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## Civil Rights--Removal of Cause

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## CASE COMMENTS

### Civil Rights—Removal of Cause

The petitioner was charged with the violation of a city ordinance which prohibited the taking of photographs in the city hall. She petitioned for removal to a federal court under 28 U.S.C. § 1443(1) (1958) which allows removal of any case in which the defendant is denied his equal civil rights in a state court. The United States Supreme Court had repeatedly held the statute was available only to defendants whose rights were denied by virtue of a state constitution or statute. The petitioner made no attempt to bring her case within the statute as interpreted by the Supreme Court. Rather, she contended that the scope of the removal statute had been misconstrued by the Supreme Court and that it was in fact broad enough to allow removal where the denial was caused by individual action. As proof that she was denied equal rights the petitioner alleged, among other points, that Negroes were systematically excluded from juries in the state court. *Held*, a defendant may have the benefit of the removal statute only when he is denied or cannot enforce his equal rights because of a state constitution or statute. *City of Clarksdale v. Gertge*, 33 U.S.L. Week 2363 (U.S. Dec. 23, 1964).

The basis of the petitioner's argument is an analogy between the judicial construction of (1) civil rights legislation generally, and (2) the removal statute specifically. The logic of her position depends on her having assumed that the reason for strict construction in each instance was the same. After making this assumption, the petitioner argued that because the Supreme Court had recently tended to extend the application of the civil rights legislation enacted under the power of the fourteenth amendment generally, it would extend the application of the removal statute which was a part of that legislation. The petitioner's minor premise is correct. The Supreme Court has in fact tended to extend the scope of the fourteenth amendment and the legislation enacted under its power by extending the concept of state action. McKenney, *An Argument in Favor of Strict Adherence to the "State Action" Requirement*, 5 W.&M. L. Rev. 213 (1964). However, the petitioner's conclusion is incorrect because the major premise is incorrect. The reason for strict construction in each instance was not the same. The strict construction of the fourteenth amendment

and the civil rights legislation generally, was based on the literal reading given that amendment in the *Civil Rights Cases*, 109 U.S. 3 (1883). On the other hand, the reason for the strict construction of the removal statute was the procedural requirements incorporated in the statute. *Virginia v. Rives*, 100 U.S. 313 (1879).

The Supreme Court's construction of the fourteenth amendment and the civil rights legislation enacted under its power has been highly criticized as undermining the congressional plan to place the protection of basic human rights in the hands of the central government. Whether or not one approves of the Supreme Court's interpretation, a review of the post-war legislation reveals that the interpretation was certainly inconsistent with the intent of Congress and the draftsmen of the amendment. Gressman, *The Unhappy History of the Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952). The Civil War may have marked the end of slavery in the United States, but there was no legal basis for the Negro's freedom. There was little sympathy in southern states for improving the status of the Negro, and the central government lacked the power to make him truly free. The Bill of Rights could not be invoked to protect the Negro against state or individual acts because in *Brown v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), the Supreme Court held that the Bill of Rights did not restrict the states as it did the federal government. The Negro could not be protected under the privileges and immunities clause, U.S. CONST. art. IV, §2, because in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), the Supreme Court held the Negro was not a citizen of the United States. Therefore, if the end of slavery was to have any real meaning for the Negro, a great transition had to take place. Congress decided to deal with the problems involved.

It was obvious that before the central government could protect the Negro it had to have new powers. The thirteenth amendment, ratified in 1865, prohibited slavery or involuntary servitude in the United States and relinquished to the central government the power to pass legislation necessary to enforce the amendment. The first exercise of the new power was the enactment of the Civil Rights Act 14 STAT. 27 (1866) which, in the eyes of some members of Congress, was so far reaching as to go beyond the scope of the amendment. The thirteenth amendment gave Congress the power to pass legislation to enforce the prohibition of slavery. The act was designed to secure freedom. The cautious

were not sure the amendment was broad enough to support the act; therefore, at the same time the act was being drafted, the fourteenth amendment was drafted to provide Congress with the power some felt it still lacked. However, as finally ratified in 1868, the fourteenth amendment was more than a simple relinquishment of power to the central government, and it gave far less power than its framers had anticipated. The fourteenth amendment made the Negro a citizen. It prohibited any act of a state which deprived a citizen of life, liberty, or property without due process of law, and it prohibited the denial of the equal protection of the law to any person. As in the thirteenth amendment, the states relinquished the power to pass legislation necessary to enforce the amendment. Two years later the fifteenth amendment prohibited the denial of the right to vote on the basis of race, color, or previous condition of servitude. Within a few years the Enforcement Act 16 STAT. 140 (1870), Second Enforcement Act 17 STAT. 13 (1871), and Civil Rights Act 18 STAT. 335 (1875) provided civil remedies and criminal penalties for violations of the federally secured civil rights. These acts reflected Congressional reaction to the abuses of the Ku Klux Klan and other lawless groups in the South. The act of 1875 was particularly broad in that it required all inns, public conveyances, theaters, and other places of public amusement to open their accommodations and privileges to all persons within the jurisdiction of the United States without regard to race. Thus, in the period of nine years Congress had apparently raised the Negro from a slave to a free citizen with equal rights to vote, use public accommodations, and be protected in his rights by the federal government. The essence of these laws was that one's opportunity to enjoy the society in which we live should not be subject to conditions of race.

Even before Congress completed its statutory handiwork, the Supreme Court dealt it a severe blow. In the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873), it was held that the privileges and immunities clause of the fourteenth amendment referred only to one's rights as a citizen of the United States. According to the case such rights were very few. The high point in the crippling judicial construction of the post-war amendments and legislation came in the *Civil Rights Cases*. Justice Bradley, delivering the opinion of the Court, made it clear that the power given the central government in the fourteenth amendment was the power

to prevent and punish state denials of the rights secured by the amendment and not denials caused by individuals. This construction meant that congressional efforts to correct individual discrimination were void and that much of the Civil Rights Act of 1875 with its accommodations provision was unconstitutional as an attempt to exercise power never given to the federal government. Nor could the needed power be found under the thirteenth amendment, because being denied admission to a restaurant was not a form of involuntary servitude. "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment," said Justice Bradley. Private discrimination and abuses had been the motivation for the efforts and hopes that went into the fourteenth amendment and the post-war legislation. That Congress thought it had been given the power to defend man's basic civil rights against state and individual deprivations is evidenced by (1) the hearings of Congressional committees and (2) the scope of the accommodations clause in the 1875 act. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949). However, "[T]he dominant conditions of the reconstruction period were not conducive to the enactment of carefully considered and coherent legislation. Strong post-war feelings caused inadequate deliberations and led to loose and careless phrasing of laws related to the new political issues." *United States v. Williams*, 341 U.S. 70 (1951). The framers had assumed too much and incorporated too little. Gressman, *supra*.

When the Supreme Court held that the fourteenth amendment contemplated only state action, the inevitable next step was to define and interpret what was encompassed by that term. With the history of the post-war legislation in mind, it is easier to understand the disposition of the Supreme Court to liberalize the concept of state action so as to extend the application of the legislation enacted under the power of the amendment. Justice Bradley in the *Civil Rights Cases* provided a convenient opening for expanding the concept of state action when he said, "[T]he wrongful act of an individual is not state action if not sanctioned in some way by the state." The inference was that state inaction to remedy a private wrong might be within the purview of state action. In 1941 the Supreme Court began defining and carving out exceptions to state action. McKenney, *supra*. In *United States v. Classic*,

313 U.S. 299 (1941), which concerned white primaries, the Supreme Court held that the right to vote in a primary was secured by the Constitution where the primary effectively controlled the outcome of the general election; the use of power by election officials is state action as contemplated by the fourteenth amendment because the officials are clothed with authority of state law. The case of *Screws v. United States*, 325 U.S. 91 (1944), opened the door for federal jurisdiction in police brutality cases. State police officers beat a Negro to death while arresting him for stealing a tire. The officers' conduct was held a state act even though in violation of a state law. Justice Douglas said that color of law means pretense of law and does not necessarily involve authority. The case of *Shelley v. Kraemer*, 334 U.S. 1 (1948), concerned discriminatory restrictive covenants in a real estate deed. In that case the Supreme Court held that although the act of an individual of making or observing such a covenant was not within the purview of the fourteenth amendment, any judicial action of a state court to enforce such a covenant is state action in violation of the amendment. In *Garner v. Louisiana*, 368 U.S. 157 (1961), Justice Douglas' concurring opinion indicates the increasingly liberal meaning being attached to state action. He spoke of custom as filling the requirement of the amendment.

“Though there may have been no state law or municipal ordinance that in terms required segregation of the races in restaurants, it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to local custom . . . . [W]here the segregation is the policy of a state, it matters not that the agency to enforce it is a private enterprise.”

This history indicates that the reason for the strict construction of the post-war civil rights legislation was the disposition of the Supreme Court to interpret the fourteenth amendment very literally and that this interpretation has been highly criticized. For the purpose of increasing personal liberties in certain directions, recently the Supreme Court has tended to extend the scope of the fourteenth amendment by finding state action present in more and more events. Thus, the concept of state action as required by the *Civil Rights Cases* has been expanded to include acts done under color of state law, inaction of the state, state judicial action, and perhaps even local custom if it reflects the policy of the state.

Although the removal statute was a part of the Civil Rights Act of 1866, the history of the removal statute specifically, has been very different from the history of the civil rights legislation generally. The statute was recodified as REV. STAT. § 641 (1873).

“When any civil suit or criminal prosecution is commenced in any state court . . . against any person who is denied or cannot enforce . . . the equal civil rights of citizens of the United States . . . such suit or prosecution may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed.”

Today this right to remove is found in 28 U.S.C. § 1443(1) (1958), and the procedural requirements are stated separately in 28 U.S.C. § 1446 (1958). The statute has always contained specific provisions for the procedure to be followed to obtain removal.

The removal statute was construed as even more limited in scope than the fourteenth amendment in that it applied to denials of rights only by state constitution or statute. *Virginia v. Rives, supra*. In *Strauder v. West Virginia*, 100 U.S. 303 (1879), the defendant was successful in obtaining removal under the statute because the petition (1) set forth sufficient facts to exhibit a denial of rights as guaranteed by the fourteenth amendment and (2) was filed in the state court before the trial. In that case Negroes were excluded from jury service by a West Virginia statute.

In *Virginia v. Rives, supra*, the petitioner sought to remove on the grounds of a denial caused by a state judge. Justice Strong said that while the removal statute could be as broad in scope as the fourteenth amendment, in fact it was not so broad. The statute authorized removal only before trial; therefore, it could not embrace a situation in which a right may be denied by judicial action during trial. An infraction of constitutional rights after trial or final hearing had commenced was left to the revisory powers of the state courts and ultimately to review by the United States Supreme Court. The reasoning was that in the absence of state constitutional or legislative impediment, the defendant could not fill the procedural requirements for removal. He could not swear before trial that his equal rights were denied him in the state court because the statute required more than a mere apprehension that one's rights would be denied. Even Justice Harlan, who dissented in the *Civil Rights*

*Cases*, saw a distinction here. He wrote a number of the Supreme Court's opinions in which the removal statute was interpreted. *Neal v. Delaware*, 103 U.S. 370 (1880); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Kentucky v. Powers*, 201 U.S. 1 (1905). Justice Harlan said the denial referred to in the removal statute was, "primarily if not exclusively a denial resulting from the constitution or laws of the state and not one that arose at the trial of the case." In *Neal v. Delaware*, *supra*, the petitioner claimed that he was denied his rights by a provision of the state constitution; however, the Supreme Court held that it must be presumed that the courts of Delaware will now hold that provision void because of the new amendments to the United States Constitution. "The presumption should be indulged in the first instance that the state recognizes an amendment to the federal constitution as binding on all citizens and to be enforced without reference to any inconsistent provision of its own constitution."

Thus, the reason for the strict construction of the removal statute was the procedural requirement of having to swear to the denial of rights before the trial. Rather than being criticized, this interpretation has been considered very reasonable.

It is true that the concept of state action, as required by the interpretation given the fourteenth amendment in the *Civil Rights Cases* has become more inclusive. However, there has been no corresponding tendency to extend the application of the removal statute. Since the reasons for strictly construing each in the first instance were independent and unrelated, the subsequent history of one is not persuasive in arguing for a similar interpretation of the other. As noted in the principal case, it is significant that Congress did not make any changes in the removal statute in the three recent civil rights acts.

*Robert Willis Walker*

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### **Contracts—Agent's Right to Commission on Reorders After Termination of His Employment**

*P*, *D*'s sales representative, after his employment had been wrongfully terminated, brought an action to recover sales commissions for sales between *D* and third parties which *P* had originally secured for *D*. *D* had agreed to pay commissions on all