

Sec. 2—Judicial Power and Jurisdiction Cl. 2—Original and Appellate Jurisdiction

done while she was acting within the scope of her employment,¹⁴⁰⁷ the actions may be removed. But the statute most open to federal-state court dispute is the civil rights removal law, which authorizes removal of any action, civil or criminal, which is commenced in a state court “[a]gainst 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.”¹⁴⁰⁸ In the years after enactment of this statute, however, the court narrowly construed the removal privilege granted,¹⁴⁰⁹ and recent decisions for the most part confirm this restrictive interpretation,¹⁴¹⁰ so that instances of successful resort to the statute are fairly rare.

Thus, the Court’s position holds, one may not obtain removal simply by an assertion that he is being denied equal rights or that he cannot enforce the law granting equal rights. Because the removal statute requires the denial to be “in the courts of such State,” the pretrial conduct of police and prosecutors was deemed irrelevant, because it afforded no basis for predicting that state courts would not vindicate the federal rights of defendants.¹⁴¹¹ Moreover, in predicting a denial of rights, only an assertion founded on a facially unconstitutional state statute denying the right in question would suffice. From the existence of such a law, it could be predicted that defendant’s rights would be denied.¹⁴¹² Furthermore, the

¹⁴⁰⁷ 28 U.S.C. § 2679(d), enacted after *Westfall v. Erwin*, 484 U.S. 292 (1988).

¹⁴⁰⁸ 28 U.S.C. § 1443(1). Subsection (2) provides for the removal of state court actions “[f]or any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.” This subsection “is available only to federal officers and to persons assisting such officers in the performance of their official duties.” *City of Greenwood v. Peacock*, 384 U.S. 808, 815 (1966).

¹⁴⁰⁹ *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Virginia v. Rives*, 100 U.S. 313 (1880); *Neal v. Delaware*, 103 U.S. 370 (1881); *Bush v. Kentucky*, 107 U.S. 110 (1883); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *Smith v. Mississippi*, 162 U.S. 592 (1896); *Murray v. Louisiana*, 163 U.S. 101 (1896); *Williams v. Mississippi*, 170 U.S. 213 (1898); *Kentucky v. Powers*, 201 U.S. 1 (1906).

¹⁴¹⁰ *Georgia v. Rachel*, 384 U.S. 780 (1966); *City of Greenwood v. Peacock*, 384 U.S. 808 (1966). There was a hiatus of cases reviewing removal from 1906 to 1966 because from 1887 to 1964 there was no provision for an appeal of an order of a federal court remanding a removed case to the state courts. § 901 of the Civil Rights Act of 1964, 78 Stat. 266, 28 U.S.C. § 1447(d).

¹⁴¹¹ *Georgia v. Rachel*, 384 U.S. 780, 803 (1966); *City of Greenwood v. Peacock*, 384 U.S. 808, 827 (1966). Justice Douglas in dissent, joined by Justices Black, Fortas, and Chief Justice Warren, argued that “in the courts of such State” modified only “cannot enforce,” so that one could be denied rights prior to as well as during a trial and police and prosecutorial conduct would be relevant. Alternately, he argued that state courts could be implicated in the denial prior to trial by certain actions. *Id.* at 844–55.

¹⁴¹² *Georgia v. Rachel*, 384 U.S. 780, 797–802 (1966). Thus, in *Strauder v. West Virginia*, 100 U.S. 303 (1880), African-Americans were excluded by statute from service on grand and petit juries, and it was held that a black defendant’s criminal