Harassed by local officials and private vigilantes, civil rights workers in the South have sought federal protection. To avoid the charade of trial in hostile state courts, they have asked federal courts to quash sham criminal prosecutions. To deter violence, they have asked the Department of Justice for prosecutions under the civil rights statutes and, in extreme situations, for the presence of enforcement personnel. But federal officials have hesitated to disturb the autonomy of local law enforcement institutions, even where intervention has been necessary to assure the supremacy of federal law.

Behind these inhibitions is a theory of federalism, articulated mainly by Justices Frankfurter, Jackson, and Harlan, and, most recently, by former Assistant Attorney General Burke Marshall. Though never

1. Popular and official accounts of racial intimidation abound. See, e.g., United States Comm'n on Civil Rights, Justice (1961); Law Enforcement (1965); Hearings Before the United States Comm'n on Civil Rights (Jackson, Miss.) (1965) (hereinafter cited as Justice, Law Enforcement, and Jackson Hearings); The Southern Regional Council, Intimidation, Reprisal, and Violence (1959), Law Enforcement in Mississippi (1965). See also the several essays collected in Southern Justice (Friedman ed. 1965) (hereinafter cited as Southern Justice), especially those by Teachout, Burns, and Lusky. For representative examples which have come before the courts, see Dombrowski v. Pfister, 380 U.S. 479 (1965); Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964); United States v. Wood, 295 F.2d 772 (5th Cir. 1962) (all examples of official intimidation); United States v. Guest, 86 Sup. Ct. 1170 (1966) (private organized violence).

Terrorism was the basic instrument of the South's previously successful effort to drive the Negro from politics. See Swinney, Enforcing the Fifteenth Amendment 1870-77, 28 J. So. Hist. 202 (1962); V. L. Wharton, The Negro in Mississippi 1865-90, 167-99 (1947).

Since Reconstruction, recurrent violence has operated to reinforce the Negro's sense of impotence. See Myrdal, An American Dilemma (1944); Dollard, Caste and Class in a Southern Town 314-88 (1937).


4. The basic texts are: Screws v. United States, 325 U.S. 91, 138-61 (1945) (Frankfurter, Jackson, Roberts, JJ., dissenting); Monroe v. Pape, 365 U.S. 167, 202-59 (1961) (Frank-
given a full-dress statement, this theory provides the conventional wisdom with the notion that federalism is simply a device for "dispersing" or "diluting" government power. From this notion springs fear that federal activism entails harm to federalism.

But federalism is a more complex mechanism. It is also designed to check abuses by dominant local factions, a task assigned to the central agencies and diverse constituency of the federal government. So understood, the objectives of federalism support intervention in today's deep South.


6. Burke Marshall has provided the most elaborate development of the doctrinal implications of the notion that "civil rights issues cut into the fabric of federalism," that they "cut most deeply where police power is involved." Federalism and Civil Rights 81. Marshall makes explicit the willingness of proponents of restraint to subordinate the principle of federal legal supremacy, and the assumption that federalism compels such subordination. Youthful civil rights workers, he has said, cannot understand federal inaction in the face of what they consider, often quite correctly, as official wholesale local interference with the exercise of federal constitutional rights. Apparently their schools and universities have not taught them much about the working of the federal system. . . . What is wrong with [their] analysis?

. . . The question embraces all the deepest complexities of the federal system. Id. at 49-50.

The assumption that federal action on behalf of civil rights conflicts with the requirements of federalism has received more frantic expression at the hands of Professor Kurland of Chicago, who mourns "the effective subordination, if not the destruction, of the federal system." Kurland, The Supreme Court, 1963 Term, Forward: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government, 78 Harv. L. Rev. 143, 144 (1964). He sees this catastrophe as a logical corollary of the desegregation cases, the sit-in cases, and principally the reapportionment cases, Id. at 162-63.

But this notion that civil rights and federalism involve competing values enjoys favor not only with advocates of restraint. It is reflected in the dichotomies which analysis often begins in civil rights cases—that the benefits of federal action must be weighed against danger to the "delicate balance" of federalism. See, e.g., Note, Federal Injunctions and State Enforcement of Invalid Criminal Statutes, 65 Colum. L. Rev. 647 (1965); Note, The Proper Scope of the Civil Rights Acts, 66 Harv. L. Rev. 1285, 1287 (1953). This notion derives from the theory best articulated by Frankfurter and Jackson, that the purpose of federalism is to preserve a balance of political power between the federal and state governments. See notes 47-49 infra and accompanying text.

Indeed, even activists accept the formula that demands for intervention present a conflict between "federalism" and "individual rights." They argue merely that the latter value should be preferred to the former. See Sobeloff, Federalism and Civil Liberties: Can We Have Both? 1965 Wash. U.L.Q. 296, 297; Van Alstyne, Book Review, 10 Vill. L. Rev. 203, 208 (1964); Wasserstrom, Book Review, 33 U. Chi. L. Rev. 406, 413 (1966). Wasserstrom is the first writer to suggest that federalism in contemporary jargon may represent only an "ideology," rather than the only acceptable definition of the term. Id. at 410.
I. The Rationale of Restraint: Separate Functions for Separate Political Systems

To justify restraint, contemporary theorists invoke a model of the federal system shaped by the concept of separation of powers. The federal government is responsible for "national" functions, such as maintaining a sound economy. State governments are charged with "local" responsibilities, in particular preserving order through tort and criminal law. Whenever the federal government takes over local police powers, federalism is jeopardized.

A. State Autonomy under the Reconstruction Amendments: "Under Color of Law" and "Comity"

The fourteenth and fifteenth amendments preclude strict separation of functions; even if narrowly construed, the amendments require occasional Supreme Court review of state tort and criminal cases. Contemporary separate function theorists endorse Supreme Court review under the amendments. But they preserve state autonomy by distinguishing Supreme Court review from "direct intervention," which includes all

7. Political scientists are accustomed to applying the phrase "division of powers" to intergovernmental relations in a federal system. See, e.g., Huntington, The Founding Fathers and the Division of Powers, in Area and Power 169 (Maass ed. 1959). However, in the view articulated by Frankfurter, Jackson, Harlan, and Burke Marshall, it is separation, rather than division which is stressed. Their point is, not that judicial or legislative power, for example, is "divided" between state and nation, but that federal powers (powers being equivalent to "functions") are distinct and separate from state powers (functions). Justice Frankfurter matched his insistence on separation of state from federal functions with an analogous and similarly inspired aversion to sharing of functions among the three branches of the federal government. In both inter- and intra-governmental relations, separation of powers, rather than checks and balances, was the guiding principle. See Thomas, Felix Frankfurter—Scholar on the Bench, Part Five passim, especially 265-66, 267, 284-85, 290-91, 315 (1960); Nathanson, Separation of Powers: The Justice Revisits His Own Casebook, in Felix Frankfurter: The Judge 1, 28-29 (Mendelsohn ed. 1964). Compare Burns & Peltason, Government by the People: The Dynamics of American National Government 64-66 (3d ed. 1957).


forms of federal action undertaken before the state has authoritatively defined its position. Intervention is permissible only if, as in the case of Supreme Court review, it follows state refusal to honor federal rights. Until the state's option to afford protection has lapsed, federal institutions must stand aside.¹⁰

Separate function theorists have brought this concept of state autonomy to two doctrinal controversies: (1) the meaning of the phrase "under color of law," in statutes which prohibit state officials from interfering with civil rights;¹¹ and (2) the uses of the principle of comity in civil rights cases. Originally, "under color of law" was construed to include any interference with federal rights by a state official.¹² Thus a heavy-handed sheriff might be subject to federal prosecution, even if he had also violated state law. Justices Frankfurter and Jackson saw this overlapping federal jurisdiction as a dangerous invasion of state autonomy. By providing a remedy, they argued, the state had exercised its option to protect federal rights. Therefore, conduct interfering with civil rights, if prohibited by state law, was action "in defiance of" rather than "under color of" law.¹³

¹⁰. To conform to this separate function conception of state autonomy, statutory civil rights remedies have been construed to allow only post-conviction relief. See notes 28-29 infra.


§ 1983. Civil action for deprivation of rights.

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

§ 242. Deprivation of rights under color of law.

Whoever, under color of law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

¹². United States v. Classic, 313 U.S. 299, 326 (1941); Ex Parte Virginia, 100 U.S. 839, 346 (1880). Classic defined the phrase as follows: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." 313 U.S. at 326.

Frankfurter and Jackson claimed to be faithfully serving the original intent of the Reconstruction Congress. But these prophets of restraint, who frequently castigated the Radicals' "vengeful spirit," could not have thought that Thaddeus Stevens shared their scruples about federal intervention. Frequently, they implied that their narrow construction set the constitutional limits of congressional power under the amendments. Conduct which violated state law they considered "unauthorized" by the state. Hence, it was not "state action," and Congress was powerless to act under the amendments. Only when the authoritative institutions of the state flouted federal rights, could Congress act:

The commands of the Fourteenth Amendment were addressed to the States. Only when the States, through their responsible organs for the formulation and administration of local policy, sought . . . to deprive the individual of a certain minimal fairness in the exercise of the coercive forces of the State, or without reasonable justification to treat him differently than other persons subject to their jurisdiction, was an overriding federal sanction imposed . . . .

This conception begot the "State action" principle on which, from the time of The Civil Rights Cases . . . , this Court has relied in its application of Fourteenth Amendment guarantees. In many cases, Frankfurter and Jackson endorsed far more expansive definitions of state action. But federal displacement of state police powers provoked unique concern. At one point, Justice Frankfurter decided that his antagonism to direct intervention was a matter "approximating constitutional dimension . . . ."

14. 365 U.S. at 241; 325 U.S. at 148-49.
15. 325 U.S. at 140-42. See Collins v. Hardyman, 341 U.S. 651, 657 (1951); United States v. Williams, 341 U.S. 70, 74 (1951). In Collins, Justice Jackson indicated his acquaintance with one of the major Reconstruction histories, which like virtually all treatments of the period before the 1950's, was violently hostile to the Radicals. 341 U.S. at 657 n.8. See STAPP, THE ERA OF RECONSTRUCTION 13 (1965).
16. 325 U.S. at 147-48; 365 U.S. at 237-38. In Screws, other members of the Court noted the constitutional overtones of Justice Frankfurter's rhetoric:

Lying beneath all the surface arguments is a deeper implication, which comprehends them. It goes to federal power. It is that Congress could not in so many words denounce as a federal crime the intentional and wrongful taking of an individual's life or liberty by a state official acting in abuse of his official function and applying to the deed all the power of his office. This is the ultimate purport of the notions that state action is not involved and that the crime is against the state alone, not the nation. 325 U.S. at 133.
17. 365 U.S. at 237-38.
19. 365 U.S. at 222. (Emphasis added.)
More often than not, Supreme Court majorities rejected narrow construction of civil rights statutes. Nevertheless, these laws never became the threat to state autonomy which Frankfurter and Jackson feared, for separate function principles soon captured the Department of Justice. Department officials neglected the civil rights criminal statutes and refused to send federal enforcement officials to the deep South. Hence the task of applying the Court's relatively broad definition of federal power fell to private litigants.

But, in administering relief under the civil rights statutes, the courts kept faith with separate function principles, by broadly interpreting the principle of comity. Incorporated in several judge-made and statutory rules, comity cautions federal judges to give state courts every opportunity to reconcile state legislation with the Constitution. For example, the "abstention" doctrine, born in a Frankfurter opinion for the Court, requires that district courts remand to the state judiciary constitutional challenges to ambiguous state statutes. This gives the state court a chance to save the statute through narrow construction.

Kindred rules forbid injunction of either threatened or pending.


25. The ban on injunction of threatened proceedings is of purely judicial origin. Its most significant contemporary restatement is *Douglas v. City of Jeannette*, 319 U.S. 157,
state proceedings, even though they might jeopardize federal rights. Comity also accounts for the cold reception given two Reconstruction-born remedies for unconstitutional prosecutions. To avoid disruption of state criminal proceedings, a hearing on federal habeas corpus must await exhaustion of state remedies.\textsuperscript{27} Similarly, removal under the civil rights removal statute is limited to cases where a finding of racial bias is compelled by obviously invalid state statutes.\textsuperscript{28}

Despite boilerplate about the states’ sovereign dignity and the integrity of local courts, most judges treat rules of comity as instruments of efficient administration.\textsuperscript{29} Abstention is supposed to avoid the creation of unstable precedents.\textsuperscript{30} Noninterference with state criminal proceedings, even though they might jeopardize federal rights. Comity also accounts for the cold reception given two Reconstruction-born remedies for unconstitutional prosecutions. To avoid disruption of state criminal proceedings, a hearing on federal habeas corpus must await exhaustion of state remedies.\textsuperscript{27} Similarly, removal under the civil rights removal statute is limited to cases where a finding of racial bias is compelled by obviously invalid state statutes.\textsuperscript{28}

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ceedings ensures orderly procedures for prosecution, trial, and appeal.\footnote{31}

But separate function theorists see in comity a vindication of their concept of state autonomy. In effect, the rules of comity prevent direct intervention by the judiciary. They keep district courts from directly participating in the administration of local criminal justice, confining federal action to review by the Supreme Court. Like the Frankfurter-Jackson interpretation of “under color of law,” comity implements the notion of the state as an integral institutional system. Federal action must wait for the state to authoritatively declare its position on a matter, “so that federal judgment will be based on a complete product of the state, ... enactments as phrased by its legislature and construed by its highest court....”\footnote{32}

B. Massive Resistance versus Federal Supremacy:

Comity as a Safeguard of State Political Power

Under normal conditions, comity does not impair the enjoyment of federal rights. State courts are presumed to protect constitutional rights in good faith.\footnote{33} Ordinarily, the presumption is justified. If state judges misapply the Reconstruction amendments in a given case, Supreme Court review can vindicate the individual complainant.

In the South massive resistance to the civil rights movement disrupted this comfortable pattern. Rules of comity denied effective federal relief to victims of groundless prosecutions; extraordinary bail charges and deliberate delays on appeal made Supreme Court review an expensive, time-consuming, and merely temporary respite from perpetual harassment.\footnote{34} At the same time, executive policies of deference to local law enforcement officials left no remedy for police brutality and private violence.\footnote{35}

Under these novel circumstances, some Southern federal judges and a minority of the Supreme Court concluded that rebellious state insti-

\footnote{31. See sources cited supra note 29.}
\footnote{33. FEDERALISM AND CIVIL RIGHTS 55.}
\footnote{34. Lusky, Racial Discrimination and the Federal Law: a Problem in Nullification, 63 COLUM. L. REV. 1163, 1167-77 (1963); SOUTHERN JUSTICE 255; Amsterdam, supra note 27, at 794-99.}
\footnote{35. See sources cited in notes 1, 21, and 22 supra.
tutions were undeserving of comity. In their view, massive resistance contradicted comity's two presumptions. State legislation aimed at "undermining federal law" showed that state institutions would not protect federal rights in good faith; systematic harassment meant that Supreme Court review would not adequately protect civil rights.

For the separate function school, however, massive resistance did not justify relaxing the rules of comity. When the NAACP asked a federal district court for direct relief from the Virginia statutes designed to drive it from the state, Justice Harlan ordered the district court to abstain. His opinion for the Court ignored the district court's justification for relief—that Virginia's avowed purpose was to obstruct federal law. The Department of Justice applied its own version of comity, even where state officials acted in bad faith. Although he was sure of "official wholesale local interference with the exercise of federal constitutional rights," Burke Marshall believed that it was necessary to respect comity principles. Marshall even maintained that the President was constitutionally bound to accept, prior to the Alabama freedom rider's crisis, Governor Patterson's promise to prevent violence.

The two approaches to comity reflect two distinct theories of the federal system. For those who think that massive resistance makes comity inappropriate, the organizing principle is federal legal supremacy. In their view, the supremacy clause requires federal intervention whenever the states deliberately violate their federal obligations. Administrative convenience and respect for local officials give way before the overriding obligation to ensure the supremacy of federal law.

But in the separate function model, federal supremacy is not controlling. Where comity clashes with federal supremacy, the conflict is resolved in favor of comity.

37. 360 U.S. at 184.
38. See notes 1, 21, 22 supra. In his Harrison dissent, Mr. Justice Douglas doubts that state courts will be reliable under conditions of local antagonism to federal law or a political minority. 360 U.S. at 180-84.
41. Federalism and Civil Rights 49-55.
42. Id. at 58.
44. Separate function theorists have seemed not to recognize conflict between deference to state institutions and federal legal supremacy, although Burke Marshall ap-
Separate function theorists do not ignore the supremacy clause in every instance of nullification. They would allow the federal government to sweep aside state obstruction of a specific federal court order, as in Little Rock, where Governor Faubus sent his militia to thwart a district court's integration decree. But what federalism dictates in Little Rock, it prohibits in Jackson, where police jailed freedom riders in deliberate violation of rights established by decades of precedent. Except where nullification assumes the form of contempt of court, the federal government must stay its hand.

Why do separate function theorists treat Jackson so differently from Little Rock? The distinction they see, like their separation of Supreme Court review from "direct intervention," reflects a preoccupation with the political dimension of federal-state relations. Their overriding goal is to maintain a stable political relationship between the state and federal governments. To ensure stability, both state and nation must have sufficient power to guarantee their independence. It is to preserve this "require[d] . . . balance of political forces" that the federal judiciary and the Justice Department must subordinate federal legal supremacy to separate function principles.

This emphasis on the political consequences of federal action explains the insistence that preservation of domestic order is a local function. States must retain this prerogative because of the power inherent

proaches explicit recognition of the problem. See FEDERALISM AND CIVIL RIGHTS 4, 7, 8, 44, 59-60. Justice Frankfurter came closest to admitting the necessity, under his conception of comity, of subordinating federal supremacy when the two principles conflict in Sweeney v. Woodall, 344 U.S. 86, 91 (1952). See Comment, Extradition Habeas Corpus, 74 YALE L.J. 78, 115 (1964). Failure to recognize particular instances of conflict between comity and federal supremacy stems from a general disregard for the possibility that state defiance of federal law can occur in a federal system. Most of what passes for contemporary federalism theory simply bypasses the problem of nullification. See the several essays collected in FEDERALISM: MATURE AND EMERGENT (MacMahon ed. 1955) discussed in note 87 infra. Justice Frankfurter in particular was plagued by a vocabulary resistant to analysis of federal-state conflict. See Henkin, Voice of a Modern Federalism, in FELIX FRANKFURTER: THE JUDGE 68, 85-86 (Mendelsohn ed. 1964). Thus blinded to the possibility of federal-state conflict, Frankfurter appeared to regard comity as a device for harmonizing institutional relationships between state and nation, regardless of whether state institutions obeyed their federal obligations:

Self limitation is not a matter of technical nicety, nor judicial timidity. It reflects the recognition that to no small degree the effectiveness of the legal order depends upon the infrequency with which it solves its problems by resorting to determinations of ultimate power. Monroe v. Pape, 365 U.S. 167, 241 (1961).

45. Cooper v. Aaron, 358 U.S. 1, 22-26 (1958) (Frankfurter, J., concurring).
46. Lusky, supra note 34 at 1169, 1181-83.
47. Screws v. United States, 325 U.S. 91, 142 (1945) (dissenting opinion); cf. FEDERALISM AND CIVIL RIGHTS 50.
in administrative control of civil and criminal justice. Thus the kinds of intervention necessary to enforce federal law in Jackson would threaten the states’ monopoly of administrative responsibility. Federal authority to abort state criminal prosecutions might make district courts meddlesome overseers of state trials. Widespread enforcement of federal criminal legislation might lead to FBI control of local police forces. Such threats to state power must be quashed, if the states are to retain the political independence required by federalism—an independence confirmed by the South’s ability to defy the federal law of racial equality.

But protecting state administrative power does not bar federal intervention in all cases. Supreme Court review and even military enforcement of a particular court order, as in Little Rock, are tolerable. As ceremonial functions, these forms of intervention dramatize the federal obligations of local officials. But however dramatic, Supreme Court review and military intervention involve only rare and momentary displacements of local authority. Habeas corpus provides a more immediate potential for interference, but “exhaustion” insures that habeas corpus will impose no prior restraints on state officials. Thus limited, federal action will not sap the strength of local institutions charged with day-to-day administrative responsibility.

These tacit assumptions explain the familiar saw that the fourteenth amendment worked no basic change in federal-state relations. On its face this statement is mystifying, for the amendment reordered the legal relations between state and nation by imposing federal restrictions on every act attributable to a state. But theorists concerned with political power, rather than abstract legal relations, recognize that new federal law does not by itself have political impact. In separate function theory, the amendments did not change federal-state relations significantly, because they brought no expansion of federal administrative power.

II. CONTEMPORARY THEORY IN HISTORICAL PERSPECTIVE

Proponents of restraint in the South invoke federalism with a confidence which suggests that their theory is the only model for resolving

49. Words to this effect often appeared in the opinions of Justice Frankfurter. See, e.g., his dissents in Screws, 325 U.S. at 140, and Monroe, 365 U.S. at 237. But they also slip, unexamined, into the rhetoric of such advocates of active federal protection of federal rights as Mr. Justice Douglas. See Screws v. United States, 325 U.S. at 109.
federal-state conflict. But among historically significant analyses, only the anti-Federalist theories of Jefferson and Calhoun would bar direct protection for Southern civil rights activities. Congress and the Supreme Court have generally preferred the Federalists’ theory to the anti-Federalist notion that state autonomy should be valued above federal legal supremacy. By introducing the concept of checks and balances, the Federalists provided for a more flexible distribution of state and federal power, compatible with forceful action in the service of federal supremacy.

A. Pre-Civil War Theories: Jefferson and Calhoun versus the Federalists

After ratification of the Constitution, controversy continued over the relative scope of state and federal power. Like current theory, Thomas Jefferson’s analysis of the federal system divided power between state and nation according to a distinction between local and national functions. Jefferson’s separation-of-powers approach precluded intervention to enforce federal law.

Later John C. Calhoun devised the doctrine of concurrent majorities to protect geographic minorities from federal power. Calhoun believed that the states had remained “sovereign” after the ratification of

50. The Fugitive Slave cases were the only instances of judicial review of congressional or executive action to deal with problems of nullification. See Prigg v. Pennsylvania, 41 U.S. (17 Pet.) 539, 614-15, 617-18 (1842), discussed in notes 65-66 infra and accompanying text. In all cases where the Supreme Court has had occasion to consider the validity of disobedience to federal court orders, it has responded with resolute affirmation of federal supremacy. See United States v. Peters, 9 U.S. (5 Cranch) 115 (1809); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cooper v. Aaron, 358 U.S. 1 (1958). Where, however, local antagonism to federal law is resolute, executive action has been necessary to deny de facto success to nullification. Where such action was forthcoming, federal law was observed, as in the Whiskey Rebellion in Pennsylvania and the South Carolina tariff controversy of 1832. Where enforcement was irresolute, nullification has proved a successful strategy, as with the Fugitive Slave laws in the pre-Civil War North and the embargo in New England before the War of 1812. For discussion, see 1 Warren, The Supreme Court in United States History 387-89 (1922); 2 Id. at 191, 480; Miller & Howell, Interposition, Nullification, and the Delicate Division of Power in a Federal System, 5 Journal of Public Law 2 (1956).


53. 1 Mogi, The Problem of Federalism 82-83 (1931).

54. The most succinct expression of Calhoun’s theory, elaborated in writings and speeches throughout his career, is found in his Disquisition on Government and a Discourse on the Constitution and Government of the United States in 1 The Works of John C. Calhoun (1854). For extensive treatment of Calhoun’s theory, see 2 Mogi, op. cit. supra note 55, at 105-17.
the Constitution. Because sovereignty was "indivisible," a federal law could not be enforced within the borders of a state where it had been formally "nullified." Only a constitutional amendment could force the state to comply.

Contemporary theory differs tangibly from Calhoun's. It limits federal power by restricting methods of enforcement, instead of denying the validity of federal law. Its concepts are functional, rather than legalistic; it avoids the rhetoric of "sovereignty." But generic similarities link Calhoun and the separate function theorists. The concept of state government as an integral decision process is akin to Calhoun's indivisible state sovereignty. Frankfurter's aversion to "determinations of ultimate power" requires an accommodation to state nullification which differs chiefly in mechanics and terminology from Calhoun's "concurrent majorities."

Jefferson and Calhoun framed their theories in response to the Federalists' campaign for a strong central government. The Federalists attacked the "idea of an absolute separation and independence" as if the states and federal governments "belonged to different nations." In their view, emphasis on federal supremacy distinguished the federal plan of the Constitution from that of the Articles of Confederation. According to Hamilton, national law under the Articles was addressed to the states alone, whereas the Constitution subjected individuals directly to federal law and permitted federal action to secure individual obedience:

The great and radical vice in the construction of the existing Confederation is in the principle of legislation for states or governments, in their corporate or collective capacities, and as contrasted from the individuals of which they consist . . . .

55. CALHOUN, A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES, op. cit. supra note 54, at 115-149.
56. Id. at 146.
57. Id. at 277-80, 284-302.
58. See note 9 supra and accompanying text; notes 31-32 supra and accompanying text.
59. See notes 43 and 44 supra and accompanying text.
60. In principle, strict obedience to comity and deference to local law enforcement officials shelters local nullification no less effectively than Calhoun's proposal for formally ratifying the practice. See notes 34-36 supra and accompanying text. Had federal judges and executive officials maintained intact their commitment to separate function principles over the past two years, nullification in the South would remain as successful as it had been from 1877 until 1964. See notes 156-57 and 165-67 infra and accompanying text.
61. The Federalists' position was set forth systematically in THE FEDERALIST, especially numbers 9, 10, 15-20, 27, 32, 39, 47-51.
62. Quoted in HUNTINGTON, supra note 7, at 191.
The consequence of this is that though in theory federal resolutions . . . are laws constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option. . . .

If, therefore, the measures of the Confederacy cannot be executed without the intervention of the particular administrations, there will be little prospect of their being executed at all. The rulers of the respective members, whether they have a constitutional right to do it or not, will undertake to judge of the propriety of the measures themselves. . . .

The federal government . . . must stand in need of no intermediate legislations, but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions.63

Following the Federalists' directions, the Constitutional Convention allowed for federal trial courts, to assure enforcement of locally unpopular legislation.64 Supreme Court Justice Joseph Story later wrote Hamilton's connection between federal supremacy and plenary enforcement power into constitutional doctrine. Rejecting a constitutional attack on fugitive slave criminal legislation, he held in Prigg v. Pennsylvania that Congress had implied power to secure enjoyment of any federal constitutional right, by proscribing any form of interference:

If, indeed, the constitution guarantees the right, and if it requires the delivery upon the claim of the owner . . . , the natural inference is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle, applicable to all cases of this sort, would seem to be, that where the end is required, the means are given . . . .65

Prigg demonstrated the Supreme Court's commitment to broad federal jurisdiction under the supremacy clause—in the context, however, of a Constitution which allowed for little encroachment on state police power.

B. The Post-War Court, Federal Supremacy, and the Reconstruction Amendments

The Reconstruction amendments prompted the Court to reconsider its commitment to federal supremacy theory. If the amendments were construed to give Congress and the President power to prevent all forms of interference, public and private, vast changes might occur in federal-state relations. The vague multitude of rights covered by the

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63. The Federalist No. 15, at 89-93 (Modern Library ed. 1937) (Hamilton).
64. Lusky, supra note 34, at 1178-79.
fourteenth amendment, in particular, could justify federal intrusion into areas of law and administration which had been governed solely, and quite adequately, by state law.66

To avoid this redistribution of police power, the Court in 1873 removed the fourteenth amendment from the reach of Justice Story's implied power doctrine.67 The amendment, it was reasoned, did not "create" constitutional rights, since the rights it specified had previously been granted by state law. Hence they were not federal rights at all, and Congress had no implied power to enforce the amendment. As rights "incident" only to "state citizenship," fourteenth amendment rights could be protected only against "state action."68

Noting the Court's refusal to imply full enforcement power from the fourteenth amendment, contemporary opponents of intervention believe its decisions confirm their own inflexible aversion to federal law enforcement responsibility.69 But they have misconstrued the post-Civil War Court's doctrine and the theory of federalism it reveals. In fact, the Court qualified its general preference for local power by approving federal protection for the Southern Negro.70 It wished to allow the federal government to suppress racial violence in the South, but not to intervene elsewhere for other purposes. The Court achieved its competing aims by distinguishing the fourteenth from the fifteenth amendment. Unlike the fourteenth amendment, the fifteenth was held to "create" a "new" right, the right to vote irrespective of race. Under the implied power doctrine, the federal government could act against all forms of interference with Negro voting rights. Thus, in fifteenth amendment cases the "state action" doctrine was inapposite. Even if the state allowed Negro voting, the federal government might prevent private intimidation.71

The fifteenth amendment affected only political warfare between whites and Negroes. Having thus limited federal power to intervene,

66. The following analysis of the post-Civil War Court's approach to construction of the Reconstruction amendments is based on the textual interpretation set forth in Note, The Strange Career of "State Action" under the Fifteenth Amendment, 74 Yale L.J. 1448, 1449-54 (1965). The Court argued that without the state action requirement, the due process clause could be turned into an excuse for enacting federal murder and theft statutes. See Justice Bradley's opinion in United States v. Cruikshank, quoted in Note, 74 Yale L.J. at 1452.
68. 74 Yale L.J. at 1452.
70. See 74 Yale L.J. at 1451-52.
71. Ibid.
the Court contemplated no limitations on the manner of its exercise. Since all racial intimidation was in part aimed at driving the Negro from politics, the fifteenth amendment by itself placed Southern terrorism within reach of Congress and the Attorney General. The Court recognized that its acceptance of federal supremacy doctrine could justify federal displacement of local law enforcement:

We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force exercised through its official agents, execute on every foot of American soil the powers to command obedience to its laws and hence the power to keep the peace to that extent.

C. Dynamics of the Federalists' Model: Checks and Balances and the Guarantee Clause

The Court never explained its theory of federalism when endorsing intervention in the South, and the rationale of its decisions has since been forgotten. To find theoretical support for the Court's position, we must return to the Federalists' analysis. In the Federalists' view, it was unrealistic to confer on any single institution an outright monopoly over specified functions. Each institution would inevitably reach for a share of control over functions legally the sole province of others. Moreover, striving for an absolute separation of functions was dangerous; it would create pockets of uncontrolled power, susceptible to abuse. Flexible sharing of functions ensured that the power of one institution would be "checked and balanced" by the power of others.

This checks and balances mechanism distinguishes the Federalists' model of federal-state relations. In the "compound republic" contemplated in the Constitution, Madison explained:

... a double security arises to the rights of the people. The different governments will control each other, and at the same time each will be controlled by itself.

73. Ex Parte Siebold, 100 U.S. 371, 395 (1880) (Bradley, J.).
75. See The Federalist No. 46, at 335-47 (Modern Library ed. 1937) (Madison); Huntington, supra note 7, at 183, 191-93.
76. The Federalist No. 51, at 339 (Modern Library ed. 1937) (Madison).
In particular, the Federalists favored a protective role for the federal government; thus, their emphasis on federal legal supremacy.\textsuperscript{77}

Madison's theory of factions justified this intervention in affairs normally the business of the states. In the Madisonian state all factions would participate, none would dominate. For a single faction in command of the government would inevitably suppress other groups and destroy individual rights.\textsuperscript{78} Madison believed that the states were more likely than the federal government to fall prey to a single oppressive faction. The states were smaller, contained fewer factions, and hence were more susceptible to single-interest majorities. In contrast, the multiplicity of factions across the nation would prevent one from capturing the federal government. Thus, the system's ultimate guarantee of political liberty was the power of the federal government to prevent abuse of state power by local majorities.\textsuperscript{79}

Madison never specified which forms federal intervention should take. The Federalists may have thought that intervention would normally include judicial review under the few prohibitions on the states written into the original Constitution.\textsuperscript{80} One danger, however, was felt to warrant explicit constitutional provision. This was the possibility that factional domination would destroy the republican character of a state's government. Unless the system could check anti-republican "usurpations," the people of a captured state would lose their liberty, and republicanism across the nation would be threatened.\textsuperscript{81} To counter this threat, the Federalists wrote into the Constitution the command of Article IV, Section 4:

The United States shall guarantee to every State in this Union a Republican form of Government \ldots \textsuperscript{82}

They intended this clause to grant the federal government whatever power was necessary to restore republicanism, or as the concept is now understood, representative democracy.\textsuperscript{83}

Although the guarantee clause itself has been forgotten by constitutional history, the model of federalism symbolized by its terms retains

\textsuperscript{77} See note 63 \textit{supra}.
\textsuperscript{78} \textsc{The Federalist} No. 10 (Madison).
\textsuperscript{79} Huntington, \textit{supra} note 7, at 180-91.
\textsuperscript{80} U.S. \textsc{Const.} art. I, § 10; art. IV.
\textsuperscript{82} U.S. \textsc{Const.}, art. IV, § 4.
\textsuperscript{83} See \textsc{The Federalist} No. 43 (Madison). "Democracy" in the idiom of the Federalists denoted government by the people themselves, as distinguished from government through popularly elected representatives. \textsc{The Federalist} No. 10 (Madison).
its force. There was no occasion for use of the clause before the Civil War. After emancipation, federal power was set in motion against the single glaring challenge to representative democracy in United States—exclusion of the Negro from the Southern political process. In allowing protection for the Southern Negro, the post-war Court followed the Madisonian model. The Court's failure specifically to invoke the guarantee clause proved not that the clause was irrelevant, but that it was unnecessary. The Reconstruction amendments, especially the fifteenth, provided an alternative means of securing the guarantee.

III. THE CONTEMPORARY RELEVANCE OF THE FEDERALIST MODEL

After 1877, a public tired of Reconstruction allowed violence and terror to disfranchise the Southern Negro. For a century, legal and academic authorities, like nearly everyone else, overlooked the exclusionary character of Southern politics. Basic themes emphasized by The Federalist were forgotten—that nullification of federal law and abuse of local governmental power were likely to occur, and that the central government's power must be sufficiently elastic to prevent such dangers. Attention has returned recently to local political abuses, and


85. During the Reconstruction period, Congress continually debated the question of the relation between the Guarantee Clause and the fourteenth and fifteenth amendments. See Lerche, supra note 84, at 198-210. Until ratification of the fifteenth amendment, the Guarantee Clause was used to require of newly admitted states that they deny no person access to the franchise on grounds of race. See Lerche, The Guarantee of a Republican Form of Government and the Admission of New States, 11 J. Politics 578, 589-91 (1949). At the time, the fifteenth amendment alone gave Congress full power to cope with all forms of racial intimidation. See note 71 supra and accompanying text.


87. The tendency has been to consider that American federalism is in a "mature" stage in the evolution of a principle of harmony. See note 44 supra. At Columbia University's Bicentennial Conference on federalism in 1954, only Arthur Holcombe contributed a brief essay on the problem of assuring federal supremacy, The Coercion of States in a Federal System, in FEDERALISM: MATURE AND EMERGENT 137 (McMAHON ed. 1955). Holcombe treats the problem as academic and hypothetical, of no practical consequence for the "mature" federalism of the United States. His discussion of the state of progress in inducing Southern states to enfranchise Negroes in consonance with the fifteenth amendment and to give them treatment consistent with the fourteenth amendment is complacent and optimistic, recognizing neither injury to the principle of federal supremacy, on the one hand, nor of need to employ means other than Supreme Court review to assure eventual compliance:

What neither the force of arms nor the more subtle coercion of political leaders at
Congress and the federal courts have rediscovered the Reconstruction amendments. But expansion of federal safeguards has not dispelled the notion that federalism erects rigid barriers to interference with local functions.

Separate function theorists view the problem of intervention as a conflict between "federalism" and "individual rights." They consider that federalism is designed only to diffuse power by protecting the institutional integrity of the states. "Individual rights" is pictured as a value analytically separate from federalism. Federalism will be served by federal abstention; individual rights, by remedial action. In every case, the question is which of these competing considerations should be favored.

It is not misleading to describe the interest represented by Clarence Gideon as "individual rights," and his antagonist as the state, rather than the instrument of a particular political group. But when Southern Negroes and civil rights workers seek relief from intimidation, this approach misses the point, for what is really involved is an effort by one faction to exclude another from the political process. The im-

the head of national parties had been able to accomplish, the federal courts are gradually bringing to pass by the creation of an ever-broadening series of precedents. The episode records the working of an important principle of political science. When in the fullness of time a political question becomes justiciable, the problem of coercing states in a federal union loses its importance so far as that particular question is concerned. Until that time is reached, American experience suggests that what politicians can not readily achieve by the political techniques of compromise and pacific adjustment had better be left undone unless the tension of unadjusted controversy threatens to provoke conflicts fatal to the existence of the federal union itself.

Id. at 152.


89. See notes 9 and 87 supra and accompanying text.

90. FEDERALISM AND CIVIL RIGHTS 81.

portance of factions, which have no place in separate function theory, was central to Madison's model of the federal system. To Madison, federalism was a unified political process, in which the same factions compete for power in both state and federal governments. By ignoring the relevance of factions to the Southern problem, separate function theory produces a variety of empirical distortions. Its exponents underestimate the task of changing unconstitutional state policies, and exaggerate the political changes which would accompany any shift of power to federal institutions. They see no real alternatives between state self-improvement and federal occupation; any "incursion of remote federal authority" will cause "debilitation of local responsibility," and require indefinite expansion of the federal role.

Finally, by identifying political violence as a problem of "individual rights," separate function theory grossly understates the problem in the South. As Burke Marshall himself has complained:

92. Because the separate function model does not break the state into factions, it cannot picture maltreatment of a weak faction as the product of a dominant faction's monopolization of political power. Perceiving the state as a sort of classless collectivity, rather than an arena of warring factions, separate function theorists rest their hopes for the vindication of federal rights on unreal possibilities. They speak as if they expect the state to change its mind without coercion:

We are told that local authorities can not be relied upon for courageous and prompt action, that they often have personal or political reasons for refusing to prosecute. If it be significantly true that crimes against local law cannot be locally prosecuted, it is an ominous sign indeed. In any event, the cure is a reinvigoration of State responsibility.


Apparently seeking to spur such a "reinvigoration of State responsibility," executive officials have preferred traditional judicial methods, supplemented by imprecation and negotiation with local officials. See Federalism and Civil Rights 75, 78.

93. Equating federal administration with control by "national" interests, state administration with control by "local" interests, separate function theorists overlook the impact of local influence on the federal political and legal processes. In fact federal officials—in Congress, in state FBI and U.S. Attorney's offices, and on the district bench—are hardly unsympathetic to local mores or unresponsive to local pressures. See Wechsler, The Political Safeguards of Federalism, 54 Colum. L. Rev. 543 (1954); Feltsason, Fifty-Eight Lonely Men 3-30 (1961); Comment, Judicial Performance in the Fifth Circuit, 73 Yale L.J. 90 (1963). Some local influence is compelled by the Constitution, especially by the sixth amendment's tightly drawn requirement that federal criminal defendants be tried before a jury drawn from the district in which the crime was committed. U.S. Const. amend. VI. If Justice Department officials are to be believed, the power of Southern juries to nullify civil rights statutes deterred even their invocation for many years. Note, Discretion to Prosecute Federal Civil Rights Crimes, 74 Yale L.J. 1297, 1298-99 (1965); Shapiro, Limitations in Prosecuting Civil Rights Violations, 46 Cornell L.Q. 552, 546 (1961).

The problem is that legal concepts have developed in terms of individual personal rights, but the rights of masses, of an entire race, are affected all at once.\footnote{55}

Marshall thought these "legal concepts" prescribed the same remedies for civil rights violations as for personal injuries—namely, lawsuits, preferably brought by the victim himself.\footnote{56} As Assistant Attorney General for Civil Rights, Marshall regarded more extensive modes of intervention as out-of-bounds for a federal administrator. He needed a different theory, one which distinguished between deprivations of "individual rights" and of the rights of "an entire race," and which could adjust accordingly its prescriptions for federal policy.

This equation of isolated threats to "individual rights" with pervasive subversion of local democracy signifies more than a factual mistake. It reflects a failure to give an adequate account of the ultimate goals of federalism, and a consequent confusion about the implications of federalism for policy. By barring federal interference with local functions, separate function theorists believe they are promoting pluralism. They are correct in claiming pluralism as an objective of federalism. But, handicapped by a simplistic notion of political power, their analysis produces a mistaken recipe for pluralism. Moreover, they fail to see that democracy and individual liberty rank with pluralism as values which federal government is designed to serve.

By pluralism, separate function theorists correctly intend a political process in which power is scattered among all significant groups, organizations, and institutions.\footnote{57} But they jump to the false conclusion that promoting pluralism invariably requires restricting federal power.

Taken seriously, this conclusion would mean that pluralism is perpetuated by the mere existence of two isolated centers of governmental power. There would be no need for interaction between them. In particular the federal government would have no claim to virtue as a guardian of pluralism.\footnote{58} Its proper role would be confined to functions beyond the capability of the states. This limited conception of the utility of a central government was explicit in Thomas Jefferson's

\footnotesize{95. Federalism and Civil Rights 8.}  
\footnotesize{96. Id. at 50.}  
\footnotesize{97. See Dahl, A Preface to Democratic Theory 137 (1956). For a summary of the characteristics of pluralist thought, see Lindblom, The Intelligence of Democracy 12-16 (1964).}  
\footnotesize{98. Thomas, Felix Frankfurter: Scholar on the Bench 266 (1960); Henkin, supra note 91, at 71 (1964).}
writings. For him the Union was necessary only to conduct foreign relations.\footnote{99}

Justice Frankfurter's generation of theorists has embraced the expansion of federal domestic responsibility for economic matters.\footnote{100} They have, moreover, supported an adventurous role for the Supreme Court under the Reconstruction amendments.\footnote{101} But at times they echo Jefferson, characterizing the protection of political values as a minor and aberrational federal function. They approve of interference with local law enforcement, even in the form of Supreme Court review, only when state conduct "shocks the conscience."\footnote{102}

Contradicted by the federal judiciary's vital contemporary role in safeguarding basic political values, this Jeffersonian notion survives because of a popular misunderstanding of the relation between power and pluralist politics. Separate function theorists understand, by power, the total physical capability of a government. The most dangerous government is the "biggest" government, the one with the greatest physical capability, without regard to the objectives for which, the manner in which, and the people over whom, that capability can be brought to bear. But pluralism is not only concerned with the total capability of government, but also with a second dimension of power. This is the actual control exercised by government over the lives of citizens. From the standpoint of Alabama Negroes the local sheriff may be considerably more powerful, in this sense, than J. Edgar Hoover.

Federalist theory accounted for this second dimension of power. The Federalists' model emphasized the need for an active federal role to prevent accumulation and abuse of control over the lives of citizens. They recognized that local factions would stifle pluralism if federal remedies were not available to stop such factions from gaining and exploiting their monopolies of political power.\footnote{103}

In the Federalists' model, the federal government guaranteed local democracy as well as local pluralism. The link between the two values was representative institutions or "republican government" which the Federalists believed was essential to the functioning of pluralism.\footnote{104}
Moreover, popular participation in government was considered an end in itself. Even the theorists committed to the virtues of local power, Jefferson, Calhoun, and de Tocqueville, emphasized the scope decentralization allowed for participation by the citizenry in government, unlike current defenders of localism, who emphasize big government as a danger to pluralism.

By making no provision for an expanded federal role when local democracy is at stake, separate function theory reveals its cardinal defect. It produces a model which cannot even identify the objectives which underlie the American choice of a federal system.

IV. FEDERALISM AND CIVIL RIGHTS: A REFORMULATION

If the separate function model misrepresents the relationship between federalism and federal protection of civil rights, how should the conventional understanding be refined? The Federalists' theory offers a basic framework, although modern experience dictates some modifications.

Federalism aims to promote, not only pluralism, the dispersal of power among distinct units, but also democratic participation and individual liberty. As forecast by The Federalist, these values have been threatened less by expanding federal power than by small, unpolicing concentrations of power. With rare exceptions, federal institutions have been the only means of checking powerful local factions.

poor in economic or other forms of power but great in number protect their interests. Madison, as well as Jefferson, recognized this point. See Huntington, supra note 7, at 183-84.

105. CALHOUN, A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 215 (1852) (noting that local government reflects local needs better than policies made by federal institutions, an indirect defense of localism on democratic grounds); Huntington, supra note 7, at 175-76; 1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 93-100 (Vintage ed. 1960).

106. See note 90 supra.

107. See THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 25, 99-100 (1947). For typical instances of local governmental attacks on political and social minorities, see Hague v. CIO, 307 U.S. 496 (1939); Herndon v. Lowry, 301 U.S. 242 (1937); Yick Wo v. Hopkins, 118 U.S. 356 (1886). In United States v. Carolene Products Co., 304 U.S. 144, 152 n.4, the Court noted that the "insular" position of local minorities may require special federal judicial concern raising the question whether:

. . . legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . than are most other types of legislation. . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

The unique genius of white supremacists in the South has lain, not in their ability
While the Federalists recognized that the states were susceptible to factional domination, they did not provide instruments for curbing the abuses which have become characteristic of local politics. They made explicit provision in the Constitution only for the destruction of republican government. Perhaps they believed that representative institutions would ensure by themselves the survival of pluralism. Pluralist politics might guarantee individual liberty, on the theory that no faction would confer on government tyrannical power which might later be turned against it.\textsuperscript{108}

In fact, republican government in the states has rarely collapsed,\textsuperscript{109} but its persistence has not always guaranteed individual liberty. When important factions agree, individual liberty has been a frequent victim.\textsuperscript{110} Direct intervention has usually been unnecessary to protect individual and minority rights. Instead, federal judicial review has fulfilled the federal function of protecting basic political values, where local democracy has failed to do the job itself.\textsuperscript{111}

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\textsuperscript{108} In \textit{The Federalist} No. 51, Madison appears to accept the theory that liberty in the states will be substantially guaranteed by the existence of republican institutions, and that the requirement of federal protection should be limited to the emergency situation contemplated by the Guarantee Clause. Yet this view contradicts the implications of the principal fear discussed in \textit{The Federalist} No. 10—the likelihood of single-interest legislative majorities in the states. If the latter fear is a significant problem, then intermediate federal intervention would seem necessary to correct moderate abuses of power by majority factions.

\textsuperscript{109} The most prominent and, perhaps, the only example is the deep South between 1877 and 1965. However, malapportionment must be recognized as a widespread, if more subtle, invasion of the principles of the Guarantee Clause; similarly, state invasions of first amendment freedoms which have called forth especially vigilant judicial protection challenge the federal responsibility to protect local democracy. See note 88 supra.


It is fortunate that judicial review has been an effective check on local abuse, for it does not threaten the administrative bases of state power. Strong state institutions have become even more important since the eighteenth century, because of the unforeseen growth of federal power.

But the federal government is not the only significant threat to basic political values. Nor is judicial review the only tolerable form of federal intervention. Where local abuse cannot be locally corrected, federal institutions should take whatever action is required to restore the regime contemplated by the guarantee clause and the Reconstruction amendments.

By itself this analysis does not refute opponents of "direct intervention" in the South. It does, however, recast the problem. The question is not whether to favor "individual rights" and forget federalism, but how best to serve federalism. Abstention, by denying the benefits of pluralist democracy to the Negro population of the South, perpetuates an immediate, though localized, affront to the objectives of federalism. Intervention, so the argument runs, creates a potential but nationwide danger—the possibility of inefficiency, abuse and even tyranny, which might result from increased centralization of law enforcement responsibility.

Although we cannot disregard doubts about the future use of power employed in the South, we should not give them the credence which the case for abstention requires. Many expressions of such skepticism reflect an indiscriminate aversion to bigness. Preoccupied with the total capability of the federal government, separate function arguments assume that power is cumulative. But the political effects of federal action are not so simple. Power to aid the Southern Negro does not necessarily augment the government's power to coerce Midwestern businessmen, Northern welfare recipients, or Vietnamese Communists.

Opposition to intervention is also founded on more precise fears. Condemning federal law enforcement, separate function theorists argue that totalitarianism characteristically begins with centralization

112. See notes 48-50 supra and accompanying text.


114. See note 102 supra and accompanying text.

115. Unless one assumes that federal protection in turbulent Southern areas implies a large and permanent federal police force, it is difficult to see what sort of correlative dangers would be created by more effective federal action in the South.
of police power. They oppose "starting down the path that would lead inevitably to the creation of a national police force." They fear measures which might make local police subservient to the unchecked power of federal law enforcement agencies.

But the facts do not substantiate this fear. Many of the most effective forms of intervention involve little danger of a "national police force," for example, district court power to stop sham prosecutions against civil rights workers. Moreover, under present circumstances increased federal scrutiny should be one of the most effective ways of avoiding a cohesive national police power. Instead of disregarding violations of federal civil rights statutes in the interest of harmony, federal agencies will have to loosen their ties to local police. If, as is generally supposed, this "countervailing power" mechanism safeguards pluralism in other sectors, it should achieve the same result in law enforcement.

Finally, fears of federal surveillance are unjustified because the federal role need only be temporary. At present, federal intervention would be justified only to assure protection for those who seek to democratize Southern politics. When local officials are forced to respect the demands of organized Negro voters, the civil rights unit in the FBI can be disbanded.

Thus, where federal protection is necessary to enfranchise Negroes in the South, intervention is a positive instrument of federalism. Federalism may require restraint in the processing of individual constitutional claims. It may even require caution in combating regional resistance to a federal law hostile to all classes of people in the region. But the repression of an entire class in its first political effort

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121. The Federalists' emphasis on the need for full federal power to assure the supremacy of federal law rested on their conviction that intensive federal action would be infrequent, and, since it had to be the product of a joint decision by various competing factions, was unlikely to be sinister in its objectives. But they were unable to relate systematically their reasoning from the principle of federal supremacy to the political values which intervention was designed to serve. And, indeed, there is no reason why intervention should in all cases promote pluralism or democracy or individual liberty. It could, for example, be argued that these values were, if anything, frustrated by President Jackson's forceful measures to quash South Carolina's attempt to nullify the
does not justify such caution. Intervention to shelter the growth of pluralist democracy in the deep South promotes the objectives of federalism. The model contemplated by the framers of the original Constitution, as refined by the Reconstruction amendments, casts the federal government in precisely this role as guarantor of the integrity of the local political process.

V. THE SCOPE OF PROTECTION UNDER CURRENT LAW AND POLICY

The dictates of separate function theory affect three areas of controversy: (1) whether federal courts should ignore the rules of comity and grant relief from official harassment of civil rights activities; (2) whether the Department of Justice should make active use (a) of civil rights criminal and injunctive sanctions, and (b) of federal enforcement personnel, to control intimidation and, (3) whether the state action doctrine should continue to restrict the federal government's constitutional power to prevent private interference with Reconstruction amendment rights. As feared by separate function theorists, "inescapable pressures" from the "immediacy and urgency of the protest movement"\textsuperscript{122} have shaken the hold of their theory in each of these areas. But the changes of the past two years have not led to a reformulation of federalism theory. Consequently, courts and administrators have not developed a consistent policy toward civil rights enforcement.

A. Judicial Control of Official Harassment

1. General Harassment and Threatened Prosecutions. Until the spring of 1965, federal judicial restraint sheltered the favored instrument of political intimidation in the South—the sham criminal prosecution.\textsuperscript{123} But in \textit{Dombrowski v. Pfister} a five-man Supreme Court majority rejected the view that comity forbids all prior restraint of state criminal proceedings.\textsuperscript{124}

\textit{Dombrowski} was a civil action brought by a Louisiana civil rights


group, asking injunctive relief from threatened prosecution under a state anti-subversive statute. Petitioners alleged, first, that the prosecution was a sham intended solely to discourage civil rights activities and, second, that the statute was unconstitutionally vague.125 Reversing dismissal of the suit by a three-judge district court,126 the Supreme Court held that proof that the prosecution was instituted in “bad faith” would justify injunctive relief.127 Moreover, it held the abstention doctrine inapplicable to all free speech cases involving statutes void on their face for vagueness.128 All future prosecutions under the vague Louisiana statute were enjoined pending a limiting construction in a declaratory judgment action in state courts.129

The Dombrowski majority broke its habit of automatic deference. But neither the vagueness nor the bad faith ground for the injunction fits the distinctive features of the problem—systematic harassment of a political minority. Vague statutes are not the sole instrument of harassment. Local officials bent on crushing an opposition do not need vague statutes; investigation, arrest, brutality, and prosecution under perfectly precise statutes can serve them just as well.130

Because the Court made vagueness on independent ground for pretrial relief, its opinion authorized district courts to disrupt state procedures unnecessarily. Injunctions are not justified merely to halt an isolated prosecution under a questionable statute; Supreme Court review adequately protects the defendant and possible subjects of future regulation. Similarly, if the abstention doctrine makes any sense at all,131 it should be applied in individual cases free from overtones of harassment.132

The Court apparently recognized that, absent the “bad faith” of

125. 380 U.S. at 482.
127. 380 U.S. at 490.
128. Id. at 489-91.
129. Id. at 491.
130. To cope with such situations, the Court has invented the notion that a statute can be “vague as applied”—i.e., not vague but applied by state officials to conduct not covered by its terms. See, e.g., Cox v. Louisiana, 379 U.S. 536, 545-51 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963). The vague as applied doctrine covers cases of sham prosecutions which cannot be reached by the “no evidence” rule of Thompson v. Louisville, 362 U.S. 199 (1960).
131. See note 29 supra and accompanying text.
132. This rule should apply at least in instances where a single case will produce a definitive state court construction of the statute, which will either be sufficiently narrow to withstand appeal to the Supreme Court or will, hence, be rejected by the Court. This analysis would single out cases like Baggett v. Bullitt, 377 U.S. 360 (1964) as instances justifying direct intervention. See Mr. Justice Harlan’s dissent in Dombrowski, 380 U.S. at 500.
Louisiana officials in Dombrowski, intervention against unconstitutional statutes may be unwarranted. In Wells v. Reynolds, decided in October, 1965, a 6-3 majority affirmed a district court's denial of injunctive relief from prosecution under one of Georgia's anti-insurrection laws.\textsuperscript{133} The statute was substantially identical to one struck down in 1963 by Chief Judge Tuttle of the Fifth Circuit in ordering the pre-trial release of civil rights workers arrested in Americus, Georgia.\textsuperscript{134} Petitioner Wells was likewise a civil rights leader. But his case arose out of a near-riot in Albany, Georgia, rather than the passive demonstration involved in the Americus controversy.\textsuperscript{135} His arrest was not immediately preceded by investigations designed solely to harass, as was the suit in Dombrowski.

By denying relief on a record devoid of evidence of bad faith, the Court shortened the reach of Dombrowski. The Court did not specify, however, what qualifications it intended to introduce, for neither the majority nor the dissenting justices delivered opinions.\textsuperscript{136}

\textsuperscript{133} 382 U.S. 39 (1965), affirming, 238 F. Supp. 779 (M.D. Ga. 1965). The District Court's decision came down before Dombrowski was decided.

\textsuperscript{134} Aelony v. Pace, 8 Race Rel. L. Rep. 1355 (M.D. Ga. 1963).

\textsuperscript{135} In Aelony, defendants were arrested while kneeling in prayer before the Americus, Georgia jail. Charged with inciting insurrection, a capital offense, they were held without bond, until Chief Judge Tuttle ordered their release, five months after their arrest. 8 Race Rel. Rep. 1355. In Wells, petitioner was arrested for circulation of fliers announcing a meeting to protest the shooting of a Negro by a local police officer. The fliers were inflammatory, accusing the police of murder in this and other instances. The meeting led to a march on City Hall, during which the district court found that bottles and bricks were thrown at business establishments passed en route. After the petitioner, leader of the march, left to carry his protest message to city police officials, the crowd turned to deliberate vandalism against several small white-owned shops. Hearing by telephone of the riot, police arrested the petitioner while in conference with him. 238 F. Supp. at 782-83.

\textsuperscript{136} It is therefore not definite that absence of bad faith was perceived by the majority to be the crucial feature distinguishing Wells from Dombrowski. They may have
The Court's confusion was more apparent in the second federal-state injunction situation to come before it after Dombrowski. The case was Cameron v. Johnson, a prosecution of civil rights demonstrators under Mississippi's recently enacted anti-picketing statute. Since the statute had been narrowly drawn to test the limits of recent Supreme Court rulings, the case met neither of Dombrowski's prerequisites for injunction. The statute was not vague on its face. Further, since the constitutionality of their conduct was a close question, defendants could not show that the particular prosecution was instituted in bad faith. State officials could not be certain under such circumstances that the defendant's conduct was within the scope of the first amendment. Hence, they would not be deliberately violating federal rights by starting a prosecution which they knew in advance would be reversed.

Apparently recognizing that Dombrowski required dismissal in Cameron, but wishing nevertheless to grant relief, the Court responded with troubled obscurity. By a 5-4 margin, it reversed the district court's denial of relief. The majority did not refer to the lower court's validation of the statute's terms, nor to its findings of fact. Instead, in what the dissent termed a "cryptic" per curiam paragraph, the case was remanded. The district court was directed to reconsider its dismissal "in light of criteria set forth" in Dombrowski. Dissent-
ing. Justices Black, Harlan, Stewart, and White condemned the majority for backing away from resolution of issues of "such great importance." The petition for review raised unambiguous questions of law, and the dissenters saw no excuse for the majority's unwillingness to resolve them for itself.

As the Cameron majority appeared to believe, Dombrowski forbids intervention in some cases where it is needed. Wherever, as in Cameron, valid statutes are invoked against acts just within constitutional limits, Dombrowski would keep federal district judges from granting a pretrial hearing. It would bar intervention even in areas where harassment is rampant and state court delay is predictable. But in such cases eventual reversal by the Supreme Court is an illusory remedy for political minorities. Three years of criminal litigation will hamstring a registration drive.

The Court can master its difficulties if it adheres more closely to the Madisonian logic implicit in Dombrowski's result. Statutory vagueness should be eliminated as an independent ground for intervention. The bad faith standard should be broadened to require consideration of the general pattern of police conduct toward the complaining group. Where there is substantial evidence of political harassment, federal courts must in effect censor local regulation of the threatened group. Such circumstances justify displacement of state courts as fact-finders and as immediate checks on law enforcement officials. Given a history of harassment, federal courts should be empowered to enjoin any prosecution which is neither groundless nor based on constitutionally protected conduct. To cope with the emergency, the courts must invalidate or restrict the range of statutes which lend themselves to abuse, like the anti-subversive statute disposed of in Dombrowski, or the anti-insurrection statute left standing in Wells.

142. Id. at 743. (Black, J.). 143. Id. at 747-48, 759. 144. See note 34 supra and accompanying text. 145. The suggested approach would produce less frequent disruption of state criminal administration than that proposed by Professor Amsterdam. Amsterdam would have rules of comity suspended whenever a state criminal defendant could make out a colorable claim that the conduct which the state labels criminal is a protected activity under the first and fourteenth amendments. He would allow direct intervention, without a showing of a pattern of harassment directed at the defendant prior to the action. Amsterdam, supra note 123, at 800. (Amsterdam's argument in the cited article goes only to removal and habeas corpus devices for aborting sham prosecutions, discussed at notes 156-58 infra, but his logic would extend to injunctive remedies also.) This proposal is based on his assumption that all state courts, not just those of the deep South, are less likely than federal courts to protect the federal rights of political minorities. Id. at 836-38, 909-10. For this assumption Professor Amsterdam offers no proof, and, indeed, all his examples, especially the scenario at the beginning of the piece from which the argu-
2. Pending Prosecutions. Proof of harassment should permit injunction of pending as well as future prosecutions. Victims of political persecution should not be denied prompt relief, simply because the state files its indictments before their petition reaches the federal court.\(^\text{146}\) But Section 2283 of Title 18 of the federal code appears to dictate otherwise. The statute bans injunctions of state judicial proceedings except when "expressly" permitted by act of Congress.\(^\text{147}\) Cameron involved a state prosecution which had been formally initiated before the defendants sought a federal injunction.\(^\text{148}\) Petitioners argued that 42 U.S.C. § 1983, the section on which their claims of unconstitutional state action was based, constitutes a statutory exception to § 2283.\(^\text{149}\)

Although one circuit court decision supports this claim,\(^\text{150}\) the weight of authority is otherwise.\(^\text{151}\) Read literally, § 1983 does not "expressly" except itself from the sweep of § 2283.\(^\text{152}\) Moreover, the courts may have been inhibited by the breadth of § 1983, which grants relief for any violation "under color of law" for any federal right. Exempting all of § 1983 from the anti-injunction statute would create a massive exception to the principle of comity underlying the statute.

Nevertheless, limitation of § 2283 need not await an act of Congress. The majority in Cameron v. Johnson could have created a judicial

\(^{146}\) The artificiality of the distinction between pending and threatened prosecutions is illustrated by comparing the Wells v. Reynolds situation, supra notes 133-36, with that presented by Cameron v. Johnson, supra notes 137-39. Although in Wells, defendant had been arrested, charged, held in jail for a time, then released on $2,500 bail, his case was not a pending prosecution covered by § 2283, because no indictment had been filed. Cameron differed from Wells only in that it was a pending prosecution, to which, under present law, § 2283 attaches, banning federal injunctive interference.

\(^{147}\) The statute provides:

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


\(^{148}\) 381 U.S. at 746-47. See note 146 supra.


\(^{150}\) Cooper v. Hutchinson, 184 F.2d 119, 124 (3d Cir. 1950).


\(^{152}\) See Note, Developments in the Law—Injunctions, 78 HARV. L. REV. 994, 1050-51 (1965).
exception to the reach of § 2283 without attempting to read an "express" authorization into the terms of § 1983. Although § 2283 appears absolute by its terms, it has always been regarded as merely declaratory of judicially formulated principles of comity. Recognizing the section's basis in comity doctrine, Judge Sobeloff in a recent Fourth Circuit case, suggested its provisions were inapplicable under the "special circumstances" created by repression of civil rights activities in Danville, Virginia. These "special circumstances" parallel the bad faith conduct recognized in Dombrowski as making comity requirements inapplicable. Dombrowski should be held to require adoption of Judge Sobeloff's similarly inspired exception to § 2283.

Dombrowski should also lead to acceptance of an alternative remedy for sham prosecutions fashioned recently by the Fifth Circuit. The appellate courts of the deep South have expanded the scope of the civil rights removal statute, 28 U.S.C. § 1443, to allow removal of any state prosecution initiated in reprisal for the defendant's political activities. The considerations of comity motivating early restrictive

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153. See Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 367-78 (1930). Indeed, the judicially drawn distinction between "pending" and "threatened" or future proceedings is itself an exception to the reach of the anti-injunction statute which has no basis in its express language.


155. See note 127 supra and accompanying text.

156. 28 U.S.C. § 1443 (1964). The statute's terms provide that:

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

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

(2) For 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.

Civil rights lawyers have argued without success, in litigation and in print, that subsection (2) covers not only federal law enforcement officials, but also private persons exercising federal rights. Amsterdam, supra note 123. It appears that the courts prefer to handle the problem of aborting state prosecutions under the more manageable provisions of § 1443(1).

157. Virginia v. Rives, 100 U.S. 313 (1880) and Kentucky v. Powers, 201 U.S. 1 (1906) held § 1443(1) applicable only to cases where denial of equal rights was compelled by state statutory provisions. See note 28 supra. In Rachel v. Georgia, 342 F.2d 336 (5th Cir. 1965), Chief Judge Tuttle argued that this holding was merely ancillary to a major premise that the denial of equal rights had to occur before trial. Therefore, he held, petitioners in Rachel were entitled to removal. Petitioners were prosecuted under state trespass statutes while sitting in at a restaurant subsequently covered by Title II of the
decisions under the removal statute\textsuperscript{158} are inappropriate under conditions of political harassment, as they were in \textit{Dombrowski} itself.

\textbf{B. The Department of Justice as Prosecutor and Policeman}

In the hands of vigilant lower courts, direct judicial remedies for unconstitutional prosecutions have often halted official harassment.\textsuperscript{160} Nevertheless, the courts alone cannot make civil rights activity safe. Judicial orders are effective only when obeyed; if they are disobeyed, as must be expected where federal law upsets local mores, the federal executive must enforce them.\textsuperscript{160} More important, the judiciary cannot act alone against private violence or police brutality.

But like the courts, the Department of Justice has moved in fits and starts toward assumption of its responsibilities in the South. In general the Department has been more willing to prosecute civil rights offenses than to impose direct prior controls through injunctions or policing activity. And even consistent prosecution of civil rights crimes has been a recent development. As late as 1964, in his review for a Columbia University audience of executive civil rights policy, Burke Marshall did not refer once to the availability of 18 U.S.C. \textsection{}241 and 242,\textsuperscript{101} criminal statutes passed by the Radicals in 1870-71.\textsuperscript{102} Officials justified

\textit{Civil Rights Act of 1964. The mere fact of prosecution and trial, regardless of its outcome, denied them equal rights guaranteed by the act as construed in Hamm v. City of Rock Hill, 379 U.S. 306 (1964).}

This rule was subsequently applied and then extended to include all prosecutions instituted solely to discourage the exercise of federal rights. Cooper v. Alabama, 353 F.2d 729; Rogers v. Tuscaloosa, 353 F.2d 78; Carmichael v. City of Greenwood, 352 F.2d 80; McNair v. City of Drew, 351 F.2d 498; Wechsler v. County of Gadsden, 351 F.2d 311; Cox v. Louisiana, 348 F.2d 750; Peacock v. City of Greenwood, 347 F.2d 678, \textit{cert. granted}, 36 Sup. Ct. 532 (1966); Robinson v. Florida, 345 F.2d 153. (All 5th Cir. 1963). These cases have brought harassment under subsection (i) by holding that "bad faith" prosecution violates the Equal Protection Clause of the fourteenth amendment, a "law providing for equal rights." Judge Johnson of the Middle District of Alabama has used the removal statute to make his court a fact-finder in the first instance in civil rights prosecutions. \textit{Compare} Forman v. Montgomery, 245 F. Supp. 17 with McMeans v. Mayor's Court, 247 F. Supp. 606 (both M.D. Ala. 1965).


159. For recent reported decisions in which the removal statute has been invoked as a remedy for sham prosecution, see note 157 \textit{supra}. Many other instances of successful resort to removal have not, of course, been reported, as they have not reached the appellate level.

160. Judge Johnson of the middle district of Alabama has often ordered the appearance of the Department of Justice in controversial cases to assure that his rulings would be enforced. Interview with federal official, Washington, D.C., Feb. 21, 1966.


their hands-off policy by stressing local responsibility for law enforcement.\(^{163}\) They also spoke of the hostility of Southern juries, and argued that losing cases would breed disrespect for federal law.\(^{164}\)

National outrage over civil rights killings in the summer of 1964 forced the Department to assume some enforcement responsibility. Since then, most serious racial crimes have been prosecuted.\(^{165}\) To avoid hostile grand juries, U.S. attorneys have been instructed to proceed by information under §242, which treats official interference with federal rights as a misdemeanor.\(^{166}\) John Doar, now Assistant Attorney General for Civil Rights, has lent his ability and prestige to the prosecution of major cases, personally obtaining the conviction of Klansmen charged with the Alabama slaying of Mrs. Viola Liuzzo.\(^{167}\)

Although the Justice Department has rediscovered the criminal statutes, it still feels bound by Burke Marshall's maxim, "[T]here is nothing to do unless something happens."\(^{168}\) This commandment underlies the Department's reluctance to request injunctions against local enforcement officials.\(^{169}\) Only widespread publicity, as in Selma

\(^{163}\) See generally FEDERALISM AND CIVIL RIGHTS.

\(^{164}\) Note, Discretion toProsecute Federal Civil Rights Crimes, 74 YALE L.J. 1297, 1298 (1965). Critics termed the argument unpersuasive. Id. at 1299-99. It was also not entirely accurate. Under President Truman, a more active Department of Justice was able to obtain convictions in the South with §242. Koehler v. United States, 189 F.2d 711 (5th Cir. 1951), cert. denied, 342 U.S. 832 (1951); Lynch v. United States, 189 F.2d 476 (5th Cir.), cert. denied, 342 U.S. 831 (1951); Crews v. United States, 160 F.2d 746 (5th Cir. 1947).

Another problem widely believed to be a major obstacle to effective enforcement was also a chimera. This was the supposed difficulty of proving specific intent in accordance with the requirements of Screws v. United States, 325 U.S. 91 (1945). Despite the Screws test, Southern juries apparently, at least in some cases, returned convictions. According to an embittered footnote in Justice Frankfurter's opinion in Monroe v. Pape, some Southern federal trial judges sympathetic to the objectives of the statute interpreted the rule in Screws somewhat liberally, to aid enforcement. 365 U.S. 167, 207 (1961). Once the Department decided to reinvigorate the statutes in 1965, convictions proved obtainable.

\(^{165}\) The Department has prosecuted the notorious Schwerner-Goodman-Chaney slaying in Philadelphia, Mississippi, during the summer of 1964. United States v. Price, 86 Sup. Ct. 1152 (1966); the Klansmen responsible for the death of Lemuel Penn in Georgia during the same summer, United States v. Guest, 86 Sup. Ct. 1170 (1966); the Klansmen who killed Mrs. Viola Liuzzo on a highway near Selma, Alabama, in 1965, N.Y. Times, Dec. 4, 1965, p. 1, col. 4; and those responsible for the firebomb slaying of a Hattiesburg, Mississippi, druggist and incipient political leader of local Negroes, id., March 29, 1966, p. 1, col. 6.

\(^{166}\) See LAW ENFORCEMENT 116.


\(^{169}\) FEDERALISM AND CIVIL RIGHTS 81.
and Bogalusa, has prompted the Department to seek broad prohibitions of local police abuses.\textsuperscript{170}

Even less has the Justice Department been willing to calm volatile Southern communities by sending federal enforcement personnel. In the early nineteen sixties, Southern civil rights organizations first broadcast their demand for a "federal presence."\textsuperscript{171} The Civil Rights Commission continues to press the Department for direct federal protection.\textsuperscript{172} To be sure, some significant changes have occurred. The Federal Bureau of Investigation now has an office in Jackson, eliminating Mississippi's status as the only state without an FBI office.\textsuperscript{173} The Bureau has begun to purge its Southern ranks of racially prejudiced agents.\textsuperscript{174} It investigates terrorist groups with the thoroughness formerly reserved for organized crime and subversive activities. But, though a federal observer was in the car driven by the killer of Mrs. Liuzzo, neither he nor any other FBI agent was—or is—authorized to take preventive action or to make an on-the-spot arrest.\textsuperscript{176}

Defending this purely reactive posture, Justice Department officials reject the principle that Justice Bradley considered "incontrovertible" during Reconstruction—that the federal government may use all means at its command to secure enjoyment of federal civil rights in the South.\textsuperscript{176} To justify their belief that federal peace-keeping activities threaten federalism, officials have termed such intervention unauthorized by Constitution or statute—in the teeth of plainly contrary laws and cases.\textsuperscript{178} They equate the demand for a federal presence with

\textsuperscript{170} United States v. U.S. Klans, 194 F. Supp. 897 (M.D. Ala. 1961) (the freedom riders crisis); Williams v. Wallace, 240 F. Supp. 100 (N.D. Ala. 1965) (Selma); United States v. Sampson, Civil No. GC 6449 (N.D. Miss., Sept. 2, 1964). But even in these cases, the Department delayed even the limited mode of intervention of seeking injunctive relief until it was unavoidable. See \textit{Federalism and Civil Rights} \textit{64-65; Law Enforcement} \textit{165-66}.

\textsuperscript{171} \textit{Southern Regional Council, Law Enforcement in Mississippi} \textit{22-23} (1965).

\textsuperscript{172} \textit{Law Enforcement} \textit{180-81}.

\textsuperscript{173} Interview with federal official, Washington, D.C., Feb. 21, 1966.

\textsuperscript{174} \textit{Ibid}.


\textsuperscript{176} \textit{Ex Parte Siebold}, 100 U.S. 371, 394-95 (1880). See notes 68-73 supra and accompanying text.

\textsuperscript{177} See, \textit{e.g.}, Attorney General Kennedy's remarks shortly after the Philadelphia, Mississippi slaying in June 1964, in \textit{N.Y. Times}, June 25, 1964, p. 18, col. 1.

\textsuperscript{178} Authority for any form of appropriate executive action to cope with mass deprivations of civil rights is manifestly granted by 10 U.S.C. § 333 (1964), originally enacted by the Radical Republicans, 17 Stat. 14 (1871):

The President, by using the militia or the armed forces, or both, or by any other
requests for a national police force, although proposals for the active use of federal enforcement personnel are intended to apply only to selected areas. While conspicuous investigative and policing activity would not stop every maniac from firing into sharecroppers' cabins, at least some would think twice. Organized, officially sponsored terror would surely be reduced. As for the Department's argument that intervention would undercut local efforts to preserve order, the contrary is more likely—a federal presence would strengthen the hand of the local forces of law and order.

C. Federalism, Federal Supremacy, and the State Action Doctrine

Separate function theory has influenced federal policy in the South mainly through discretionary rules and policies. At one significant point, however, the notion that federalism requires state administrative control of tort and criminal matters has entered constitutional doctrine. This is the state action requirement, which until March, 1966, defined the reach of federal power to enforce the Reconstruction amendments. The state action doctrine denied Congress power to legislate against interference by private persons with the exercise or enjoyment of Reconstruction amendment rights. Section 241, enacted

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means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

Even without explicit statutory authority, it would seem clear that the President has the power, if not the duty, to do whatever is reasonably necessary to enforce federal law, including the application of federal force or the invocation of federal injunctive prohibitions. Ex Parte Siebold, 100 U.S. 371, 394-95 (1880); In re Debs, 158 U.S. 564, 582 (1895). Cf. In re Neagle, 135 U.S. 1, 59 (1890).

Critics of Justice Department policy have repeatedly noted the transparency of official denials of power to act. LAW ENFORCEMENT 144-66; Burns, supra note 168, at 235-40.

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180. LAW ENFORCEMENT 180-81; SOUTHERN REGIONAL COUNCIL, op. cit. supra note 171, at 36-38.
181. LAW ENFORCEMENT 175.
as part of the Ku Klux Act of 1870, exceeds the constitutional limits set by the state action doctrine since it prescribes all conspiracies, private as well as public, to impair the exercise of federal rights. By initiating prosecution of private racial offenses under § 241, the Justice Department gave the Supreme Court occasion to re-examine its commitment to "state action." Six justices took the opportunity in United States v. Guest, a prosecution of Georgia Klansmen, to affirm congressional power over private conduct under the amendments.

The Court's decision must have surprised many commentators, for recent wrangling over the scope of the doctrine has seldom hinted any doubt that state action was an immutable boundary of power under the amendments. The state action debate has never acknowledged its theoretical source: a clash between the logic of federal legal supremacy and separate function notions about federalism.

Broadly speaking, four approaches have been taken. The "pure" separate function position was adopted by Justices Frankfurter and Jackson, in portions of their opinions in Screws v. United States and Monroe v. Pape. They argued that state action included only action sanctioned by the authoritative institutions of state government. Civil rights offenses which were illegal under state law could not be made federal crimes.

185. The statute reads:
   If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
   If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
   They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.
187. See note 167 supra.
188. See notes 208-09 infra and accompanying text.
Although the Supreme Court rejected this restrictive conception of state action, it held fast to the premise that state action defined the limits of power to enforce the amendments. The Supreme Court adopted a second understanding of state action, which includes any individual official's conduct, whether or not his acts were prohibited by state law. The Court's reluctance to extend federal power to purely private conduct reflected acquiescence in the Frankfurter-Jackson notion that federalism assigned social control to the states.

A few commentators offered a third approach, designed to reconcile the Southern Negro's need for federal protection from private violence with the assumed commands of federalism. This was the "breakdown" theory of state action. Federal laws against private action would be allowed only where state protection of civil rights was inadequate or deliberately withheld. During Reconstruction the Supreme Court in effect adopted the breakdown approach. Federal jurisdiction over private conduct was confined to the South—where breakdown conditions had occurred—by a more liberal construction of the fifteenth amendment than the fourteenth. The breakdown theory thus satisfies the minimum requirements of Madisonian federalism; it permits federal action wherever state law cannot prevent political violence.

But even the breakdown analysis of state action does not go as far as the terms of § 241. The Radical Republicans who enacted this across-the-board proscription of private interference with federal rights accepted the fourth, and most liberal, construction of congressional enforcement power. They relied on Justice Story's implied power doctrine, a pure federal supremacy approach. To ensure the supremacy of federal law, Justice Story held in Prigg v. Pennsylvania, Congress has implied power to secure the enjoyment of any constitutional rights by proscribing all forms of interference. It could be argued that Justice Story's rule should not apply to Reconstruction amendment

194. Cf. note 49 supra.
195. Frantz, supra note 188 at 1359-61; Harris, The Quest for Equality 53 (1960).
196. See notes 72-74 supra and accompanying text.
197. See notes 78-79 supra and accompanying text.
198. See note 66 supra and accompanying text.
199. See note 65 supra and accompanying text.
rights, because the amendments contain a limited grant of enforcement power. The Radicals, however, interpreted the enforcement clause as coinciding with, rather than limiting, the implied power doctrine previously applied to other constitutional rights.

In *United States v. Guest*, the Supreme Court seems to have accepted the Radicals' construction of the enforcement sections of the fourteenth and fifteenth amendments. In *Guest*, the defendants, Georgia Ku Klux Klansmen, were alleged to have conspired to intimidate Negroes in the exercise of a number of specified federal rights, among which was the right to equal protection created by the fourteenth amendment.

200. Any rational means for reaching a constitutional objective is within Congress' power under Chief Justice Marshall's construction of the necessary and proper clause in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). When in *Prigg v. Pennsylvania*, Justice Story held Congress had implied power to secure the enjoyment of any constitutional right, the means open to Congress under the *Prigg* doctrine were subject only to the *McCulloch* definition of the boundaries of necessary and proper power. However, section five of the fourteenth amendment states explicitly that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." "Appropriate" could be read to confer more limited, more reviewable power than "necessary and proper." This limiting construction of section five is strengthened by the legislative history of the fourteenth amendment. A first version of the amendment introduced in 1865 by the Joint Committee on Reconstruction explicitly conferred necessary and proper power on Congress; it read: "Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. IV, § 2); and to all persons in the several States equal protection in the rights of life, liberty and property." The draft was eventually called back into the Committee, when its Radical sponsors realized that it had no chance to gain the 2/3 vote necessary for passage. See *James, The Framing of the Fourteenth Amendment* 50 (1956). The proposed amendment then went through a series of revisions, each one increasingly vague, with the final version appearing with the declaratory and enforcement sections separated. *Id.* at 82-83. Professor Bickel has interpreted this maneuvering to mean that "Congress was not to have unlimited discretion and it was not to have the leeway represented by the 'necessary and proper' power." Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 60 (1955).

This legislative history has never figured in judicial interpretations of the terminology finally settled on by the thirty-ninth Congress. After the Radicals in 1870-71 passed legislation which could be permitted only by equating "appropriate" with "necessary and proper," the Supreme Court's decisions upsetting Reconstruction laws were based on the Court's analysis of the requirements of federalism. See *Note, The Strange Career of "State Action" under the Fifteenth Amendment*, 74 Yale L.J. 1448, 1449-54 (1965).

The Court's use of "appropriate" as a vehicle for adjusting federal-state relations seems consistent with the imprecise intentions of the framers of the amendment. See Bickel, *supra*, at 60-62. Changed conditions justify the present Court's readjustment. See notes 212-14 infra and accompanying text.


203. Three rights were allegedly threatened by the defendant's action: (l) the right
Mr. Justice Stewart's opinion for the Court avoided re-examination of the state action doctrine; joined by Justices Harlan and White, he construed the pleadings to include an allegation that state action was involved in the defendant's conspiracy. However, Mr. Justice Brennan, joined by Mr. Chief Justice Warren and Mr. Justice Douglas, felt compelled to face the constitutional question. They accepted the Radicals' theory of federal power to enforce the amendments:

Although the Fourteenth Amendment itself, according to established doctrine, "speaks to the State or to those acting under the color of its authority," legislation protecting rights created by the Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, § 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection.

Justices Clark, Fortas, and Black accepted Justice Stewart's construction of the indictment, but in dicta, stated their belief that "the specific language of § 5, the enforcement section of the amendment empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." Although their summary statement might merely indicate acceptance of the breakdown theory, it seems more likely that Clark, Fortas, and Black share Mr. Justice Brennan's willingness to resurrect the Radicals' interpretation.

The Court might have met the federal government's responsibility to protect local minorities by simply adopting the breakdown approach. Nevertheless, it was justified in approving unlimited federal jurisdiction over private interference with the amendments. It is

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204. 80 Sup. Ct. at 1177.
205. Id. at 1191.
206. Id. at 1180.
207. Had they differed with the construction elaborated by Mr. Justice Brennan, it would seem that they would have made some indication of the nature of their disagreement, especially since the tacit purpose of their remarks on the question was to provide guidance for Congress in drafting new civil rights legislation. Cf. Mr. Justice Harlan's disapproving footnote. 86 Sup. Ct. at 1180 n.1.
208. See notes 78-79 supra and accompanying text.
209. It is, however, hardly true, as asserted by Mr. Justice Clark, that this conclusion
true that, outside the South, state tort and criminal law generally give adequate protection against violence aimed at impairing the exercise of Reconstruction amendment rights. But Congress might reasonably decide that federal rights could not be safely secured unless the Justice Department held continuing authority to prosecute violent interference, wherever and whenever such intimidation appeared. This judgment would rest on Congress' fundamental responsibility to ensure the supremacy of federal law. Only the most compelling reasons could justify judicial veto of Congress's decision to overlap state law enforcement responsibility.

At present, compelling reasons for such restrictions on congressional power do not exist. The separate function fear of federal executive supervision of local police officials under civil rights statutes, however valid, is irrelevant to the question of extending enforcement jurisdiction to private civil rights offenses. More important, it is too late to throw up one's hands at the suggestion of a federal criminal law which overlaps state legislation. The FBI and United States attorneys are now deeply involved in the war against bank robberies, pimping, obscenity, narcotics, and gambling. Authority to prosecute private civil rights crimes, involves only a minimal erosion of the states' remaining exclusive domain. Moreover, modern expansion of the

can be wrung from "the specific language" of section 5. 80 Sup. Ct. at 1180. See note 200 supra and accompanying text.


211. See notes 199-201 supra and accompanying text. The differences between "appropriate" and "necessary and proper," if they exist, concern only what means Congress may use to secure federal supremacy; they do not alter the ultimate objective of enforcement—the integrity of the Supremacy Clause.

212. See notes 116-18 supra and accompanying text.


218. Ironically, the same New York Times which reported the first modern conviction under 18 U.S.C. § 241, Assistant Attorney General Doar's triumph in the Liuzzo killing, also reported that a violator of the federal bank robbery statute had been sentenced to death. N.Y. Times, Dec. 4, 1965, p. 1, col. 1. For reasons never articulated, the qualms about federal criminal jurisdiction voiced whenever civil rights enforcement is under consideration, have never inhibited courts and commentators when discussing other activities of the Criminal Division of the Justice Department, which have in fact eroded much more than civil rights criminal statutes ever will the states' monopoly of responsibility
due process clause has undermined the doctrinal foundation for the post-Civil War Court's original decision to limit fourteenth amendment enforcement power to "state action." Congress had originally intended the privileges and immunities clause, not the due process clause, to be the vehicle through which fundamental rights would be protected from state as well as federal deprivation. In emasculating the privileges and immunities clause, the Court aimed to prevent federal interference with state law enforcement institutions, not only by federal criminal law, but by Supreme Court review as well. The Court wished to avoid a construction which would make it:

a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights . . . .

Not sharing this aversion to Supreme Court review under the amendments, the modern Supreme Court has used the bizarre doctrine of "substantive due process" to sidestep the nineteenth century Court's construction of the privileges and immunities clause. Since the Court has granted citizens a broad array of fourteenth amendment rights, it should be prepared to secure their enjoyment by permitting Congress and the executive to prevent all forms of interference. The state action doctrine, which drew its strength from obsolete qualms about federal law enforcement responsibility, should no longer override the claim of federal supremacy.


220. The framers did not "intend" to incorporate the first eight amendments per se, but only those rights which are "fundamental." See generally Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights—the Original Understanding, 2 STAN. L. REV. 5 (1949); Crosskey, Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority, 22 U. CHI. L. REV. 1 (1954). The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 80-81 (1873), cursorily dismissed the claim that the equal protection or due process clauses could serve as well as the privileges and immunities clause as bases for incorporating basic guarantees against state action into the amendment.

221. The Slaughterhouse Cases, supra note 220. See 2 Warren, THE SUPREME COURT IN UNITED STATES HISTORY 5592 (1922).

222. The Slaughterhouse Cases, supra note 220, at 78.

223. The phrase is a contradiction in terms.

Postscript: The Removal Cases—An Unexpected Regression

When it was decided in April 1965, Dombrowski v. Pfister seemed to herald a radical expansion of federal protection for embattled local minorities. But barely one year later the Supreme Court reneged. On June 20, 1966, as this Comment was going to press, a 5-4 majority reversed the decision of the Fifth Circuit Court of Appeals in Peacock v. City of Greenwood. The Fifth Circuit had reinterpreted the civil rights removal statute, to permit removal to a federal district court of any state prosecution initiated solely to obstruct civil rights activity. Reversing, the Supreme Court reaffirmed nineteenth century cases which confined removal to state trials prejudiced by a statute discriminatory on its face. Removal is thus unavailable to the civil rights worker harassed by charges of unlawful assembly, sedition, or lascivious carriage—characteristic guises of sham prosecutions in the South.

The Court, following the separate function faith, counts on an independent state judiciary to teach itself respect for federal rights and then call a halt to police abuses. But this independent judiciary

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228. 347 F.2d 679, 684. See note 157 supra. Defendants in Peacock also advanced two other claims. They argued that § 1443(2) supported removal under the first and fourteenth amendments, a contention rejected both by the Supreme Court and the Court of Appeals. 34 U.S.L. WEEK 4572, 4573. They also argued that § 1443(1) dictated removal when defendants could not obtain a fair trial in the state court in which their case was pending, when a literal reading of the subsection, id. at 4577, a claim likewise ignored by the Circuit Court. 347 F.2d at 684.
229. 34 U.S.L. WEEK at 4579. The leading cases were Kentucky v. Powers, 201 U.S. 1 (1906); Virginia v. Rives, 100 U.S. 313 (1880). In a companion case to Peacock, Georgia v. Rachel, 34 U.S.L. Week 4563, the Court unanimously opened the Rives-Powers barrier just a crack. It allowed removal where sit-in demonstrators were arrested attempting to enforce Title II of the Civil Rights Act of 1964. The Court argued that the public accommodations title of the Civil Rights Act was unique, in that its own provisions authorized district court intervention to “substitute a right for a crime.” 34 U.S.L. WEEK at 4579. Thus, the Court in effect construed the removal statute, which is an express grant of federal jurisdiction, in pari materia with the anti-injunction statute, 28 U.S.C. § 2283 (1964), a withdrawal of jurisdiction. Even conceding arguendo that this analogy was valid, Mr. Justice Douglas in dissent found that § 11(b) (the Kates proviso) of the Voting Rights Act of 1965 authorized direct intervention as plainly as did § 203 of the 1964 Act. Id. at 4584.
230. Charges levelled at the defendants involved in the Peacock appeal included assault and battery, interfering with an officer, illegal operation of motor vehicles, contributing to the delinquency of a minor, parading without a permit, disturbing the peace, and inciting a riot. See the dissenting opinion, 34 U.S.L. WEEK at 4580.
231. Mr. Justice Stewart’s opinion trotted out the classic separate function maxim—
exists in few states, least of all in the South. State judges are generally
the liegemen of local political establishments. When a dominant fac-
tion feels threatened enough to turn police harassment on its foes, most
state judges will find political pressure more compelling than federal
supremacy.232

The Court’s antipathy to the Fifth Circuit’s rule evidently stemmed
from fear of “wholesale dislocation” of state judicial responsibility.233
But the rule—limited to harassment prosecutions—hardly affects an
essential part of state court business.234 It permits direct intervention
only where the normal remedy of Supreme Court review is inade-
quate.235 More important, judicial remedies like removal do not touch
on the substantial concerns of opponents of direct intervention. They
put us no closer to the day when the cop on the beat takes his orders
from J. Edgar Hoover; they can not destroy the administrative bases
of state political power.236

Affirming the Fifth Circuit would not have shifted power to in-
truders from Washington. On the contrary, federal district and appeals
judges are drawn from local leadership groups; their careers, while
generally more distinguished, have not diverged widely from those
of state judges and public officials.237 But life tenure allows federal

comity requires that the good faith of state officials be presumed but never actually
scrutinized:

The civil rights removal statute does not require and does not permit the judges
of the federal courts to put their brethren of the state judiciary on trial.
34 U.S.L. Week at 4578. Compare Mr. Justice Harlan’s opinion for the Court in Harrison
v. NAACP, 360 U.S. 167 (1959), discussed in notes 39-40 supra and accompanying text.
The Court went on to intimate that federal supervision would stunt the growth of re-
spect for federal supremacy among Southern state judges, a claim rather difficult to
down. 34 U.S.L. Week at 4580.

232. Only a failure to compare Madisonian federalism theory with present-day politi-
cal realities can lead to reification of the paper resemblance between the state and
federal governments—as Mr. Justice Douglas noted. Id. at 4580. See notes 78-79 supra
and accompanying text.
233. Id. at 4579.
234. Removal has not in fact been widely abused by defense lawyers, as Mr. Justice
Stewart seems tacitly to fear. It has operated almost without exception in genuine civil
rights cases, and at that almost exclusively in those areas of the deep South where
harassment is prevalent.

235. See note 34 supra and accompanying text. Other remedies for civil rights viola-
tions mentioned by the Court, 34 U.S.L. Week at 4578, are not the answer to sham
prosecutions. Immediate release is the proper remedy, not Supreme Court reversal three
or four years in the future, and not the uncertain, cumbersome, and likely dispropor-
tionate sanction of federal criminal or civil liability.
236. See text following note 47 supra.
237. The career of Mr. Justice Stewart, who wrote the Court’s Peacock opinion, pro-
vides an ironic example. After a distinguished sojourn in the public life of his home
judges to bring a national perspective to the problems of their jurisdiction. They are, in brief, uniquely fitted to integrate federal policy with regional mores, to soften resistance to the demands of federal law. With its renewed ban on direct intervention, the Court has senselessly disarmed the Southern federal bench.

town, Cincinnati, Ohio, Stewart graduated to a place on the Court of Appeals for the Sixth Circuit. As an appellate judge, he would have been ideally equipped to play a significant supervisory role, had Cincinnati encountered problems like those of present-day Mississippi and Alabama.


The Court declined to act on the constitutional issues the case presents and refused the plaintiffs an opportunity to offer evidence in proof of their case. . . . To me, the majority's decision appears to rest on a sort of visceral feeling that somehow, if relief were granted, the Court would be impinging on States' Rights.

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"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.

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 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 makes federalism workable.

Joining Judge Wisdom as leaders of the effort to bring the Constitution to the deep South have been Judges Rives, Brown, and Chief Judge Tuttle of the Fifth Circuit and Judges Sobeloff and Bell of the Fourth Circuit. See, e.g., cases cited in notes 154 and 157 *supra*.