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IN DEFENSE OF JUDICIAL ACTIVISM

LUTHER M. SWYGERT*†

Judicial activism traditionally uses the principles built into the Constitution and statutory law to foster the ends of social justice. The term connotes a liberal approach so as to read into legal norms the essence of due process and equal protection under the law. Those are the two most fundamental concepts of individual rights embraced by the Constitution. Today judicial activism is under attack.¹

Recently the judiciary, especially the federal judiciary, has been criticized for exceeding its powers and invading the province of the legislative and executive branches. In a speech before the Federal Legal Council, the Attorney General of the United States, William French Smith, accused the federal courts of "making unwise intrusions upon the legislative domain."² He explained that the policy of the Reagan Administration regarding the federal bench is to discourage judicial activism:

We believe that the groundswell of conservatism evidenced by the 1980 election makes this an especially appropriate time to urge upon the courts more principled bases [of decisionmaking] that would diminish judicial activism. . . . In recent decades, . . . Federal courts have engaged in a . . . kind of judicial policymaking. In the future, the Justice Department will focus upon the doctrines that have led to

* Senior Judge, United States Court of Appeals for the Seventh Circuit. The University of Notre Dame (L.L.B. 1927).
† I am indebted to my law clerk, Barbara E. Rook, for her invaluable assistance in the research and writing of this article.

1. As it has come to be used today, the word "activism" connotes a liberal and expanding judicial approach to legal problems. This usage, however, perverts the true meaning of the word. A politically conservative judge may be just as active in narrowing the application of a statute or in cutting back individual rights as a liberal judge may be in the pursuit of what he regards as desirable social or political ends. See Engle v. Isaac, 102 S. Ct. 1558, 1580 (1982) (Brennan, J., dissenting); Johnson, The Role of the Judiciary with Respect to the Other Branches of Government, 11 GA. L. REV. 455, 469 (1977).

the courts' activism. We will attempt to reverse this unhealthy flow of power from state and Federal legislatures to Federal Courts . . . . 3

Some members of Congress echo the criticism voiced by the Attorney General. Senator Jesse Helms of North Carolina has introduced a bill to deprive the federal courts of jurisdiction to hear cases concerning school prayer. 4 Other bills pending before Congress would restrict federal-court jurisdiction over cases involving abortion 5 and school

3. Id.
4. S. 450, 96th Cong., 1st Sess. §§ 11-12 (1979), provides in part:
Sec. 11(a) Chapter 81 of Title 28, United States Code, is amended by adding at the end thereof the following new section:
(a) Notwithstanding the provisions of sections 1253, 1254, and 1257 of this Chapter the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation, or any part thereof, or arising out of any Act interpreting, applying, or enforcing a State statute, ordinance, rule, or regulation, which relates to voluntary prayers in public schools and public buildings.

Sec. 12(a) Chapter 85 of Title 28, United States Code, is amended by adding at the end thereof the following new section:
§ 1364. Limitations on jurisdiction
Notwithstanding any other provision of law, the district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under section 1259 of this title.
5. S. 158, 97th Cong., 1st Sess. (1981) provides in part:
Section 1. (a) The Congress finds that the life of each human being begins at conception.
(b) The Congress further finds that the fourteenth amendment to the Constitution of the United States protects all human beings.

Sec. 4. Notwithstanding any other provision of law, no inferior Federal court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to issue any restraining order, temporary or permanent injunction, or declaratory judgment in any case involving or arising from any State law or municipal ordinance that (1) protects the rights of human persons between conception and birth, or (2) prohibits, limits, or regulates (a) the performance of abortions or (b) the provision at public expense of funds, facilities, personnel, or other assistance for the performance of abortions: Provided, That nothing in this section shall deprive the Supreme Court of the United States of the authority to render appropriate relief in any case.

The report on S. 158 by the Separation of Powers Subcommittee of the Judiciary Committee acknowledged that "[t]he Supreme Court retains full power to review the constitutionality of S. 158." STAFF OF SUBCOMMITTEE ON SEPARATION OF POWERS, 97TH CONG., 1ST SESS., REPORT ON THE HUMAN LIFE BILL S. 158, 21 (Comm. Print 1981). See also Sager,
busing.\(^a\)

The idea that the courts have overstepped the bounds of judicial

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Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 HARV. L. REV. 17, 37 (1981) ("the independence and finality of the Supreme Court's constitutional judgments are unimpaired by the fact that it is evaluating a congressional limitation on jurisdiction").

6. S. 1647, 97th Cong., 1st Sess. § 3 (1981) provides in part:

(a) Notwithstanding any other provision of law, no inferior court of the United States nor any judge of any inferior court of the United States shall have jurisdiction to issue any injunction, writ, process, order, citation for an order with respect to contempt, rule, judgment, decree, or command—

(1) requiring the assignment or transportation of any student to a public elementary or secondary school operated by a State or local educational agency for the purpose of altering the racial or ethnic composition of the student body at any public school;

(2) requiring any State or local educational agency to close any school and transfer the students from the closed school to any other school for the purpose of altering the racial or ethnic composition of the student body at any public school . . . .

See also S. 1760, 97th Cong., 1st Sess. § 4 (1981).

The constitutionality and the wisdom of the bills to limit federal-court jurisdiction has already been the subject of much debate among legal scholars. Professor Archibald Cox, a former Solicitor General of the United States, discussing these bills, stated that:

A constitutional right is at the mercy of legislative majorities unless supported by a judicial remedy. To deprive Federal courts of jurisdiction granted by the Constitution . . . would result in a hodgepodge of inconsistent state interpretations, not all of which could be expected to rise above local selfishness or passion.

Cox, Don't Overrule the Court, NEWSWEEK, Sept. 28, 1981, at 18. Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit believes that the framers of the Constitution did not intend to give Congress the authority to restrict the Supreme Court's power of judicial review. Kaufman, Congress versus the Court, N.Y. TIMES MAG., Sept. 27, 1981, at 96. He finds that "clearly, the framers did not wish to leave to the states final authority to decide matters of Federal constitutional law. For this reason, the argument that Congress can withdraw jurisdiction over certain classes of Federal cases or rights because it has discretion to abolish the lower courts does not hold up under examination." Id. at 102. Judge Kaufman concluded that "[d]epriving the Federal courts of the power to adjudicate cases relating to such issues as desegregation, abortion and school prayer effectively precludes Federal protection—the constitutionally envisaged and most reliable form of protection—of our cherished constitutional rights." Id. at 104. Professor Sager believes that "[a]batement of any of the bills that are part of the proposed assault on the federal judiciary would set a dangerous and tawdry precedent by sabotaging the integrity of the judicial process." Sager, supra note 5, at 89. Former U.S. Supreme Court Justice Arthur Goldberg has stated that "[t]o acquiesce in the removal of [federal court] jurisdiction would be to alter the substance of established constitutional law, to surrender the 'citadel' of equal
review and usurped legislative and executive powers is not new. In fact, it has been around since the adoption of the Constitution. Chief Justice Marshall's landmark decision in *Marbury v. Madison*, holding that the Supreme Court had the power to declare acts of Congress unconstitutional, engendered much controversy. Criticism of the Supreme Court's activism enjoyed a renaissance during the 1920s and 1930s, when the Court struck down much of the economic and business legislation of the day, and again during the years of the Warren Court, which was accused of acting as a "super-legislature," especially to breach the separation of judicial and legislative powers." *Address by the Honorable Arthur J. Goldberg in Honor of Justice Hugo L. Black*, 24 ALA. L. REV. 255, 263 (1972). See also the authorities cited in Sager, supra, at 20 n.7. *But see Berger, Congressional Contraction of Federal Jurisdiction*, 1980 WISC. L. REV. 801.

Bills to limit federal court jurisdiction are not new. For example, the Jenner bill, proposed in 1957 would have eliminated Supreme Court jurisdiction in cases involving (1) the practices of congressional committees, (2) the federal government's enforcement of security regulations pertaining to federal employees, (3) state regulation of intrastate "subversive activities," (4) school board regulation of "subversive activities" of teachers, and (5) state regulation of admission to the state bar. S. 2646, 85th Cong., 1st Sess. (1957), discussed in Elliott, *Court-Curbing Proposals in Congress*, 33 NOTRE DAME LAW. 597 (1958). The Tuck bill, proposed in 1964 in response to the Supreme Court decisions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 553 (1964), would have eliminated the district court's original jurisdiction and the Supreme Court's appellate jurisdiction of state legislatures. H.R. 11926, 75th Cong., 1st Sess. (1964), reprinted in 110 CONG. REC. 20285 (Aug. 19, 1964). In 1972 a bill was introduced in Congress to restrict the power of federal courts to order busing as a remedy for school segregation. H.R. 13915, 92d Cong., 2d Sess. (1972), discussed in Thompson & Pollit, *Congressional Control of Judicial Remedies: President Nixon's Proposed Moratorium on "Busing" Orders*, 50 N.C. L. REV. 809 (1972). None of these bills was ever enacted into law.


8. 5 U.S. (1 Cranch) 137 (1803).

9. *Id. at 178.*


[These decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor
in the areas of desegregation, reapportionment, criminal procedure, and prisoners' rights.

Inasmuch as I am, admittedly, one of the so-called "activist" judges, I must respond to these critics, both past and present, by saying that they fail to recognize the basic principles of our constitutional system of government and the structural realities of our political system. It is my contention that judges who have made activist decisions have not done so out of any desire to preempt the powers of other branches of government or to impose their individual political or social philosophies on others. But when other branches of government failed to take action, the courts acted in order to enforce the provisions of the Constitution.

I. DEMOCRATIC THEORY AND THE COURTS

Many commentators have characterized the judicial branch as undemocratic and therefore inconsistent with our form of government. Professor Commager, writing almost thirty years ago, called judicial review "a drag . . . upon democracy," and, more recently, Professor Bickel referred to the Supreme Court as "a deviant institution in the American democracy." The question often asked is: "Why should a majority of nine Justices appointed for life be permitted to outlaw as unconstitutional the acts of elected officials or of officers controlled by elected officials?"

There are two answers to this criticism. First, there are checks on the power of the federal courts. When the courts are interpreting legislation, their decisions are subject to change by the Congress. Even when a decision is based on the Constitution, it may be altered should this Court, ordained as a judicial body, be thought of as a general haven for reform movements.

13. Id. at 94.
14. Id. at 93.
through the procedure of constitutional amendment.\textsuperscript{20} Another political
check on the courts is the power of the President to appoint all federal
judges and Supreme Court Justices, subject to the approval of the
Senate.\textsuperscript{21}

There are other informal checks on the power of the federal
courts. The Executive Branch may simply refuse to enforce a court
order,\textsuperscript{22} or lower courts may decline to follow the decision of a higher
court.\textsuperscript{23} Further, Congress can use its spending power to frustrate
enforcement of a judicial mandate.\textsuperscript{24} Finally, several commentators have
argued persuasively that the power of the courts is subject in the
final analysis to the power of the people to accept or reject the prin-
ciples expounded by their courts.\textsuperscript{25} As Professor Bickel stated:

The Supreme Court's judgments may be put forth as uni-
versally prescriptive; but they actually become so only when
they gain widespread assent. They bind of their own force
no one but the parties to a litigation. To realize the pro-
mise that all others similarly situated will be similarly
bound, the Court's judgments need the assent and the
cooperation first of the political institutions, and ultimately
of the people.\textsuperscript{26}

The second answer to the criticism that the courts are
undemocratic is that our system of government is not a pure
democracy. The dictionary definition of democracy is "government by
the people: rule of the majority.\textsuperscript{27} But our Constitution contains
several provisions that call for nonmajoritarian elements in the gov-
ernment,\textsuperscript{28} of which the courts are only one example. The Constitu-
tion itself is protected from changes desired by a mere majority by

\textsuperscript{20} U.S. CONST. art. V. See L. Levy, Judicial Review and the Supreme Court
12 (1967).
\textsuperscript{21} U.S. CONST. art. II § 2. See A. Bickel, The Supreme Court and the Idea
of Progress 88 (1978).
\textsuperscript{22} See J. Choper, supra note 19, at 56.
\textsuperscript{23} See id.
\textsuperscript{24} See id.
\textsuperscript{25} See id. at 56; L. Levy, supra note 20, at 12 ("Judicial review would never
have flourished had the people been opposed to it . . . . [I]t exists by the tacit consent
of the governed.").
\textsuperscript{26} A. Bickel, supra note 21, at 90.
\textsuperscript{27} Webster's Third New International Dictionary (1963).
\textsuperscript{28} See Bishin, Judicial Review in Democratic Theory, 50 S. Cal. L. Rev. 1099,
1109 (1977).
Article V, which requires more than a simple majority to enact amendments.29

Our constitutional system embodies the principle of majority rule but limits the power of majorities by guaranteeing certain individual rights which cannot be abridged, even by the majority. Several commentators have concluded that the courts are undemocratic, but properly so.30 Those who argue that equating democracy with majoritarianism is too simplistic attempt to integrate the courts into their theory by defining “democracy” broadly so as to include the role of the judicial branch.31 Whether the courts are characterized as consistent or inconsistent with anyone’s political definition of democracy is unimportant. What is important is that the Constitution guarantees certain individual rights to those whose interests may not be protected through the traditional democratic processes, and that the courts are the guardians of those rights. As Justice Jackson once noted, “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”32

29. Other examples of the framers’ distrust of popular majorities include article I’s provision for the election of Senators by state legislatures rather than by the people directly, and the electoral college system of electing the President required by article II.

30. E.g., A. Bickel, supra note 21, at 83 (“Our government is not, and ought not to be, strictly majoritarian.”); Mace, The Antidemocratic Character of Judicial Review, 60 CALIF. L. REV. 1140, 1149 (1972) (“the character of judicial review is properly antidemocratic”).

31. E.g., Bishin, supra note 28, at 1137 (“Judicial review helps American government make tolerable accommodations between personal and group rule and therefore seems sufficiently in line with the purposes of the ‘American democracy’ to qualify as one of the acceptable devices for achieving them.”); Rostow, supra note 18, at 197 (“democracies need not elect all the officers who exercise crucial authority . . . . The independence of judges . . . has been the pride of communities which aspire to be free.”). This point was made perhaps most eloquently by Justice Donald Wright, formerly of the California Supreme Court:

The Constitution envisions that democracy includes the right of the minority to attempt to become the majority. And a constitutional democracy recognizes the right of the minority to be protected from the arbitrariness or, in some instances, the tyranny of the majority. When forces within our system would abridge these rights, the court must intervene and protect those who have proved unable to protect themselves. In this context, judicial review of legislative acts may run counter to the will or the wish of the majority, but to say that judicial review is undemocratic is to ignore fundamental rights guaranteed to all, including the members of the minority.


II. THE INTENT OF THE FRAMERS

Some commentators have argued that the Founding Fathers never intended the Supreme Court to be the primary check on abuses of power by the states and the other branches of government.\(^{33}\) They relied in part on the position taken by the Jeffersonian Democrats during the late eighteenth century that the Supreme Court was too powerful and that the legislative branch should predominate.\(^{34}\) Other scholars have found ample evidence for the conclusion that "the courts were intended from the beginning to have the power that they have exercised."\(^{35}\) Justice Jackson believed that "[i]t is probable that many, and it is certain that some, members of the Constitutional Convention appreciated that [the clause providing for the judicial power and the supremacy clause] would spell out a power in the Supreme Court to pass on the constitutionality of federal legislation," although he noted that the judicial power was "the least debated of any of the important implications of the instrument."\(^{36}\)

James Madison, speaking at the congressional debate on the Bill of Rights, stated:

If [these amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or the Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.\(^{37}\)

This statement shows a recognition by Madison of the powerful role the federal courts would necessarily play in protecting individual rights guaranteed by the Constitution from infringement by the legislative or executive branches. Further evidence that the Founding Fathers intended the courts to have the power to interpret the Constitution and provide the ultimate check on the other branches of government may be found in Alexander Hamilton's essay, The Federalist No. 78:

\(^{33}\) See, e.g., Mason, supra note 7, at 393.

\(^{34}\) See A. Cox, supra note 10, at 1-3, 93.


\(^{36}\) R. Jackson, supra note 10, at 4.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. . . .

* * *

... [T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. 38

These statements of the framers and the provisions of the Constitution itself demonstrate that the federal courts must have the authority to declare acts of Congress, state legislative enactments, and executive actions unconstitutional. The supremacy clause made the Constitution the supreme law of the land, but "maintaining the supremacy of the Constitution [requires] a strong and independent judiciary, possessing the power and the authority to resolve disputes of a constitutional nature between the states, between the states and the national government, and, most importantly, between individuals and governmental institutions." 39 Both Madison 40 and Hamilton 41 knew that the rights guaranteed by the Constitution would mean little without a federal judiciary to enforce its provisions.

40. See id.
41. The Federalist No. 78, supra note 38, at 228:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.
III. THE LEGISLATIVE AND EXECUTIVE BRANCHES

It is certainly true that the legislative and executive branches are as bound by the principles of the Constitution as are the federal courts. Nevertheless, the structure of our system of government makes it imperative that there be an independent judicial branch to ensure that the states and the other two branches of government adhere to the constitutional limitations on their power; no other branch of government is so capable of preserving the integrity of the constitutional safeguards.

A. The Legislative Branch

Legislators are not independent or disinterested; rather, they are politicians who are answerable to the voters who put them into office. They must run on their records and therefore are preoccupied with the possible political consequences of the positions they take on various issues. Legislators are more often subject to significant time pressures; the schedule of a legislative session will be crowded with many bills to be considered, and legislators, in addition to working on legislative business, must participate in political activities and spend time in their home districts.

Legislation is often the product of long, hard-fought negotiation and compromise. Powerful interest groups employ lobbyists to influence legislators' votes on pending bills. Further, legislators must consider the majority of situations to which a law will apply, and potential negative consequences for individuals or minority groups may be outweighed by potential benefits, or even unknown at the time a bill is under consideration.

B. The Executive Branch

An examination of the structure of the executive branch reveals limitations similar to those of the legislature. Executive officials are answerable directly or indirectly to the electorate; therefore, their decisions, like those of legislators, are influenced by what would be politically safe or popular. Executive and administrative officials are also subject to political pressures from constituencies and interest-group lobbyists. Moreover, although executive officials often act on

42. See C. Breitel, The Courts and Lawmaking in Legal Institutions Today and Tomorrow 1, 7 (M. Paulsen ed. 1959).

a problem more quickly than legislators, such actions may be in response to a political storm or a public whim.

C. The Judiciary

An independent judiciary is institutionally suited to safeguarding constitutional principles. Federal judges are not answerable to any constituency and are thus insulated from most political pressures. They are therefore in a better position than legislators or executive officials to protect the constitutional rights of individuals, even when that requires a politically unpopular decision.

The other two branches of government and the states may simply refuse to act, but a court, when presented with a concrete case, must make a decision. Many commentators have noted that the courts are most often criticized for activist decisions in cases in which state governments or the other branches of the federal government could have acted to prevent or remedy constitutional violations but failed to do so. Further, with an actual case before it, a court can deal with the possible unforeseen effects of a law on an individual. Finally, the absence of direct political responsibility on judges and the "deliberative, contemplative" nature of the judicial process results in more thoughtful decisions.

IV. "Activist" Decisions of the Past

To support my contention that activist judicial decisions are the result of judges fulfilling their duty to uphold the Constitution and not the result of any judicial usurpation of power, I rely on an ex-

44. Cox, The Supreme Court 1965 Term, Foreward: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 122 (1966) ("If one arm of government cannot or will not solve an insistent problem, the pressure falls upon another").

45. See Johnson, supra note 1, at 474-75; Wright, supra note 31, at 1267-68. I recognize of course that a court decision will not always reach the merits of a claim.

46. Cox, supra note 37, at 592 ("I suspect that a careful study would reveal that the Supreme Court today is most 'activist' in the areas of the law where political processes have been inadequate, because the problem was neglected by politicians."); Johnson, The Constitution and the Federal District Judge, 54 Tex. L. Rev. 903, 905 (1976) ("On far too many occasions the intransigent and unremitting opposition of state officials who have neglected or refused to correct unconstitutional or unlawful state policies and practices has necessitated federal intervention to enforce the law."); Mason, supra note 7, at 408 ("failure of the states to protect individual liberties or undertake corrective measures drove the Court... into untrodden fields").

47. See Wright, supra note 31, at 1267-68.

48. See J. Choper, supra note 19, at 67-68.
amination of some past decisions. These decisions were criticized at the time as examples of the federal courts' overstepping the bounds of judicial review and resolving questions more properly left to the legislative or executive branches. Looking at these decisions with the benefit of hindsight, however, will show that the constitutional rights of individuals had been violated and that the legislative or executive branches could have acted but failed to do so. It was thus left to the federal courts to safeguard the rights guaranteed by the Constitution.

A. Reapportionment

As recently as 1946, the Supreme Court refused to consider a constitutional challenge to a state districting plan. In *Colegrove v. Green*, the plaintiffs alleged that the Illinois legislature had failed to reapportion congressional districts since 1901, and that the great changes in the population distribution in the intervening forty-five years made the 1901 map unfair and unrepresentative. The three-judge district court dismissed the complaint, and the Supreme Court affirmed on the ground that "due regard for the effective working of our Government reveal[s] this issue to be of a peculiarly political nature and therefore not meet for judicial determination."

Justice Frankfurter, writing for the plurality, stated that:

Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. . . . The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.

Justice Black disagreed:

What is involved here is the right to vote guaranteed by the Federal Constitution. It has always been the rule that where a federally protected right has been invaded the federal courts will provide the remedy to rectify the wrong

49. 328 U.S. 549 (1946).
50. 64 F. Supp. 632 (N.D. Ill. 1946).
51. 328 U.S. at 552.
52. Justices Reed and Burton concurred in Justice Frankfurter's opinion; Justice Rutledge concurred in a separate opinion. Justice Black dissented, and Justices Douglas and Murphy joined in his dissent.
53. 328 U.S. at 556.
done. Federal courts have not hesitated to exercise their equity power in cases involving deprivation of property and liberty. . . . There is no reason why they should do so where the case involves the right to choose representatives that make laws affecting liberty and property.54

The problems with the remedy for malapportionment suggested by Justice Frankfurter in Colegrove—resort to the state legislatures or Congress—are apparent. It is unrealistic to expect legislators to vote to correct malapportionment in the very districts that put them into office.55 But to allow malapportioned districts to remain in the absence of legislative action would fly in the face of the constitutional guarantee of the right to vote, which would be jeopardized if the voting strength of some persons or groups could be diluted or destroyed by those in power. The inaction of state legislatures and Congress thus made it clear that it was up to the federal judiciary to preserve this constitutional right.56

As Professor Auerbach has noted,57 it is anomalous for critics of judicial activism to suggest that the courts defer to the legislative branch on questions of apportionment. The idea that legislative action or inaction merits deference from the courts is based on the assumption that such action is the product of a vote by the majority of representatives who were elected by a majority of the voters, but malapportionment effectively destroys that assumption.58

54. Id. at 574 (Black, J., dissenting) (citations omitted).

Legislative fairness in districting is inhibited by factors built into our political structure. Once a group has the dominant position . . . its overriding interest is to maintain that position. The motives of most individual legislators are just as selfish. Any substantial changes in districts means that the members must face new constituents and deal with uncertainties—in short undergo risks that few politicians would voluntarily put upon themselves. Voting for a fair apportionment would in many cases mean voting oneself out of office. That is too much to ask of most politicians.

56. See A. Cox, supra note 10, at 117-18 ("the cancer of malapportionment would continue to grow unless the Court excised it"); Auerbach, The Reapportionment Cases: One Person, One Vote—One Vote, One Value, 1964 SUP. CT. REV. 1, 70; Johnson, supra note 46, at 906; Lewis, supra note 55, at 1095; Wright, supra note 10, at 20-22; Wright, supra note 31, at 1267.

57. Auerbach, supra note 56, at 2.
58. See id. See also R. Neely, supra note 17, at 14 ("Both majority rule and effective participatory democracy were denied by a self-serving structure which had little or no rational justification").
Access to the legislative process in a truly representative democracy must be open to all citizens. Therefore, the integrity of the political process must be preserved. Because the legislative branch cannot or will not perform this function, it is the responsibility of the courts to ensure that the principle of one-man/one-vote is effectuated in our federal and state electoral systems.

In 1964, in *Reynolds v. Sims*59 and its companion cases, the Supreme Court recognized its duty to protect the constitutional rights of those citizens whose right to vote had been infringed by malapportionment.60 In the majority opinion in *Reynolds*, Chief Justice Warren stated:

Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of . . . legislators. . . . We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.61

The continuing need for federal court action in protecting the

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60. Apparently, some commentators view Baker v. Carr, 369 U.S. 186 (1962), as the Supreme Court's turning point in the area of reapportionment. See, e.g., R. Neely, supra note 17, at 14; Bennett & Quade, supra note 12, at 94. I nevertheless choose to rely on *Reynolds* because in *Baker*, the Court expressly declined to overrule Clegrove, finding that its holding that the federal courts have jurisdiction to hear apportionment cases was not inconsistent with the decision of the Court in Clegrove to refuse to intervene in this "political arena." *Baker*, 369 U.S. at 202. Further, the Court's holding in *Baker* was limited to the finding that the courts had the subject-matter jurisdiction, and it was not until 1964 that the Court actually exercised its power to declare a reapportionment scheme unconstitutional, *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964), and to set out constitutional standards for apportionment, *Reynolds v. Sims*, 377 U.S. 533, 568, 577-85 (1964).

61. 377 U.S. at 565-66. Justice Frankfurter, joined by Justice Harlan, dissented in *Baker*, 369 U.S. at 266, 330 ("the case is of that class of political controversy which . . . is unfit for federal judicial action"). Justice Harlan also dissented in *Wesberry*, 376 U.S. at 20, 48 ("the Court attempts to effect reforms in a field which the Constitution . . . has committed exclusively to the political process"), and *Reynolds*, 377 U.S. at 589, 624 ("these decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court . . . [which] is that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act").
constitutional right to vote is evidenced by recent challenges to malapportioned legislative districting plans. This responsibility is one the courts cannot and must not abdicate in deference to the legislative branch of government if the Constitution is to be preserved as the supreme law of the land.

B. Prisoners' Rights

I have witnessed a great change in the development of the law on prisoners' rights during my years on the bench. Originally, courts routinely relied on the "hands-off" doctrine in refusing to review prisoners' complaints charging inhuman treatment and civil rights violations. Even as recently as 1960, a federal district court dismissed a prisoner's complaint alleging that prison officials had failed to provide him proper medical treatment; the court found that "to allow such actions would be prejudicial to the proper maintenance of [prison] discipline."

Courts and commentators offered several justifications for the hands-off doctrine. First, it was said that the administration of federal prisons was entrusted to the discretion of the executive branch and therefore judicial intervention would violate the principle of separation of powers. Second, principles of federalism dictate that federal courts should not interfere in the administration of state prisons.


65. See Williams v. Steele, 194 F.2d 32, 34 (8th Cir. 1952) ("Since the prison system of the United States is entrusted to the Bureau of Prisons . . . the courts have no power to supervise the discipline of the prisoners nor to interfere with their discipline."); Sutton v. Settle, 302 F.2d 286, 288 (8th Cir. 1962) (per curiam) ("Courts have uniformly held that supervision of inmates of federal institutions rests with the proper administrative authorities and that courts have no power to supervise the management and disciplinary rules of such institutions").


67. See Procurier v. Martinez, 416 U.S. 396, 405 (1974); Siegel v. Ragen, 180 F.2d 785, 788 (7th Cir. 1950) ("The Government of the United States is not concerned with, nor has it the power to control or regulate, the internal discipline of the penal institutions of its constituent states."); Haas, supra note 66, at 797; Millemann, supra note 66, at 36-37.
Third, judges lack expertise and experience in prison administration.68

The failure of both executive officials and legislators to take action to remedy the shocking conditions that exist in our penal institutions has caused the demise of the hands-off doctrine.69 As the Supreme Court recognized,

[a] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.70

The inaction on the part of executive officials and legislators is the result of several factors. Prison officials often take no initiative in instituting reform because of "bureaucratic inertia."71 Further, prison administrators are limited by budgetary constraints beyond their control.72 Legislators have few incentives to appropriate funds for upgrading prison conditions; prisoners are an unpopular minority whose plight engenders little public support, especially at a time when

68. See Procunier v. Martinez, 416 U.S. at 405; Goldfarb & Singer, supra note 66, at 181; Haas, supra note 66, at 797; Millemann, supra note 66, at 36.
69. See Detainees of the Brooklyn House of Detention v. Malcolm, 520 F.2d 392, 397 (2d Cir. 1975) (citations omitted):
The failure in the past of legislators to take the proper correctional action to remedy these inhuman conditions for both detainees and convicted prisoners has eroded the historical reluctance of federal courts to interfere with the administration of penal institutions.... Indeed this failure has required the courts to take action in the interests of fundamental decency and the protection of the constitutional rights of the inmates.

70. Procunier v. Martinez, 416 U.S. at 405-06. See also Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam):

Federal courts sit not to supervise prisons but to enforce the constitutional rights of all "persons," including prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the Government for redress of grievances....
71. UCLA STUDY, supra note 69, at 555.
72. Millemann, supra note 66, at 40; UCLA STUDY, supra note 69, at 554. See also Detainees of the Brooklyn House of Detention v. Malcolm, 520 F.2d at 399 ("Inadequate resources or finances can never be an excuse for depriving [prisoners] of their constitutional rights").
there is a growing concern about crime.\textsuperscript{33} Prisoners themselves are often disenfranchised,\textsuperscript{74} and a disproportionately large number of them come from racial and socioeconomic groups that are politically powerless.\textsuperscript{75} It is therefore not surprising that inhuman conditions in prisons have persisted despite the power of legislators and administrators to initiate improvements.

Federal judges are not anxious to intervene in the administration of prisons, but they have been forced to do so by the continued inaction of state and federal executive officials and legislators. For the judges to do otherwise would be an abrogation of their duty to uphold the Constitution.

In 1977, I sat on the panel that heard the case of \textit{Green v. Carlson}.\textsuperscript{76} In that case, the plaintiff was the mother of a prisoner who had been incarcerated at the federal penitentiary at Terre Haute, Indiana. The plaintiff alleged that her son had been admitted to the prison hospital suffering from a serious asthma attack, that no physician was on duty and none was called during the eight-hour period the prisoner was in this condition, and that as a result of injections by an unlicensed nurse of a drug inappropriate for the treatment of asthma, the prisoner died. The district court dismissed the complaint on the ground that under state law, the cause of action did not survive the decedent.\textsuperscript{77} The Seventh Circuit reversed, noting that the anomalous result of that holding would allow recovery for injury but not death.\textsuperscript{78} We found that whether or not a federal civil rights action survives must be a question of federal common law because "[t]he liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred."\textsuperscript{79} We went on to hold that under the Supreme Court's decision in \textit{Estelle v. Gamble},\textsuperscript{80} the plaintiff's complaint in \textit{Green} stated a claim. In \textit{Estelle}, the Court recognized that "deliberate indifference to serious medical needs of prisons constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment."\textsuperscript{81}

\textsuperscript{73} See Millemann, supra note 66, at 38-39, 54; Comment, \textit{Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform}, 12 Harv. C.R.-

\textsuperscript{74} See Millemann, supra note 66, at 38-39.

\textsuperscript{75} See Comment, supra note 73, at 386.

\textsuperscript{76} 581 F.2d 669 (7th Cir. 1978).

\textsuperscript{77} Id. at 671 n.3.

\textsuperscript{78} Id. at 674.

\textsuperscript{79} Id. at 675.

\textsuperscript{80} 429 U.S. 97 (1976).

\textsuperscript{81} Id. at 104 (citations omitted).
It seems incredible to think that only a few years ago a prisoner in similar circumstances was without a remedy in federal court. Today, it is settled that the deprivation of basic human rights in prison amounts to a constitutional violation that will be remedied by the courts. I believe that whatever improvements have been made in the law concerning prisoners’ constitutional rights and in prison conditions have been almost solely due to the decisions of the federal courts. These allegedly interventionist decisions have made it clear that the courts can be relied on to protect the constitutional rights of individuals when the other branches of government do not do so.

C. Desegregation

The desegregation cases decided by the Warren Court during the 1950s and 1960s were particularly controversial. This was an area of the law in which the Constitution, in section 5 of the fourteenth amendment, expressly provided for Congress to have broad enforcement powers. But, despite this clear authority, Congress refused to exercise its section 5 power to remedy the conditions of racial inequality that existed throughout our nation by the time the Supreme Court decided Brown v. Board of Education.

Chief Justice Warren, writing for the Court in Brown, found that “education is perhaps the most important function of state and local governments,” and concluded that “[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.” In holding that separate but equal educational facilities violated the fourteenth amendment’s guarantee of equal protection, the Court relied on the psychological effect of segregation on school children: “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”

82. See Wright, supra note 10, at 16 (“Congress had not worried about Negro rights for almost seventy-five years [since the passage of the Civil War amendments]”). See also Cox, supra note 37, at 592:
It would have been best, no doubt, for the Congress to have taken the initiative in compelling school desegregation, but legislative action was blocked by the power of the Southern Congressmen and the filibuster. The Executive theoretically could have given more leadership. As a practical matter, however, the task of initiating steps to realize a national ideal fell to the Court; either it must act or nothing would be done.
84. Id. at 493.
85. Id.
86. Id. at 494.
Much of the criticism of the *Brown* decision is based upon the Court's use of psychological or sociological data. "No court, say the dissatisfied, has the competence or the jurisdiction to weigh evidence which is 'sociological' rather than 'legal' in character. The impact of school segregation upon the psychology of Negro children . . . [is] political . . . , not legal . . . , and [is] properly the business of legislators, not judges." To ignore this evidence from the social sciences, however, would have been to ignore the facts. The justices did not hold themselves out as having expertise or training in education or psychology; rather, they relied on the best information available from the experts.\(^8^8\)

Another criticism of *Brown* and the other desegregation decisions was that the Court was acting "almost entirely without the support of Congress."\(^9^9\) Although it is certainly correct that the Supreme Court led the way in protecting the constitutional rights of minority groups,\(^9^0\) the support of Congress was forthcoming, as evidenced by the passage of the Civil Rights Act of 1964\(^9^1\) and subsequent equal rights legislation.\(^9^2\) As Judge J. Skelly Wright has noted, the Court in *Brown* "awakened the nation's conscience" to the problem of racial inequality.\(^9^3\) Although the principles espoused in the *Brown* decision have been popularly accepted, controversy continues over how best to effectuate those policies.

V. CONCLUSION

Judge Frank M. Johnson of the United States Court of Appeals for the Eleventh Circuit has spoken eloquently on the subject of judicial activism:

[I]t is my firm belief that the judicial activism which has generated so much criticism is, in most instances, not activism at all. Courts do not relish making such hard decisions and certainly do not encourage litigating on social or political problems. But . . . the federal judiciary . . . has

\(^8^7\) Bennet & Quade, *supra* note 60, at 96.
\(^8^8\) *See* Johnson, *supra* note 1, at 471-72.
\(^8^9\) Bennet & Quade, *supra* note 12, at 93.
\(^9^0\) *See id.* at 93 n.8 ("most of the civil rights trails have been blazed by the Supreme Court").
\(^9^1\) 78 Stat. 252.
\(^9^2\) This is not to say that the *Brown* decision received immediate acceptance by legislators and executive officials. In fact, there was a great deal of resistance to lower court orders attempting to enforce the mandate in *Brown* by state and local school officials. *See generally* A. Bickel, *supra* note 17, at 256-58.
\(^9^3\) Wright, *supra* note 10, at 16.
the paramount and continuing duty to uphold the law. When a "case or controversy" is properly presented, the court may not shirk its sworn responsibility to uphold the Constitution. . . . The courts are bound to take jurisdiction and decide the issues—even though those decisions result in criticism. . . . And, finally, I submit that history has shown, with few exceptions, that decisions of the federal judiciary over a period of time have become accepted and revered as monuments memorializing the strength and stability of this nation.94

The responsibility for trends in the development of the law, whether in the direction of activism or judicial restraint, do not belong solely to the members of the federal judiciary. Lawyers play a vital role in shaping this development. The questions presented to judges are framed by lawyers within the context of actual controversies. The decisions of the court are many times influenced by the advocacy of the lawyer; his creativity and persuasiveness often determine whether the law stands still or moves forward.

The responsibility for the growth of the law and for its flexibility in meeting the changing needs of our society has never belonged to the judiciary alone—or even to the legislative or executive branches of government. That responsibility has always been shared by the members of the legal profession. Therefore, the activist trends in judicial decisions could not have come about without support from the bar. Further, although the federal courts may often lead the way in initiating change in some areas of constitutional law, these decisions have become important because they have been accepted by the public and the other branches of government.

Lawyers, judges, members of Congress, executive officials, and state-elected officials share the responsibility for preserving the independence of the judiciary. The judicial branch must continue to be insulated from political pressures in order to function properly; if the independence of the judiciary is destroyed by the "court curbing" bills now pending in Congress or by increased political answerability to the electorate or to members of Congress, the only effective safeguard against the infringement of constitutional rights will be lost.95

94. Johnson, supra note 1, at 474-75.
95. Senator Arlen Specter of Pennsylvania, in a letter to the Editor of the New York Times, March 6, 1982, has suggested that the news media have failed in their duty to "alert the American people to the clear and present danger to constitutional government presented by current efforts in Congress to limit the jurisdiction of the Supreme Court of the United States." I contend that this is the duty not only of the media but more importantly of all of us who work in the legal profession.