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# **SOUTH CAROLINA LAW REVIEW**

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## **A FEDERAL JUDGE IN THE DEEP SOUTH: RANDOM OBSERVATIONS**

HONORABLE JOHN MINOR WISDOM\*

It is a great honor to participate in the Hagood Lecture Series in which so many distinguished speakers have given outstanding lectures. I shall not attempt to match their profundity. Instead, I shall make some random remarks on my experience as a federal judge in the Deep South for twenty-seven years. Some of those years were critical in the coming of age of civil rights. I hope you will bear in mind that my observations are limited to a particular time in six states and are not necessarily applicable to other states and to the present time.

For most of my years on the bench, the jurisdiction of the court on which I served, the United States Court of Appeals for the Fifth Circuit, covered six hard-core Southern states: Mississippi, Louisiana, Texas, Georgia, Alabama, and Florida. For me, if we had had a seventh state, the most compatible, historically and ideologically, would have been South Carolina. In the language of regional nineteenth century historians, Louisiana and South Carolina were the last two Southern states "redeemed" from Reconstruction.

Our court grew from seven judges in 1957, when I first went

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on the bench, to twenty-six judges, the largest appellate court in the English-speaking world and the appellate court with the largest caseload. In 1962 and for many years thereafter, certain overzealous advocates of states rights proposed to divide the circuit, purportedly to reduce our caseload but actually, as most objective observers agreed, to reduce the court's influence in civil rights cases. Such a division would have put Richard Rives of Alabama and Elbert Tuttle of Georgia in one circuit, and John Brown of Texas and John Wisdom of Louisiana in the other.<sup>1</sup> Each court would have had additional judges, presumably less activist than the four I named. We won that battle and other battles, but we lost the war in 1981 when Congress divided the circuit. Now the Fifth Circuit includes only Louisiana, Mississippi, and Texas; the new Eleventh Circuit includes Alabama, Georgia, and Florida.

Some excellent judges and students of judicial administration, especially in the late seventies, favored splitting the circuit because they felt that a court of fifteen, later twenty-six, judges was too large to be manageable and was lacking in collegiality. I consistently opposed dividing the circuit. I felt then and feel now that the broader the source for selection of judges, and the more diverse their backgrounds, the less parochial a federal court of appeals is — and the better it can perform its federalizing function. Such a court is less likely to be subject to local and regional pressures. I should not like to see circuits fractionated with the possibility someday of having one circuit for each large state. If the division of our circuit should start a trend, California, New York, and Texas may someday each constitute a federal circuit and there may be twenty-five circuits or more. Circuit courts will lose their identity as national courts. It will then be *absolutely* necessary to establish a special court to resolve in-

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1. Judges Rives, Tuttle, Brown, and I, or combinations of the four, generally voted together in civil rights cases. In a strongly worded dissent in a school desegregation case, Judge Ben F. Cameron quoted the following description from an unidentified press article dated July 20, 1963: "These four Judges will hereafter sometimes be referred to as The Four." *Armstrong v. Board of Educ.*, 323 F.2d 333, 353 n.1 (5th Cir. 1963) (Cameron, J., dissenting). Judge Cameron charged that the judges of a state were "gerrymander[ed] . . . in order to accomplish a desired result. . . ." *Id.* at 359. For a more in-depth discussion of Judge Cameron's opinion of "The Four," see J. BASS, UNLIKELY HEROES 235-47 (1981). Judge Cameron was a formidable adversary. Notwithstanding our differences, I remember him with respect and affection.

tercircuit conflicts, a controversial question today. Our Judicial Council is now asking for two more judges. That would make us a court of sixteen, one more than we had when there was an active movement to divide the circuit — supposedly because the court was too large. Division and subdivision of circuits is not an acceptable solution to the problem of increasing caseloads. The only sensible solution to the problem of overloaded courts is a major reduction in federal jurisdiction, starting with the elimination of diversity jurisdiction. Sensible legislative solutions to judicial problems, however, exist only in a friendly political climate. Up to now a powerful lobby of plaintiffs' lawyers has been able to defend diversity jurisdiction against all attacks.

The Supreme Court decided *Brown v. Board of Education* on May 17, 1954.<sup>2</sup> I have no trouble remembering the day of the month. May 17 is my birthday, and my wife gave a dinner for me on May 17, 1954. My close friends — most of them with conservative New Orleans backgrounds — and I discussed the Supreme Court decision over cocktails and at dinner. Not a friend raised an eyebrow. All of us expected the decision. And we anticipated no violent or stubborn opposition in the South. Desegregation at the graduate level in universities had been the law for several years, and the all-white voters' primary was, in theory, a thing of the past. Most of us that night in 1954 agreed with William Alexander Percy, Walker Percy's father. In *Lanterns on the Levee*, a justly admired autobiography, Percy, a Mississippian, wrote:

The righteous are usually in a dither over the deplorable state of race relations in the South. I, on the other hand, am usually in a condition of amazed exultation over the excellent state of race relations in the South. It is incredible that two races, centuries apart in emotional and mental discipline, alien in physical characteristics, doomed by war and the Constitution to a single, not a dual, way of life, and to an impractical and unpracticed theory of equality which deludes and embitters, heckled and misguided by pious fools from the North and impious fools from the South — it is incredible, I insist, that two such dissimilar races should live side by side with so little friction, in such comparative peace and amity. This result is due

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2. The famous school desegregation cases, collected under the case styled *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954).

solely to good manners. The Southern Negro has the most beautiful manners in the world, and the Southern white, learning from him I suspect, is a close second.<sup>3</sup>

I went on the court in July 1957. Little desegregation had occurred by that time and very little occurred for several years. There was almost no desegregation in any area, geographically or socially. The adversary system in Anglo-American law is barely adequate for settling civil disputes between litigants, and is in sad need of an overhaul. The criminal system is creaking. In the absence, therefore, of assistance from the legislative and executive branches, neither the civil nor the criminal system of law is an effective instrument for enforcing a national policy that conflicts with state and local policy. The problem in the sixties and seventies was not so much the judicial recognition of civil rights, but their enforcement. For example, very few blacks were registered to vote. No blacks served on juries although the right to be tried by a jury selected from a cross-section of the community had existed for a hundred years. In New Orleans, after Reconstruction and until the middle sixties, no black had ever served on a grand jury or a petit jury, except one man. His skin was so light that he was thought to have been white—a true case. The white public, from leaders of the establishment on down to ordinary citizens, would not accept enforcement of civil rights. Indeed, the public did not accept the legitimacy of desegregation until ten years after *Brown* when Congress gave it the stamp of approval with the Civil Rights Act of 1964 and the Voting Rights Act of 1965.<sup>4</sup> Oh, yes, we had no trouble extending *Brown* to drinking fountains. Realistically and analytically, however, it is difficult to apply the rationale in *Brown* to water fountains. It is stretching it to say that a drinking fountain for blacks is inherently unequal to one for whites. And it would certainly be ridiculous to say, as some courts have said in other contexts, that relief should be limited to identifiable victims. Some years later, we had a more difficult time desegre-

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3. Judge Cameron, who was extremely well read and appreciated good writing, quoted this passage in a blistering dissent in the Birmingham bus case, *Bowman v. Birmingham Transit Co.*, 292 F.2d 4, 17 (5th Cir. 1961) (Cameron, J., dissenting), in which Judge Tuttle and I enjoined the transit company from seating passengers by race.

4. Now codified at 42 U.S.C. §§ 1975-2000 (1976) and 42 U.S.C. §§ 1971, 1974 (1976) respectively.

gating swimming pools. A Supreme Court, otherwise sensitive to civil rights, accepted the explanation of the city fathers in Jackson, Mississippi, that the city's public pools and wading pools were closed, not to circumvent a desegregation order, but to avoid operating wading pools and swimming pools at a financial loss.<sup>5</sup> Everyone in the State of Mississippi knew that explanation was for the birds; the mayor of Jackson had publicly vowed that his city's swimming pools would never be desegregated.

The most serious problem concerned schools and still does in large cities. The rednecks joined the Klan throughout the South. The influential citizens joined Citizens' Councils — the way businessmen join the local chamber of commerce. It was the civic thing to do. The Citizens' Councils were as strongly opposed to desegregation as the Klan, but they burned no crosses. They did exert a strong influence throughout the South, especially in the small towns and medium-sized towns. From the standpoint of a trial judge, always closer to the firing line than judges on our court, one of the worst aspects of the problem was the united front presented by southern governors, senators, congressmen, and local officials.<sup>6</sup> Shortly after the *Brown* decision,

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5. *Palmer v. Thompson*, 403 U.S. 217 (1971) (affirming the Fifth Circuit 5 to 4). Upon rehearing, our court had affirmed the district judge's decision by a divided vote. 419 F.2d 1222 (5th Cir. 1969) (en banc) (7 to 6). It has always interested me that Judge Rives wrote the opinion for our court and Justice Black wrote the opinion for the Supreme Court. Each was nearing the end of a long career, and each was recognized as a champion of civil rights.

6. In a 1966 talk to the Judicial Conference of the Third Circuit, I observed: In this area of conflict the civil rights cases involve accepted customs of the community and the criminal cases involve established state procedures. It is, therefore, an extremely sensitive, difficult area in which federal courts must perform their nationalizing function. This is where localism tends to create wide differences among the judges on our inferior federal courts. Parochial prides and prejudices and built-in attachments to local custom must be expected to reduce the incentive of inferior federal courts to bring local policy in line with national policy. This 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. . . . District courts are also understandably loath to change local customs or to appear to be getting ahead of our court or the Supreme Court.

To fill the vacuum, therefore, the circuit court must step in, often with very complete directions to the district judge. It is not that we are more courageous or more enlightened. We are 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 a single section of one state, and

101 southern senators and congressmen signed the "Southern Manifesto" denouncing the *Brown* decision as "a clear abuse of judicial power."<sup>7</sup> The open opposition of elected officials and prominent citizens to an orderly transition led first to school boards ignoring the whole distasteful subject, then to public disorder and violence, and later to sophisticated legislative schemes to circumvent court orders. In retrospect, the Supreme Court's Delphic pronouncement to proceed with "all deliberate speed," however wise it seemed at the time, enabled footdragging federal judges to proceed with no speed and gave time to determined segregationists to organize private schools. Over a period of time many fly-by-night inferior private schools became better than many public schools.

The principal legal obstacle southern courts had to overcome came from Judge John J. Parker, respected Chief Judge of the Fourth Circuit, speaking for a three-judge district court in *Briggs v. Elliott*,<sup>8</sup> one of the original cases consolidated for argument in *Brown*. On remand, Judge Parker said: "The Constitution, in other words, does not require integration. It merely forbids discrimination."<sup>9</sup> This dictum, followed widely, frustrated

rarely do we have to condemn and enjoin our golfing or fishing companions. The Supreme Court, almost wholly removed from the local scene, is by this criterion, best suited to carry out the political role of the courts. . . .

The district courts' 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 people press against national policy. When district courts falter or fail in this mission — and I am sympathetic with their position — the circuit court must bring the district courts into line.

I am not suggesting that the court, according to its notion of justice, may abandon reasoned, principled, neutral decision-making. The integrity of the judicial process requires a court to respect the requirements of jurisdiction, case in controversy, standing, ripeness, mootness, stare decisis, and all of the other time-tested restraints on judicial activism. Beyond and cutting across these is the natural restraint that comes from the realization of the magnitude of the problem of balancing the competing values: how to preserve the value of federalism in carrying out national policies while still giving effect to the states as political bodies; how to achieve this aim while protecting the constitutional rights of individual citizens against government invasions from the Nation and from the states.

42 F.R.D. 453, 457-59 (1966).

7. 102 CONG. REC. 4515-16 (1956) (*Declaration of Constitutional Principles* introduced March 12, 1956 and signed by 82 congressmen and 19 senators); see also *id.* at 4460 (introduction of the declaration on the house side).

8. 132 F. Supp. 776 (D.S.C. 1955).

9. *Id.* at 777.

effective efforts to desegregate schools and resulted in piecemeal litigation turning on proof of discrimination against identifiable individual victims. That thinking, based on treating the fourteenth amendment purely as a prohibitory law adopted in the interest of individuals as individuals, pervades a substantial number of decisions today. In the mid-sixties we slew the dragon, at least in school desegregation in the Fifth Circuit, but it took three cases to do it. In *United States v. Jefferson County Board of Education*,<sup>10</sup> we squarely held that school boards had an affirmative duty to integrate, to liquidate the dual system, “lock, stock, and barrel”<sup>11</sup> (the Supreme Court paraphrased this as “root and branch”),<sup>12</sup> not just the duty to stop discriminating against individual black applicants for admission to historically white schools. The vice was in the system; the discrimination was against blacks as a group; the remedy had to be to restructure the system. We held that the “only adequate redress for a previously overt system-wide policy of segregation directed against Negroes as a collective entity is a system-wide policy of integration”<sup>13</sup> and “the organized undoing of the effects of past segregation.”<sup>14</sup> We then wrote a model decree which I hoped would provide uniform standards throughout the circuit and would get the courts out of the business of closely supervising education — a task for which judges are certainly not qualified. It failed to do that, but it did firmly establish affirmative action as an essential element in desegregation of schools.

I am sometimes asked why we distinguished between de jure and de facto segregation in *Jefferson*. The answer is simple. *Jefferson* involved only de jure segregation, and I and others on the court who thought as I did had enough difficulty putting together a majority without adding to our troubles. Later, when we faced the question in two cases involving tri-ethnic cities, we ordered desegregation of Mexican-Americans without regard to whether the segregation was de facto;<sup>15</sup> the school boards had

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10. 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967).

11. 372 F.2d at 878.

12. *Green v. County School Bd.*, 391 U.S. 430, 437-38 (1968).

13. 372 F.2d at 869.

14. *Id.* at 866.

15. *Cisneros v. Corpus Christi Ind. School Dist.*, 467 F.2d 142, 147-48 (5th Cir. 1972); *United States v. Texas Educ. Agency (Austin I)*, 467 F.2d 848, 863 (5th Cir. 1972)



desegregated the schools by putting Hispanics in black schools.

In 1961 I wrote the opinion desegregating the University of Mississippi.<sup>16</sup> It led, I am sorry to say, to a tragic confrontation at Oxford, Mississippi, to two deaths, and to many injuries, especially to United States marshalls. I described James Meredith, the first black to attend Ole Miss, not as a man with psychiatric troubles, one of the reasons given by the University for denying his admission, but as a man with "a nervous stomach and a mission." At that time it took a brave man to do what he did. It was not surprising that he had a nervous stomach. Today, of course, all state and private universities in the South, except one or two fundamentalist institutions, have open admissions policies and affirmative recruiting programs for minorities. Sometimes now when I watch a basketball game between the University of Mississippi and the University of Alabama, with only a few whites, usually substitutes on each team, I think of the two deaths and many injuries caused when Ross Barnett, Governor of Mississippi, in contempt of our court, and really in contempt of the nation, attempted to turn Meredith away from the University of Mississippi. Perhaps, looking back, sports have had more to do with acceptance of blacks into the main stream of American life than all our post-*Brown* decisions.

Although desegregation was slow for ten years after *Brown*, it accelerated in the late sixties and early seventies in transportation, hotels, restaurants, parks, barrooms, and athletic contests. Most of this acceleration took place as an extension of the school desegregation cases, without a critical analysis of the applicability of the *Brown* holding that "separate but equal" was not equal. Senators, congressmen, governors, and local politicians who had once signed the manifesto denouncing the *Brown* decision as a "clear abuse of judicial power," changed their public attitude.<sup>17</sup> I attribute this change of attitude to the Voting Rights Act of 1965. A vote is a vote is a vote. George Wallace once stood in front of a schoolhouse door saying, "never, never, never." Today he is Governor of Alabama again because he suc-

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(en banc); *United States v. Texas Educ. Agency (Austin II)*, 532 F.2d 380, 392 (5th Cir. 1976), *vacated and remanded*, 429 U.S. 990 (1976); *United States v. Texas Educ. Agency (Austin III)*, 564 F.2d 162, 163 (5th Cir. 1977).

16. *Meredith v. Fair*, 298 F.2d 696 (5th Cir. 1962).

17. *See supra* note 7 and accompanying text.

cessfully wooed forty percent of the black vote.

Until attitudes changed, some federal judges had their difficulties. Frank Johnson was a fine trial judge in Montgomery and is a fine judge now on the Court of Appeals of the new Eleventh Circuit. Frank's mother's house was bombed. Fortunately she happened to be in a different part of the house at the time, and was not injured. Dick Rives of our court, also from Montgomery, was subjected to horrific vandalism. His son's grave was painted red and strewn with garbage. But, sweet man that he was, and loyal Alabamian, he wrote a letter to the *Montgomery Advertiser*, saying that one should not jump to the conclusion that an Alabamian was responsible. Skelly Wright, when a district judge in New Orleans, at one time had police protection twenty-four hours a day.

I had what I call "petty" harassment. The telephone used to ring late at night for years and years, two of our dogs were poisoned, and once we found two small rattlesnakes in our yard. My wife developed a technique for answering telephone calls. When late calls came in, Bonnie used to pretend that one of our daughters had picked up the telephone on another line and would say, "Pay no attention, Kit. That's just a sick person who should see a doctor." Sometimes it worked.

I think, however, that I did not lose a single friend. My friends used to kid me; I kidded back. One invariably said, "What have you done to us white folks today?" I invariably replied, "Oh, just put a Neanderthaler like you under the jail." One of my black friends used to say to me, "What have my people done to you today?" I managed better than some, partly because for a short while, a very short while, I was a minor hero for helping to get the Eisenhower-oriented Louisiana delegation seated over the old-line Republican Taft delegation in the 1952 Republican Convention. Eisenhower was popular in Louisiana. He carried the state in 1956. He came close in 1952. Of course, as everyone knows, that election was stolen in Louisiana.

What is the prevailing thought I am left with as a result of twenty-seven years of experience as a federal judge? My experience confirms a longstanding belief: It is fortunate for the development and protection of civil rights that we live under a Hamiltonian theory of federalism rather than a Jeffersonian theory. The civil rights and civil liberties we now enjoy would never have evolved as far as they have if our federal courts had de-

ferred to the states to the extent that Jefferson wanted, and to the extent that some influential persons and courts now want. When the states enacted legislation denying the civil rights and civil liberties that Jefferson so passionately espoused, or when state courts and state law enforcement officers violated civil rights, federal courts stepped in to protect federally created and federally guaranteed individual rights. The federal executive and legislative branches defaulted; the states actively resisted. Abstinence by federal courts would, in my opinion, have amounted to abdication of the federal responsibility to enforce the citizenship clause of the fourteenth amendment and the abolition of all badges and indicia of slavery required by the thirteenth amendment. This is to say nothing of the due process and equal protection clauses of the fourteenth amendment.

The country lives, thrives upon, and enjoys Jeffersonian freedoms and rights under what is primarily a Hamiltonian view of federalism: a strong national government adequate to enforce national policy in a country characterized by states of variant interests and classes of persons having diverse interests sometimes opposed to national interests. This view coincided with that of James Madison of the Constitutional Convention and of the Federalist Papers, and that of Madison in his middle and late thirties, but not with the view of his later years. Central to Madison's political thinking was the belief that minorities would receive better treatment from a large federal republic than from the individual states. Many years later, Madison and Hamilton's projection turned out to be true, at least in the six states of the Fifth Circuit in the 1960's and 70's.

I am astonished at the resurgence of the notion that the states, as state governments, organized the union. They did organize a league of friendship under the Articles of Confederation. It did not work, and we the people of the several states rid ourselves of an unworkable alliance of states which, according to the Articles but not the Constitution, retained their "sovereignty, freedom, and independence." The omission of that phrase in the Constitution is probably the most important difference between the Constitution and the Articles of Confederation.

I do not know what is meant by those who talk today about the "New Federalism." It has some semblance of meaning if it refers to a return of some social and economic responsibility for

local interests to the states and to the cities. But that was the old federalism. In the great crises of national concern, such as the rejection of the Articles of Confederation, the adoption of the Constitution, the Civil War, the Great Depression, the struggle in the fifties, sixties, and seventies for civil rights, civil liberties, and especially for the right to vote, states' righters were on the wrong side of workable federalism. The results that were achieved in the struggle for civil rights came from a strong national policy Congress finally adopted in 1964 and 1965, which federal courts enforced against parochial prides, prejudices, and pressures.

I do not know what "Our Federalism" means, as expounded by an unquestionably great justice and constitutional scholar, Hugo Black. A basic tenet of his was that federal courts should defer to the state courts in state criminal cases. This is a defensible sentiment, derived from the doctrine of comity, but one divorced from reality in a crunch involving state opposition to federal law. Some of Justice Black's successors have gone far beyond that great justice's exposition of comity between courts in the context of pending criminal proceedings. I happen to think that, like Dr. Frankenstein, he created a monster, this one on call to strangle almost any federal interference with state affairs. But in lower federal courts, theirs is not to reason why. Could someone have blundered? I do know that in the Fifth Circuit, freedom riders, protesters distributing handbills, marchers, demonstrators kneeling in prayer on church steps, and other civil rights advocates would have languished interminably in state jails if they had waited for state courts to vindicate their constitutional rights. In civil rights cases, especially in voting cases, litigants, regardless of the effect of discriminatory impact, would have waited to little avail for findings of intent to discriminate against them. Constitutional rights are better protected in the South today, and there is now a large body of legal commentary heralding state constitutions as sources of more expansive protection of individual rights and liberties than is afforded by the Federal Constitution.<sup>18</sup> But that is a development of the late

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18. See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); *Developments*

seventies and eighties.

In critical periods of our history the federalizing function of United States courts is more important than its dispute-settling function. That federalizing 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. In the 1787 Constitutional Convention, the Committee of the Whole approved John 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. We hear this argument echoed constantly today in all levels of discussion, including congressional debates and speeches by judges. James Madison disagreed. He argued that "[a]n 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."<sup>19</sup> As early as 1801, in the pejoratively termed "midnight judges" law, Congress and John Adams established a federal circuit system substantially similar to the system we now have, which was not established until 1891.

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

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*in the Law, The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); sources cited in *id.* at 1329 n.20.

19. 5 ELLIOT'S DEBATES 159 (Reprint. 1941) (1836).

Some of you may not think so, but I think of myself as less activist than the so-called "strict constructionists." To the people of New Orleans, which was occupied by federal troops until 1877, the year of the Hayes-Tilden deal, as well as to you in Columbia, South Carolina, which was burned and sacked by Sherman's troops in 1865 — "states' rights" are mystical, emotion-laden words that carry the sound of bugles. But the crowning glory of American federalism is not states' rights; it is the protection the United States Constitution gives to the individual citizen against all wrongful governmental invasion of fundamental rights and freedoms. When the wrongful invasion comes from the state, and especially when the unlawful state action is locally popular or when there is local disapproval of the requirements of federal law, federal courts must expect to bear the primary responsibility for protecting the individual. This responsibility is not new. It did not start with the school desegregation cases. It did not start with the Civil War amendments. It is inherent in the citizenship clause of the fourteenth amendment. It is close to the heart of the American federal union, as the framers saw it. It is implicit in the replacement of the Articles of Confederation by the Constitution. It makes federalism workable — provided that federal judges perform firmly and fully their historic, destined, although sometimes friction-making and exacerbating role in American federalism.

