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THE FRICTIONMAKING, EXACERBATING POLITICAL ROLE OF FEDERAL COURTS

by

John Minor Wisdom

A JUDGE'S reluctance to speak in public comes from the fear of saying too much or too little. He may say too much if he speaks on live issues or refers to live judges. In avoiding this danger he runs the risk of indulging in cryptic and sometimes vapid generalities. I shall try to thread my way between saying too much and too little on a subject of special interest now—the frictionmaking, exacerbating political role of federal courts. This is the federal courts' destined role of bringing local policy in line with national policy. The role is properly described as "political" because federal courts, although operating only within the framework of "cases or controversies", adjust the body politic to stresses and strains produced by conflicts (1) between the nation and the states and (2) between the states and private citizens asserting federally-created or federally-protected rights. In the second area of conflicts the courts' role is not just to safeguard individual personal rights. The basic political rights of a large group, an entire race, may be affected.

These stresses and strains are peculiar to our unique form of govern-
ment. They occur because, unlike other federalisms, in the American system states are neither administrative units of a national government nor sovereign members of a federated league. They are indestructible political entities having their own law, own authority, and own system of courts, but subordinate to the federal sovereignty in all matters of national concern. However, conflicts between the nation and the states should not be over-emphasized. The pragmatic necessity for federal legal supremacy when tensions strain the federal structure tends to obscure the growing importance of the states as partners with the nation in common ventures. Our system is not just a federal system—it is a cooperative federal system.  

I. The increasing importance of the political function of federal courts is not caused, to any great extent, by activistic tendencies on the part of some federal judges to intrude into state affairs. In my humble but considered judgment, events beyond the control of judges have thrust the federal courts into a larger and more active political role than their predecessors played—but not a role unanticipated by the authors of the Constitution.

In 1928 Congress was debating the Norris-LaGuardia bill to curb the federal courts' use of injunctions in labor disputes. At that time Congress feared that federal courts were over-protective of property interests at the expense of labor. The "balance-wheel" was off-center. The bill provoked long debates in Congress and extended discussion throughout the country on the proper purposes and powers of federal courts.

In the same year Mr. Justice Frankfurter, then teaching at Harvard Law School, wrote a memorable article, The Distribution of Judicial Power Between United States and State Courts. He was disturbed by the extension of federal authority that had taken place in the years between 1900 and 1928. Pointing both to the past and to the future, he wrote:

Whatever our [political] preferences, the complexities and interdependence of modern society are bound to throw upon the federal courts increasing burdens of litigation affecting federal rights. . . . Whether national responsi-
bility or state rights were the accent in speech, the administrations of Theodore Roosevelt, Taft, Wilson and Coolidge alike have contributed heavily to the growth of federal authority. This has had its reflex in federal litigation. The process will not stop.9

In the forty years since then, we have had the administrations of another Roosevelt and four other aggressive presidents. Dramatic slogans tell the story: the New Deal, the Fair Deal, the Great Crusade, the New Frontier, and now the Great Society. Expanding federal litigation in both old and new fields of endeavor and the resulting expansion of federal authority have accelerated at a pace that would have left Taft, Wilson, Harding, and Coolidge panting for breath. Congress has just completed another great debate over federal-state relations. We stand in a brief hiatus between adoption and effective enforcement of the Civil Rights Act of 1964.10 This statute will have a far, far greater effect on the federal system, particularly on the role of federal courts, than the Norris-LaGuardia Act. It is timely to echo Justice Frankfurter’s words in 1928, “Nothing but good can come from a re-examination of the purposes to be served by the federal courts.”

I have some figures to illustrate what has happened in our court, the United States Court of Appeals for the Fifth Circuit. At the time Frankfurter wrote, forty years ago, 240 appeals were filed in our court. Twenty-five years later, in the 1953-1954 term, the number had more than doubled. By 1964, the number again had doubled. In our current term we have more than 1,000 regularly docketed filings and another 1,000 so-called administrative filings. In 1928 four circuit judges handled the Fifth Circuit appeals; last year Congress approved a total of thirteen circuit judges for our court, making our court, by four judges, the largest federal court in the United States.

The relatively heavy increase in diversity litigation in the Fifth Circuit is a result of the enormous industrial expansion and increase in population in Texas, Florida, Georgia, and Louisiana, and, to a lesser extent, in Alabama and Mississippi. The increase in federal question litigation and the resulting extension of federal judicial authority, in our circuit as in all circuits, has two fundamental causes: first, the irresistible momentum of historical events, world-wide in importance, driving this country toward a strong national government; secondly, paradoxically but inevitably in a society that cherishes individual self-determination, the movement away from government controls toward increased recognition by federal courts of the rights of individuals, especially the rights under the first eight amendments and the Civil War amendments. Similar movements do not coexist in most countries. Their coexistence in this country is something like Alexander Hamilton and Thomas Jefferson sharing an apartment happily together.

9 Ibid.
11 13 CORNELL L.Q. 499, 530 (1928).
The Great Depression of the thirties, World War II, the Korean War and now another war, the rising peril from Russian and Chinese communism, the harnessing of atomic energy, Negro enfranchisement, the civil rights explosion, the growing congressional recognition of the nation’s interest in education, health and welfare, the national importance of the development of automation and electronics, the mobility of modern life, miracles in transportation and communication, megalopolis, the reach for the stars, these and many other powerful influences—not the grasp for power Lord Acton feared and not the activism of federal judges—have shaped the national government into a strong central government. But this has always been in the cards—always since the Constitutional Convention, discarding the notion of a league of sovereign states, “converted their congress of ambassadors . . . into a legislature,” and approved the supremacy clause.13 The James Madison of the Constitutional Convention14 and the Federalist Papers15 (but not some of the other Madisons), the Alexander Hamilton of the Federalist Papers,16 Secretary of the Treasury,17 and first ghost writer to a president,18 the Thomas Jefferson of the Louisiana Purchase19 (but not some of the other Jeffersons), and, of course, John Marshall of McCulloch v. Maryland20 and many other decisions all saw the direction if not the shaping of events when they constructed the Constitution or construed it so as to “anticipate America.”

This country lives and thrives and enjoys Jeffersonian freedoms and rights under what is primarily a Hamiltonian view of constitutional gov-

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14 Article II of the Articles of Confederation expressed this conception of a league of sovereign states: “Each State retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right which is not by this confederation expressly delegated to the United States, in Congress assembled.” But article VI, clause 2, the supremacy clause of the Constitution, states:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

15 Madison went very far indeed. In his journal of the federal convention, he reported that he seconded the motion giving the national legislature a negative on such state laws which might be contrary to the Articles of the Union. 1 FERRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 164 (1911).
16 See especially The Federalist No. 44 (Madison).
17 See especially The Federalist Nos. 13, 23, 33, 78 (Hamilton).
18 See his Opinion on the Constitutionality of the National Bank, February 23, 1791 in 3 THE WORKS OF ALEXANDER HAMILTON 441-91 (Lodge ed. 1904); Reports on Manufactures, id. vol. 4, at 151.
This view rejects as archaic and unrealistic the maxim that "the least government is the best government" and favors a strong, more perfect Union under a Constitution, that "ought to be construed liberally in advancement of the public good." Yet there has never been a time when the individual citizen enjoyed more meaningfully liberty, equality before the law, first amendment rights, freedom from abuses of the governmental process—the "unalienable" rights of man before the altar of which Jefferson dedicated his life.

The development of a strong national government adequate to the exigencies of the times and to the complexities of administering a great modern nation is not necessarily inconsistent with the vitality of the states as members of the federal union. The notion that state governments have a less significant role to play in the lives of the American people than they once had is a myth. The expansion of the functional responsibility of the nation in furnishing services to its people has encouraged the states and political subdivisions to increase their functional responsibility and activities—in education, health, welfare, roads and highways, law enforcement, hospitals, and other state- and county-operated services. If we take debt as a measure of activity (and, of course, debt is only one criterion) from 1950 through 1964 federal debt increased 22 per cent; state and local debt increased 305 per cent. Total state government expenditures for the services traditionally performed by states now exceed federal expenditures for domestic programs.

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22 This is the thesis of Professor Clinton Rossiter in Rossiter, Alexander Hamilton and the Constitution 11, 236-37 (1964).


24 This calls for a division of the question. Strong governors and legislatures are characteristic of some states. In others, as James Reston has said, "The state capitals are over their heads in problems and up to their knees in midgets." Quoted by Eric Goldman in replying to Russell Kirk, Is Washington Too Powerful?, The New York Times Magazine, March 1, 1964, p. 22, 84.


From 1902 to 1962 the federal government's general revenues increased 141 times, the general revenues of local governments 45 times. During the same period the general revenues of the states multiplied 164 times. If taxes alone are considered, the growth figures are as follows: for the federal government, 126 times; for local governments, 33 times; for the states, 132 times. Whether computed in terms of general revenues or in terms of taxes alone, the revenue growth rate of state government over six decades is greater than that of either of the other levels. If, however, war and war-related costs are excluded and the figures are limited to domestic expenditures, then the direct expenditures of state governments grew more rapidly from 1902 to 1962 than those of either the national government or the communities. Martin, The Cities and the Federal System 186 (1965).
Although a strong central government means more congressional legislation, more federal administrative agencies, and more federal question cases in federal courts, it has not necessarily meant that federal courts are increasingly intruding in state affairs. As many authorities on constitutional law have repeatedly pointed out, contrary to the legal situation as it existed thirty years ago, in economic and social regulation, taxation, and other vast areas of governmental activity the states are virtually free from federal judicial interference. Not in thirty years has a state economic regulation been held unconstitutional by the Supreme Court for lack of substantive due process. Again, notwithstanding the breadth of the commerce clause, the Supreme Court has allowed wide latitude to the states in taxation of interstate commerce, multiple-state taxation, highway regulation, and many other matters. What is more, the Supreme Court has protected state power from the encroachment of congressional action. This means of course that state legislatures enjoy a freedom from federal controls and Supreme Court interference that our laissez faire-oriented fathers and grandfathers would have regarded as dangerous to the free enterprise system.

_Erie v. Tompkins_ now competes against a growing federal common law. But _Erie_ is a constant reminder to federal courts not to trespass on the domain of state courts. Whatever else it does, _Erie_ makes for healthy federalism. Similarly, the development of the abstention doctrine and

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52 See discussion of cooperative federalism in economic and social regulation in _Freund, The Supreme Court of the United States_, 22-23 (1961).
54 We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Justice Black in _Ferguson v. Skrupa_, 372 U.S. 726, 731-32 (1962) (Quoting from _Day-Brite Lighting, Inc. v. Missouri_, 342 U.S. 421, 423 (1952) and _Williamson v. Lee Optical Co._, 348 U.S. 483, 488 (1955)).
60 _Erie v. Tompkins_, 304 U.S. 64 (1938).
inter-jurisdictional certification promotes federal deference to states' rights.

The reapportionment cases cut both ways. It is true that in the past state legislatures have been solely responsible for apportionment of representation. They could and did consider geography, county lines, rural checks on urban powers, and other factors militating against the principle of one man, one vote. But it is also true that federal courts, especially the inferior courts, have moved slowly in this field and have acted only as a last resort, when legislatures failed to act. And it is also true that in the past cities and suburban areas have been so under-represented in some state legislatures that a strong tendency has developed toward direct federal-municipal dealings that bypass state governments, thereby undermining effective state administration. Fair apportionment will lead to more responsible state legislatures. In the long run, this now unwanted intrusion of federal courts into state affairs will strengthen the states and their local communities vis-à-vis the federal government. There will be less need for city officials to run to Washington for help. And state legislatures will be more responsive to urban and suburban needs.

Horizontal headshaking, and sometimes stronger criticisms, by confirmed segregationists may be ignored. But contemporary criticism of the Supreme Court and other federal courts also comes from responsible critics—not to speak of dissenting justices. In 1958 the Tenth Conference of State Chief Justices concluded that "the Supreme Court too often has tended to adopt the role of policy-maker without proper judicial restraint." Only three years earlier, however, President Eisenhower’s Com-
mission on Intergovernmental Relations—not exactly a way-out group—reported that federal limitations on the states arising out of national powers "have only a minimal effect on the capacity of the States to discharge their functions. . . . The trend of [federal] judicial opinions outside the civil liberties field has on the whole been tolerant and accommodating to state policy." I subscribe to this view today.

II.

For the most part the friction-making cases in the federal courts are not those over the allocation of power between the states and the nation. They are the cases between the states and its citizens involving civil rights and fair criminal procedures. These contests arise from state courts' employing lower constitutional standards in their criminal procedures than federal courts employ, or from a state's failure to give effect to constitutionally created or federally guaranteed rights, when these rights conflict with state laws and customs. To the extent that federal courts hold such state action to be unconstitutional, of course they restrict states' rights. But this is a restriction on the power of the state over citizens as individuals or as a class. Many of these rights may be described as inherent in national citizenship. They are rights derived from the Constitution, particularly the thirteenth, fourteenth, and fifteenth amendments, and from the Bill of Rights as it has been brought forward into the due process and equal protection clauses. Federal decisions upholding these rights against adverse state action have only an indirect relationship to the allocation of power between the nation and states, for they act as limitations on the governmental powers of both the nation and the states. Nevertheless, these are the cases which at this time most obviously test the plasticity and effectiveness of the federal structure. For purposes of this Article, I limit my frame of reference, more or less, to civil rights litigation in the Fifth Circuit. In other times and other regions of the country comparable strains on the federal systems have occurred and will continue to occur.

Civil rights cases reflect the customs and mores of the community as well as the legal philosophy of the individual judges called upon to

It is not generally realized that the report contains no criticism, indeed no mention of the school segregation cases.

The Conference of State Chief Justices resolved that a committee be appointed "to examine the allocation of jurisdiction between the state and federal courts" and "make recommendations for achieving a sound and appropriate distribution of judicial power between the nation and the states." Subsequent to this action, Chief Justice Warren recommended to the American Law Institute that it undertake a study toward the same ends. That study is now nearing completion.

44 COMM'N ON INTERGOVERNMENTAL RELATIONS, REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS 31 (1955).


48 "[T]o deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual." Pointer v. Texas, 380 U.S. 400, 414 (1965) (Goldberg, J., concurring opinion). Since Gideon v. Wainwright, 372 U.S. 335 (1963) twenty-six states have instituted vital reforms in their criminal procedures.

adjudicate the controversies. This area of conflict therefore is an extremely sensitive and difficult one in which federal courts must perform their nationalizing function. This is where localism tends to create wide differences among our courts. Parochial prides and prejudices and built-in attachments to local customs must be expected to reduce the incentive of inferior federal courts to bring local policy in line with national policy. This in turn produces differences in the respective roles of the Supreme Court, the circuit courts, and the district courts—depending on the extent to which the court is capable of establishing policy and the degree of its insulation from localism.

I do not use the term “localism” with any invidious implication. “The root conceptions of our federal judicial system were independence and localism. . . . An independent judiciary was part of the scheme of counterpoises in government. . . . Moreover, in establishing United States courts Congress was mindful of state loyalties.” Federal district judges who are often reversed in civil rights cases have no intention of flouting the law and do not lack good faith. They do not consciously yield to local prejudice at the expense of their philosophy of law and integrity as a judge. In good part, difficulties in the judicial performance of inferior federal courts are built into the system. Mandates of the Supreme Court or of the circuit courts, especially in civil rights cases, often allow a wide range of choice. Or the state of the law applicable to a given case may be so uncertain as to permit broad latitude of judicial action. Moreover, the district judge is personally accountable to the local community and to the local bar to a much greater degree than an appellate court. He is unlikely to forge ahead of the Supreme Court or of our court. In these circumstances, and considering the discretion a district court has anyway, it is not surprising that in a conservative community a federal judge may feel that he cannot jeopardize the respect due the court in all of his cases by appearing to be ahead and to the left of the Supreme Court and our court in cases involving civil rights and criminal rights which comprise only a small portion of his docket. It is appropriate, therefore, that the appellate court bear the brunt of unpopular decisions.

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In a study of the background of district judges sitting in 1963, 51.3 per cent were born in the district to which they were appointed, 56.1 per cent attended law school in the state in which the district was located, and 89 per cent had previously held governmental positions in the same state. The combined effect of this system of selection has been the recruitment of southern federal judges with good state connections and local coloration. In no sense of the word have the selectees been federal officials with alien political values.

FRANKFURTER, Court and Political Change in the South, 22 J. SOCIAL ISSUES 59, 67 (1966).

48 "If large numbers of southerners for reasons just or unjust, come to consider federal judges to be nothing but 'yankee agents,' even civil rights advocates may lose more than they may gain from immediate legal victories. These men will not only be lonely, but ostracized." PELTASON, FIFTY-EIGHT LONELY MEN op. cit. supra note 1, at 272. Concerning both district and appellate judges, Judge John R. Brown has said:

[L]ifetime tenure insulates judges from anxiety over worldly cares for body and home and family. But it does not protect them from the unconscious urge for the approbation of their fellow men—and fellow men most often means those of like interest and backgrounds, business and professional experiences and predilections, and even prejudices.

Brown, Hail to the Chief: Hutcheson, the Judge, 38 TEXAS L. REV. 145 (1959).
In the school segregation cases the Supreme Court put the primary responsibility for action on the school boards and secondary responsibility on district courts. It has not worked out well. School officials, acting under compulsion in the first place, are not anxious to initiate or carry through plans for prompt and adequate desegregation. In the first decade of school desegregation, school officials and elected officials generally felt that political necessities required them to build a public record of unwillingness to desegregate without having exhausted all legal remedies—hence, ceremonial appeals, repetitive appeals on issues previously decided. For any substantial departure from past practices—faculty desegregation, for example—school officials want a court order; most officials simply will not take voluntary action to desegregate faculties, facilities, or extracurricular activities. District courts are also understandably loath to change local customs without firm mandates from our court. To fill the vacuum, therefore, the circuit court must step in, often providing very complete directions to the district judges.

Circuit judges are not more courageous or more enlightened than district judges. They are just not on the firing line, not as exposed to built-in pressures and allegiances, not as tied by birth, education, residence, professional experience and other ties to one state and to one section of a state. And rarely do they have to condemn and enjoin their golfing, fishing, or gin rummy companions. The Supreme Court, almost wholly removed from the local scene, by this criterion has an obligation to lead or at least point out the logical line of development of the law.

Differences in judicial performance may depend on whether the case involves civil rights or fair criminal procedures. Many of the "criminal" cases involving, for example, the denial of counsel to an accused, or a coerced confession, or the systematic exclusion of Negroes from juries, come to the federal courts by way of habeas corpus, after a full trial has been had in state courts, often after appeals to the United States Supreme Court. In such cases, federal judges are loath to set aside the state conviction, especially when the petitioner's failure to assert his right in a timely manner may constitute a fatal procedural default under state law. In the criminal cases lower federal courts are likely to wait for the Supreme Court to give specific direction in a special fact-situation. For example, before the *Miranda* decision* we our court held up a number of cases waiting for enlightenment from the Supreme Court on the scope of the *Escobedo* rule requiring counsel during police interrogation.

In civil rights cases, on the other hand, the inferior federal courts have a greater latitude for action, because the guidelines are not as clearly marked as are those in the criminal procedure cases. There have been relatively few school cases to reach the Supreme Court and the general direction from the Supreme Court that school boards should desegregate with "all deliberate speed" has allowed a wide variety of action at both

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the district court and appellate levels. (Or it did in 1954, and for many years thereafter. Now time has run out.) On several occasions the Supreme Court has explained that “all deliberate speed” allowed delays caused by administrative difficulties, not delays caused by community hostility to desegregation. But it is no slight task for a school board or district court, charged with the responsibility of effecting or supervising a change in custom, to avoid being affected to some degree by community hostility or community acceptance of desegregation. It is hoped that the recent case United States v. Jefferson County Bd. of Education\(^5\) will provide a remedy expediting school desegregation. Jefferson recognizes the affirmative duty imposed on school authorities to integrate—lock, stock, and barrel; provides a model decree to be used uniformly throughout the circuit; and holds that HEW guidelines are constitutional, within the scope of the Civil Rights Act of 1964, and within the minimum standards the Supreme Court and the Fifth Circuit have set for school desegregation.

When, however, in a case involving a federally protected right, a state statute appears to the court to be unconstitutional or when state actions appear to be discriminatory, the court’s duty is clear: No matter how popular local law may be or how unpopular federal requirements may be, federal courts must expect to bear the primary responsibility for protecting the individual.\(^2\) This responsibility is not new. It did not start with the school segregation cases. It is close to the heart of the American federal union. It is implicit in the replacement of the Articles of Confederation by the Constitution. It was ordained when the Constitutional Convention approved the supremacy clause. It makes American federalism workable.

Lower federal courts “had their origin in fears of local hostilities.”\(^5\) In the 1787 Convention, the Committee of the Whole approved Randolph’s proposal for mandatory federal courts. Pierce Butler and Edward Rutledge, both of South Carolina, moved for reconsideration. The states, they said, would not stand for such an encroachment; the state judges would uphold the federal constitution and laws, subject to review by the Supreme Court. James Madison disagreed. He argued that “unless inferior federal tribunals were dispersed throughout the Republic with final jurisdiction in many cases, appeals would be multiplied to an oppressive degree.” Besides, “an appeal would not in many cases be a remedy.” In words often quoted, Madison said:


\(^{23}\) Frank takes a middle ground. See Frank, Historical Bases of the Federal Judicial System, 13 Law & Contemp. Prob. 3 (1948).
What was to be done after improper verdicts, in state tribunals, obtained under the biased directions of a dependent judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. . . . An effective judiciary establishment, commensurate to the legislative authority, was essential. A government without a proper executive and judiciary would be the mere trunk of a body, without arms or legs to act or move."

Although Rutledge's motion for reconsideration carried, Madison ultimately prevailed by finding an acceptable compromise in "empowering" Congress to establish inferior courts. But "it is quite clear that the reason Congress was given such power and presumably the basic reason for the existence of the federal courts which Congress did establish forthwith, was the need for national tribunals to enforce the national law in the teeth of local resistance." So at least Marshall declared.

When the Federalists in the closing hours of John Adams's term, exercised almost to the fullest the constitutional grant of judicial power, federal courts were presciently entrusted with all litigation "arising under the Constitution and laws of the United States . . . where the matter in dispute shall amount to four hundred dollars." This 1801 law provided for six circuit courts, in addition to new district courts. A year later, to frustrate President Adams' appointment of new judges, Jeffersonian Republicans repealed this "Midnight Judges" law. Seventy-five years later Congress, by the Act of March 3, 1875, again made the federal courts "the primary and dominant instruments for vindicating rights given by the Constitution, laws and treaties of the United States."

When the object of a lawsuit is to assert federally protected rights that inhere in national citizenship, the difference in theory between the Articles of Confederation and the Constitution becomes especially significant. The Articles were based on a league of friendship, a league of sovereign states with the national government acting only through the states. But the Constitution, created by the people—not by the states as states—operates directly on the individual citizen. Here too, the opening sentence of the fourteenth amendment becomes meaningful: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." By virtue of this new national citizenship Negroes are no longer "beings of an inferior race" incapable of citizenship, the Dred Scott article of faith. Negroes too are part of "the people of the United States."

I see no evidence that the Department of Justice has pushed its way

54 Elliot, Debates on the Adoption of the Federal Constitution 159 (1896).
55 Lusky, supra note 52, at 1178.

The force and dangers of parochial attachments, the effectiveness and limitations of a centralized judiciary administering law over a continent, the dependability of state courts, the convenience of suitors, shifting economic and political sentiments—such influences, with varying incidence, have shaped the accommodations of authority distributed between the national judiciary and the state courts.

Id. at 514.
into civil rights litigation. On the contrary, it has moved slowly as a litigant. When it has participated, it has been under specific congressional authority. In these cases, the federal government acts to protect the rights of individual citizens rather than to increase national power at the expense of the states. I feel strongly that the nation is injured when the constitutionally guaranteed or federally created rights of its citizens are invaded as a result of state law or state custom. Even without specific statutory authority, the nation should have standing to sue in the federal courts to protect itself and its citizens against a wrongful governmental invasion of a state.\(^5\)

Whether the United States is a party to the suit or not, the district court's function in the body politic is to stand fast at the pressure points where state policies or community customs or the local interests of segments of the people press against national policy. When district courts falter or fail in this mission, the circuit court must bring the district courts into line.

I am not suggesting that a court, acting according to its own measure of justice, may abandon disciplined, reasoned, principled decision-making.\(^9\) The integrity of the judicial process compels the court to respect the requirements of jurisdiction, case or controversy, standing, ripeness, mootness, stare decisis, and all other time-tested restraints on judicial activism. Beyond and cutting across these is the natural restraint that comes from a realization of the magnitude of the problem of balancing important competing federal values: how to preserve the value of federalism in carrying out national policy while giving effect to the states as indestructible political bodies; how to achieve this aim while protecting the constitutional rights of individual citizens and minorities, as a class, against unlawful invasions from the states and from the central government.

### III.

How well have the federal courts fulfilled their role? Looking at it qualitatively, the district courts and our court too, if I may say so, have performed better than might have been expected.\(^5\) The South is over the


\(^9\) "The soul of a government of laws is the judicial function, and that function can only exist if adjudication is understood by our people generally to be—as it is—the essentially disinterested, rational and deliberate element in our democracy." From an address by Professor Arthur E. Sutherland, quoted in Brennan, *Some Aspects of Federalism*, 39 N.Y.U.L. REV. 945, 961 (1964).

hump—over the hump of de jure segregation, over the hump in that responsible southerners accept the principle of desegregation as the law of the land, over the hump without serious damage to the federal structure.

Looking at it quantitatively, one would have to say that the results achieved have been modest and the pace slow. Federal courts have erred more from over-deference to states' rights than by taking an activist position. The accomplishment has been substantial in the field of voting rights. It has been meager in the field of school desegregation. It has been poor in the field of employment opportunities. It has been non-existent in the housing field.

As indicated earlier, the major reason for the slow pace is not the intransigence of southern judges. In civil rights cases the problem of enforcement is far more difficult than the problem of legislative or judicial definition. In most of these cases we are concerned with nationally created rights that are attributes of the national citizenship recognized in the Civil War amendments, including the neglected thirteenth amendment. The responsibility for protecting those rights lies with the nation—with all three of the coordinate branches of government. But until Congress adopted the Civil Rights Act of 1964 and the Voting Rights Act of 1965, statutes with teeth, Congress and the executive had not acted affirmatively to enforce these rights of national citizenship. This left it entirely to the judiciary, the branch of government least able to carry out enforcement in a reasonable time and on a national scale. Our only technique of enforcement is through the slow process of adversary litigation, circumscribed by all the traditional limitations on the judicial process and the additional limitations peculiar to federal courts. We are circumscribed too by the variance in views to be expected of fifty judges, individualists with widely varying backgrounds and legal philosophies. The Negro plaintiffs in Brown who never attended a desegregated school have a right to feel cheated. Negroes generally, still wearing the badges of slavery condemned a hundred years ago, naturally are tempted to air their grievances on the streets. Notwithstanding, in view of the magnitude of the task, the massive resistance of the southern states, and the nature of the federal court system, federal courts in the Fifth Circuit, on the whole, moved at a faster pace than might have been expected.

Professor Kenneth N. Vines of Tulane University has made valuable statistical studies of race relations cases from May 1954, the date of the Brown decision, to October 1963. There were 291 of these cases in the federal district courts in the eleven former Confederate states. In spite of the widespread opinion that federal courts have favored Negro litigants,

61 Professor Hamilton concluded that, "Although certain federal judges in the South have been very unsympathetic toward the rights of Negroes, as a general rule it must be conceded that most of the southern district judges have done a good job of enforcing the rights of Negroes." 1965 Wis. L. Rev. 72.
62 See Vines, Federal District Judges and Race Relations Cases in the South, 26 J. Politics 337 (1964). The statistics are based on the race relations law reporter's definition of what is a "race relations" case.
Negroes were successful in only 51.3 per cent of the cases. The figures show wide variations from category to category. Decisions were favorable to Negroes in about 60 per cent of the school cases. In criminal trial procedures, decisions were favorable in only 11 per cent. This compares with a 48 per cent success in voting and 17 per cent in employment cases.

The differences in the individual records of the sixty judges are striking. Thirty-seven judges decided 267 of the 291 cases. Only eighteen of these judges decided cases favorably to Negroes, with a range of appellate success of 30-80 per cent. Seven judges handled 43 cases and decided none of them in favor of Negroes. Nine judges decided 62 cases of which Negroes won less than 20 per cent. At the other extreme, four judges who handled 35 cases decided in favor of Negroes more than 90 per cent of the time. Thus, a large proportion of the decisions were made by judges representing two extremes.

When we turn to the figures for the courts of appeals the striking fact is the large number of reversals in favor of Negro appellants. The district courts in the Fifth Circuit decided 51.3 per cent of the cases in favor of Negroes as against 75.6 per cent in the Fourth Circuit. The Fifth Circuit reversed about 43 per cent of the appeals. The circuit court decisions favoring Negro litigants consist primarily of reversals of district court decisions against Negroes. Of the cases reversed, 97 per cent are in favor of the Negro appellants; of the cases affirmed, 57 per cent are in favor of the Negro appellants. By way of comparison, less than 5 per cent of all cases appealed by non-Negro litigants were successful. It must be remembered that in a great many of the appeals district judges have made findings of fact and may be reversed only on the clearly erroneous rule or for abuse of discretion for failing to issue an injunction.

63 For a variety of reasons, such statistics are not completely reliable. Much depends on the compiler's interpretation. For example, if the court grants partial relief is that to be counted as favorable or unfavorable? I am certain, however, that a nonstatistical evaluation would show a less effective judicial performance. For example, was it a victory for desegregation when the court approved the Atlanta School Board's step program of a grade a year, starting at the twelfth grade and working down? Calhoun v. Latimer, 321 F.2d 302 (5th Cir. 1963). It took Hawkins nine years and three trips to the Supreme Court to gain the right to attend Florida Law School. State of Florida ex rel. Hawkins v. Board of Control, 47 So. 2d 608 (Fla. 1950); 33 So. 2d 116 (Fla. 1951), cert. denied, 342 U.S. 877 (1951); 60 So. 2d 162 (Fla. 1952), reversed and remanded, 347 U.S. 971 (1954); 83 So. 2d 20 (Fla. 1951), cert. denied, earlier mandate recalled and vacated, case remanded, 350 U.S. 431 (1956); 93 So. 2d 314 (Fla. 1957), cert. denied without prejudice to seek relief in an appropriate United States District Court, 355 U.S. 839 (1957); 162 F. Supp. 851 (N.D. Fla. 1957), reversed, 253 F.2d 712 (5th Cir. 1958); 162 F. Supp. 851 (N.D. Fla. 1958). By that time thirty-five-year-old Hawkins, out of school for ten years, could not pass the new admission tests. See UNITED STATES COMM'N ON CIVIL RIGHTS, EQUAL PROTECTION OF THE LAWS IN PUBLIC HIGHER EDUCATION 1960, 75-79 (1961). Term after term went by before Meredith was admitted to "Ole Miss." See Meredith v. Fair, 298 F.2d 696 (5th Cir.), cert. denied, 371 U.S. 828 (1962). See also United States v. Barnett, 376 U.S. 681 (1964), answering question certified, 330 F.2d 369 (5th Cir. 1963); Comment, Judicial Performance in the Fifth Circuit, 73 YALE L.J. 90, 90-92 (1963). Were these victories for constitutional rights?

64 In the period 1954-1962 the southern district courts decided 51.3 per cent of all cases involving negro litigants in favor of negroes. The Fourth, Fifth, Sixth and Eighth Circuits, including those cases decided from eleven southern states, decided 75 per cent in favor of negroes; that of the Supreme Court was 94.4 per cent. In reversing lower decisions, the circuit courts listed above decided 96.8 per cent in favor of negroes; the corresponding figure for the Supreme Court was 94.4 per cent. Vines, Courts and Political Change in the South, 22 J. SOCIAL ISSUES 59, 70 (1966). See also Tables 3, 4, 5 in Vines, The Role of Circuit Courts of Appeal in the Federal Judicial Process: A Case Study, 7 MIDWEST J. POL. SCI. 305, 310, 312, 313 (1963).
IV.

I draw the following conclusions:

First, it is evident, at least in the deep south states, that many federal district courts take a more narrow view than the circuit court of their federal function to bring state and local policy into line with national policy, especially in civil rights cases involving protection of constitutional rights of individuals against invasions by the state. This is mainly because of the district courts’ front-line exposure to the effects of localism. I repeat, I do not use the term with any invidious connotation.

Second, in litigation involving federal-state conflicts, the relatively insulated position of the circuit court and its regional character as a representative of six states makes it appropriate that the circuit court bear the brunt of bringing state or local policy into line with national policy. This principle would not relieve the district court of responsibility in cases that clearly call for federal relief, but it tends to protect the local standing of the district court in the doubtful cases involving an extension—a logical and proper extension but still an extension—of an accepted principle of law. In performing our appellate function, our court has had to resort to a number of forceful measures. We have ordered mandates to be issued forthwith. We have treated a district court’s long non-action on a motion as a denial of the motion. We have issued injunctions pending appeals. We issued guidelines for the benefit of school boards and district courts long before HEW guidelines were issued. There is no doubt that the necessity of scrutinizing findings of fact and questioning a trial judge’s exercise of discretion involve a danger of improper appellate intrusion into the proper sphere of a trial court. Both circuit court and district courts may find themselves on the brink of matters traditionally beyond their competence. But awareness of this danger should not frustrate the performance of the federalizing function.

Third, the relative latitude allowed the circuit court, because of the dearth of explicit directions it receives from the Supreme Court and because the circuit court is, in 95 per cent of federal cases, the court of last resort, increases the importance of its federalizing function independently of the Supreme Court. For example, contrary to the usual impression, there are so few Supreme Court decisions on school desegregation that inferior courts must improvise in dealing with de facto segregated schools, faculty integration, site selection of schools, and many other problems. To this extent, the Fifth Circuit is forced into a policy-making position

65 "[W]e hold that HEW’s standards are substantially the same as this court’s standards." United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), aff’d and decree modified in rehearing en banc, No. 23345, 5th Cir., March 29, 1967.

66 The judiciary cannot . . . avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it is brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp what is not given. The one or the other would be treason to the constitution.

as to decisions only tangentially dependent on the Supreme Court. In the total exercise of our court's function, the civil rights field is only one among many fields of federal-state conflict and sectional differences in attitude. The federalizing role is of major importance in labor law, oil and gas, taxation, agricultural controls, and in many other areas of the law. To carry out this function effectively, the regional character of the circuit courts must be preserved. Division of the Fifth Circuit, for example, would greatly impair the effectiveness of its federalizing function.

Fourth, this nation is undergoing a social revolution with only minor dislocations of the American federal system. It is far from over. Only in the last few years have the school boards in the deep south advanced beyond token desegregation. Faculty integration has not started. Non-discriminatory assignment of children, initially, to the first grade or to kindergarten is just getting started. Thanks to the 1964 Civil Rights Act and to HEW guidelines there is hope that public schools in the deep south will advance beyond token desegregation; hope, too, that courts may avoid any close supervision of public schools. But the country has not yet begun to feel the impact of the Civil Rights Act of 1964 in housing, employment, or public accommodations. The full effect of the Voting Rights Act of 1965 may not be felt until 1968 or perhaps 1972 or 1976. In short, the South may be over the hump, but in fulfilling our historic mission, judges in this circuit may expect to be busy upsetting lifelong friends.

V.

As Madison, Hamilton, and Marshall clearly foresaw, the central principle that makes the American system workable is federal legal supremacy. This principle preserves national policy against conflicting local policy, protects the individual's constitutional rights against governmental abuses of both the nation and the states, and safeguards basic political principles of American federalism. The voting-rights cases illustrate these three aspects of federal legal supremacy. The protection that federal courts accord to Negro voters as a class carries out national policy, gives effect to the individual Negro's right to vote under the fifteenth amendment, and supports the constitutional guarantee of a republican form of government by insuring Negro participation in the electoral process.

Considering the long denial of civil rights to Negroes under color of

67In 1965 there was no faculty desegregation in any of these school districts; indeed, none of the 30,500 Negro teachers in Alabama, Louisiana, and Mississippi served with any of the 65,400 white teachers in those states. In the 1963-1964 school year, the eleven states of the Confederacy had 1.17 per cent of their Negro students in schools with white students. In 1964-1965, undoubtedly because of the effect of the 1964 act, the percentage doubled, reaching 2.25. For the 1965-1966 school year, this time because of HEW guidelines, the percentage reached 6.01. In 1965-1966 the entire region encompassing the southern and border states had 10.9 per cent of their Negro children in schools with white children; 1,535 biracial school districts out of 3,031 in the southern and border states were still fully segregated; 3,101,043 Negro children in the region attended all-Negro schools. Despite the impetus of the 1964 act, the states of Alabama, Louisiana, and Mississippi still had less than one per cent of their Negro enrollment attending schools with white students. SOUTHERN EDUCATION REPORTING SERVICE, STATISTICAL SUMMARY (Dec. 1965), cited in UNITED STATES COMM'N ON CIVIL RIGHTS, SURVEY OF SCHOOL DESSEGREGATION IN THE SOUTHERN AND BORDER STATES 1965-1966, 1 (1966).
law and their slow march through the courts to reify equality before the law, a monument should be erected to patient Negro plaintiffs who never lost faith in the federal court as the proper place for solution of racial problems. Unfortunately many Negroes suffering from vestigial disabilities of slavery still stand and wait in front of closed doors. Their patience wears thin. If their grievances are to be settled in courthouses, not in streets, our federal courts must be accessible. And federal judges must perform firmly and fully their historic, destined, if friction-making, exacerbating political role.68

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68 So there may be no misunderstanding as to my position with regard to the place of states in American federalism, I quote from a recent opinion:

The concept of the States as political bodies rather than administrative units of the national government tends to fractionalize power, preserve regional differences, encourage home rule, and promote democracy at all levels of government. These characteristics of American federalism are essential to the kind of government I want to live under. . . . 'States' Rights' are mystical, emotion-laden words. For me, as for most Southerners, the words evoke visions of the hearth and defense of the homeland and carry the sound of bugles and the beat of drums. But the crowning glory of American federalism is not States' Rights. It is the protection the United States Constitution gives to the private citizen against all wrongful governmental invasion of fundamental rights and freedoms.