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### Comment, Federal Removal and Injunction to Protect Political Expression and Racial Equality: A Proposed Change

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*FEDERAL REMOVAL AND INJUNCTION TO PROTECT  
POLITICAL EXPRESSION AND RACIAL EQUALITY: A  
PROPOSED CHANGE*

Constitutionally secured civil rights and liberties are enforceable in federal courts and, by virtue of the supremacy clause, demand recognition in otherwise independent state courts as well. Through this accommodation, the duality of judicial administration and the supremacy of federal law coexist within our federal system. The principle of duality in judicial administration is imperfect, however, for the tribunal to which all state courts must ultimately look for authority on federal questions is the United States Supreme Court. Similarly, the supremacy of federal law, while perfect in principle, is imperfect in fact; for federal forums are often initially unavailable to prevent a state from infringing federal rights in the exercise of its police power. That is, the principle of duality recognizes the state's legitimate interest in adjudicating questions arising in the exercise of its police power and does not permit all federal rights to receive immediate protection in a federal forum, the assumption being that federal rights receive the same protection in state courts as in federal courts.

This Comment explores the problem of obtaining at the outset a federal forum in which to assert and protect federally-secured rights of free political expression and racial equality against incursion by state criminal prosecutions. Ultimate federal review may be available by appeal or certiorari to the Supreme Court, but that review pays great deference to the state fact finder. Moreover, such review is ordinarily available, if at all, only after the claimant has exhausted his state remedies. Initial access to a federal forum to protect federal rights of political expression or racial equality is available only in limited circumstances. In general, the remedy of federal anti-suit injunction to prevent the commencement or continuance of state criminal proceedings is available only to a claimant who can make a timely showing in advance and from the face of the state statute involved that such state adjudication will certainly deny his federal right of political expression. Similarly, the remedy of federal removal is normally available only to a claimant who can make a like showing—also from the face of a state statute—that state adjudication will deny his right of racial equality. The principal exception to the general rule arises in those "equal access" cases in which a Negro seeking equal service in public accommodations has thereby become a defendant in a state criminal trespass prosecution.

Here, the barrier to initial federal relief has been lowered, and claimants in such cases may obtain removal or an anti-suit injunction on the theory that federal law has transmuted a crime into a right, and that any state prosecution—regardless of its outcome and regardless of the facial validity of the state statute—abridges this federal right.

This Comment suggests that the combination of the advance certainty test and the equal access exception thereto constitutes a logical absurdity in the judicial evolution of federal remedies which new federal legislation can and should correct. The advance certainty test serves to keep federal courts out of the fact-finding and guilt-determining processes in deference to the peculiar interests of the states in administering their own criminal laws. The equal access exception permits federal courts to engage in fact finding to protect only one right, while excluding many equally crucial rights from the benefit of initial federal protection. This exception rests upon a vacuous distinction between a federal right which carries with it a concomitant proscription of state prosecution for its exercise and those federal rights which have no such collateral protective umbrella. The identification of those cases in which a federal court will engage in fact finding to guard federal rights at the outset should not turn upon the chance occurrence of a concomitant statutory right barring state prosecution—such as the right which the Court found in the equal access cases—but rather upon the nature, importance, and sensitivity of the substantive right itself. It is further the thesis of this Comment that the guarantees of free political expression and racial equality are rights to which federal courts should accord special initial protection regardless of the facial validity of the statute which threatens their exercise in state criminal prosecutions.

Part I of this Comment examines the existing means by which prospective defendants can obtain federal protection for their rights of free political expression or racial equality when threatened by state criminal proceedings. It will trace the recent and parallel evolution of the federal remedies of injunction and removal, examining the differing restrictions now in force upon both. Part II will analyze those restrictions in terms of federal theory, offering a critique of the view of federalism which they imply. Part III will propose a statute unifying the remedies of injunction and removal, making their availability depend upon neither the existence of a facially void statute nor a right carrying a concomitant freedom from prosecution, but upon the nature, importance and sensitivity of the right itself.

## I

## THE SCOPE OF PRESENT REMEDIES

Initial federal relief from state criminal proceedings may take the form of an anti-suit injunction or removal to a federal court. Since the limitations now in force upon these two remedies differ substantially, it is best to discuss them separately, even though there is considerable overlap in function. The form in which federal relief must be cast depends in part upon the status of the state proceedings. For the purposes of federal relief, the moment at which a state criminal prosecution commences is the instant an indictment is returned, or an information or complaint is filed.<sup>1</sup> Prior to that moment the proper form for initial federal relief is the anti-suit injunction, which may then block the commencement of state proceedings. After that moment an anti-suit injunction may still be available to block the continuance of proceedings. Removal is available only after state proceedings have commenced.<sup>2</sup>

*A. Federal Anti-Suit Injunctions**1. Injunctions Preventing the Commencement of State Prosecution*

The judicial doctrine of abstention,<sup>3</sup> which holds that state courts must have a chance initially to decide federal questions arising in the course of state adjudication, has historically been the principal limit

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1. *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965).

2. *Virginia v. Paul*, 148 U.S. 107, 119-20 (1893).

3. Justice Frankfurter fathered the abstention doctrine, under which a federal court may refrain from deciding even substantial federal questions, and gave it its fullest expression in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). *Pullman* involved a state statute which the Commission interpreted to require conductors (who were all white), and not porters (who were all Negroes) to operate sleeper cars. Acknowledging a substantial equal protection issue raised by the railroad and porters in objecting to the Commission's interpretation, Justice Frankfurter for the majority nevertheless did not reach the federal question, but remanded to allow state courts to consider the issue. His rationale was twofold: First, a state court may so decide the case as to avoid the federal question altogether, so abstention would serve the end of avoiding needless federal decisions; and secondly, the intricacies of state law are best left for state court decision, and federal courts should therefore not waste time rendering "tentative" state law decisions.

In practice, the abstention doctrine in federal question cases allows the litigant on remand to "expose" federal issues in state court while reserving his right to reargue them in federal district court if the state court decides those questions against him. Thus it is said that abstention in federal question cases is a "postponement" and not an "abdication" of federal jurisdiction, unless the litigant on remand "waives" his right by arguing the federal question fully in state court. *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 416, 421 (1964). See generally C. WRIGHT, *THE FEDERAL COURTS* 169-77 (1963); Note, *Federal Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967).

upon the use of federal anti-suit injunctions to block the commencement of state criminal proceedings. Nevertheless, such an injunction is potentially the most effective means for defensive assertion of federal rights of political expression against state prosecutions. In the landmark case of *Dombrowski v. Pfister*<sup>4</sup> such an injunction issued to prevent the enforcement of a state statute which abridged first amendment rights by virtue of its unconstitutional vagueness and overbreadth.<sup>5</sup> *Dombrowski* also suggested in dictum that identical relief is appropriate to prevent bad-faith prosecutions which inhibit the exercise of constitutionally protected freedoms generally.<sup>6</sup>

*Dombrowski* involved the efforts of Louisiana officials to prosecute members of a civil rights organization under a state subversive activities control act. Finding this statute unconstitutionally overbroad, and separately suggesting that bad-faith prosecution under any statute is improper, the Court held that federal injunction was the correct remedy, and that abstention was "inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities."<sup>7</sup> *Dombrowski* thus severely restricted the applicability of the abstention doctrine. The Court abandoned its earlier dispositive presumption that state courts would construe state statutes in accord with the Constitution<sup>8</sup>—at least where the statute is on its face vague or overbroad—and apparently concluded that federal intervention at the outset is essential if it appears that many state decisions would be necessary in order to hammer out a constitutional construction of state statutes.<sup>9</sup>

*Dombrowski's* analysis of the chilling effect which facially overbroad statutes have upon the exercise of political expression was a

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4. 380 U.S. 479 (1965).

5. *Id.* at 492-96.

Pursuant to 28 U.S.C. § 2281 (1964), a three-judge court issued the injunction in *Dombrowski*. 380 U.S. at 482. That statute provides that only such three-judge courts can enjoin "the enforcement, operation, or execution of any state statute" or administrative order on the grounds of unconstitutionality by restraining the action of any state official. Passed in 1910, shortly after the Supreme Court had upheld in *Ex Parte Young*, 209 U.S. 123 (1908), a federal injunction against a state officer by rejecting a challenge that the eleventh amendment prohibited such interference by federal courts, section 2281 was part of an effort to make certain that only courts of "special dignity" could so interfere with state activity. See H. M. HART & H. WECHSLER, *FEDERAL COURTS AND THE FEDERAL SYSTEM* 847-49 (1953) [hereinafter cited as HART & WECHSLER].

6. 380 U.S. at 489-91.

7. *Id.* at 489-90.

8. See note 3 *supra*.

9. 380 U.S. at 491-92.

new departure which contains the germ of a complex and far-reaching notion. The Court had much earlier held that the vice of vague or overbroad statutes is that they not only proscribe constitutionally regulable activity, but also exceed constitutional boundaries to inhibit protected activity.<sup>10</sup> The *Dombrowski* opinion pushed the analysis further:

We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal . . . [T]he reasons for the vagueness doctrine in the area of expression demand no less than freedom from prosecution prior to a construction adequate to save the statute.<sup>11</sup>

Thus *Dombrowski* focused upon the relation of the defendant to the process of judicial lawmaking, and suggested that when a defendant must endure a state prosecution in order to vindicate his federal rights, he is not always receiving enough constitutional protection. At least where a state statute unconstitutional on its face inhibits free expression, *Dombrowski* holds that federal anti-suit injunctions are available at the outset to prevent the commencement of a state prosecution.

*Dombrowski's* principles are obviously capable of tremendous expansion,<sup>12</sup> and they have become the grounds for injunctive relief in a great variety of cases involving political expression. Thus, antiwar demonstrators reclassified from student II-S status to draft-eligible I-A status as a penalty for engaging in protest activity have successfully invoked *Dombrowski* on the ground that they should not even have to defend their political activity from attack by reclassification and induction.<sup>13</sup> Similarly, *Dombrowski* has supported a federal injunction against Georgia's prosecution of a civil rights organization under a state insurrection statute which forbade, *inter alia*, circulating "insurrectionary papers."<sup>14</sup>

Recent cases exploring the *Dombrowski* doctrine have further

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10. *Shelton v. Tucker*, 364 U.S. 479, 487-88 (1960).

11. 380 U.S. at 491-92.

12. Realizing the potential breadth of the doctrine that the chilling effect of state prosecutions for the exercise of constitutional rights warrants injunctive relief, the majority hedged the new principle thus: "[T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. . . . [T]he mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." *Id.* at 484-85.

13. *Wolff v. Selective Serv. Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967).

14. *Carmichael v. Allen*, 267 F. Supp. 985, 993-94 (N.D. Ga. 1967).

refined and sometimes confused its implications for anti-suit injunctions. The Court has held that an appeal which results in a narrowed and constitutional construction of a facially overbroad statute does not cure the conviction secured prior to the permissible construction.<sup>15</sup> One recent lower court decision, however, refused *Dombrowski*-type relief where a prior adjudication had found that defendants prosecuted under an overbroad statute had not engaged in constitutionally protected activity;<sup>16</sup> and another declared that the facial defects of an incitement-to-destruction statute were curable in one prosecution, and so denied injunctive relief against state proceedings.<sup>17</sup>

More recently, in *Zwickler v. Koota*,<sup>18</sup> the Supreme Court held that the overbreadth of a New York statute prohibiting the printing or distribution of anonymous political campaign pamphlets was sufficient ground in itself for a federal injunction against state prosecution.<sup>19</sup> No additional "special circumstances," such as bad-faith prosecution, were deemed essential to support a claim for injunctive relief. *Zwickler* thus affirms a line of cases descending from *Dombrowski* which enjoin state prosecutions under facially void statutes without finding bad faith in the prosecution. These cases also indicate that *Dombrowski's* rationale applies to overbroad statutes affecting political expression by proscribing action, as well as those affecting only speech or writing. Thus injunctive relief has prevented state prosecution under an overbroad disorderly conduct ordinance,<sup>20</sup> a sedition statute,<sup>21</sup> criminal syndicalism acts,<sup>22</sup> a "mob action" statute,<sup>23</sup> and intimidation statutes.<sup>24</sup>

Where the statute is constitutional on its face, however, and the petitioner for injunctive relief charges that the prosecution is proceeding in bad faith, the harder question arises whether that element of *Dombrowski* condemning bad-faith prosecutions is also

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15. *Ashton v. Kentucky*, 384 U.S. 195, 201 (1966) (common law definition of criminal libel narrowed to valid constitutional specificity only on appeal after conviction; analyzed by Supreme Court as overbroad statute).

16. *Wright v. City of Montgomery*, 282 F. Supp. 291, 294 (M.D. Ala. 1968).

17. *Turner v. LaBelle*, 251 F. Supp. 443, 446 (D. Conn. 1966).

18. 389 U.S. 241 (1967).

19. *Id.* at 249-50, 254.

20. *Hunter v. Allen*, 286 F. Supp. 830, 835 (N.D. Ga. 1968).

21. *Smith v. Hill*, 285 F. Supp. 556 (E.D. N.C. 1968).

22. *Ware v. Nichols*, 266 F. Supp. 564, 567, 569 (N.D. Miss. 1967); *Harris v. Younger*, 281 F. Supp. 507, 510 (C.D. Cal. 1968), *prob. juris. noted*, 37 U.S.L.W. 3247 (U.S. Jan. 13, 1969).

23. *Landry v. Daley*, 280 F. Supp. 938 (N.D. Ill. 1968).

24. *Id.*

enough by itself to support injunctive relief. This question reached the Supreme Court in *Cameron v. Johnson*.<sup>25</sup> There the Court denied relief, while upholding in principle this use of the anti-suit injunction. *Cameron* involved a Mississippi antipicketing statute which forbade unreasonable obstruction of entrances to county courthouses. The state sought to apply it against a group of about 40 pickets who marched around a courthouse seeking to encourage Negro voter registration.<sup>26</sup> Finding the statute constitutional on its face,<sup>27</sup> the Court affirmed the denial of an anti-suit injunction and held that even where the first amendment protects the conduct in issue, and the petitioner so alleges, there is no ground for injunctive relief.<sup>28</sup> Accordingly, the Court declined to determine whether the statute *as applied* abridged first amendment freedoms. Instead, it emphasized that "the issue of guilt or innocence is for the state court at the criminal trial . . . ."<sup>29</sup>

*Cameron* thoroughly confuses the concept of bad-faith prosecution. That concept, as it emerged in *Dombrowski*, seemed to encompass both the case in which a state statute could not be constitutionally applied to the claimant because federal law protected the activity for which he faced state prosecution,<sup>30</sup> and the situation in which the claimant had not violated the state law and the prosecutor lacked probable cause to believe otherwise.<sup>31</sup> *Cameron*, however, rejected the claim of bad-faith prosecution on two new grounds: First, there was no "selective enforcement" of the law, and any apparent unevenness in enforcement resulted only from varying police estimates of the legality of the conduct involved; and second, there was no police harassment prior to the arrests.<sup>32</sup> However, the *Cameron* majority did not hold explicitly that the statute could be constitutionally applied to the claimants, though the dissent strenuously argued that it could not be so applied.<sup>33</sup> Nor did the *Cameron* majority explicitly find that the prosecution had probable cause to believe that the claimants had violated the law, though the

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25. 390 U.S. 611 (1968).

26. *Id.* at 614-15.

27. *Id.* at 616.

28. The Court remarked: "Any chilling effect on the picketing as a form of protest and expression that flows from good-faith enforcement of this valid statute would not . . . constitute . . . an impermissible invasion of protected freedoms." *Id.* at 619. See also Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 268, 326, 330 (1969).

29. 390 U.S. at 621.

30. 380 U.S. at 490.

31. *Id.*

32. 390 U.S. at 619-20.

33. *Id.* at 627.

dissent vigorously asserted that there was "no evidence" of violations of the statute.<sup>34</sup> It is not clear whether the *Cameron* majority intended quietly to dilute the "strong medicine"<sup>35</sup> of *Dombrowski* by confining federal inquiry to the issues of selective enforcement and police harassment. Perhaps the Court simply felt that no real issue of probable cause arose and that the Constitution did not protect the claimants' activity, so that neither of the *Dombrowski* inquiries would have helped their case.

Whatever the Court's intent, its failure to find that both of the *Dombrowski* elements of bad faith were absent, coupled with its use of the proposition that only state courts can determine guilt or innocence, is unfortunate. A federal court reading *Cameron* broadly and *Dombrowski* narrowly might foreclose an attempt to establish bad faith by deeming evidence probative of unconstitutional application or want of probable cause inadmissible because also determinative of the issue of guilt or innocence—a question which *Cameron* pointedly reserved for the state courts. Reading the decision as a dilution of *Dombrowski*, a claimant might still argue that the statute in question had been persistently applied to prohibit protected activity,<sup>36</sup> and that by implication every such application amounts to a form of selective enforcement. But the damage of bad-faith prosecution seems to occur in precisely the cases *Dombrowski* envisioned, when there is no cause to believe that state law has been violated, or when that law is applied to proscribe federally protected activities. If *Cameron* precludes consideration of unconstitutional application and want of probable cause, then indeed the "impropriety" of bad-faith prosecution which *Dombrowski* noted means very little.

Whatever the theoretical possibilities after *Cameron*, in only one case has a federal anti-suit injunction issued to abort a state prosecution on the ground of bad faith, while several cases deny such injunctions.<sup>37</sup> *Landry v. Daley*<sup>38</sup> is the maverick case. *Landry* purports

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34. *Id.* at 624, 626-27.

35. *Id.* at 623.

36. See *Brock v. Schiro*, 264 F. Supp. 330, 338 (E.D. La. 1967).

37. See *Turner v. LaBelle*, 251 F. Supp. 443, 447 (D. Conn. 1966) (incitement to destruction statute); *Dawkins v. Green*, 285 F. Supp. 772, 773-74 (N.D. Fla. 1968) (riot and arson statutes).

38. There are actually four separate *Landry* opinions, two of which deal with the question of bad-faith prosecution for disorderly conduct, resisting an officer, and breach of the peace. *Landry v. Daley*, 288 F. Supp. 183, 288 F. Supp. 189 (N.D. Ill.), *appeal dismissed sub nom. Landry v. Boyle*, 393 U.S. 220 (1968). The third *Landry* opinion considers the scope of the three-judge requirement under section 2281 (see note 5 *supra*) and concludes that where three judges

to follow *Cameron's* limitations on federal court inquiry while granting an anti-suit injunction against a state prosecution under a disorderly conduct ordinance. The claimant, who was chairman of an urban renewal committee, had sought to enter the spectator section of the Chicago City Council with about fifty supporters to observe action upon a petition his group had earlier submitted. Denied access to the chambers, the claimant later sought admittance alone, only to be denied entrance by a police officer on the ground that the spectator gallery was full. The claimant thereupon stated that he would not leave, and was forthwith arrested for breach of the peace.<sup>39</sup> Specifically finding that the claimant had in no way breached the peace as far as the spectators inside the gallery were concerned, and that "disturbing policemen is not disorderly conduct,"<sup>40</sup> the *Landry* court held that the first amendment protected the claimant's conduct and that the arresting officer had no probable cause to believe a crime had been committed, and so issued the injunction.<sup>41</sup> In a companion case in which the claimants similarly urged that the state prosecution was proceeding in bad faith, the district court construed *Dombrowski* to demand a factual investigation in all such cases to determine "[W]hether the conduct of the various plaintiffs was of such nature as to constitute sufficient cause for prosecution under the statutes or ordinances . . . or whether these provisions have been enforced . . . in an improper and discriminatory manner solely for the purpose of discouraging plaintiffs' exercise of constitutionally protected activities."<sup>42</sup> *Landry's* requirement of an evidentiary hearing may well have overstepped the boundaries which *Cameron* had imposed upon federal inquiry. *Landry* did not actually find that the claimant was innocent under state law, but in holding that the claimant's acts constituted neither disorderly conduct nor a breach of the peace, and that the arresting officer had no probable cause to believe otherwise, *Landry* necessarily foreclosed argument on the issue

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have found challenged statutes facially constitutional, proper procedure allows the court, "as a matter of discretion," to decline to hear arguments as to unconstitutional application, and to return the case to a single judge on the question of enjoining state prosecutions for bad-faith proceedings under valid laws. 288 F. Supp. 195, 199 (N.D. Ill.), *appeal dismissed*, 393 U.S. 220 (1968). The fourth case contains extended discussion of the powers of federal courts to issue anti-suit injunctions, and concludes that challenges to bad-faith prosecution require plenary hearings to find whether probable cause to prosecute exists or whether the threatened prosecutions constitute an effort to penalize constitutionally protected conduct. 288 F. Supp. 200, 221 (N.D. Ill.), *appeal dismissed*, 393 U.S. 220 (1968).

39. 288 F. Supp. at 191-92.

40. *Id.* at 192-93.

41. *Id.* at 193-94.

42. *Id.* at 221.

of guilt. *Dombrowski's* concept of anti-suit injunction to prevent the commencement of bad-faith prosecution would similarly require that federal relief occasionally foreclose the issue of guilt from state court consideration. If *Cameron's* insistence that federal courts cannot determine guilt means that they cannot foreclose the issue by hearing evidence of bad faith which goes also to the question of guilt, then *Landry* demonstrates that *Cameron's* limitation and *Dombrowski's* mandate are inherently in conflict. In construing *Dombrowski* to require, and *Cameron* to allow, federal courts to hold a hearing on the issue of probable cause where a claimant seeks injunctive relief from alleged bad-faith prosecution, *Landry* seems to follow the *Cameron* dissent, which similarly scrutinized the facts and found that there was "no evidence" of a violation of the law,<sup>43</sup> instead of the *Cameron* majority, which reached no such factual conclusions.

*Dombrowski* authorizes anti-suit injunctions in order to protect political expression, but no case has yet held its analysis appropriate in cases involving issues of racial equality. Yet *Dombrowski's* rationale seems equally appropriate to state prosecutions for the assertive exercise of equal rights, particularly those involving equal access to public accommodations and attempts to secure voting rights for Negroes. Like most forms of political expression, the assertion of racial equality at the lunch counter and in voter registration drives may arguably approach conduct which the state may regulate through such "housekeeping" laws as breach-of-peace and trespass statutes. Indeed, these are the laws by which states frequently deter the effective exercise of equal rights.<sup>44</sup> Moreover, these civil rights cases typically involve not those facially void statutes which are common in political expression cases, but valid statutes unconstitutionally applied.<sup>45</sup> Therefore, claimants arguing the applicability of the *Dombrowski* chilling effect analysis to constitutional claims grounded in the fourteenth amendment and the civil rights statutes face not only the objection that the chilling effect logic applies only to first amendment claims,<sup>46</sup> but also the formidable difficulties of proving bad-faith enforcement without seeming to cross *Cameron's* line into arguments

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43. 390 U.S. at 624, 626-27.

44. See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965) (obstructing public passages statutes); *Brown v. Louisiana*, 383 U.S. 131 (1966) (breach of peace statute). See also *Henry v. Mississippi*, 379 U.S. 443 (1965), in which the Court failed on review to overturn a questionable application of a breach-of-peace ordinance to a civil rights worker, defeated by the "adequate state ground" rule, *id.* at 446; *Currie, supra* note 28, at 331.

45. See authority cited note 44 *supra*.

46. *Sarfaty v. Nowak*, 369 F.2d 256 (7th Cir. 1966). But see *United States v. Jackson*, 390 U.S. 570, 581-82 (1968) (holding that inasmuch as the death penalty for the federal crime of

of guilt or innocence. Only in *Landry* has a claimant accomplished this feat, and it is hardly likely that the full implications of both cases can coexist as compatible principles for long.

In summary, federal injunctive relief from imminent state criminal prosecutions is available under *Dombrowski* to prevent facially invalid statutes from inhibiting protected political expression. *Dombrowski* further suggests that such relief can prevent unconstitutional application of valid statutes and groundless prosecution which threaten political expression, but *Cameron* undercuts this suggestion, and in fact only one case has accorded relief in the absence of a facially void statute. *Dombrowski* should also protect the assertion of rights of racial equality, but no case has extended anti-suit injunctions to block the commencement of state proceedings in this area. Such an extension is unlikely under present practice. The rights of equality most need protection from groundless prosecution and unconstitutional application of valid laws, but this is precisely the area in which federal courts are reluctant to protect even political expression.

## 2. *Injunctions Preventing the Continuance of State Prosecutions*

Applicants for the second variety of injunctive relief—that which prevents the continuance of state court proceedings already in progress—face the formidable barrier of the anti-injunction statute, which in general terms prohibits federal injunctions aimed at state proceedings.<sup>47</sup> Despite its language, the statute's ban is not absolute. The Supreme Court has said that it is not jurisdictional at all, but only a limitation upon the exercise of equity jurisdiction which is inapplicable to suits brought by the United States.<sup>48</sup> The Fourth Circuit has held the prohibition to be avoidable in the face of "compelling reasons" for injunctive relief.<sup>49</sup> Further, *Dombrowski* avoided the ban by plainly holding that the invocation of federal jurisdiction prior to commencement of state proceedings causes the subsequent award of relief to relate back to the federal filing date.<sup>50</sup>

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kidnapping is possible only where the accused asserts his innocence and demands a jury, this gruesome possibility "chills" his fifth amendment right to demand a jury trial, and in the absence of other overriding justification for imposing the choice, it is unconstitutional to present the accused with such a dilemma).

47. The anti-injunction statute, 28 U.S.C. § 2283 (1964), provides:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

48. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957).

49. *Baines v. City of Danville*, 337 F.2d 579, 593 (4th Cir. 1964).

50. 380 U.S. 479, 484 n.2 (1965).

The anti-suit injunction may therefore block the continuance of state proceedings which have in fact progressed after the claimant filed for federal relief, while in form blocking only their commencement.

Assuming, however, that a claimant seeking a federal forum fails to bring action for injunctive relief prior to the commencement of state proceedings, the question arises whether the anti-injunction statute is a complete bar. It is not. Contained within the statute is an exception for relief where "expressly authorized by Act of Congress,"<sup>51</sup> and a claimant may bring himself within this exception under a statute general in its terms, for it is established that such a statute may "expressly" authorize an exception without referring by its terms to the anti-injunction statute.<sup>52</sup> In the civil context, parties seeking enforcement of such federal laws as the Securities Exchange Act have obtained federal anti-suit injunctions which interrupted state court litigation on the ground that the federal interest in effective federal economic regulation overshadows the policy of the anti-injunction statute, and the statutory power of federal courts to issue injunctions in such cases constitutes an "express exception" to the anti-injunction statute.<sup>53</sup>

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51. 28 U.S.C. § 2283 (1964). The other exception—for injunctions "necessary in aid of jurisdiction"—is not helpful in the case of claims raised to prevent criminal prosecutions, for it has application only in in rem actions. *Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922), held that prior federal jurisdiction over an in personam controversy is not impaired by a second parallel suit in a state court seeking to determine the same controversy between the same parties, and that prior federal jurisdiction is grounds for enjoining subsequent and parallel proceedings only when the action is in rem. Almost twenty years later the Supreme Court cut back federal authority to enjoin state court proceedings even where the state proceeding ignored res judicata effects of a prior federal adjudication and relitigated the controversy, but the Court expressly approved *Kline's* in rem exception. *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 135 (1940).

When, in 1948, the anti-injunction statute was revised as the present 28 U.S.C. § 2283 (1964), the Revisor's Note suggested that the new section restored the pre-*Toucey* law, including (by implication) the in rem limitation upon the prior jurisdiction exception to the anti-injunction statute. See HART & WECHSLER, *supra* note 5, at 1075. Chief Justice Warren has argued that the revised section 2283 clearly enlarges the possibilities for federal injunctions, *Amalgamated Clothing Workers of America v. Richman Bros.*, 348 U.S. 511, 523 (1955) (dissenting opinion), but there is now a clear lower court holding that the *Kline* limitation is still good law. *Hyde Constr. Co. v. Koehring Co.*, 388 F.2d 501, 508 (10th Cir. 1968). If the *Kline* limitation were removed, then an argument could be advanced that a petition for federal anti-suit injunction filed after state proceedings had commenced might be valid to preserve federal jurisdiction over claims arising under, e.g., section 1983.

52. *Amalgamated Clothing Workers of America v. Richman Bros.*, 348 U.S. 511, 516 (1955).

53. *Studebaker Corp. v. Gittlin*, 360 F.2d 692, 697-98 (2d Cir. 1966). The Bankruptcy, Interpleader, and Limitation of Liability Acts, *inter alia*, have also been found to be exceptions "expressly authorized by Act of Congress." See D. CURRIE, FEDERAL COURTS—CASES AND MATERIALS 562-63 (1968).

Several courts have found other "express exceptions" in various civil rights acts. Thus, the Fifth Circuit in *Dilworth v. Riner*<sup>54</sup> has held that the public accommodations section of the Civil Rights Act of 1964<sup>55</sup> is such an exception.<sup>56</sup> In *Dilworth*, 18 Negro defendants had sought service in Tom's Restaurant in Mississippi. Informed that they could get service only by sitting in a section reserved for Negroes, they refused to go to that section or to leave the restaurant. They were arrested and charged with the "breach of the peace type"<sup>57</sup> crime of refusing to leave the premises after having been requested to do so. The defendants sought and obtained a federal injunction against the continuance of state prosecution against them. The *Dilworth* court reasoned that the public accommodations section not only guarantees equal access as a matter of right, but that its provision forbidding any attempt to penalize any person who seeks to exercise that right peaceably also requires the abatement of any effort to prosecute such a person.<sup>58</sup> The court concluded that claimants peaceably exercising their right to equal access "may simply not be punished and prosecution is punishment."<sup>59</sup>

Whether section 1983 of the Civil Rights Act of 1871<sup>60</sup> with its broad protection of all constitutional rights, is similarly an "express exception" to the anti-injunction statute remains an open question. The Third Circuit has indicated in passing that it is,<sup>61</sup> but a line of

54. 343 F.2d 226 (5th Cir. 1965).

55. 42 U.S.C. §§ 2000a—2000a-2 (Supp. 111, 1965-67). Section 2000a provides in part: "All persons shall be entitled to the full and equal enjoyment . . . of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." Section 2000a-2 provides in part: "No person shall . . . punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 2000a . . ."

56. 343 F.2d at 231.

57. *Id.* at 228.

58. *Id.* at 230. The Court relied upon *Hamm v. City of Rock Hill*, 379 U.S. 306, 315 (1964), which had construed the public accommodations provision to require abatement of state prosecution which commenced after enactment of the section even though the conduct involved had occurred prior to enactment.

59. 343 F.2d at 231.

60. Enacted originally as part of the mass of civil rights legislation which emerged from the Reconstruction Congress, the present 42 U.S.C. § 1983 (1964) provides:

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

61. *Cooper v. Hutchinson*, 184 F.2d 119, 122 (3d Cir. 1950). No injunction issued, but the court of appeals ordered the district court to retain jurisdiction until the state court had considered the constitutional issues presented.

cases culminating in the Fourth Circuit's careful opinion in *Baines v. City of Danville*<sup>62</sup> concluded that section 1983 could not be such an exception. In *Baines* the claimants had sought to enjoin 105 criminal prosecutions for violations of ordinances regulating picketing, requiring parade permits, and limiting the number of participants in demonstrations. For four days demonstrations in Danville had proceeded without incident, but on the fifth day demonstrators invaded the county courthouse and, after several arrests, turned to violence and destruction of property.<sup>63</sup> The claimants argued that the state prosecutions infringed first amendment freedoms in violation of section 1983. Affirming the district court's order denying the injunction, the court of appeals reasoned that if every grant of equity jurisdiction under which injunctions could issue were construed as an express exception to the anti-injunction statute, there would remain nothing to the prohibition of the statute but an empty shell: It would prohibit federal courts from enjoining state court proceedings except where federal courts have power to issue injunctions—a meaningless prohibition.<sup>64</sup>

Nevertheless, *Baines* does not foreclose the issue. The district court in *Landry v. Daley*<sup>65</sup> refused to dismiss a claim for injunctive relief against the continuance of state proceedings, relying upon *Dombrowski* as a mandate to use section 1983 to prevent the unconstitutional application of state statutes in first amendment cases. *Landry* reasoned that the Reconstruction Congress which passed section 1983 must have intended to modify the policy of the anti-injunction statute, which dates back to 1793.<sup>66</sup> Dismissing as "highly speculative"<sup>67</sup> the argument that *Cameron* limits *Dombrowski*,<sup>68</sup> *Landry* rejected the notion that the availability of injunctive relief depends upon whether a claimant reaches federal court before or after the commencement of state proceedings, labeling such a limitation "anomalous."<sup>69</sup> The strength of *Landry* as authority is doubtful,<sup>70</sup> but

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62. 337 F.2d 579 (4th Cir. 1964) and cases therein cited.

63. *Id.* at 582-84.

64. *Id.* at 589. See also Note, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726, 738 (1961), which concluded that if section 1983 were an express exception to the anti-injunction statute, "it could lead to frequent disruption of state criminal proceedings. Every question of procedural due process might provide a basis for delay of state administration of justice."

65. 288 F. Supp. 200 (N.D. Ill. 1968). See note 38 *supra*.

66. *Id.* at 223.

67. *Id.* at 220.

68. See text accompanying notes 25-35 *supra*.

69. 288 F. Supp. at 224.

70. See text accompanying notes 25-43 *supra*.

the Supreme Court has recently twice noted the question of whether section 1983 is a potential "express exception" to the anti-injunction statute without deciding the issue.<sup>71</sup> Thus, a reexamination of the *Cameron* doctrine in the context of the conflicting policies of the anti-injunction statute and section 1983 may be imminent.

*Dilworth* charts the course for circumventing the anti-injunction statute in cases involving rights of racial equality, and *Landry* suggests a path for avoiding the statute where claimants assert first amendment rights under section 1983. In the context of removal, shortly to be explored,<sup>72</sup> the Supreme Court has considered and accepted the *Dilworth* rationale, but only where federal law both provides a right and prohibits penalties for the exercise of the right<sup>73</sup>—the theory being that in such cases federal law "substitutes a right for a crime."<sup>74</sup> The utility of the *Dilworth* principle is tied to equal access cases. Although other civil rights laws, such as the Voting Rights Act of 1965,<sup>75</sup> also prohibit punishment for exercising protected rights, the Supreme Court has not yet characterized any statute other than the public accommodations provision as one "substituting a right for a crime."<sup>76</sup>

Whether *Landry's* reading of section 1983 as an "express exception" to the anti-injunction statute will survive remains to be seen. *Landry's* claim that it is anomalous to distinguish between efforts to secure anti-suit injunctions before and after commencement of state proceedings ignores the interest of the state in maintaining an orderly court calendar, for if a claimant could at any time seek injunctive relief, he could clearly wait until the eve of judgment to do so. Limiting his federal relief to the pre-proceeding stage at least puts a premium upon early efforts to secure federal intervention, and decreases the disruptive effect upon state proceedings. Yet *Dilworth*

71. *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965); *Cameron v. Johnson*, 390 U.S. 611, 613 n.3 (1968).

72. See text accompanying notes 78-102 *infra*.

73. *Cf. Georgia v. Rachel*, 384 U.S. 780 (1966).

74. *Id.* at 805.

75. 42 U.S.C. § 1971 (1964) provides in pertinent part: "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude." 42 U.S.C. § 1973i(b) (Supp. III, 1965-67) adds: "No person . . . shall intimidate, threaten, or coerce . . . any person for voting or attempting to vote . . ."

76. In *Greenwood v. Peacock*, 384 U.S. 808 (1966), the Court considered the Voting Rights Act but did not find that it worked such a transmutation, although four dissenting Justices urged that the antipenalty provision in section 1973i(b) (see note 75 *supra*) plainly makes the act of prosecution for the exercise of the right to vote a denial in itself of a federal right. *Id.* at 847-48.

plainly permits such a disruption in equal access cases and, if section 1983 is not to be an "express exception," the first amendment rights which *Dombrowski's* innovative doctrine sought to support will lose federal protection upon the fortuity that the state indictment preceded the claimant's filing for federal relief.<sup>77</sup>

### B. Removal Under the Civil Rights Removal Act

When a state criminal prosecution involving "equal civil rights" has reached the "proceedings" stage and therefore falls under the protective umbrella of the anti-injunction statute, petitioners seeking a federal forum may look to section 1443, title 28, United States Code, the Civil Rights Removal Act. Removal differs procedurally from injunctive relief: The act of filing in federal court coupled with notification of the adverse party and the state court halts the state proceeding automatically<sup>78</sup> without any hearing in federal court. Argument on the propriety of removal follows in the federal court, which remands the case to the state court if removal was improper.<sup>79</sup> Anti-suit injunctions, on the other hand, are not automatic, but issue only after the claimant has proved that he is entitled to relief. Section 1443 provides in pertinent part:

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

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

Professor Amsterdam, in an exhaustive study of this provision, labeled it a "text of exquisite obscurity."<sup>80</sup> At the outset it plainly appears that the statute does not on its face accord the special remedy of removal to claimants asserting those rights of political expression which *Dombrowski* protected by injunction under section 1983. Rather, the statute provides a remedy to protect the rights of equality.

The fundamental problems of construction are to delineate the

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77. The fact that pre-indictment injunctive relief may be equally disruptive makes the distinction all the more anomalous. See text accompanying notes 50-51 *supra*.

78. 28 U.S.C. § 1446(e) (1964).

79. 28 U.S.C. § 1447(c) (1964).

80. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 843 (1965).

meaning of the phrase "is denied or cannot enforce" and to determine which of those laws protecting equality are included in the phrase "any law providing for equal civil rights."<sup>81</sup> The phrase "is denied or cannot enforce" implies both a present and a prospective denial of

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81. Complex statutory history compounds the problem of interpreting the phrase. The predecessor of section 1443 was part of the First Civil Rights Act (1866), which provided that all persons born in the United States (excluding Indians not taxed) have the same right to make and enforce contracts, sue and be sued, buy, sell, hold, and lease real and personal property, "and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27. The quoted segment remains unchanged in the present 42 U.S.C. § 1981 (1964).

After ratification of the fourteenth amendment in 1868, Congress reenacted all of the First Civil Rights Act in section 18 of the Second Civil Rights Act (1870), separately reiterating in section 16 the nonproprietary rights protected by the first act, adding in sections one through six the right to vote, with private and criminal sanctions against any person who infringes that right, and providing in section 16 a prohibition against discriminatory taxation of aliens. Act of May 31, 1870, ch. 114, §§ 1-6, 16, 18, 16 Stat. 140-44.

The Third Civil Rights Act (1871) broadened the remedial provisions of the second act by providing that "any person who, under color of any law . . . of any State . . . shall subject any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall [any State law to the contrary notwithstanding] be liable" to the injured party in law or equity. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. This is the predecessor of the present 42 U.S.C. § 1983 (1964). See note 60 *supra*.

Throughout these changes, the removal provision, which in its original form referred not to deprivations of rights "under any law providing for equal civil rights" but rather to "the rights secured . . . by the first section of this act" (*i.e.*, the Civil Rights Act of 1866), remained unaltered. Plainly it did not then refer to the Third Civil Rights Act (1871), which has become in part the modern section 1983.

However, in 1875 Congress revised the statutes, carrying forward the removal provision and the substantive provisions in separate titles of the code. This revision necessitated the change in the language of the removal provision, which could no longer refer to "the rights secured by . . . this act," and which thenceforth referred instead to "any right secured . . . by any law providing for the equal rights of citizens." REV. STAT. § 641 (1875), 28 U.S.C. § 1443 (1964), shortened in 1948 to the present phrase "a right under any law providing for the equal civil rights" of all persons. 28 U.S.C. § 1443 (1964). See Amsterdam, *supra* note 80, at 827 n.148, 828 n.150.

The major Civil Rights Act of 1875, ch. 114, 18 Stat. 335, which sought to secure equal access to public accommodations and to penalize people who impeded such equal access, survived only eight years before the Supreme Court in the Civil Rights Cases, 109 U.S. 3 (1883), declared the act unconstitutional over Justice Harlan's vigorous dissent. This act made no reference to the removal provision.

The question arises, then, which of these acts and the subsequent civil rights legislation does the phrase "a right under any law providing for equal civil rights" encompass? Arguably, the present section 1983, which originated in the Act of 1871, falls in that limbo of time in which the removal provision still referred expressly only to the rights secured by the original Act of 1866, and the 1875 revision of the language of the removal provision did not incorporate section 1983 because of the Reviser's apparent intent to work no change. See *Georgia v. Rachel*, 384 U.S. 780, 789-90 (1966). Only *subsequent* statutes, such as the Act of 1875, could be included, because by then Congress in enacting them must have known that they would fit within the generic phrase "any law."

Professor Amsterdam urged that the phrase "any law" should include not only those laws explicitly protecting equality of rights, but also such laws "whose *purpose* was to protect the Negro and assure his civil rights" (emphasis added), whether or not phrased in terms of

rights,<sup>82</sup> but the language is nevertheless ambiguous. It does not by its terms specify that the denial of a right may occur when its exercise is interrupted by "mesne process"<sup>83</sup>—arrest and application of law at the enforcement level—or only when a defendant cannot later vindicate his rights during a state trial on the merits. In resolving this question in the context of equal rights the Court faced the same issue which confronted *Dombrowski* in the context of political expression: Whether the mere fact of state prosecution, regardless of its outcome, so violates the claimant's rights as to justify federal protective intervention.

The other troublesome problem of construction posed by section 1443—to determine which are the laws that "provide for equal civil rights"—leads to the question of whether the statute refers only to those laws phrased in terms of equality, or includes also those laws whose purpose was to secure equality.<sup>84</sup> Section 1981, which guarantees all people the same right to contract, litigate, give evidence, and benefit from all laws and proceedings "as is enjoyed by white people,"<sup>85</sup> is plainly a law which "provides for equal civil rights." It is not, however, clear that the drafters of the removal provision meant to include statutes such as section 1983 which provide redress for violations of any federal right, but which the Reconstruction Congress enacted for the purpose of protecting equality.<sup>86</sup>

In *Georgia v. Rachel*<sup>87</sup> and *Greenwood v. Peacock*<sup>88</sup> the Supreme Court gave definitive answers to the questions of construction which the removal provision raised, and in the process affirmed the severe limitations earlier placed upon the utility of the statute. It construed

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equality. Such construction would include section 1983 insofar as it protects nonproprietary civil rights. *Amsterdam*, *supra* note 80, at 866-74.

Another commentator suggested an approach later echoed by Justice Douglas, writing for four dissenters in *Greenwood v. Peacock*, 384 U.S. 808, 841 n.4, 847-48 (1965). The original provisions of the Civil Rights Act of 1866 securing to all "the same right . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons," is so closely related to the purposes and protections of the fourteenth amendment that the aim in interpreting section 1443 should be to determine whether the state law sought to be applied by the state court is by its terms and in application non-discriminatory. See Johnson, *Removal of Civil Rights Cases from State to Federal Courts: The Matrix of Section 1443*, 26 *FED. B.J.* 99, 128-31 (1966).

82. See *Georgia v. Rachel*, 384 U.S. 780, 800 (1965).

83. See *Amsterdam*, *supra* note 80, at 910.

84. *Id.* at 866.

85. 42 U.S.C. § 1981 (1964). See note 81 *supra* for the history of this provision.

86. *Amsterdam*, *supra* note 80, at 872. See also note 81 *supra*.

87. 384 U.S. 780 (1966).

88. 384 U.S. 808 (1966).

the phrase "is denied or cannot enforce" to limit removal to cases in which a claimant can demonstrate that he can neither enforce nor vindicate his right in a state court.<sup>89</sup> It limited the phrase "any law providing for equal civil rights" to include only those laws which by their terms provide for equality,<sup>90</sup> thus including sections 1971 and 1981,<sup>91</sup> but excluding section 1983.<sup>92</sup>

*Rachel* involved a state trespass arrest of Negroes seeking service in privately-owned restaurants in Atlanta, Georgia.<sup>93</sup> *Peacock* presented the more complex problem of a voter registration march which resulted in the arrest of 14 people on charges of obstructing the public streets in violation of a state statute.<sup>94</sup> Finding in *Rachel* that the public accommodations section of the Civil Rights Act of 1964<sup>95</sup> not only protects equal access to public facilities, but also forbids prosecution for the exercise of the right of equal access in refusing to leave a segregated lunch counter,<sup>96</sup> the Court upheld removal.<sup>97</sup> Finding in a statute protecting equal voting rights no similarly-articulated proscription of prosecution for exercising those rights by marching in a street, the *Peacock* court denied removal.<sup>98</sup> *Peacock's* construction of section 1443 vindicated the interpretation which the Court had announced in the companion cases of *Strauder v. West Virginia*<sup>99</sup> and *Virginia v. Rives*<sup>100</sup> in 1880. Both *Strauder* and *Rives* involved jury discrimination in the South, but the Court granted removal only in *Strauder*, where a West Virginia statute by its terms excluded Negroes from juries.<sup>101</sup> *Rives* denied removal where segregation in juries was de facto only.<sup>102</sup>

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89. *Georgia v. Rachel*, 384 U.S. 780, 799-800 (1966).

90. *Id.* at 792.

91. *Greenwood v. Peacock*, 384 U.S. 808, 825 (1966). 42 U.S.C. § 1971 (1964) provides in part: "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude . . . ." For a summary of 42 U.S.C. § 1981 (1964), see note 81 *supra*.

92. *Georgia v. Rachel*, 384 U.S. 780, 792 (1966). For full text of section 1983, see note 60 *supra*.

93. 384 U.S. at 783.

94. 384 U.S. at 810-11.

95. See note 55 *supra*.

96. In *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964), the Court had earlier held that the supremacy clause precluded state prosecution because the very terms of the Civil Rights Act prohibit "any attempt to punish" persons exercising rights protected under the Act. *Id.* at 311.

97. 384 U.S. at 804-05.

98. 384 U.S. at 827-28.

99. 100 U.S. 303 (1880).

100. 100 U.S. 313 (1880).

101. 100 U.S. at 312.

102. 100 U.S. at 323. The purely procedural dilemma which section 1443 poses is

*Rachel* and *Peacock* draw a finely-honed distinction. Some federal laws phrased in terms of equality forbid prosecution for acts essential to the exercise of the rights they protect. In state prosecutions endangering those rights *Rachel* permits removal. Other federal laws similarly phrased do not forbid state prosecution for the exercise of the rights they protect—even though these rights may be equally susceptible to state abridgement. In state prosecutions threatening the latter rights, *Peacock* denies removal.

### C. Common Problems of Advance Certainty

Injunctions such as those in *Dombrowski* and *Zwickler*, and removal in such cases as *Strauder* and *Rachel*, differ from each other procedurally,<sup>103</sup> protect different arrays of rights,<sup>104</sup> and interrupt state processes at different stages;<sup>105</sup> but the two remedies remain strikingly similar in that they impose identical burdens of proof upon would-be claimants, and effect the same result. Thus, a claimant seeking either injunction or removal must generally show a flaw in the state prosecution, such as a facially void statute as in *Dombrowski* (injunction) and *Strauder* (removal). In each case the successful claimant emerges free from prosecutions threatening his federal rights.<sup>106</sup>

There are actually two routes by which a claimant may obtain relief by injunction or removal: He may demonstrate either an element of certainty in advance of federal fact finding, such as that which a facially unconstitutional statute provides, that a state court will deny

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underscored by the fact that de facto segregated juries violate the fourteenth amendment and provide ground for reversal. *Smith v. Texas*, 311 U.S. 128 (1940). Yet by the *Peacock* construction, even today such a ground would not support removal.

103. See text accompanying notes 78-79 *supra*.

104. Anti-suit injunctions blocking *commencement* of state proceedings protect first amendment guarantees. See text accompanying notes 44-46 *supra*. Anti-suit injunctions blocking *continuance* of state proceedings protect equal access rights, and perhaps first amendment rights if *Landry* remains good law. See text accompanying notes 72-77 *supra*. Removal protects only rights of racial equality. See text accompanying notes 90-92 *supra*.

105. See text accompanying notes 1-2 *supra*.

106. Anti-suit injunctions can vitiate substantive charges against the claimant, but cannot forestall unconstitutional procedures in state proceedings. Compare *Dombrowski v. Pfister*, 380 U.S. 479, 497 (1965) (decree prohibiting enforcement of certain sections of the state subversive activities act) with *Stefanelli v. Minard*, 342 U.S. 117, 123-24 (1951) (denying injunctive relief against the admission in evidence of illegally seized property in state prosecutions) and *Cleary v. Bolger*, 371 U.S. 392, 400 (1963) (reversing an injunction forbidding a state officer from testifying to evidence gathered by federal officers, and noting that *Stefanelli* survives even the *Mapp v. Ohio*, 367 U.S. 643 (1961), exclusionary rule). On the other hand, removal may correct even state *procedures* where a statute prescribes a racially discriminatory practice, as in *Strauder*.

his federal rights; or the existence of a right not to be prosecuted for his exercise of a federal right. The claimants in *Strauder* (removal) and *Dombrowski* (injunction) obtained their remedies by passing the advance certainty test.<sup>107</sup> In *Dombrowski* the Court found advance certainty that the continued operation of an overbroad statute would abridge first amendment freedoms, and that state courts could not quickly rectify matters by adequately narrow construction. It remarked:

[T]he mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings

. . . .

. . . .

. . . [When statutes have an overbroad sweep] the assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded.<sup>108</sup>

In contrast to *Strauder* and *Dombrowski*, the claimants failed the advance certainty test in *Peacock* (removal denied) and *Cameron* (injunction denied). It is insufficient, Justice Stewart remarked for the *Peacock* majority, to allege or even to show "that the defendant is unable to obtain a fair trial in a particular state court."<sup>109</sup> Rather, he must satisfy himself with proceeding in a state court except "where it can be clearly predicted by reason of the operation of a persuasive and explicit state or federal law"<sup>110</sup> that he will be denied his federal rights by the mere fact of prosecution. Similarly, Justice Brennan noted for the *Cameron* majority that the "mere possibility" of unconstitutional application of a facially constitutional state statute does not suffice as a ground for anti-suit injunction.<sup>111</sup>

The defendant in *Rachel*, however, went the second route to obtain removal and faced no advance certainty barrier in the process. The distinction between *Rachel* and *Peacock*, Justice Stewart explained, was the existence of the federal right not to be prosecuted

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107. In *Virginia v. Rives*, 100 U.S. 313 (1880), decided as a companion case to *Strauder*, the Court denied removal and contrasted the advance certainty which a statute provides with the speculative uncertainty that nonstatutory procedure provides, remarking: "[I]n the absence of constitutional or legislative impediments [a defendant] cannot swear before his case comes to trial that his enjoyment of all his civil rights are denied to him. When he has only an apprehension . . . he cannot affirm that they are actually denied, or that he cannot enforce them." *Id.* at 320.

108. 380 U.S. at 484-86.

109. 384 U.S. at 827.

110. *Id.* at 828.

111. 390 U.S. at 621.

for seeking equal access to public accommodations.<sup>112</sup> This distinction, however, does not go to the question of certainty in advance of federal fact finding, which was totally absent in *Rachel*. There the Court was obliged to remand the case to the district court to determine whether the defendant was seeking equal service or was committing an act of trespass which a state could penalize without violating federal law and the supremacy clause. Thus, the Court has refused both injunction and removal where the claimant has failed the advance certainty test, apparently closing inquiry at that point, while implicitly conceding in *Rachel* that such certainty is not always a prerequisite.<sup>113</sup> On the removal question in equal access cases, the *Rachel* Court aligned itself with the earlier reasoning of the Fifth Circuit in *Dilworth*,<sup>114</sup> which had upheld a federal injunction against the continuance of state proceedings in an equal access case. *Dilworth* and *Rachel* reached the same result through identical reasoning, the former finding equal access cases to be within an "express exception" to the anti-injunction statute, the latter finding equal access cases an exception to the advance certainty requirement. *Rachel* did not cite *Dilworth*, but the two cases demonstrate the parallel evolution of the two remedies.

The advance certainty barrier serves the principle of duality within the federal scheme by severely limiting the occasions upon which federal courts will interfere in a state criminal proceeding. Indeed, the advance certainty test, like federal question abstention in cases reaching the Supreme Court from the states,<sup>115</sup> has no other purpose. The tangible value of the duality principle as preserved by the advance certainty test is that it prevents disruption of state court calendars by litigants grasping at procedural straws to delay state adjudication, and it saves state prosecutors from the task of justifying in federal court each criminal charge they plan to pursue. Less tangibly, deference to the duality principle prevents corrosion of the

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112. 384 U.S. at 826-27.

113. Justice Douglas, speaking for the *Peacock* dissenters, pointed out that the Voting Rights Act of 1965, 42 U.S.C. § 1973i(b) (Supp. 1, 1965-66), prohibits all attempts to intimidate any person for voting or attempting to vote. 384 U.S. at 847. Thus the distinction between *Rachel's* focus upon the statute prohibiting any person from penalizing another for exercising the right to equal access and *Peacock's* holding that no such right to be free of prosecution exists in the voting situation appears to be thin indeed, depending upon minute differences in statutory language. See Note, 14 U.C.L.A.L. REV. 1159, 1164 (1967). Phrased another way, *Rachel* begged the question whether the defendant had trespassed or merely exercised his right to equal access, holding that prosecution for exercising the latter right is prohibited; and *Peacock* begged the question whether a person could be prosecuted for exercising the right to vote, holding that prosecution for marching in a street is not prohibited.

114. 343 F.2d 226 (5th Cir. 1965). See text accompanying notes 54-59 *supra*.

115. See note 3 *supra*.

relations between federal and state judiciaries by minimizing jurisdictional disputes. The consequence of the advance certainty test is that it prevents federal courts from pretrying state cases by confining federal inquiry to the issue of the facial constitutionality of a state statute. These legitimate values of the duality principle are subordinated to the interests of the defendant who comes as a petitioner to the federal court and satisfies the advance certainty test. The existence of a facially void statute satisfies the test, for it convinces federal courts that federal relief is essential to preserve the petitioner's federal rights, thereby justifying the disruption which advance federal relief causes.

The one recognized generic exception to the advance certainty barrier is the circumstance in which a federal statute which transmutes a crime into a right precludes state prosecution. Equal access cases are the only present example of this exception. Of course these cases constitute an exception to the fact-finding ban which the advance certainty test imposes upon the federal forum, thereby allowing initial federal interruption of state processes where it is *not* certain that federal intervention will be essential. If, as *Landry* holds, claimants seeking an anti-suit injunction under section 1983 on grounds of unconstitutional application of a state statute can require the federal court to find facts to determine whether the statute is being so applied, then the breach in the advance certainty barrier is much greater.

Since the purpose of the advance certainty test and any applicable exception is properly to adjust the competing federal principles of duality and supremacy, the compelling question is whether the law has done so. The argument of the opinions of *Rachel* and *Dilworth*—that Congress has substituted the right of equal access for the crime of criminal trespass in public accommodations, in effect creating a shielding right to protect the substantive right from prosecution—is unsatisfactory for three principal reasons. First, there are many shielding rights which the Court has not construed as exceptions to the advance certainty test. For example, Congress similarly protected the right to vote in the Voting Rights Act of 1965<sup>116</sup> but the Court did not recognize an exception to the advance certainty test in voting cases. Further, section 1983 itself creates no "substantive" rights, but provides only a remedy by which claimants may redress invasions of substantive rights secured elsewhere. Yet the Court has not held that section 1983 is another exception to the

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116. See note 75 *supra*.

advance certainty test. Therefore, the distinction between those shielding rights which justify immediate federal factual inquiry and those which do not turns upon a form of expression: The federal statute which provides, "No person shall . . . punish"<sup>117</sup> justifies federal factual inquiry at the outset, while the federal statute which provides, "[e]very person who . . . [deprives another] of rights . . . shall be liable"<sup>118</sup> requires obeisance to the advance certainty principle.

Secondly, it is far from clear that equal access rights are uniquely important or uniquely susceptible to state abuse. In forging the shielding rights notion, the Court nowhere urged that equal access rights were in any other sense unique. To the extent that the shielding rights rationale is flimsy, the absence of a basis for distinguishing the equal access cases is fatal to the logic which establishes those cases as the only exception to the advance certainty rule.

Third, the equal access exception demonstrates that federal courts can legitimately look beyond the face of a state statute to the facts giving rise to the prosecution and indeed must do so to accord initial federal protection for some federal rights. In these cases it is the unconstitutional application of facially valid state statutes which endangers a federal right, and it is the examination of facts rather than the scrutiny of statutory language which is vital to the protection of the right. Plainly a federal court which can block a state prosecution by finding a statute void on its face has interfered less with the traditional function of state court criminal adjudication and has intruded less deeply into the fact finding process than a federal court which must examine the evidence underlying a state prosecution to determine whether a valid statute may be constitutionally applied to a defendant. In this sense the task of a federal court in void-statute cases is easier than its job in any other case. But the equal access exception proves that the presence of facially void statutes is not the only warning signal that initial federal relief will be essential. Indeed, it appears that initial relief by anti-suit injunction or removal is all the more necessary in cases—like those involving equal access—of unconstitutional application of statutes; for subsequent relief upon direct or collateral review is hamstrung by the completion of the crucial process of fact finding by another forum. Therefore, although the restriction of initial federal relief to cases involving void statutes serves the practical purpose of making federal intervention available only in the easiest cases, the equal access exception shows that this

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117. 42 U.S.C. § 2000a-2 (1964). See note 55 *supra*.

118. 42 U.S.C. § 1983 (1964). See note 60 *supra*.

restriction is too severe, and indeed that the restriction may well exclude from initial federal scrutiny those cases which most need it.

## II

### RIGHTS OF POLITICAL EXPRESSION AND RACIAL EQUALITY WITHIN THE FEDERAL SCHEME

The rationale limiting the availability of removal and anti-suit injunctions ultimately depends upon analysis of the competing elements of federalism. To the extent that the rights of political expression and racial equality are inadequately protected, it is fair to say that the duality principle—which speaks in terms of the separate functions of state and federal judiciaries—has in effect overshadowed the equally important supremacy principle—which demands the vindication of federal rights, contrary state law notwithstanding.

#### *A. Racial Equality and Political Expression Versus the Duality Principle*

The advance certainty rule is a pragmatic expression of the duality principle, while the shielding rights exception is, in contrast, a pragmatic assertion of the supremacy principle. At present, only the equal access statute brings cases within the shielding rights exception. Insofar as that statute is not convincingly distinguishable from section 1971's protection of equal voting rights or section 1983's protection of the whole panoply of constitutional rights,<sup>119</sup> the problem which next arises is to describe the array of rights which should properly constitute an exception to the duality principle in the context of the remedies of federal injunction and removal.

Modern versions of the duality principle emphasize the integrity of the separate state and federal judicial systems and stress that the conflict is between upholding individual rights by federal intervention and maintaining the separate functions of the two systems. Justice Frankfurter's abstention doctrine<sup>120</sup> best articulates the modern version of the duality principle which the advance certainty test is designed to preserve. Frankfurter believed that even where cases raise "sensitive" constitutional issues the federal judiciary must abstain from decision where state courts might either narrow state statutes so as to avoid federal questions altogether or correctly dispose of such questions on their merits, thus making federal decision of those same

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119. See text accompanying notes 117-18 *supra*.

120. See note 3 *supra*.

questions unnecessary.<sup>121</sup> This application of the duality principle has its roots in Jeffersonian federal theory,<sup>122</sup> which held that state and national governments perform distinct and separate functions, neatly divided by the line between foreign and domestic affairs.<sup>123</sup> Implicitly following this separate function logic, Frankfurter argued that even in cases raising federal issues of racial discrimination the full gamut of state legal processes, from legislating through enforcement to final adjudication, must run its course before federal authority can intrude to protect federal rights.<sup>124</sup>

This "hands off" policy,<sup>125</sup> which protects the separation of functions between state and federal courts, is reflected in the opinions of *Rachel*, *Peacock*, and *Cameron*. In refusing to consider that rights might be denied on the streets by mesne process,<sup>126</sup> in then focusing perforce upon in-court denials of rights, and in noting finally that the removal statute "does not permit the judges of the federal court to put their brethren of the state judiciary on trial," *Peacock* narrowly construed the meaning of the broad remedial terms of section 1443.<sup>127</sup> Given the advance certainty test, the narrow inquiry into in-court denials of rights, and the Court's final unwillingness to estimate the fairness of state courts, there can be little doubt that the Court believes essential the separation between the functions of state and federal courts, and holds that this separation precludes early federal relief from even wrongful state criminal prosecution.

The separate function theory operates on the assumption that state court fairness will allow adequate protection for federal rights. Where truly individual rights are at stake, there is little reason to dispute this assumption, and the most forceful arguments for separation of functions have presumed that the competition is between local responsibility for the protection of federal rights and federal intervention to protect such rights.<sup>128</sup> Frankfurter made this point

121. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500-01 (1941).

122. See Comment, *Theories of Federalism and Civil Rights*, 75 *YALE L.J.* 1007, 1024-29 (1966).

123. Huntington, *The Founding Fathers and the Division of Powers*, in *AREA AND POWER* 150, 166, 168-69, 172 (A. Maass ed. 1959).

124. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 498 (1941).

125. In these words Justice Frankfurter described congressional policy against federal interference by injunction in state proceedings. *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 132 (1941).

126. *Rachel* had construed the phrase "is denied or cannot enforce" to *exclude* out-of-court denials of rights. See text accompanying notes 82-86, 89 *supra*.

127. 384 U.S. at 828.

128. See B. MARSHALL, *FEDERALISM AND CIVIL RIGHTS* 8 (1964): "The problem is that legal concepts have developed in terms of individual personal rights, but the right of masses, of

explicit in contrasting intrusion by "remote federal authority" with the more desirable faith in "local responsibility"<sup>129</sup> in a case involving clearly individual rights. He was dissenting from the conviction of Georgia law enforcement officers on a federal charge for beating a Negro arrestee. More recently Justice Harlan, acknowledging the erosion of the "state action" limit upon fourteenth amendment protections, argued that "values of federalism" require "local authority" to regulate private relationships.<sup>130</sup>

In the context of federal anti-suit injunction and removal, however, there are two arguments against the separate function version of the duality principle as well as its underlying assumption that intervention will further one individual's rights at the prohibitive cost of invading local responsibility. The first applies to civil rights in general; the second applies specifically to the rights of political expression and racial equality.

First, the rapid proliferation of federal rights which the Warren Court has articulated in destroying the separate-but-equal doctrine,<sup>131</sup> and in discarding the "state action" limits which the first *Civil Rights Cases*<sup>132</sup> had imposed upon congressional power to reach "private acts" of discrimination<sup>133</sup> has so nationalized the array of civil rights protecting the populace that a continued deference to the duality of federalism in the area of judicial administration is

an entire race, are affected all at once." See also Comment, *Theories of Federalism and Civil Rights*, *supra* note 122, at 1029. Mr. Marshall is a former Assistant United States Attorney General.

129. *Screws v. United States*, 325 U.S. 91, 160-61 (1945) (dissenting opinion).

130. *Peterson v. Greenville*, 373 U.S. 244, 250 (1963) (concurring opinion).

131. The progeny of *Brown v. Board of Education*, 347 U.S. 483 (1954) have eradicated the doctrine, *inter alia*, in public parks, auditoriums, transportation, courtroom seating, voting places, and public housing. See W. LOCKHART, Y. KAMISAR, & J. CHOPER, *CONSTITUTIONAL LAW, CASES—QUESTIONS—MATERIALS* 1228 (2d ed. 1967). Further, the Court in effect forbade repeal of state open housing statutes by amendment to the state constitution, *Reitman v. Mulkey*, 387 U.S. 369 (1967), and has similarly struck down the attempt of Akron, Ohio to repeal its open housing ordinance by amendment to the city charter, *Hunter v. Erickson*, 393 U.S. 385 (1969).

132. 109 U.S. 3 (1883).

133. As recently as 1961 the Court still spoke only in terms of congressional power under section 5 of the fourteenth amendment to redress invasions of constitutional rights by "those who carry a badge of authority of a State and represent it in some capacity," *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961). In *United States v. Guest*, 383 U.S. 745 (1966), however, concurring opinions of six Justices explicitly held that Congress may prohibit individuals from obstructing fourteenth amendment rights. 383 U.S. at 762, 784. See also Comment, *Fourteenth Amendment Enforcement*, 55 CALIF. L. REV. 293 (1967), in which the author concludes that under *Guest's* "idealistic conception" of constitutional rights, which Congress can articulate and protect against state and individuals alike, Congress could, "for all practical purposes, abolish the states." *Id.* at 302, 315.

inapposite. The notion that duality means separation of function founders upon the reality of the enlarged involvement of federal rights in every facet of national life. Congress is free to expand the protection of the due process clause, and transmute crimes under state law into rights under federal law.<sup>134</sup> The Supreme Court can reverse state criminal convictions which rest upon a misapplication of hearsay rules violating the accused's confrontation rights<sup>135</sup> or upon the presentation of probative but illegally obtained evidence.<sup>136</sup> In other words, congressional power to expand and federal judicial power to protect sensitive federal rights potentially involved in every state criminal prosecution explodes the theory that separate function is a viable expression of the duality principle. *Dombrowski's* recognition that constitutional rights may be invaded on the street by mere arrest and subsequent prosecution regardless of whether a state court ultimately vindicates them is far more consistent with the nationalization of the citizen's protective array of rights than is the appeal to separate judicial administration in the name of duality.

Second, the rights of political expression and racial equality differ from other federal rights in two respects: They are rights likely to be asserted in concert by large numbers of people rather than merely by individuals, and both are peculiarly susceptible to abuse through state "housekeeping" laws. Since the struggle for equal civil rights and the wider student effort to call attention to hitherto unaccepted social and political views involve assertions of equality and of first amendment rights by and for large numbers of people at once,<sup>137</sup> the concept of a conflict between protecting merely individual rights and nourishing

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Certainly there seems no longer to be a constitutional bar to a federal murder statute: Three men, one of whom had been found innocent by two state juries, were sentenced in federal court to ten years in prison under a federal conspiracy statute for the murder of Mrs. Viola Liuzzo. *N.Y. Times*, Dec. 4, 1965, at 1, col. 3. Like section 1983, see note 60 *supra*, the conspiracy statute under which those convictions were obtained prohibits invasions of any constitutional right. See 18 U.S.C. § 241 (1964). Also among the charges in *Guest* itself was one for the murder of Negro educator Lemuel Penn. 383 U.S. at 748.

134. See text accompanying notes 72-74 *supra*.

135. *Bruton v. United States*, 391 U.S. 123 (1968).

136. *Mapp v. Ohio*, 367 U.S. 643 (1961). Not only can the Supreme Court recharacterize the facts found in state criminal adjudications upon direct review, but federal district courts can conduct full factual inquiries after state convictions. In *Townsend v. Sain*, 372 U.S. 293 (1963) the Court held that federal district courts hearing habeas corpus petitions must hold full evidentiary hearings unless the state court has "reliably found the relevant facts." *Id.* at 312-13.

137. The phenomenon of massive expression of political sentiment apart from the ballot box has become commonplace, both on campuses and in city streets, as a few contemporary examples illustrate. 450 students at a noon rally at San Francisco State College were arrested for violating a court injunction banning such assemblies. *San Francisco Chronicle*, Jan. 24, 1969, at 1, col. 8. 5000 persons marched in a peace parade protesting the Vietnam war during

local responsibility underestimates the urgency and dimensions of the values of political expression and racial equality which clamor for federal protection.<sup>138</sup> Moreover, the mere-individual-rights hypothesis leads to the conclusion that initial local adjudication is as appropriate as initial federal adjudication, assuming the institutional neutrality of local agencies. Yet the more accurate view is of the rights of tremendous numbers asserted in a few representative cases, where such assumptions are unwarranted. The question of segregation, for example, affects the entire populace of the South, and southern forums clearly lack the institutional independence and neutrality to decide justly the racial conflicts which still literally divide the community.<sup>139</sup> Similarly, those questions of first amendment protection for political expression which arise in state criminal prosecutions are most likely to involve large numbers of claimants holding hostile views on issues which sharply divide the community,<sup>140</sup> such as questions of foreign policy and student rights.

Thus, the protest movements which have impelled the Court to recognize the place of symbolic speech within the first amendment's protection<sup>141</sup> have proved to be a special affront to state authorities offended both by their tactics<sup>142</sup> and their causes.<sup>143</sup> State authorities

the inauguration of President Nixon. San Francisco Chronicle, Jan. 20, 1969, at 1, col. 7. 1,500 demonstrators at the University of Wisconsin swelled in numbers to 5000 when National Guard troops appeared on the scene. N.Y. Times, Feb. 14, 1969, at 1, col. 4. 25,000 joined in an antiwar Easter parade in New York. N.Y. Times, April 7, 1969, at 23M, col. 1. At the same time in San Francisco, some 20,000 marched to the Presidio to protest the war and the impending courts martial of in-service activists. San Francisco Chronicle, April 7, 1969, at 1, col. 5.

138. *Theories of Federalism and Civil Rights*, *supra* note 122, at 1026-27.

139. See M. BERGER, EQUALITY BY STATUTE 148-49 (rev. ed. 1967) (suggesting that only the "sympathy" of more distant power could justly deal with the race question in the South, and that local agency could not have done so); L. FRIEDMAN, SOUTHERN JUSTICE (1965); Amsterdam, *supra* note 80, at 794-99; Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1182 (1963) (concluding that litigation in the South is not the means to secure federal rights).

140. Genuine issues of free political expression - substantial enough to survive initial federal scrutiny - clearly arise where outsiders speak unpopular views, and in a real sense it is only for these that the first amendment guarantee has meaning. See Amsterdam, *supra* note 80, at 801.

141. *Tinker v. Des Moines Independent Community District*, 37 U.S.L.W. 4121 (U.S. Feb. 25, 1969).

142. The injunction against the antiwar protest march on the occasion of former President Johnson's visit to Century City Plaza in Los Angeles on June 23, 1967 forbade, *inter alia*, parading, marching, walking, or stopping in front of the exits of the Century Plaza Hotel, and it also banned both singing and sound equipment. ACLU OF SOUTHERN CALIFORNIA, DAY OF PROTEST, NIGHT OF VIOLENCE 43 (1967).

143. In the disorder accompanying the Free Speech Movement at Berkeley in 1964, University of California officials initially opposed any form of student electioneering which

have called for federal investigation of student movements,<sup>144</sup> and legislatures have hastily passed statutes which strike broadly at student activism.<sup>145</sup> There is no reason to suppose that state courts caught between first amendment claims and the competing community desire for peace and tranquility can act with greater neutrality in adjudicating federal defenses against state prosecutions than do southern courts in segregation cases.

The peculiar susceptibility of the rights of equality and political expression to collateral abuse under "housekeeping" laws hardly admits of dispute. The catalogue of statutes which states have used to secure convictions which the Court later found to violate the first amendment guarantee of free political expression includes facially constitutional statutes prohibiting loitering,<sup>146</sup> breach of the peace,<sup>147</sup> and trespass.<sup>148</sup> The Supreme Court early decided that where such statutes are so indefinite that they cannot stand constitutional scrutiny, the defendant need not prove that his conduct is constitutionally protected and hence unregulable, but has standing to

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involved university facilities. *Symposium—Student Rights and Campus Rules*, 54 CALIF. L. REV. 1, 6 (1966). Perhaps the sit-in cases represent the clearest example of the use of state law to frustrate not only the manner, but the very aim, of a protest movement. In these cases facially constitutional statutes (breach-of-peace) became the weapon with which to inhibit otherwise legal, completely nonviolent and nonobstructive protest. See *Taylor v. Louisiana*, 370 U.S. 154, 155 (1962). See also examples cited in B. MARSHALL, *FEDERALISM AND CIVIL RIGHTS* 46-47 (1964).

144. Governor Reagan sponsored a resolution at the National Governors' Conference in Washington calling for the Department of Justice to make a full investigation into the "instigators, the causes and effects of such [campus] violence." The Conference rejected the proposal, and also defeated it when offered a second time by Governor Williams of Mississippi, after assurances that the FBI was investigating the problem. Reagan's resolution asked whether there was "a nationwide plan or organization" behind campus outbreaks. *N.Y. Times*, Feb. 28, 1969, at 1, col. 2.

145. In response to continued turmoil on campuses of state colleges all over California, Governor Reagan called upon the State Assembly to pass new and stiffer laws penalizing trespass upon state property, and requiring expulsion of students guilty of "disruption." *San Francisco Chronicle*, Jan. 8, 1969, at 1, col. 8. In immediate response many legislators introduced bills to stiffen penalties for infractions of university rules. *San Francisco Chronicle*, Jan. 8, 1969, at 10, col. 1. California has yet to enact the new laws, which are still in committee. Seven states have enacted new legislation aimed at campus disorders, two have begun legislative investigations, and 16 others (including California) have bills in progress. Typically, the new laws authorize governors to revoke scholarship funds of students involved in demonstrations. Such are the aims of statutes passed in Maryland, Illinois, and North Carolina. See *N.Y. Times*, May 4, 1969, at 1, col. 5.

146. In *Thompson v. Louisville*, 362 U.S. 199 (1960), a Negro defendant, who had been "shuffling" in time with jukebox music in a cafe without any objection from the proprietor, who was on the scene, was convicted for violating a loitering ordinance. Finding "no evidence" of a violation of the ordinance, the Supreme Court reversed. *Id.* at 200, 206.

147. *Brown v. Louisiana*, 383 U.S. 131 (1966).

148. *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

assert in his own defense that some protected conduct, even though not his own, is punishable under the statute.<sup>149</sup> Understandably the conduct to which such statutes have been applied includes such disparate behavior as inflammatory speech,<sup>150</sup> blocking access to buildings as an incident of picketing,<sup>151</sup> and verbal abuse of law enforcement officers.<sup>152</sup> More recently the states' response to demonstrations has included new and narrow "rifle shot" statutes,<sup>153</sup> hastily passed to halt immediate and hitherto unanticipated threats to normal community functions.<sup>154</sup> Enhanced judicial sensitivity to the sophisticated questions posed by prosecution under housekeeping statutes spawned the chilling effect doctrine and *Rachel's* newfound modification of the narrower precedents interpreting section 1443. *Cameron* demonstrates the dilemma of the Court in passing upon such statutes, which can hardly be definite in their terms<sup>155</sup> but which the Court will not strike down wholesale. Therefore, the statutes continue in force, and the danger of application abusing rights of equality and political expression persists. The result is that "low-visibility" constitutional rights<sup>156</sup> often fail to find protection because, to the prospective claimant, the burden of a defense which may ultimately require an appeal to the Supreme Court is even greater than the punishment under the statute.

In summary, the separate function vision of the duality principle had its place in a federalism which exists no longer, in a federalism

149. *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940).

150. *Turner v. LaBelle*, 251 F. Supp. 443 (D. Conn. 1966).

151. *Cameron v. Johnson*, 390 U.S. 611 (1968).

152. *Landry v. Daley*, 288 F. Supp. 189, 192-93 (N.D. Ill. 1968).

153. *Cameron v. Johnson*, 390 U.S. 611, 627 (1968) (dissenting opinion).

154. Six months after the student occupancy of Sproul Hall on the Berkeley campus which occurred on December 2 and 3, 1964, the California legislature enacted a statute expressly aimed at preventing future sit-ins in public buildings. CAL. PEN. CODE § 602.7 (West Supp. 1968). The constitutionality of the statute is open to question. See Comment, *The University and the Public: The Right of Nonstudents to Access to University Property*, 54 CALIF. L. REV. 132, 134-35 (1966). A California court of appeals has held the statute constitutional, *People v. Agnello*, 259 Cal. App. 2d 785, 792, 66 Cal. Rptr. 571, 575 (1968), but the California supreme court has not yet considered the question.

155. Generality of statutory language in vagrancy statutes serves the purpose, for ill or for good, of arming the policeman with legal authority to use his experienced "sixth sense" to spot trouble before it fully develops, and to detain or incarcerate suspicious persons prior to the commission of serious crimes. See Note, *Vagrancy: A Constitutional Battle*, 16 SYRACUSE L. REV. 646, 659, 663 (1965). Similar generality in disorderly conduct laws reflects the intent to deter and penalize minor offences which disrupt the public peace. Inherently such laws leave tremendous latitude for abuse of federal rights. See Sherry, *Vagrants, Rogues, and Vagabonds—Concepts in Need of Revision*, 48 CALIF. L. REV. 557 (1960); Watts, *Disorderly Conduct Statutes in Our Changing Society*, 9 WM. & MARY L. REV. 349 (1967).

156. Cf. *Sibron v. New York*, 392 U.S. 40, 52 (1968).

outmoded by the radical extension of federal rights under the Warren Court. Further, the analysis of mere individual rights as against state responsibility mistakes the nature of the demand for federal protection of rights of equality and political expression which are today asserted by and for large numbers of people in individual cases. Neither the separate function application of the duality principle nor the mere-individual-rights hypothesis which the principle assumes justifies the view that duality should preclude initial federal relief in criminal cases encroaching upon the rights of equality and political expression. The peculiar susceptibility of those rights to the peculiarly vague housekeeping laws of the states further underscores the special nature of those rights and their special need for federal protection.

### B. *Federalist Theories and the Supremacy Principle*

While Frankfurter's defense of the principle of duality within the federal framework fails to deal adequately with the rights of political expression and racial equality, the early federalists' defense of the principle of supremacy and Congress' own vision of the meaning of supremacy in the context of racial equality strongly suggest that federal courts may justifiably act in certain areas to guard federal rights from threats of state encroachment by prosecution. Madison and Hamilton wrote the classic treatise on American federalism, cleverly choosing *The Federalist* as the title theme of their essays: The word "federal" evoked in 18th century America the image of federated government, with emphasis upon division of powers, local autonomy, and limited central authority.<sup>157</sup> Yet the plain purpose which animated their essays was to persuade a mistrusting public of the importance of federal supremacy in a scheme which seeks to reconcile the centrifugal element of duality with the centripetal element of supremacy.

The major aspect of central authority upon which Hamilton insisted was that Congress should pass laws which directly affect the people—laws whose vitality does not depend upon the mediating operation of local government.<sup>158</sup> Further, he clearly favored a federal

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157. See Diamond, *The Federalist's View of Federalism*, in *ESSAYS IN FEDERALISM* 21, 23-24 (1961).

158. He remarked, "[W]e must abandon the vain project of legislating upon the states in their collective capacities: We must extend the laws of the Federal Government to the individual citizens of America." *THE FEDERALIST* No. 23, at 148 (J. Cooke ed. 1961) [hereinafter cited as *THE FEDERALIST*]. Hamilton spoke of "rights" and "liberties" but was explicit only about property rights. G. DIETZE, *THE FEDERALIST* 146-47 (1961). But he was explicit on the point that the federal government "must itself be impowered to employ the arm of the ordinary magistrate to execute its own resolutions." *THE FEDERALIST* No. 16, *supra*, at 102.

enforcement arm and a federal judiciary,<sup>159</sup> not only to assure consistent nationwide application of federal law,<sup>160</sup> but also to counteract inertia, noncompliance, and active resistance at the state level.<sup>161</sup> Madison, like Hamilton, plainly anticipated that federal law would reach the people directly and that where federal and state laws conflicted, decisions regarding the proper boundary between federal and state authority would be made by federal courts.<sup>162</sup> Madison also went so far as to suggest that the federal government should be able to negate all state laws,<sup>163</sup> and his famous theory of warring political factions<sup>164</sup> led him to condemn local autonomy in which one faction might hold complete sway in areas too finely subdivided to permit the balancing influence of opposing factions.<sup>165</sup>

In contrast, Jefferson and the antifederalists fought for the duality principle. Jefferson believed that the township, in which people directly participated in government, was the most perfect form of republicanism,<sup>166</sup> and this vision colored his whole view of federalism. The fault of local governments was rather "an excess of liberty" than of tyranny, toward which vice the central government tended.<sup>167</sup> Convinced of the virtue of local government, Jefferson decided that the division between domestic and foreign problems was also the proper boundary between the functions of state and federal government, and that the spheres of state and federal powers should nowhere overlap.<sup>168</sup> To him the institution of judicial review was a cancer upon republicanism,<sup>169</sup> which made the Constitution "a mere

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159. THE FEDERALIST No. 16, *supra* note 158, at 102-03.

160. THE FEDERALIST No. 22, *supra* note 158, at 143-44.

161. THE FEDERALIST No. 16, *supra* note 158, at 103.

162. THE FEDERALIST No. 39, *supra* note 158, at 256.

163. See Madison's letters to Washington and to Jefferson, excerpted in G. DIETZE, THE FEDERALIST 86 n.100, 87 n.101 (1960). See also Randolph's presentation of the Virginia Plan to the Convention in I J. MADISON, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 21 (M. Farrand ed. 1966).

164. THE FEDERALIST No. 10, *supra* note 158, at 56-65.

165. Huntington, *The Founding Fathers and the Division of Powers*, in AREA AND POWER 150, 189-90 (A. Maass ed. 1959). The Supreme Court's deathblow to legalized segregation might bear out Madison's theory. Arguably, no purely southern faction could have ended southern segregation, but enough factional support existed in a national context to wipe out at least legislated segregation. But query whether the sheer weight of Supreme Court authority and an initial national inertia simply made the public swallow a doctrine which would have gained only minority support had it been put to a national vote.

166. Letter to John Taylor, May 28, 1816, in 10 WRITINGS OF THOMAS JEFFERSON 27, 29 (P. Ford ed. 1899).

167. Letter to Archibald Stewart, Dec. 23, 1791, in 5 WRITINGS OF THOMAS JEFFERSON 408, 409 (P. Ford ed. 1895).

168. Huntington, *supra* note 165, at 166, 168-69, 172.

169. See Letter to James Pleasants, Dec. 26, 1821, in 10 WRITINGS OF THOMAS JEFFERSON 197, 199 (P. Ford ed. 1899).

thing of wax in the hands of the judiciary.’<sup>170</sup> For him, the great need of federalism was to strengthen state governments, which only the state governments themselves could do, and then only if the central government stayed its hand.<sup>171</sup>

While none of the early federalist theories deals directly with the mode by which the federal judiciary can protect federal supremacy within the duality of the federal system, Madison and Hamilton anticipated: First, that local units of government would drag their feet enforcing federal rights; second, that the federal government was better suited than state governments to enforce federal law; and third, that one role of the federal judiciary was to protect federal rights against recalcitrant state judicial administration. Analyzing federalism in terms of constituency,<sup>172</sup> and behavior, Hamilton and Madison concluded that the principle of supremacy was the element of federalism most in need of protection because most threatened by the political process. Analyzing federalism in terms of function only, Jefferson allowed his faith in local government to lead him to the conclusion that the duality principle was the element of federalism most threatened and most in need of protection from federal encroachment.

The supremacy arguments of Hamilton and Madison found support in the resurgent nationalism of the Radical Republicans after the Civil War, which spawned both the fourteenth amendment and the removal provisions construed in *Rachel* and *Peacock*.<sup>173</sup> Debate in the Senate and the House of Representatives, focusing upon reports of discrimination in the South, emphasized in pragmatic terms precisely the arguments which Hamilton and Madison had advanced in theoretical terms to defend the supremacy principle: First, state courts could not be trusted to enforce racial equality;<sup>174</sup> second, federal courts should have power to enforce racial equality;<sup>175</sup> and third, the

170. Letter to Judge Spencer Roane, Sept. 6, 1819, in *id.* at 140, 141. Roane was Marshall's antagonist in the battle to establish the power of the Supreme Court to review state court decisions. See HART & WECHSLER, *supra* note 5, at 403-07.

171. Letter to Archibald Stewart, *supra* note 167, at 409-10.

172. Huntington, *supra* note 165, at 168-69.

173. See note 81 *supra*.

174. See Amsterdam, *supra* note 80, at 814-15. Senator Lane remarked:

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.

CONG. GLOBE, 39th Cong., 1st Sess. 602 (1866).

175. Amsterdam, *supra* note 80, at 827.

South would not only actively resist federal law but would engage in a massive campaign against it, not only through facially unconstitutional statutes, but also through uneven application of facially valid statutes,<sup>176</sup> and through custom and mere habit of mind.<sup>177</sup> The Civil Rights Acts and the removal provision in section 1443 were Congress' answer.

Jefferson's argument for the duality principle found support neither in judicial doctrine nor in the outcome of the debates of the Reconstruction Congress. Jeffersonian duality as articulated in the abstention doctrine—the principle to which the Court paid deference in *Rachel* and *Peacock*—disturbed neither the Reconstruction Congress nor the state courts<sup>178</sup> which first applied Congress' pragmatic construction of federal supremacy as expressed in section 1443. Thus, a Negro defendant charged with murdering a white man in North Carolina successfully invoked the predecessor of section 1443 purely on the ground of local prejudice, and the state court allowed removal, remarking: "Had the object merely been to prevent discrimination *by the laws of the State*, very few words would have answered the purpose . . . . [Congress intended the statute to] include cases where, by reason of prejudice in the community, a fair trial cannot be had in the State courts."<sup>179</sup> Similarly, a Texas court, taking note of the "comprehensive language" of the predecessor of section 1443, commented that even in the absence of facially discriminatory laws "there may be many localities where the colored man cannot expect to receive his equal rights under the laws," and allowed removal.<sup>180</sup>

The arguments of the federalists, and their articulation in judicial doctrine and the debates of the Reconstruction Congress, do not bury the principle of duality beneath an overriding principle of federal supremacy. But they refute the separate function approach as a means to explicate the duality principle, for they demonstrate that in fact the

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176. *Id.* at 815-16.

177. *Id.* at 816.

178. The earliest removal procedure required a motion filed in state court. If the state court denied the motion, defendant could litigate his case on the merits, reserving the propriety of the denial for state court review, or he could file a motion in federal court and ignore the state proceedings, risking loss of the suit if the federal court also denied his claim. Finally, he could press his case in both courts at once. Since 1948, removal has been automatic, under 28 U.S.C. § 1446(e) (1964), which allows defendant to file in federal court and notify plaintiff, which notice effects the removal. See HART & WECHSLER, *supra* note 5, at 1033-35.

179. *State v. Dunlap*, 65 N.C. 491, 494-95 (1871).

180. *Gaines v. State*, 39 Tex. 606, 612 (1873).

functions of state and federal judiciaries are not separate at all, but unavoidably intertwined. Duality emerges as a residual principle, standing only in default of special efforts by Congress and the federal courts to accord special protection to federal rights.

### C. Ghosts of the Supremacy Principle

Hamilton's belief that for lack of a federal forum federal rights would go unvindicated has reappeared as a silent premise in the background of many Supreme Court opinions. The institution of federal judicial review of state decisions does not itself imply such a premise: Marshall's famous aphorism that it is a *Constitution* which the Court expounds<sup>181</sup> could mean only that changing conditions require corresponding changes in specific protections so as to keep the whole scheme of the Constitution intact.<sup>182</sup> It follows that the Court must review state decisions if only to assure that state courts understand and apply evolving constitutional principles. But in quiet ways the premise appears in the Court's opinions—a recognition of what may fairly be called the institutional orientation of state courts.

Thus the Court, while bending to the view that state courts will protect federal rights as they must,<sup>183</sup> has also bent the other way. In *Rachel* and *Dombrowski*, for example, the Court recognized that a state court faced with the mandate of a statute from its own legislature will more likely uphold the statute than strike it down for repugnance with the Constitution. This is the crux of the logic by which the Court can conclude that the existence of a facially unconstitutional law provides advance certainty that prosecution under it in a state court will in that court deny a defendant's constitutional rights.<sup>184</sup> A similar philosophy underlies the Court's willingness to engage in the finding of "constitutional fact."<sup>185</sup> A state court acknowledging the constitutional principle that Negroes cannot by law be excluded from juries will not avoid Supreme Court reversal merely by taking

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181. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315, 406 (1819).

182. So Justice Black has interpreted the job of the Court. See Reich, *The Living Constitution and the Court's Role*, in HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM 133, 139-42 (S. Strickland ed. 1967).

183. See *Amalgamated Clothing Workers of America v. Richman Bros.*, 348 U.S. 511, 518 (1955).

184. In *Rachel*, Justice Stewart remarked for the majority: "Removal is warranted only if it can be predicted by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts. A state statute authorizing the denial affords an ample basis for such a prediction." 384 U.S. at 800.

185. See Strong, *The Persistent Doctrine of Constitutional Fact*, 46 N.C.L. REV. 223, 244-49 (1968).

arguably ambivalent testimony which it later characterizes as proof of coincidental rather than law-imposed jury segregation.<sup>186</sup> Nor will the Court allow a state conviction to stand when there is in the record "no evidence" to support it.<sup>187</sup> These cases cannot be dismissed as unique expressions of judicial skepticism in the only area of domestic dispute which divided the country in a Civil War. In the area of criminal law a state court which finds as a matter of fact that a confession was voluntary will not avoid federal reversal, for the Supreme Court may freely characterize the facts otherwise, and conclude that the confession was inadmissible because coerced.<sup>188</sup> Similarly in first amendment cases the Court "will review the finding of facts by a State court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it . . . ."<sup>189</sup> The premise that the institutional orientation of state courts affects their treatment of federal rights is the only reasonable explanation for the Supreme Court's skepticism.

### III

#### A SUGGESTED REFORM

##### *A. A Statutory Proposal*

The fault of section 1443 as definitively construed by the Supreme Court first in *Strauder* and finally in *Rachel* and *Peacock* is not that Congress overreached itself,<sup>190</sup> but that Congress was inept. The Court rejected the "unseemly" role in which a broader reading of the removal provision would have cast the federal judiciary.<sup>191</sup> In effect, Congress directed the federal courts to determine when and where state tribunals would refuse to protect the equality of federal rights. In effect the Court in *Rachel* and *Peacock* answered Congress by declining to select from the delineated category those cases in which state tribunals will predictably fail in their constitutional task, except where the existence of facially void state statutes makes predictability easier while affording federal courts the opportunity to

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186. *Norris v. Alabama*, 294 U.S. 587 (1935).

187. See note 146 *supra*.

188. *Watts v. Indiana*, 338 U.S. 49, 52-54 (1949).

189. *Fiske v. Kansas*, 274 U.S. 380, 385 (1927).

190. The Court had "no doubt . . . that Congress has constitutional power to provide that all federal issues be tried in the federal courts, that all be tried in the courts of the States, or that jurisdiction of such issues be shared." *Greenwood v. Peacock*, 384 U.S. 808, 833 (1966). The Court there dealt "not with questions of congressional power, but with issues of statutory construction." *Id.* at 814.

191. *Georgia v. Rachel*, 384 U.S. 780, 803 (1966).

render decisions without extensive evidentiary findings, and where states threaten to use facially valid statutes to deprive citizens of equal access to public accommodations.

*Rachel* and *Peacock* teach lessons not in constitutional law or in federalism, but in statutory draftsmanship: Since the sensitivity of the Court does not permit it to predict when and where state courts will vitiate federal rights, Congress must expressly do so by statute, or suffer those rights to become the frequent victim of "repression by mesne process."<sup>192</sup> In other words, a statute which would break through the present limits of injunction and removal must simply specify the nature of the claims which will support such initial federal relief, and cannot depend for its operation upon the existence of a provable certainty in advance of federal fact finding by which federal courts can predict the future fairness of state adjudication. Such a statute must shift the focus of federal inquiry from the fairness of state courts to the scope and the merit of the claim presented. Such a statute necessarily gives the litigant the power to abuse the remedy by halting, at least momentarily, state court proceedings. It must therefore attempt to minimize the disruptive effect upon state court proceedings by discouraging litigants from using it to bring frivolous claims, or claims of defense in cases peculiarly within the competence of state courts. The statute proposed below represents an effort to incorporate these requisites:

**§ 000. Federal Injunction and Removal in State Criminal Proceedings, Prospective and Pending.**

(a) **Injunction.** Any person detained in custody by any State or officers thereof may at any time prior to the filing of an information or complaint, or the return of an indictment against him, obtain in the district court of the United States in the district and division embracing the place wherein he has been so detained, a temporary restraining order staying the commencement of proceedings against him upon bringing in said district court any claim specified in subsection (c) of this section.

(b) **Removal.** A party defendant in any criminal proceeding commenced in a State court may within ten days after the filing of an information or complaint, or the return of an indictment against him, remove the proceeding to the district court of the United States in the district and division embracing the place where the action is pending upon bringing in said district court any claim specified in subsection (c) of this section.

(c) **Claims.** The claims to which subsections (a) and (b) of this section refer are as follow:

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192. Professor Amsterdam's phrase. Amsterdam, *supra* note 80, at 910.

(1) A claim that the conduct for which he has been detained, or upon which the information or complaint has been filed or the indictment returned against him, constitutes political expression fully protected by the first and fourteenth amendments of the Constitution of the United States; or

(2) A claim that any punishment imposed upon him for the conduct for which he has been detained, or upon which the information or complaint has been filed or the indictment returned against him, would deny him a right secured by Sections 1971, 1981, 1982, or 2000a of Title 42 of the United States Code;<sup>193</sup> or

(3) A claim that the State statute or city ordinance for the violation of which he has been detained, or for the violation of which the information or complaint has been filed or the indictment returned against him, is on its face vague, overbroad, or racially discriminatory so as to render it unconstitutional under the equal protection or due process clauses of the fourteenth amendment of the Constitution of the United States; or

(4) A claim that a State statute or city ordinance prohibiting loitering, breach of the peace, disorderly conduct, vagrancy, criminal trespass, or similar public disturbance, for the violation of which he has been detained, or for the violation of which the information or complaint has been filed or the indictment returned against him, is as applied to him unconstitutionally vague or overbroad.

(d) **Disposition of the case.** If at any time the district court shall find that claims made pursuant to subsection (c) of this section are without merit, it shall dissolve the temporary restraining order obtained pursuant to subsection (a) of this section or remand the proceeding removed pursuant to (b) of this section. If the district

193. Section 1971 provides in pertinent part:

All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude . . . .

Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1982 provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Section 2000a provides in pertinent part:

All persons shall be entitled to the full and equal enjoyment . . . of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.

court shall find in addition that the claim for relief made pursuant to subsection (c) of this section is frivolous, then upon remand the State court may proceed without awaiting the expiration of the time for appeal from the disposition made by the district court.<sup>194</sup> If the district court shall find that the claimant has under subsection (c) stated a full defense, it may issue a permanent injunction staying the commencement or continuance in State court of the proceedings against the claimant, or dismiss the charges against him.

### B. Commentary

The proposed statute differs from current law in three principal respects. First, the proposal treats the federal remedies of anti-suit injunction and removal in the context of state criminal proceedings which threaten racial equality and political expression as identical means to secure relief, differing not as to the substantive rights each seeks to protect but only as to the time in which each remedy interrupts the process of state criminal adjudication.<sup>195</sup> At present, anti-suit injunctions to block the commencement of state proceedings are not available to protect racial equality,<sup>196</sup> and federal removal is not available to protect political expression.<sup>197</sup> Under the proposal each remedy is available to protect both arrays of rights, and the selection

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194. Under 28 U.S.C. § 2107 (1964) the time for appeal is 60 days. One federal district court in Louisiana, tersely dismissing a removal petition under the present section 1443, in which a Negro defendant charged with misuse of property sought to remove on grounds of local prejudice, remanded the case to the state court immediately. Noting that the claimant had a right to appeal the remand order, the court held that where removal petitions are clearly spurious, state proceedings ought not to be delayed. *Louisiana v. Tyson*, 241 F. Supp. 142, 147 (E.D. La. 1965). It is intended that the proposal retain the approach adopted by the *Tyson* court.

195. The American Law Institute, in its STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Tent. Draft No. 6, 1968) [hereinafter cited as TENT. DRAFT NO. 6], recommended a change in the anti-injunction statute (see *supra* note 47) to permit federal anti-suit injunctions in civil rights cases. *Id.* at 42 (see also *infra* note 202). Acknowledging that continuance of a pending state prosecution is potentially as burdensome as commencement of a new one, the ALI nevertheless suggested no expansion of the removal remedy. *Id.* at 113-14. It reasoned that to expand removal would require a more carefully restricted formula than a similar expansion of injunctive relief requires, since removal proceeds automatically, without findings by a federal judge. *Id.* at 114. Professor Currie suggested that the "everyday process of removal" may be "less irritating" than injunctions, but favors expansion of injunctive relief over removal on the ground that it is clear that injunctive relief does not involve full federal adjudication of state criminal cases. Currie, *supra* note 28, at 333. The proposal here advanced offers a "more restricted" formula than the ALI proposal (see note 202 *infra*), and makes clear that the function of the remedy, whether cast as an injunction or removal, is to examine the merits of petitioner's claim and to remand to state court for adjudication and sentencing whenever the claims are "without merit" or "frivolous." See subsection (d) of the proposed statute.

196. See text accompanying notes 44-46 *supra*.

197. See text accompanying notes 80-81 *supra*.

of remedy will reflect only the moment of time at which federal intervention is sought. The sequential placement of the proposed remedial provisions corresponds to the stages in the advancing state process in which each remedy becomes appropriate. Thus, subsection (a) proposes a temporary order restraining the commencement of state judicial proceedings after the state has detained the claimant for the purpose of prosecution—an order which under subsection (d) becomes a permanent injunction if the district court finds the claim for relief to be a complete defense. Subsection (b) similarly proposes removal of the case after state proceedings have begun in order to block their continuance—and this removal will result in a dismissal of the charges against the claimant if the district court finds his claim for relief substantial. Both remedies are automatic in the sense that they effect a stay or initial removal without any federal adjudication.<sup>198</sup>

Second, the suggested procedure differs from present practice in that it both narrows and broadens present remedies. It narrows them in a temporal sense, by providing the “strong medicine” of federal intervention only within the first ten days after the state lodges formal charges. Under current law, removal under section 1443 is possible in criminal cases “at any time before trial”<sup>199</sup> and insofar as anti-suit injunctions are available because federal statutes provide such relief as “express exceptions” to the anti-injunction statute,<sup>200</sup> there is no time limit at all. Under the proposal the appeal time may still continue to delay state court trial if the district court remands without finding that the claim for federal relief was “frivolous.”<sup>201</sup> Further, the time lapse between filing in federal court and disposition after hearing may continue to delay state adjudication. But such delays now occur whenever claimants seek removal, and the ten-day limit of subsection (b) will at least eliminate some of the uncertainties, for in the event that 11 days elapse between formal charges and the trial date, state officials will know whether federal relief will interfere with state trial. Simultaneously the proposed statute broadens present remedies in a substantive sense. It abandons the advance certainty criterion and the equal access exception as checks to federal fact finding and focuses

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198. The present 28 U.S.C. § 1446(e) provides that upon filing the removal petition in district court the defendant “shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal . . . .” Similar service of the petition for temporary stay or removal upon the appropriate state court and officers would effect the stay or removal under the proposed statute.

199. 28 U.S.C. § 1446(c) (1964).

200. See text accompanying notes 51-52 *supra*.

201. See note 194 *supra*.

the attention of the federal court upon the subject of the dispute and the merits of the opposing claims.<sup>202</sup>

Third, by providing an automatic removal or temporary stay of state proceedings upon the "bringing of the claim" in federal court, the proposal accords to the litigant the power to effect initial federal interruption of state proceedings. This "automatic" element of the suggested scheme is patterned after the existing removal procedure which requires no federal adjudication or judge-made order to effect removal at the outset, but only service of notice upon the state court and the opposite party.<sup>203</sup> The scheme relies upon the expense<sup>204</sup> of continued litigation and the power of the district court "at any time" to remand the case as a check against frivolous removal or injunction claims.

Claims brought under subsections (c) (1) or (c) (4) would effect initial federal intervention in a case such as *Cameron*, and defendants would obtain at the outset a chance to argue both the facial validity of the "rifle-shot"<sup>205</sup> statute and the application of the statute to the conduct for which they were apprehended. Claims brought under subsection (c) (2) would effect removal or temporary stay in situations such as those in *Rachel* and *Peacock*, and in similar cases which today constitute the unfinished business of the Reconstruction Congress. The proposed provisions do not permit temporary stay or removal for claims under section 1983 on the ground that a mere assertion of innocence to any criminal charge coupled with the claim that detention for such innocent conduct violates the fourteenth

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202. The ALI proposal allows anti-suit injunctions to restrain state criminal prosecutions that should not be permitted to continue either because the statute or other law that is the basis of the prosecution plainly cannot constitutionally be applied to the party seeking the injunction or because the prosecution is so plainly discriminatory as to amount to a denial of the equal protection of the laws.

TENT. DRAFT NO. 6, *supra* note 195, at 42.

The proposal of this Comment, like the quoted segment of the ALI statute, focuses the attention of the federal court upon the merits of constitutional claims, but without requiring a finding that the conduct is "plainly" protected. Professor Currie, noting the importance of the underlying facts in protecting constitutional claims, found the ALI proposal "too grudging" in requiring that the prosecution be "plainly" forbidden. Currie, *supra* note 28, at 330. Noting that discriminatory prosecution often aims at punishing activity which is *not* federally protected, Currie favors a statute which would grant relief against bad-faith prosecutions without requiring a finding that proceedings are "plainly discriminatory." *Id.* at 331-32. Subsection (c)(4) of the proposal here advanced seeks to grant relief against such prosecution under state "housekeeping" laws wherever the claimant can prove his innocence, so that regardless whether his conduct is federally protected, he may obtain federal relief. See text accompanying notes 215-17 *infra*.

203. See note 198 *supra*.

204. See Note, *Civil Rights Removal*, 14 U.C.L.A. L. REV. 1159, 1169 (1967).

205. Justice Fortas' phrase. 390 U.S. at 627.

amendment's guarantee against deprivation of liberty without due process should not suffice for initial federal intervention, and federal courts should not at the outset adjudicate the merits of all such claims.<sup>206</sup> *Dombrowski's* limitation upon the use of that section<sup>207</sup> would not operate if it had been included in subsection (c)(2), for the proposal defines the instances in which initial federal relief is appropriate not in terms of future denials of rights for which *Dombrowski* and its progeny developed the advance certainty test, but only in terms of the subject matter of the claim itself. That is, the phrasing of the proposal does not require that a federal court find that mere arrest and prosecution violate a right, as *Dombrowski* found in the specific case of prosecution under a facially void statute. Rather, it asks the federal court to find that punishment for the conduct *would* violate a right—and this requires the court to find the facts underlying the prosecution and the conduct itself.

Relief in the precise situation of *Dombrowski* would continue to be available under the proposed scheme, which does not speak to the exact factual context of *Dombrowski* at all. *Dombrowski's* injunction issued under the threat of state prosecution, but there had been neither detention nor the filing of a complaint.<sup>208</sup> The proposed scheme would authorize federal intervention in later stages of a *Dombrowski* fact situation, and any time a *Dombrowski*-like party substantiated a claim of protected political expression, whether the state's threat to that claim were grounded in a facially void statute or in a valid statute unconstitutionally applied to suppress political expression which the first amendment protects. While the operation of the proposal turns upon detention or the lodging of formal charges as the salient facts proving the imminence of state action, it is the intent of the proposal that the word "detained" be given broad meaning. It should include release on bail or own recognizance, just as the phrase "in custody" in the context of federal habeas corpus<sup>209</sup> includes parole,<sup>210</sup> on the ground that any form of restraint of movement constitutes detention, and bail or other conditional release usually imposes such restraint.<sup>211</sup>

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206. The breadth of claims which would sustain federal intervention would be virtually unlimited, especially in view of Congress' now-complete power to expand fourteenth amendment protections. See note 133 *supra*.

207. See text accompanying notes 10-11 *supra*.

208. Claimants in *Dombrowski* only urged that the state was threatening to make arrests and bring baseless charges. 380 U.S. at 482.

209. The remedy of federal habeas corpus is available only "in behalf of a person in custody" pursuant to a state court judgment. 28 U.S.C. § 2254(a) (1964).

210. *Jones v. Cunningham*, 371 U.S. 236 (1963).

211. In California, a defendant who leaves the state while free on bail becomes subject to

Subsections (c)(1) and (c)(3) both relate to first amendment claims, but the two sections differ in coverage. Statutes facially void for vagueness or overbreadth may regulate expression in a nonpolitical context,<sup>212</sup> or prohibit activity in no way related to expression.<sup>213</sup> Under *Dombrowski*, relief from prosecution under such void statutes is available only where they abridge first amendment freedoms and only prior to the commencement of state proceedings.<sup>214</sup> Under the terms of subsection (c)(3) such relief would be available where *any* facially void statute has become the basis for prosecution and detention, and at any time within ten days after the filing of formal charges. Where the statute is facially valid, however, a claimant asserting his right of free expression can obtain relief only where he proves that his conduct constituted political expression protected by the first amendment.

Subsection (c)(4) is most problematic. Its purpose is to provide federal relief to prevent any truly malicious prosecution under those state "housekeeping" laws most susceptible to abuse.<sup>215</sup> To prove that the law is *as applied* to him vague or overbroad, a claimant need only demonstrate his innocence. If he proves it, then the law as applied to him is vague.<sup>216</sup> While any person detained under such statutes could thus assert his innocence in federal court, massive dislocation of state criminal administration is hardly likely. The expense and trouble of invoking the federal remedy will deter drunks and vagrants picked up for overnight custody, and the prospect of remand for full adjudication in state court will deter potential claimants against whom police have acted with clear justification. It is likely that only

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arrest upon order of the court before which he is to appear. CAL. PEN. CODE § 1310 (West 1966).

212. In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), the Court struck down a state statute prohibiting exhibition of "obscene, indecent, immoral, or sacrilegious" films, apparently on a vagueness analysis. 345 U.S. at 504-05.

213. In *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), the Court struck down for vagueness a statute prohibiting gangsterism, which the statute defined as belonging to a gang, having a criminal record, or having been thrice convicted of disorderly conduct. 306 U.S. at 453.

214. 380 U.S. at 484 n.2, 489-90.

215. See text accompanying notes 146-56 *supra*.

216. See *Bouie v. City of Columbia*, 378 U.S. 347 (1964), in which Negro defendants seeking service at a lunch counter were convicted on a criminal trespass charge under a statute which forbade entry upon the premises of another after notice forbidding such entry. The Supreme Court reversed the conviction on the ground that the defendants had not entered in violation of the owner's command, but had only refused to leave in violation of his command. Since nobody had originally objected to entry, and the statute narrowly forbade only such entry, it was unconstitutionally *vague as applied* to punish a refusal to leave the premises. *Id.* at 352-53.

those who are actually abused, for racial or political reasons unlikely to receive neutral treatment at a state trial, will seek the federal remedy.<sup>217</sup>

In summary, the proposed scheme would systematize federal anti-suit injunction and removal as they apply to state criminal proceedings, treating them as equivalent remedies. It would make both remedies available, in succession, to protect rights of racial equality and political expression whenever state criminal prosecutions, under valid or void statutes, threaten those rights. The proposed scheme does not ask federal courts to judge state judiciaries, but rather to inquire what right is threatened, and whether the threat is actual. Any litigant may "automatically" delay state court proceedings under the proposed scheme, but any litigant may do so today under section 1446.<sup>218</sup> To some extent this potential vice inheres in the removal procedure.<sup>219</sup> While the advance certainty barrier minimizes procedural abuse under existing law, the threat of remand and plenary trial in state court will minimize the possibility for similar abuse in the proposed scheme.

#### CONCLUSION

The arrays of federal rights which anti-suit injunctions protect from the abuse of state criminal prosecutions differ according to the time a claimant seeks relief. If he knocks at the door of the federal forum before state proceedings commence, he may protect himself from prosecution under facially void state laws abridging first

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217. The relief available under subsection (c)(4) is potentially broader than that possible under the ALI proposal which requires a finding of "plain" discrimination violative of the equal protection clause. See note 202 *supra*. Professor Currie would go further than the ALI, allowing federal injunctive relief where the prosecution is either "discriminatory" or in bad faith, but he does not want federal courts to "proceed to try the facts and determine whether an offense had in fact been committed." Currie, *supra* note 28, at 332. The author of the proposal here presented would be amenable to amending subsection (c)(4) to allow relief from bad-faith or discriminatory prosecutions under state housekeeping laws, but the theory of the statute as drafted is that any distinction between a finding that prosecution is in bad faith (because "baseless") and one that the law cannot be read to condemn the petitioner's conduct (hence that he is innocent under the law involved), is vacuous.

*Landry v. Daley*, 288 F. Supp. 189 (N.D. Ill. 1968), found the prosecution to lack probable cause. It was, in short, "baseless." See text accompanying notes 38-43 *supra*. Since *Cameron* has clouded the meaning of bad faith considerably, and since the burden of proof for innocence under the state statute appears to be no greater than the burden of proof for bad faith, the proposal here prefers the phrase "unconstitutionally vague as applied." This phrase recognizes that the facts underlying petitioner's claim are all-important, and that the real purpose of the remedy is to free claimants from the burden of prosecution where they have not violated the state law involved.

218. See note 198 *supra*.

219. See *Amsterdam*, *supra* note 80, at 832.

amendment freedoms, and perhaps from bad-faith prosecutions, but if he reaches federal court any time thereafter, he may only be able to claim that the state is infringing his right to equal access to a public accommodation. If he seeks removal, he may obtain it only where he can point to a facially discriminatory state statute or, again, to a denial of equal access.

Identical in effect, and in their proof requirements, anti-suit injunctions and removal should also protect identical rights. No constitutional consideration impedes clarification and uniformity of such federal relief, and harmony between state and federal judiciaries requires that the availability of such relief turn no longer upon predictability of local fairness, but upon the nature of the rights involved. Any proposal seeking to provide initial federal protection for rights of racial equality and political expression will give litigants a certain leeway for procedural abuse, and some leeway exists under present law. But the proposal here advanced, which benefits litigants with frivolous claims not at all, runs little greater risk of abuse than now exists, while providing remedies in the cases which need them most.

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