BYU Law Review

Volume 1996 | Issue 2 Article 4

5-1-1996

Civil Rights and Federalism Fights: Is There a "More Perfect Union" for the Heirs to the Promise of Brown?

Pace Jefferson McConkie

Civil Rights and Federalism Fights: Is There a "More Perfect Union" for the Heirs to the Promise of *Brown*?

Pace Jefferson McConkie[*]

I. INTRODUCTION

Federalism has been the center of our democracy's great debate since its inception. The founders of this country were divided on the issue and its governing principles, with some advocating protection from tyranny by way of a strong central government while others saw protection in the division of power among state and local governments and the central government.[1] In our day, the debate continues with equal fervor, especially in light of a Republican congressional majority moving with great haste to shift the balance of power from the federal government to the states in many critical areas of public policy and administration and in the face of a federal judiciary increasingly anxious to relinquish its jurisdiction over local public entities such as school districts.[2]

One thing is clear, however. The most dramatic and contemptuous confrontations over federalism have been over race, and over African Americans in particular. When the early Americans claimed that federalism would be a protection from tyranny, they did not have the tyranny of slavery in mind. Indeed, Southerners supported a federalist system in part because they believed it would best ensure the continued existence of slavery. Likewise, when oppressed people of color demanded equal protection and civil rights pursuant to the

---

* National Litigation Project, Lawyers' Committee for Civil Rights Under Law; B.A. University of Utah, 1984; J.D. University of Arkansas at Little Rock, 1987. This article is based on an address given at a symposium entitled "The Dilemma of American Federalism: Power to the People, the States, or the Federal Government?" held at Brigham Young University, October 1995. Special thanks is owed to Daniel L. Nagin, a student intern from the University of Chicago School of Law, for his valuable assistance, contributions and keen intellectual insight.

1. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 2-3, 6 (1988).

2. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 489-91 (1992).

United States Constitution one century after their emancipation from slavery, states' rightists invoked federalism to continue their suppression under state-sponsored discrimination.

Indeed, during the two periods in our history when federalism was most vehemently advanced, the overriding purpose was the oppression of African Americans: at first for the preservation of slavery, and then for the preservation of de jure segregation and discrimination. Race provides a strong undercurrent or at least plays a part in today's debate as well. But regardless of the underlying motives behind the current debate over federalism, it remains clear that traditional arguments that federalism could prevent federal civil rights enforcement have been severely weakened by the Civil War Amendments to the U.S. Constitution. This is not to say, however, that federalism cannot play a positive role in the protection of civil rights today.

II. RACE AND FEDERALISM

During the nineteenth century, many abolitionists charged that the Constitution was a pro-slavery document because it contained the Three-Fifths Compromise,[3] the Fugitive Slave Clause,[4] and prohibited Congress from restricting slave importations until 1808.[5] While portions of the Constitution certainly supported slavery as an institution, the system of federalism adopted by the Constitution cannot simply be characterized as having the sole purpose of sustaining slavery. That both slaveholding and non-slaveholding delegates adopted a new Constitution grounded in federalism suggests that federalism had a general appeal independent of its relation to slavery.[6] After experiencing the problems associated with weak national government under the Articles of Confederation, but being fearful of locating power in a single entity, many Northern and Southern delegates supported the notion of a relatively strong central government in counterpoise with state governments.[7]

---

3. U.S. CONST. art. I, § 2.

4. *Id.*

5. *Id.* § 9.

6. *See, e.g.*, THE FEDERALIST Nos. 28, 29, 32 (Alexander Hamilton), Nos. 46, 51 (James Madison).

7. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 2-5 (2d ed. 1991).

In many respects, however, constitutional provisions expressing the limited nature of the federal government's power and the sovereignty of the states were born of efforts by Southern delegates to preserve and protect slavery. As a legal historian has recorded, "the pro-slavery group gained a series of important concessions in the areas of taxation, representation, the slave trade, and fugitive slaves. More critical, perhaps, were the negative protections that restricted the central government to only those powers enumerated in the Constitution."[8] Thus, Southerners sang the praises of federalism and sought to root it firmly in the Constitution in the hope that it would serve as a bulwark against attacks on slavery.[9]

Charles Pinckney, a delegate to the Constitutional Convention from South Carolina, argued to his fellow citizens back home for ratification of the Constitution by asserting the principles of federalism as a protection of their "slave interests":

> We have a security that the general government can never emancipate them, for no such authority is granted; and it is admitted, on all hands that the general government has no powers but what are expressly granted by the Constitution, and that all rights not expressed were reserved by the several states. . . . In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made better if we could; but on the whole, I do not think them bad.[10]

Thus, from the very start, principles of federalism were intertwined with efforts to preserve slavery. Ultimately, the Ninth and Tenth Amendments were the result of a compromise with Southern delegates, who demanded them as concessions before they would ratify the other eight amendments in the Bill of Rights.[11]

---

8. PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY 23-24 (1981).

9. For a discussion of such notable southern delegates as John Rutledge and Charles Pinckney of South Carolina and Luther Martin of Maryland, see ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION 107-24 (5th ed. 1976).

10. FINKELMAN, *supra* note 8, at 30 (quoting 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 254-55 (Max Farrand ed., 1937)).

11. *See* KELLY & HARBISON, *supra* note 9, at 164-66.

In the years leading up to the Civil War, federalism evolved into a radical theory of states' rights. In the early 1830s, for example, Senator John C. Calhoun of South Carolina espoused the "doctrine of nullification" in opposition to federal efforts to raise tariffs. Calhoun argued that states retained the right to nullify or disobey certain federal laws under the system of federalism and specifically under the Tenth Amendment.[12] Though this was primarily an economic issue, it was (as was everything in the South) intertwined with the issue of slavery. For example, Southerners opposed the tariffs not only because they "came into sharp conflict with the agrarian interests of the South," but also because the tariffs embodied an external federal authority that threatened "the interests of its 'peculiar institution,' Negro slavery."[13]

Following Calhoun's lead, Southerners increasingly employed the states' rights theory in defense of slavery and eventually based their secession on this foundation.[14] Federalism became "simply a philosophical screen to protect the South's real ideology—the maintenance of slavery."[15] The principles of federalism were not only invoked for the preservation of slavery however. In the pre-Civil War years, the balance of power between the states and the federal government was decidedly tilted toward the states by mutual agreement.[16] Even Chief Justice John Marshall, a staunch advocate of national power, authored a unanimous Supreme Court opinion holding the Bill of Rights inapplicable to the states.[17] States had almost limitless autonomy to regulate the rights and burdens of their citizens.[18]

Today, however, there is an inherent flaw in viewing this pre-Civil War era as the most accurate expression of the framers' understanding of federalism and, therefore, the model upon which current federal-state relations should be based. This is particularly true if the principles of federalism are invoked to oppose the role of the federal government—particularly judicial intervention—in civil rights cases, or

---

12. *See id.* at 287-98.
13. *Id.* at 236-37.
14. *Id.* at 371-73.
15. FINKELMAN, *supra* note 8, at 336.
16. *See* TRIBE, *supra* note 1, at 2-5.
17. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).
18. TRIBE, *supra* note 1, at 3.

congressional attempts to remedy discrimination and its present effects.

After the war, the so-called Civil War Amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments) fundamentally altered the original balance of power between the federal government and the states.[19] Unlike the other twelve amendments, the Civil War Amendments (abolishing slavery, providing for the equal protection of the laws, and giving black men the right to vote) were directed at the states themselves and explicitly curtailed spheres of state power once thought plenary.[20] In addition, these Amendments explicitly granted powers to the federal government by allowing Congress to enforce the Amendments by "appropriate legislation."[21] Thus, the antebellum system of federalism was completely reordered.[22]

This dramatic change in the balance between federal and state power was instigated over matters of race[23] and mandated, among other things, that Congress specifically "identify and redress the effects of society-wide discrimination" against African Americans.[24] Even Justice Scalia has concurred that "[a] sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory."[25] Justice Scalia has also noted that the framers of the Amendments distrusted the states to protect the rights contained therein because "racial discrimination against any group finds a more ready expression at the state and local than at the federal level."[26] The reordering of federalism became a matter of asserting federal power to protect individuals against state interference.[27] In

---

19. Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989).

20. *Id.* (citing *Ex parte* Virginia, 100 U.S. 339, 345 (1880) ("They were intended to be, what they really are, limitations of the powers of the States and enlargements of the power of Congress.")).

21. U.S. CONST. amends. XIII, § 2; XIV, § 5; XV, § 2; *see also* Patterson v. McLean Credit Union, 491 U.S. 164, 174 (1989); Jones v. Alfred H. Meyer Co., 392 U.S. 409, 439 (1968); United States v. Guest, 383 U.S. 745, 762 (1966) (Clark, J., concurring).

22. *See generally Croson*, 488 U.S. at 486-93.

23. *Id.* at 490.

24. *Id.*

25. *Id.* at 522-23 (Scalia, J., concurring).

26. *Id.*

27. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 83-130 (1872) (dissents); STONE, *supra* note 7, at 482-83, 779.

this attempt to protect individuals, the Supreme Court eventually interpreted the Due Process Clause of the Fourteenth Amendment to apply most of the provisions of the first eight amendments to the states.[28]

Because of the Civil War Amendments' complete reordering of antebellum federalism, any argument to rekindle it must find a way to discard the Amendments and their plain intent to curtail state power in favor of federal authority in the area of political and civil rights.[29] Although states' rights advocates may not like these Amendments' expansion of federal power at the expense of state power, they are not entitled to ignore their existence.

Normally, this reality is conceded by states' rightists. However, they still assert that the Civil War Amendments should not be interpreted as a repudiation of federalism generally nor as a rejection of the idea that states should be the principal locus of power in our political system. To the contrary, since the preservation of slavery was one of the principal motivations behind Southern delegates' endorsement of federalism,[30] the end of slavery removed one of the central justifications for federalism. Thus, the Civil War and the Civil War Amendments undermined federalism's legitimacy as a political theory in our constitutional system, at least with regard to civil rights enforcement and equal protection.[31]

III. FEDERALISM, CIVIL RIGHTS, AND SCHOOL DESEGREGATION

A. "Federalism Generally" Arguments

The argument that the Civil War Amendments should not be interpreted as a repudiation of "federalism generally" severely misses the point with regard to civil rights cases and school desegregation cases in particular. Simply put, these arguments assert that public schooling is an activity our federalist system leaves to state control since the federal government has limited enumerated powers, the Tenth Amendment reserves to the states (or the people) any powers not granted to the federal government, and the Constitution grants no powers

---

28. *See* STONE, *supra* note 7, at 777-86.

29. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986).

30. *See supra* notes 8-17 and accompanying text.

31. *See generally* Richmond v. J.A. Croson Co., 488 U.S. 469, 486-93 (1989).

to the federal government in the area of education.[32] As a consequence, federal judicial interference in public education—even where necessary to dismantle an unconstitutional and discriminatory system—should be of only the most limited nature.[33]

Carried to its logical conclusion, this argument is unconvincing for two reasons. First, school desegregation and equal-educational-opportunity cases most often involve a violation of the Equal Protection Clause of the Fourteenth Amendment, which is explicitly directed against the states and the exercise of state power.[34] The express terms of the Equal Protection Clause subordinate states' rights to the federal constitutional protection of civil rights. Moreover, the Amendment empowers Congress to enforce its provisions and reinforces the primacy of the federal government in the area of equal protection.[35] In this area, the superior power of the federal government is neither implied nor derived indirectly from the language of the Supremacy Clause,[36] but is clearly and affirmatively set forth in the Fourteenth Amendment. Thus, of all the provisions of the Constitution, the Equal Protection Clause of the Fourteenth Amendment seems a rather anomalous choice of arena for arguments advocating the need to temper federal power in the name of federalism.

Second, the argument that the Civil War Amendments did not affect federalism generally in civil rights cases is flawed because African Americans were the principal intended beneficiaries of the Civil War Amendments:

> [O]n the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the pro-

---

32. *See generally* Coalition to Save Our Children v. State Bd. of Educ., 901 F. Supp. 784, 785-86 (D. Del. 1995).

33. *Id.* at 793.

34. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County Sch. Bd., 391 U.S. 430 (1968); Brown v. Board of Educ., 347 U.S. 483 (1954).

35. *See Croson*, 488 U.S. at 469; Katzenbach v. Morgan, 384 U.S. 641 (1966).

36. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2.

> tection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.[37]

In school desegregation cases, as well as in other civil rights contexts (e.g., voting rights, employment, housing, and various affirmative action initiatives), remedial measures benefit the very persons singled out by the framers for federal legislative and judicial protection.[38] Thus, federalism-based arguments against necessary federal intervention in school desegregation or other civil rights matters centered on the equal protection guarantees of the Constitution ring particularly hollow.

B. Tenth Amendment Arguments

Similarly, the Tenth Amendment itself provides a less than convincing justification for the states' rights position.[39] First, the text and background of the Amendment suggest that it was simply intended to underscore the limited nature of the federal government's powers rather than to serve as an independent or substantive obstacle to the exercise of federal power.[40] As an altered version of Article IX of the Articles of Confederation, the Tenth Amendment "deliberately omitted any requirement of an express articulation of the national government's powers,"[41] and the framers were apparently of the view that the very structure of the federal government itself—the representation by electoral process of state interests in the House and especially the Senate—could adequately protect state interests against federal power.[42]

Even during the pre-Civil War period when the power of the states in the federal system was at its peak, the Tenth Amendment never acquired much substantive weight in the jurisprudence of the Supreme Court. In *McCulloch v. Mary-*

---

37. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873); *see also Croson*, 488 U.S. at 469.

38. *See* Freeman v. Pitts, 503 U.S. 467, 485, 491, 498-99 (1992).

39. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

40. *See* KELLY & HARBISON, *supra* note 9, 165, 168; TRIBE, *supra* note 1, at 307.

41. *See* TRIBE, *supra* note 1, at 307 n.7.

42. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985); THE FEDERALIST No. 46 (James Madison).

land,[43] for example, the Court broadly construed the Necessary and Proper Clause, concluding that neither the Tenth Amendment nor the rest of the Constitution delineated with any specificity the precise contours of the federal government's power or, by implication, what powers were left to the states.

In the twentieth century, the Tenth Amendment has only lessened in constitutional importance. Most frequently arising as an issue in cases involving the scope of congressional power under the Commerce Clause, the Court considered the Amendment "but a truism that all is retained which has not been surrendered."[44] "From the beginning and for many years," the Court continued, "the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."[45] Such means for the exercise of a granted power would include enforcement of the Equal Protection Clause of the Fourteenth Amendment. Considering the text, history, and Supreme Court construction of the Tenth Amendment, states' rightists must do more than resuscitate the amendment—they must breathe life into it that has never been there.

C. Brown v. Board of Education *and the Quintessential Battles Involving Race, Civil Rights, and Federalism*

Since 1954, the most prominent battles regarding race, civil rights, and federalism have been in the arena of public education—an arena not "enumerated" in the federal constitution and which traditionally falls under the rubric of state and local governmental responsibilities. In the landmark *Brown v. Board of Education* decision, the Supreme Court ruled:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural

---

43. 17 U.S. (4 Wheat.) 315 (1819).

44. United States v. Darby, 312 U.S. 100, 124 (1940).

45. *Id.*; *see* United States Term Limits v. Thornton, 115 S. Ct. 1842 (1995); *Garcia*, 469 U.S. at 547-52.

> values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*[46]

Thus, based on the equal protection command of the Constitution, federal courts injected themselves into the regulation of public schools.

Brown shook the moral fibre of this country and its public institutions. It crumbled the foundation of segregation. It finally established as the supreme law of the land that in the field of public education, the doctrine of "separate but equal" has no place, that separate is inherently unequal, and that the segregation complained of deprived the black plaintiffs and those similarly situated of the equal protection of the laws. It established the constitutional basis for our democratic ideal of equal opportunity for all Americans regardless of race or color and guaranteed the protection of the highest court in the land in the pursuit of those opportunities and rights.[47]

In the name of federalism and states' rights, however, *Brown* was met with massive and, at the time, unimaginable resistance.[48] Undoubtedly, this was because the floodgates had been opened and, for the first time, the long and unremitting struggle for civil rights had achieved the possibility of eliminating "separate but equal" from all phases of society, including voting, reapportionment, housing, employment, transportation, and public accommodations. Certainly, the aftermath of *Brown* led to the major civil rights, voting rights, equal employment, and equal housing statutes of the 1960s.[49]

Unfortunately, the implementation order of *Brown*, calling for the desegregation of public schools "with all deliberate speed," lacked a Supreme Court mandate for the coercion necessary to quash much of the resistance to its decision.[50] Moral

---

46. 347 U.S. 483, 493 (1954) (emphasis added).

47. *See* Pace J. McConkie, *Dedication to Thurgood Marshall*, 70 DENV. U. L. REV. 581, 584-85 (1993).

48. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958); KELLY & HARBISON, *supra* note 9, at 864-72.

49. McConkie, *supra* note 47, at 585; *see* Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994); Voting Rights Act of 1965, 42 U.S.C. § 1973 (1994).

50. Brown v. Board of Educ., 349 U.S. 294, 301 (1955) ("*Brown II*").

appeals by the Court based on shared mutual respect did not work.[51] Although the Court had hoped that Southern states would do the right thing and comply, they did not do so.[52] Much like Abraham Lincoln's proposal to slaveholders in Southern states four months before the Emancipation Proclamation for a voluntary, compensated emancipation of the slaves,[53] the Supreme Court's decision met with bigotry and resistance.[54]

States' rights arguments were invoked almost immediately in opposition to *Brown*, as Southerners drew on political theories they had asserted over the years to preserve slavery and Jim Crow laws.[55] Thus came the familiar decrees from statehouses: in Virginia, opposing the "further encroachment by the Supreme Court, through judicial legislation, upon the reserved powers of the state";[56] in Arkansas, opposing

> the Un-Constitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court, including interposing the sovereignty of the State of Arkansas to the end of nullification of these and all deliberate, palpable and dangerous invasions of or encroachments upon rights and powers not delegated to the United States;[57]

and in Alabama:

> I stand here today as governor of this sovereign state and refuse to wittingly submit to illegal usurpation of power by the central government. I claim today for all the people of the state of Alabama, those rights reserved to them under the Constitution of the United States. Among those powers so

---

51. *See, e.g., Cooper*, 358 U.S. 1; KELLY & HARBISON, *supra* note 9, at 864-72. *See generally* Robert A. Burt, Brown's *Reflection*, 103 YALE L.J. 1483 (1984).

52. *See generally* Burt, *supra* note 51.

53. "'This proposal makes common cause for a common object, . . . casting no reproaches on any. It acts not the pharisee. The change it contemplates would come gently as the dews of heaven, not rending or wrecking anything. Will you not embrace it?'" *Id.* at 1493 (quoting Abraham Lincoln, Proclamation Revoking General Hunter's Order of Military Emancipation of May 9, 1862 (May 19, 1862), *in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 222, 223 (Roy P. Basler ed., 1953)).

54. *See generally* Burt, *supra* note 51.

55. *See, e.g., Cooper* 358 U.S. 1; KELLY & HARBISON, *supra* note 9, at 864-72.

56. Linwood Holton, *A Former Governor's Reflections on Massive Resistance in Virginia*, 49 WASH. & LEE L. REV. 15, 18-19 (1992) (quoting ROBIN L. GATES, THE MAKING OF MASSIVE RESISTANCE 110 (1962)).

57. ARK. CONST. amend. XLIV (repealed 1990); *see* Henry Woods & Beth Deere, *Reflections on the Little Rock School Case*, 44 ARK. L. REV. 971, 972 (1991).

> reserved and claimed is the right of state authority in the operation of the public schools, colleges and universities.[58]

In many instances, state and school authorities relied on the Tenth Amendment to resist federal court orders to desegregate educational facilities.[59] These arguments failed miserably, and ultimately the Court mandated the immediate dismantling of unconstitutional dual school systems and the elimination of the vestiges of segregation, "root and branch."[60]

Again, once a violation of the Equal Protection Clause was identified, the Tenth Amendment was simply deemed irrelevant.[61] In the same vein, the Supreme Court recently upheld the authority of a federal court to order local entities to raise taxes in order to fund its desegregation decree, though it would not allow the court, under principles of federal-state comity, to impose those taxes directly.[62]

While it remains abundantly clear that states and local school authorities are obligated, pursuant to federal court decrees, to remedy constitutional violations,[63] it is also clear that federal courts are paying ever closer attention to the "general principles of federalism" in the implementation and duration of their decrees.[64] Federal court orders cannot extend beyond the scope of their remedial authority[65] and, generally, cannot call for the reorganization of state or local governments or agencies.[66] In *San Antonio Independent School District v.*

---

58. *All Things Considered* (National Public Radio broadcast, July 27, 1995) (quoting Governor George Wallace (June 11, 1963)) (transcript on file with the author).

59. *See* Bush v. Orleans Parish Sch. Bd., 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961); *cf.* United States v. Barnett, 330 F.2d 369 (5th Cir. 1963), *cert. denied*, 376 U.S. 681 (1964); Bryan v. Austin, 148 F. Supp. 563 (E.D.S.C.), *vacated*, 354 U.S. 933 (1957).

60. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971); Green v. County Sch. Bd., 391 U.S. 430, 438 (1968).

61. *See* Milliken v. Bradley, 433 U.S. 267, 291 (1977) ("The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful stato conduct enacted by the Fourteenth Amendment.").

62. Missouri v. Jenkins, 495 U.S. 33 (1990); *see also* United States v. Texas, 506 F. Supp. 405 (E.D. Tex. 1981), *rev'd*, 680 F.2d 356 (5th Cir. 1982); Bradley v. School Bd., 462 F.2d 1058 (4th Cir. 1972), *aff'd*, School Bd. v. State Bd. of Educ., 412 U.S. 92 (1973).

63. Freeman v. Pitts, 503 U.S. 467, 485-90 (1992); *Green*, 391 U.S. at 437-38.

64. *See Freeman*, 503 U.S. at 489-91.

65. Missouri v. Jenkins, 115 S. Ct. 2038, 2047-49 (1995).

66. *See* Milliken v. Bradley, 433 U.S. 267, 291 (1977).

Rodriguez,[67] the Court stated that "every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system."[68] Justice Powell, writing for the Court, expended considerable energy discussing which matters should be deferred to state and local authorities. The issue on appeal, however, was limited to the question of *liability* before a finding of constitutional wrongdoing had been made, removing the issue from traditional Equal Protection analysis and federal supervision pursuant to an established violation of the Fourteenth Amendment.

Recent pronouncements by the Court reveal great enamoration with the ideal of local school control[69]—perhaps because local control shares the same objectives as the Tenth Amendment and the principles of federalism while being less problematic legally, intellectually, and historically.[70] In *Freeman v. Pitts*, a recent case regarding the standards for unitary status and the lifting of federal court supervision over former de jure segregated school systems, Justice Kennedy wrote that "'local autonomy of school districts is a vital national tradition'"[71] and "[r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system."[72]

Such language predictably spawns premature motions for and declarations of unitary status by school districts with educational systems replete with uneradicated vestiges of segregation and continuing policies and practices which perpetuate segregation and result in discriminatory conditions indicative of the prior dual systems.[73] Time becomes the predominant factor, with school districts anxious to have years of federal supervision removed and federal courts anxious to relieve their bur-

---

67. 411 U.S. 1 (1973).

68. *Id.* at 44.

69. *Jenkins*, 115 S. Ct. at 2054; Freeman v. Pitts, 503 U.S. 467 (1992); Board of Educ. v. Dowell, 498 U.S. 237 (1991).

70. Rather than an issue of sovereignty, the ideal of local control is advanced as the preferred means to provide an adequate education and to operate a school system because it allegedly restores the political accountability of the school system to its citizenry. *See Freeman*, 503 U.S. at 489-91.

71. *Id.* at 490 (quoting Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977)).

72. *Id.*

73. *See* Coalition to Save Our Children v. State Bd. of Educ., 901 F. Supp. 784 (D. Del. 1995).

densome caseloads.[74] Incredibly, this also results in some school districts, which seek to have federal court supervision over their systems of education lifted, proclaiming that they (the districts) are the "victims" of desegregation.[75] Normally, these are the same recalcitrant state and local authorities who have been reluctant to embrace the equal educational opportunity mandate of *Brown* and its progeny while passionately embracing the concepts of federalism in defense of doing nothing.[76]

Still, there is no constitutional right to local control of a school system which violates the civil rights and equal protection of its students. This constitutional doctrine remains firm and unshakable and cannot be lost in the debate. As the Supreme Court recently stated, "the court's end purpose must be *to remedy the violation* and, in addition, to restore state and local authorities to the control of a school system *that is operating in compliance with the Constitution.*"[77] "Where control lies," the Court continued, "so too does responsibility."[78]

The duty and responsibility of constitutional violators is, therefore, unaltered by principles of federalism in any form. State and local governments must "take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system" and "ensure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present."[79]

IV. A POSITIVE ROLE FOR FEDERALISM IN THE PROTECTION OF CIVIL RIGHTS

> We believe that the power of government—in other words, of the people—should be expanded . . . as rapidly and as far as the good sense of an intelligent people and the teachings of experience shall justify, to the end that oppression, injustice, and poverty shall eventually cease in the land.[80]

---

74. *Id.* at 823 n.52, 824.

75. *See, e.g.*, Coalition to Save Our Children v. State Bd. of Educ., 767 F. Supp. 328, 341-46 (D. Del. 1991); Coalition to Save Our Children v. Buchanan, 744 F. Supp. 582, 592-93 (D. Del. 1990).

76. Coalition to Save Our Children v. State Bd. of Educ. 757 F. Supp. at 341-46; Coalition to Save Our Children v. Buchanan, 744 F. Supp. at 592-93.

77. Freeman v. Pitts, 503 U.S. 467, 489 (1992) (emphasis added).

78. *Id.* at 490.

79. *Id.* at 485.

80. MARIO CUOMO, REASON TO BELIEVE 77 (1995) (quoting a late nineteenth-

It was clear in the middle of the nineteenth and the twentieth centuries that if there were to be any civil rights protection for African Americans, it would have to come from the federal government. President Harry S. Truman spoke to the NAACP in 1947 and declared: "The extension of civil rights today means not protection of the people against the government, but protection of the people by the government. We must make the federal government a friendly, vigilant defender of the rights and equalities of all Americans."[81] Despite the gains that minorities have achieved through federal enforcement of civil rights, one cannot assume that the federal government has always protected victims of bigotry, prejudice, and official discrimination. It has not. The dark days after Reconstruction where civil rights were either retracted or not enforced cannot escape our historical perspective, particularly with reference to public education, public accommodations, and voting rights, among others.[82]

Likewise, as today's conservative judiciary and congressional majority increasingly exhibit a "New Harshness,"[83] the federal government cannot necessarily be looked to as a civil rights sanctuary. Thus, a positive role for federalism in the protection of civil rights should be secured. To that end, the preservation of federalism as a political principle and as an institutional structure must allow the protection of civil rights and individual liberties to become a dominant objective, particularly with regard to racial minorities. This requires a change of course. Federalism must accept that civil rights principles—indeed, constitutional protections for racial minorities—are a natural and lawful restraint on majoritarianism and are an essential part of our constitutional structure.

It is quite possible, under this scenario, that federalism could provide a source of political strength for ethnic and minority groups when, for example, they gain control of school boards or city councils. In addition, state constitutions and statutes often provide civil rights protections and remedies that can be vindicated in state courts and agencies.[84]

---

century Populist party decree).

81. *All Things Considered* (National Public Radio broadcast, July 27, 1995) (quoting Harry S. Truman (1947)) (transcript on file with the author).

82. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896).

83. CUOMO, *supra* note 80, at 9-13.

84. *See, e.g.*, Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, No. 85,375 (Fla. Mar. 29, 1995) (pending); Coalition for Equity, Inc. v.

Perhaps we should be as optimistic about the benefits of federalism as Justice Brandeis, who wrote in 1932:

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risks to the rest of the country. . . . If we would guide by the light of reason, we must let our minds be bold.[85]

V. CONCLUSION

History is our greatest teacher. In his first inaugural address, President Lincoln concluded by stating: "'We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection.' He [then] prayed that: 'the mystic chords of memory . . . will yet swell the chorus of the Union when again touched, as surely they will be, by the better angels of our nature.'"[86]

As the federalism debates rage on, we can, to borrow from Judge Higginbotham, choose to be like Lincoln or we can secure our place in history with others, such as Rutherford B. Hayes, who betrayed African Americans in the 1877 Compromise to win nineteen electoral votes in the South. After Hayes agreed with Southern Democrats to withdraw federal protection of former slaves, the chairman of the Kansas State Republican Committee summed up their pact as follows: "'As matters look to me now, I think the policy of the new administration will be to conciliate the white men of the South. Carpetbaggers to the rear, and niggers take care of yourselves.'"[87]

While there are ever-present signs of contentment with similar pacts or "contracts" today, i.e., conciliate the majority, poor people to the rear, and minorities take care of yourselves, I remain hopeful that the "better angels of our nature" will prevail. To that end, increased, effective advocacy for the equal-protection and civil rights guarantees of the federal Constitu-

---

Hunt, Nos. CV-90-883-R, CV-91-0117-R, 1993 WL 204083 (Ala. Cir. Ct. 1993) (addressing equal educational opportunity in state courts through state constitutional provisions and school financing statutes).

85. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

86. *See* A. Leon Higginbotham, *Dear Mr. Speaker: An Open Letter*, NAT'L L.J., June 5, 1995, at 19-20.

87. *Id.*

tion must prevail, subordinating states and states' rights where necessary, in order to form "a more perfect Union" for the heirs to the promise of *Brown*.