obvious Hohfeldian objection. By "right," the statute and I mean immunity.

⁴⁶¹ *Tinkoff v. Zerst*, 80 F.2d 464 (10th Cir. 1935). For discussion of federal habeas corpus as a bail writ in connection with state prosecutions, see AMSTERDAM 339-70.

⁴⁶² See pp. 830-38 *supra*. But see note 183 *supra*.

the exhaustion doctrine. Whether anticipatory habeas corpus is sought in such cases on a theory which expands the "special circumstances" exception or on a theory which retracts the exhaustion requirement without reference to the "special circumstances" rubric, the same concerns should be dispositive.⁴⁶³ Nevertheless, the direction from which one comes to confrontation of those concerns in a particular case is not without importance. To proceed by accepting the exhaustion requirement as a limitation coextensive with the habeas corpus jurisdiction and by throwing the burden on the habeas petitioner to demonstrate "special circumstances" which take his case out of the rule is to slide easily enough into the attitude expressed in one postconviction case: "The district court had undoubted jurisdiction to entertain the writ but the situations in which it is proper to exercise it are so rare that the effort almost never succeeds."⁴⁶⁴ To proceed conversely by inquiring whether in a particular case or class of cases justification exists for a federal court's declining summary exercise of a congressionally given summary jurisdiction is to put the leaden boot on quite another foot. I recognize that the Supreme Court and the lower federal courts have long taken an approach to the exhaustion doctrine which more nearly approximates the former than the latter method of proceeding.⁴⁶⁵ But this approach itself grew up in the postconviction cases involving claims of unconstitutional trial procedure,⁴⁶⁶ where it is perhaps explicable on the ground that this class of case does generically present strong affirmative justifications for requiring exhaustion.⁴⁶⁷ Even when limited to these cases the approach has been rightly condemned;⁴⁶⁸ extended beyond them, it is unsupportable.

It bears reiteration that the exhaustion doctrine is a judge-made decision to refuse to hear cases over which Congress unmistakably gave

⁴⁶³ These concerns, of course, will also play a role, within somewhat narrower compass, in determining the scope of the recognized categories of "special circumstances." Compare text accompanying note 497 *infra*, with text accompanying note 458 *supra*.

⁴⁶⁴ *United States ex rel. Murphy v. Murphy*, 108 F.2d 861, 862 (2d Cir.), *cert. denied*, 309 U.S. 661 (1940).

⁴⁶⁵ This is most evident in the postconviction cases where the existence of a state collateral remedy is unclear; in such cases the petitioner has been required to put the state processes to the test. *E.g.*, *Mooney v. Holohan*, 294 U.S. 103 (1935); and the line of Illinois cases climaxed by *Jennings v. Illinois*, 342 U.S. 104 (1951), and *Young v. Ragen*, 337 U.S. 235 (1949). In the lower courts, compare *United States ex rel. Emerick v. Denno*, 328 F.2d 309 (2d Cir. 1964), with *United States ex rel. Carrol v. Murphy*, 334 F.2d 65 (2d Cir. 1964).

⁴⁶⁶ The uncompromising statements of the exhaustion rule in *Davis v. Burke*, 179 U.S. 399 (1900), and *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13 (1925), have been often quoted in later decisions and appear to have contributed strongly to the increasing rigor of the rule.

⁴⁶⁷ See pp. 830-38 *supra*. Compare pp. 859-61 *supra*.

⁴⁶⁸ Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 230-31 (1948).

the federal judges jurisdiction.⁴⁶⁹ That decision not only lacked any statutory basis; it was in flat contravention of the statutory command that, when presented with a petition for habeas corpus, a federal judge "shall forthwith award a writ of habeas corpus,"⁴⁷⁰ "shall proceed in a summary way to determine the facts of the case,"⁴⁷¹ "and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws . . . , he or she shall forthwith be discharged and set at liberty."⁴⁷² This is the language of the 1867 statute, which also provided that a return to the writ should be made within three days⁴⁷³ and a hearing held within five days thereafter.⁴⁷⁴ These provisions have no ambiguity; they are patterned on those of the English Habeas Corpus Act⁴⁷⁵ and, like the provisions of that act, are plainly designed to make the writ of habeas corpus an imperious, expeditious remedy for the relief of illegal restraint. As for the state courts, "any proceeding against [the] . . . person . . . alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, [pending the habeas corpus proceeding and after final judgment of discharge] . . . shall be deemed null and void."⁴⁷⁶ As the *Royall* opinion recognized, "The statute evidently contemplated that cases might arise when the [habeas corpus] power . . . should be exercised, during the progress of proceedings instituted against the petitioner in a State court,"⁴⁷⁷ and the only congressional resolution of the conflicts which would thus inevitably arise was to nullify the state court proceedings.

If, despite the peremptory tenor of the statute, *Royall* allowed a federal habeas corpus court "discretion"⁴⁷⁸ to delay relief until the conclusion of state court processes, such discretionary delay was plainly an exception to the ordinary operation of the legislation. "[T]he court could not, against the positive language of Congress, declare any

⁴⁶⁹ *Royall* and the cases following it have expressly acknowledged this character of the doctrine. See notes 396-401 *supra* and accompanying text.

⁴⁷⁰ Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

⁴⁷¹ Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386.

⁴⁷² *Ibid.*

⁴⁷³ *Ibid.* The time was three days if the prisoner was detained within twenty miles of the court, ten days if between twenty and one hundred miles, twenty days if more than one hundred miles. The analogous provision today requires return within three days irrespective of distance, unless for good cause additional time, not above twenty days, is allowed. 28 U.S.C. § 2243 (1958).

⁴⁷⁴ Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386. The analogous provision today requires hearing within five days after return, unless for good cause additional time is allowed. 28 U.S.C. § 2243 (1958).

⁴⁷⁵ See notes 383-84 *supra* and accompanying text.

⁴⁷⁶ Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 386. See note 110 *supra* and accompanying text; notes 489-90 *infra* and accompanying text.

⁴⁷⁷ 117 U.S. at 248; see text accompanying note 398 *supra*.

⁴⁷⁸ See text accompanying notes 400-02 *supra*.

such exception . . . ;⁴⁷⁹ the Justices in *Royall* thought the exception which they did declare "in harmony with what we suppose was the intention of Congress" ⁴⁸⁰ This was perhaps permissible judicial license on the facts of *Royall* itself—a case as clearly without the concerns of the Reconstruction Congress as it was within the literal language of the statute.⁴⁸¹ And *Royall* might support similar license in other cases where it is consistent with the statutory aim. But to pass from *Royall* to an attitude which makes the dilatory exercise of the habeas corpus jurisdiction a first principle, which reads deference to the state judiciary into a statute designed to abort state judicial proceedings,⁴⁸² is perverse.

Congress has altered the habeas corpus legislation in pertinent regards since *Royall*, but I do not think that these changes substantially affect the character of the writ authorized in 1867 as an immediate, supervening pretrial federal remedy. The *Royall* doctrine in its post-conviction phase was approved by the enactment of 28 U.S.C. § 2254 (1958), in the Judicial Code revision of 1948.⁴⁸³ But section 2254 was specifically limited in its operation to postconviction cases;⁴⁸⁴ its enactment responded solely to concern with those cases;⁴⁸⁵ and the perceived evils which generated that concern were so exclusively creatures of the ordinary postconviction case⁴⁸⁶ that the congressional action in 1948 cannot fairly be read as reflecting any judgment relative to pretrial federal habeas corpus. At most, section 2254 expresses an attitude of preference for state over federal postconviction processes (an attitude which is dubiously susceptible of generalization to include the

⁴⁷⁹ *Ex parte Royall*, 117 U.S. 241, 249 (1886); cf. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.): "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."

⁴⁸⁰ 117 U.S. at 252.

⁴⁸¹ See notes 395-407 *supra* and accompanying text.

⁴⁸² See notes 109-34, 379-85, 469-77 *supra* and accompanying text.

⁴⁸³ See notes 415-17 *supra* and accompanying text.

⁴⁸⁴ See note 417 *supra*.

⁴⁸⁵ See note 415 *supra*.

⁴⁸⁶ Chief Judge Parker, whose important role in the enactment of § 2254 is described in note 215 *supra*, enumerated the following evils of the federal habeas corpus jurisdiction: (1) a flood of litigation in the lower federal courts resulting from "holding out to convicted prisoners the hope of escaping punishment by making an attack on the court which has convicted them," Parker, *supra* note 215, at 172; (2) "the unseemly spectacle of federal district courts trying the regularity of proceedings had in courts of coordinate jurisdiction and of state trial judges appearing as witnesses in defense of the proceedings had in their courts," *id.* at 172-73; and (3) the unseemliness of a single federal district judge being required "to review and pass upon convictions which had been affirmed by the highest state courts and which the Supreme Court of the United States had refused to review by certiorari," *id.* at 173. These perceived evils have long been the principal grievances lodged against federal habeas corpus. See authorities cited note 182 *supra*.

state trial process)⁴⁸⁷ and, more specifically, an attitude of reluctance to permit the lower federal courts to pass judgment on the state judges (an attitude having limited pretrial implications to which I shall return shortly).⁴⁸⁸ Somewhat more significant as an indication of congressional attitude is the Act of June 19, 1934, chapter 673,⁴⁸⁹ replacing the automatic stay procedure of the 1867 statute with a provision leaving to the federal habeas corpus judge discretion to determine whether or not state prosecution should be stopped pending disposition of the habeas petition. The 1934 legislation does express congressional unwillingness to see state trials interrupted by the defendant's unilateral act of filing a federal habeas petition, which might prove frivolous on examination. But the unfettered power left to the federal trial courts to stay state proceedings hardly suggests a judgment that the right of immediate discharge from unconstitutional confinement given in 1867 was meant to be broadly subordinated to the State's interest in undisturbed criminal trials.⁴⁹⁰ Perhaps nothing was intended but a check upon the dilatory tactic of the frivolous petition. Perhaps, reading the statute most expansively, one can find in it a judgment that state trials are not to be needlessly disrupted. The latter reading gives the *Royall* doctrine some congressional support, but is far from a reversal of the basic determination made by the Reconstruction Congress that fed-

⁴⁸⁷ The argument in favor of ceding a primary jurisdiction to the state courts in the ordinary postconviction case, raising claims of constitutional trial error, is considerably stronger than that for pretrial deference to state process. See pp. 836-38, 860-61, 890 *supra*.

⁴⁸⁸ See text accompanying note 519 *infra*.

⁴⁸⁹ 48 Stat. 1177.

⁴⁹⁰ The House report on the bill which became the 1934 act expressed a purpose to deprive state criminal defendants of the use of the automatic stay procedure as "a powerful weapon to delay a trial and possibly defeat the ends of justice." H. REP. NO. 1726, 73d Cong., 2d Sess. 1 (1934). As exemplifying the need for the legislation, the report described a recent "important murder trial," *ibid.*, in Massachusetts in which some of the defendants filed a federal habeas petition during trial; the federal district judge, after hearing, found the petitioners' contentions without merit; the petitioners thereupon appealed. "Obviously, it is undesirable that by this means the defendants should be enabled automatically to procure a stay of the trial." *Id.* at 2. The Senate report consisted substantially of a reprint of the House report, S. REP. NO. 1426, 73d Cong., 2d Sess. (1934), and its language was paraphrased on the floor by Senator Walsh, whose turn of phrase indicates that he regarded the Massachusetts petitioners' substantive claim as frivolous. 78 CONG. REC. 12366 (June 18, 1934). The bill passed the House without debate, *id.* at 10755-56 (June 7, 1934), and passed the Senate following only Senator Walsh's explanation and an obscure comment by Senator Robinson which seems directed to a postconviction proceeding in a death case, *id.* at 12366 (June 18, 1934). The only suggestion in the legislative history of broader reflections pertinent to the exhaustion doctrine is a statement in Attorney General Cumming's letter to the Chairman of the House Committee that notwithstanding termination of the automatic stay provision, the habeas petitioner's "rights are safeguarded by the fact that he has an opportunity to secure a review in the Supreme Court of the United States after exhausting his remedies in the State courts." H. REP. NO. 1726, 73d Cong., 2d Sess. 2 (1934); S. REP. NO. 1426, 73d Cong., 2d Sess. 2 (1934) (again paraphrased by Senator Walsh, 78 CONG. REC. 12366 (June 18, 1934)). The statement, of course, refers only to cases in which the federal habeas corpus judge does not grant a stay; it does not reflect a view as to when the stay should be granted.

erally unlawful restraints should be terminated without delay or the biding of state processes by a federal habeas corpus court.

I conclude, then, that the exhaustion doctrine is not to be viewed as an inexorable command, subject to rare exceptions in compelling circumstances. But neither do I think it can be viewed today as a dubiously allowable judicial shift, destructive of congressional purpose and rarely to be tolerated. Dubious *Royal's* case may have been at the date it was decided, and some of its modern extensions doubtless threaten to destroy the efficacy of the habeas corpus jurisdiction.⁴⁹¹ Nonetheless, better than seventy-five years of practice and the positive, albeit limited, endorsements of Congress have given the doctrine substantial credentials. Against this background, I think it appropriate to come to questions of its application in pretrial cases—where the doctrine remains wholly a judicial creature—without strong disposition for or against the requirement of exhaustion. The inquiry may begin with *Royal's* formulation that the decision whether a habeas corpus court should anticipate or await state trial ought to be made “in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.”⁴⁹² In appraising these “relations,” it is pertinent to examine what specific “rights” are in issue, what the Constitution and the Congress (by legislation other than the habeas corpus statute itself) have said about their importance and the usual forum for their enforcement, and, finally, what the federal and state courts respectively can do and are in fact doing under their joint obligation “to guard and protect” those rights.

(a) The strongest argument for the exercise of a federal anticipatory habeas corpus jurisdiction may be made in cases where the petitioner asserts that the conduct for which he is being prosecuted in a state court is conduct in the exercise of freedoms protected by the first amendment. I have already discussed the unique importance of those freedoms to a free society,⁴⁹³ their particular vulnerability to destruction by state process,⁴⁹⁴ the unlikelihood that they will be protected adequately by the state courts,⁴⁹⁵ hence the imperative need for undelayed federal trial court intervention to protect them.⁴⁹⁶ Where

⁴⁹¹ See the discussion of the *Wykcoff* and *Brown v. Rayfield* cases in text accompanying notes 504-07 *infra*.

⁴⁹² 117 U.S. at 251.

⁴⁹³ See note 253 *supra* and accompanying text.

⁴⁹⁴ See notes 254-55 *supra* and accompanying text.

⁴⁹⁵ See pp. 800-02, 840-42 *supra*.

⁴⁹⁶ See note 256 *supra* and accompanying text. The decision in *Douglas v. City of Jeannette*, 319 U.S. 157 (1943), disallowing federal injunction of state prosecutions

the state legislation on which the charge is laid is challenged on its face, I have pointed out that there exist no considerable justifications for deference to the state trial process.⁴⁹⁷ Where the challenge is to the application of the legislation, the state's interest in undisturbed administration of its statute or ordinance is more substantial. But in these latter cases, where questions of fact are determinative, the importance of assuring a federal trial forum is compelling, if highly valued liberties protected against the States by the national constitution are not to be left to the pleasure of state judges and juries.⁴⁹⁸ The Supreme Court itself, on direct review of state convictions in these cases, has engaged in an extraordinary (although necessarily limited) re-examination of factual issues;⁴⁹⁹ and the *Shuttlesworth* and *Dresner* decisions⁵⁰⁰ strongly suggest that a State will not be permitted to exact the penalties imposed upon such convictions until after the more searching reexamination available on federal postconviction habeas corpus has been had. Federal intervention into the state process prior to execution of sentence is probably therefore inevitable—as it should be—in any case in which the state courts reject a first amendment contention; the only question is whether the intervention comes sooner or later in the process. Considerations canvassed above demand that it come at the outset, by way of anticipatory relief. State prosecution is itself an effective instrument of repression;⁵⁰¹ federal guarantees must be made immediately felt by the prosecutor and police chief;⁵⁰² and the use of anticipatory federal power in this clearly defined class of cases threatens no wholesale disruption of state criminal law administration.⁵⁰³

claimed to infringe first amendment rights, may be thought to militate against this conclusion. I think it does not. First, *Douglas* is a narrower decision than has sometimes been supposed; it is supportable on the limited ground, *id.* at 165, that the ordinance sought to be enjoined was that same day declared unconstitutional in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and nothing in the *Douglas* record suggested that the threat of its enforcement endured a decision of the Supreme Court striking it down. Second, *Douglas* was decided in an era when the Court was involved in developing the first principles of the first amendment's substantive protection and was yet inexperienced in the problems of subtle procedural encroachments on the amendment's guarantees. See the subsequent cases cited note 254 *supra*. The authority of *Douglas* may already be substantially impaired, see note 39 *supra*; certainly the tenor of the opinion in *Baggett v. Bullitt*, 377 U.S. 360 (1964), and the logic of *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), discussed in note 193 *supra*, repudiate much of the underpinnings of *Douglas*; one may expect, I think, more direct Supreme Court repudiation shortly. See note 40 *supra*.

⁴⁹⁷ See text accompanying notes 457-58 *supra*.

⁴⁹⁸ See text accompanying notes 192-93, 255 *supra*.

⁴⁹⁹ See *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 85 Sup. Ct. 453 (1965).

⁵⁰⁰ See text accompanying notes 446-47, 459-60 *supra*.

⁵⁰¹ See pp. 796-802, 823-25, 836-38, 840-42, 860-62 *supra*.

⁵⁰² See text accompanying note 186 *supra*.

⁵⁰³ Compare text accompanying notes 171-73 *supra*.

For these reasons I think the *Wykcoff* and *Brown v. Rayfield* decisions⁵⁰⁴ are wrong. It suffices, of course, to distinguish those cases, that the Fifth Circuit treated them as involving postconviction, not pretrial, petitions,⁵⁰⁵ hence as falling within the terms of section 2254. But even under the regime of the statute, where the courts may have less freedom than in pretrial cases to displace the exhaustion requirement,⁵⁰⁶ the considerations canvassed in the preceding paragraph amply establish that first amendment cases as a class present "circumstances rendering [state] . . . process ineffective to protect the rights of the prisoner."⁵⁰⁷

(b) Many of the same considerations press for anticipatory habeas corpus in all cases where a petitioner claims that the charges on which he is being prosecuted cannot constitutionally be applied to his conduct by force of any of the guarantees of civil rights⁵⁰⁸ contained in the post-Civil-War Amendments. The protection of civil rights, protection of the liberty of the freedman and the loyal Union man in the South against persecution and oppression, were paramount objectives of the Congress which enacted the 1867 habeas corpus statute.⁵⁰⁹ I have previously pointed out that the need for an anticipatory federal jurisdiction to protect substantive guarantees of civil rights is more demanding than the need for federal anticipatory protection of procedural guarantees,⁵¹⁰ and that the values of leaving substantive federal issues to the state courts in the first instance are less than those of leaving to initial state court disposition even such federal procedural issues as might practicably be isolated in advance of trial.⁵¹¹ The decision to abstain pending exhaustion of state remedies, "in the light

⁵⁰⁴ See notes 418-20 *supra* and accompanying text.

⁵⁰⁵ In this, too, I think the Fifth Circuit was wrong. See AMSTERDAM 318-19 n.168.

⁵⁰⁶ See notes 483-88 *supra* and accompanying text. The Court's view that § 2254 codified the judicially developed exhaustion doctrine, see note 416 *supra*, probably refers to that doctrine in its twentieth-century, postconviction rigor. See notes 465-66 *supra* and accompanying text.

⁵⁰⁷ 28 U.S.C. § 2254 (1958). Of course the *Shuttlsworth* and *Dresner* cases, discussed at notes 446-47, 459-60 *supra* and accompanying text, do require exhaustion of state remedies in postconviction habeas cases raising substantive first amendment claims. But in neither case do the respective courts appear to consider any question broader than a contention of "special circumstances" arising from the confinement of the petitioners under short sentences, coupled with the prospect of delay and the unavailability of bail in state collateral proceedings. The courts dispose of this contention in a manner favorable to the petitioners, and I do not think that either case can be read as passing considered judgment on the larger question whether in first amendment cases generically the exhaustion of state collateral remedies should be demanded.

⁵⁰⁸ See note 41 *supra*.

⁵⁰⁹ See notes 76-134, 151-60 *supra* and accompanying text.

⁵¹⁰ See text accompanying notes 249-52 *supra*.

⁵¹¹ See pp. 859-61 *supra*.

of the relations existing”⁵¹² between the state and federal courts, presupposes that, in respect of the subject matter of the litigation, the state courts have a generally primary competence or responsibility—that they are the ordinary and normal place for such litigation. However this may be regarding other federal questions, it is clearly not so in matters of civil rights. This was the fundamental decision made by the Reconstruction Congress,⁵¹³ and, although extension of anticipatory federal relief in all cases involving a substantive civil rights claim is not so clearly demanded as in first amendment cases, I think the reasons for the broader relief are sufficient.

I am led to this result in part by the absence of feasible alternatives. If it is once decided that federal anticipatory habeas corpus is necessary and proper in some instances beyond the narrow class of first amendment cases, it becomes essential to draw a line—and a clear line⁵¹⁴—defining the appropriate scope of exercise of the anticipatory jurisdiction. One conceptually possible principle of definition was offered by the petitioners in *Wykcoff* and *Brown v. Rayfield*,⁵¹⁵ who argued that, because of Mississippi’s statewide policy of massive resistance to federal guarantees of equality, the courts of that State were unlikely to protect criminal defendants claiming those guarantees.⁵¹⁶ I agree that the degree of probability that state courts will not fairly protect federal rights is a pertinent question; indeed, I think that probability by far the most important factor in determining the fit scope of anticipatory federal relief. But I have already indicated the belief that that probability is an unfeasible issue to litigate in advance of state proceedings, both because its factual complexity makes the litigation impracticable, and because the embarrassing nature of inquiry into a State’s—or its judges’—constitutional fidelity makes the litigation impolitic.⁵¹⁷ The Supreme Court’s treatment of the removal statute in the *Rives-Powers* cases supports this conclusion;⁵¹⁸ and the congressional response, by enactment of section 2254, to the perceived affront of federal district judges trying the state judiciary⁵¹⁹ further confirms it. Other factors pertinent to defining the scope of anticipatory jurisdiction—the amount of delay likely to be involved if exhaustion is required, the nature and amount of disruption of state processes likely if exhaustion is not required, the effect on the volume of federal dis-

⁵¹² See text accompanying note 492 *supra*.

⁵¹³ See notes 32-33, 47-160 *supra* and accompanying text.

⁵¹⁴ See text accompanying notes 171-73 *supra*.

⁵¹⁵ See notes 418-20 *supra* and accompanying text.

⁵¹⁶ See notes 448-49 *supra* and accompanying text.

⁵¹⁷ See pp. 800, 835-36 *supra*.

⁵¹⁸ See notes 235-47 *supra* and accompanying text.

⁵¹⁹ See note 486 *supra*.

strict court litigation in either case⁵²⁰—seem also impracticable to litigate; and, in any event, these factors could contribute to a satisfactory definition only if considered in connection with a formula which also took account of the unlitigable factor of probable state court fairness in handling a petitioner's federal claim. A more administrable principle than litigation of these issues is demanded; the allowance of anticipatory habeas corpus in cases raising claims under the substantive guarantees of federal civil rights seems to me the best that can be done.

D. Conclusion: Availability of Anticipatory Habeas Corpus and Removal in Civil Rights Cases

The issues canvassed in this Article are difficult and uncertain in their resolution. One proposition, however, is clear. There are ample sources from which federal power may be drawn to abort state prosecutions which affect federally guaranteed civil rights.

Jurisdiction in habeas corpus is indisputable. Reasonable men may disagree concerning the appropriate scope of the exhaustion doctrine and its several exceptions. But the choice to issue the writ and entertain federal contentions in advance of state trial is manifestly within the range of judicial propriety. The removal statute does present troublesome problems of construction. One may agree or disagree with the *Rives-Powers* doctrine, with the *Galamison* reading of "law providing for . . . equal civil rights," with the Mississippi District Court's restriction of subsection 1443(2) to persons acting "in at least a quasi-official capacity." Again these are questions which, after a canvass of the pertinent materials and concerns, may be decided either way. Choice, and the obligation of choice, remain with the federal judiciary.

A very considerable range of reasonable options is presented. By restricting subsection 1443(2) to "quasi-official" persons and relaxing the *Rives-Powers* and exhaustion doctrines only in first amendment cases, federal anticipatory jurisdiction may be limited to the protection of freedoms of expression. By insisting inflexibly on exhaustion and adopting the *Galamison* confinement of section 1443 to claims under explicitly egalitarian federal guarantees, the anticipatory protection may be limited to cases involving facially discriminatory state statutes (under the *Rives-Powers* reading of 1443(1) and "quasi-official" reading of 1443(2)), or to cases of discriminatory administration of state law by demonstrably hostile state courts (by overruling *Rives-Powers* but adhering to the "quasi-official" reading), or to all substantive equal

⁵²⁰ See text accompanying note 179 *supra*.

protection cases (by adhering to *Rives-Powers* but extending 1443(2) to nonofficial persons). The exhaustion rule and application of the "denial" concept of 1443(1) may be made to turn on inquiry into the attitudes of the state judges or the temper of the state juries or both, or may be made to turn on factors which render actual hostility of the state judicial organs irrelevant. Federal anticipatory jurisdiction may be withdrawn entirely save in federal-officer cases; or it may be extended to all cases involving substantive claims, or substantive and procedural claims, under federal guarantees of civil rights, or, more broadly, under the Constitution and laws.

All of the options are not, of course, equally desirable for the effective functioning of a federal system committed to the national protection of certain individual liberties, nor are all equally supportable upon the applicable legislative and judicial materials. I have indicated my own conclusion that federal anticipatory habeas corpus should extend to all cases in which a state criminal defendant claims that the charges against him are prohibited by the guarantees of civil rights found in the post-Civil-War Amendments. This conclusion is supported, but not compelled, by the technical and doctrinal considerations which I have examined. It is compelled by my evaluation of what the *Royall* opinion called the "relations existing . . . between the judicial tribunals of the Union and of the States" in matters of civil rights.

Federal guarantees of civil rights have their principal sphere of operation in the protection of interests which the States do not, and are not likely to, protect. The same generation of legislators which determined that the guarantees should be given determined also that national judicial enforcement in the first instance was imperative if those guarantees were not to be destroyed. Both determinations involved a subordination of substantial state concerns, among them the state concern for an unhindered criminal process. That concern was expressly subordinated by the removal and habeas corpus statutes, and in each case the subordination went the length of those guarantees of individual freedom which Congress had the constitutional power to protect.

The need for federal judicial protection has not narrowed. State criminal prosecutions still threaten the whole register of federal guarantees. They are still "harassing, annoying and even driving out of the State"⁵²¹ persons for whose safe conduct a high national commitment has been made. This harassment is endemic to the popular, localized, politics-dominated state criminal administration. It is worked,

⁵²¹ See text accompanying note 130 *supra*.

for the most part, not by final judgments of conviction but by mesne process. It can be stopped only by a federal anticipatory jurisdiction as broad as the evil itself. Unnecessary interruption of state proceedings, of course, should be avoided. Where federal guarantees can be amply vindicated at the conclusion of state process—as is ordinarily the case with federal trial procedure guarantees—their vindication may be left to postconviction stages. But the power of repression by mesne process allows no such accommodation in the case of substantive guarantees. Here the respective interests of the Nation and the States are best reconciled by federal intervention at the outset of the prosecution, delimited, however, in a manner which makes the federal intervention as little disruptive and as little abrasive as possible. This last objective is not served by trying the state judiciary in a federal court or by impracticable inquiries into the probable adequacy of state procedures. It is served by exercising federal jurisdiction in a class of cases defined simply by their subject matter.

The same considerations lead me to give the same scope to the removal statute. I would allow removal wherever a substantive federal civil rights defense is claimed. I would prefer to see this result rested on subsection 1443(2),⁵²² which is explicitly limited to substantive claims and naturally lends itself to this construction; but I think the result can be reached under subsection 1443(1) as well. True, under 1443(2), and perhaps under 1443(1), defendants having colorable but not necessarily valid federal claims⁵²³ could have their trial in a federal court of state-law questions not raised in a habeas corpus proceeding. This seems to me justified by considerations of economy which lessen the cost to the defendant of invoking federal jurisdiction,⁵²⁴ and because it gives desirable “breathing space”⁵²⁵ by assuring a federal forum on all issues to defendants prosecuted for the arguable exercise of constitutional freedoms. But the question is not easy, and

⁵²² I speak of the “color of authority” clause discussed extensively above. I put no weight on the “refusing” clause of § 1443(2), whose legislative history indicates a very narrow purpose touching none of the sorts of cases with which this Article is concerned. See note 79 *supra*.

⁵²³ This is the test of removability under § 1443(2). See note 328 *supra*. It is less clearly the test of removability under § 1443(1), but I think the interpretation of that subsection suggested in text accompanying notes 249-52 *supra* supports the test in preference to a test which turns jurisdiction on the validity of the federal claim. Divorce of the jurisdictional question from the merits also seems to me to make up in ease of administration what it costs in added volume of removable cases.

⁵²⁴ *Cf. Hurn v. Oursler*, 289 U.S. 238 (1933).

This consideration also tends to support construction of the phrase “criminal prosecutions” in § 1443 to allow removal of all state criminal charges arising out of the same series of acts or transactions if any one of the charges meets the requirements of removability. The question of joinder in the removal of multiple-charge prosecutions is a difficult one, however, and insufficiently central to the concerns of this Article to justify treatment here.

⁵²⁵ *NAACP v. Button*, 371 U.S. 415, 433 (1963).

I would not have strenuous objection to the contrary view that, where a removal petitioner's federal contention fails, his trial on state law issues should be remitted to the state courts. The latter result would be reached if removability were sustained only under 1443(1) and if that subsection were narrowly read as turning removal on the showing of a valid, not merely arguable, federal claim. Such a reading, in any event, is clearly preferable to disallowing removal and limiting federal anticipatory relief to the habeas corpus form. Habeas corpus and removal each have procedural limitations which make extension of the other necessary for complete relief.⁵²⁶ Habeas corpus may be available at earlier stages of the state criminal process than removal,⁵²⁷ and it will ordinarily bring the prosecution to quicker final disposition in the federal court. Removal practice allows the defendant to halt the state proceedings even though a federal judge may not be immediately available;⁵²⁸ and if the "custody" requirement for habeas corpus is not held satisfied by the conditions of a defendant's release on bail,⁵²⁹ removal nevertheless reaches his case. In situations where both federal remedies are available to a defendant, I see no reason why he should not be given his option; but if this is thought unwise, an accommodation of the remedies is easily made.⁵³⁰

There remains the question whether anticipatory relief should in any case be allowed where the defendant asserts no colorable federal substantive claim, but where it appears probable before trial that he will be denied a federal procedural guarantee. Habeas corpus in such cases is difficult to justify doctrinally,⁵³¹ but subsection 1443(1) would allow removal more or less broadly depending upon the continuing vitality of the *Rives-Powers* doctrine. There can be no doubt that Congress, making explicit provision by the 1964 Civil Rights Act for the appeal of remand orders in removed civil rights cases, expected that the Supreme Court would limit or overrule *Rives-Powers*.⁵³² I have sug-

⁵²⁶ Nor do I think that extension of federal injunctive relief in some or all of the same cases would obviate the need for either habeas corpus or removal. Often it will be impossible to obtain a temporary restraining order to stop state proceedings as early as the filing of a removal petition will stop them. And the injunction case in the federal court will ordinarily proceed more slowly than either a habeas proceeding or a removed criminal trial.

⁵²⁷ See *Virginia v. Paul*, 148 U.S. 107 (1893).

⁵²⁸ See notes 169-71 *supra* and accompanying text.

⁵²⁹ See notes 373-74 *supra* and accompanying text.

⁵³⁰ For example, habeas corpus may be disallowed where removal would give the defendant complete relief. See *Ex parte Dickson*, 14 F.2d 609 (N.D.N.Y. 1926). There is ample doctrinal support for such a resolution. See, e.g., *Stack v. Boyle*, 342 U.S. 1, 7 (1951).

⁵³¹ Ordinarily the State's legal basis for detention of a defendant for trial will not be affected by procedural illegalities.

⁵³² See, e.g., 110 CONG. REC. 6551 (March 30, 1964) (remarks of Senator Humphrey), 6344 (remarks of Senator Kuchel), 6739-40 (April 6, 1964) (remarks of Senator Dodd).

gested a limitation to cases in which only federal procedural claims are made. The effect of this principle would be to leave intact in such cases the distinction between *Strauder* and *Rives-Powers*, turning removability on the existence of a facially unconstitutional state statute. I am far from satisfied with that result. For, today, in matters of procedure as of substance, "by far the most serious denials of equal rights occur as a result not of statutes which deny equal rights on their face, but as a result of unconstitutional and invidiously discriminatory administration of such [*sic*] statutes."⁵³³ Nevertheless, the considerations which supported the *Rives-Powers* decisions in their time remain cogent. The 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 pre-trial stages—has expanded considerably; and I think the basic determination in *Rives-Powers* is sound—that such claims should not support removal without inquiry into the probability of their denial by the state courts. This is the sort of inquiry I regard as ordinarily unfeasible. *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. Beyond this, I would unhappily let *Rives-Powers* stand.

⁵³³ *Id.* at 6739.