VERMONT LAW REVIEW

VOLUME 2 1977

"A PLAGUE OF LAWYERS"?: LAW AND THE PUBLIC INTEREST†

James L. Oakes*

Jerold S. Auerbach, author of *Unequal Justice*[1] and professor of history and law at Wellesley College, recently wrote that American society is suffering from *A Plague of Lawyers.*[2] One of Professor Auerbach's theses is that as the laws multiply, and with them the lawyers, "civilization crumbles."[3] Because such a view falls all too readily on the public's ears, attuned as they have been to the roar from Watergate, my first purpose in this article is to question this anti-law thesis. I will do so principally by seeking to demonstrate that Professor Auerbach, for all practical purposes, has overlooked a major development in American law, namely, the rise of public

† This article is based on the second annual Sterry R. Waterman Lectures given by Judge Oakes at Vermont Law School (Nov. 3 & Dec. 15, 1976). In his lecture of November 3, Judge Oakes made the following tribute to Judge Waterman:

> The Sterry R. Waterman Lectures is a particularly appropriate forum for the development of the optimistic theme of law truly in action in the public interest. For Judge Waterman's life and work give lie to the notion that a lawyer's calling is inconsistent with a devotion to the public interest. He began as a small town lawyer taking part in the public affairs of his town, his region and his state. He became a leading Vermont practitioner and assumed an important role in the prestigious American Law Institute, ultimately becoming a principal exponent of the Uniform Commercial Code, which, thanks in part to his efforts, has been enacted in nearly every state. Finally, he became Vermont's judge on the United States Court of Appeals for the Second Circuit, where, for two decades, he has emphasized the underlying policies involved in a given case rather than the semantic logic and narrow use of precedent which can be a refuge for judges less imbued with the public interest. Sterry Waterman has not only made the law his life, he has made the public interest his credo.

* Judge, United States Court of Appeals for the Second Circuit.

1. J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976).

2. HARPER'S, October, 1976 at 37.

3. *Id.* at 38.

interest practice and the public interest lawyer. The advent of public interest law, which has developed principally during the last two decades, at the very least mitigates the harsh charges made by Professor Auerbach against the American system of justice. This development suggests that what some view as "A Plague of Lawyers" may indeed be a moving force behind law truly in action in the public interest.

The second point of this article will be to indicate how the development of public interest law, important as it has been, can be, and perhaps to some extent already has been, hamstrung by narrow decisions from the United States Supreme Court and the lower federal courts. It will be my second purpose, therefore, to warn against the danger to the public interest in diluting the role of public interest law, particularly by limiting access to the federal courts, the principal source of development of this law.

I.

Let me first develop Professor Auerbach's anti-law thesis.[4] Professor Auerbach goes so far as to suggest that by the time we celebrate our Tricentennial a hundred years hence "we will be fortunate indeed if any Americans but lawyers are alive to see it."[5] He points out that the ratio of lawyers to population has grown from 1 to 1100 in 1900, to 1 to 700 in 1950, and now to 1 lawyer for every 530 people. The stream of law students has swollen from 53,000 in 1950 to 68,000 in 1968, and 97,000 just three years ago.[6] He also observes that we have more lawyers per capita than any other country in the world, and a great many more than either urban industrial Japan, the new nations of Africa or the People's Republic of China.[7] So stating, however, he fails to distinguish the political, social, economic, educational or other causes for these differences around the world.

The Far Eastern countries may be rather readily distinguished. The Confucian idea was for man to regulate his activities according

4. L. HAND, THE SPIRIT OF LIBERTY 100 (1959): "He [Mr. Justice Cardozo] never disguised the difficulties, as lazy judges do who win the game by sweeping all the chess men off the table. . . ."

5. HARPER'S, *supra* note 2, at 37.

6. *Id.*

7. *Id.*

to a self-imposed code of reason and morality; law as a sanction was foreign in concept. Indeed, thousands of years of Eastern civilization have resulted in the concept that the person who needs to resort to law, or to enforce it, is inferior. The criminal law, often abused as a tool of oppression, was in the nature of things the only law used and it perforce was applicable only to inferiors. There were not judges as such, only civil servants. Although industrialization and dealing with Western countries have begun to change this, to compare law in the Far East to law in the United States is to compare apples to eggs.

The developing or Third World countries also present a culture vastly different from our own. There the customary law is used to settle simply the average or ordinary dispute because the technical means and training required in a complex legal system have not yet been developed. One cannot superimpose another concept of law on an entirely different culture. This fact became most obvious to me in Zambia in 1971 when I had occasion to sit in on a murder trial. At this trial, because there were thirty-one languages or dialects in the country, there was no jury; furthermore, because the technical machinery and training were insufficient, there was no court reporter, so instead the trial judge was also required to act both as court reporter (in longhand) and jury.

But Professor Auerbach seems to make a point when he notes that England has a ratio of lawyers to populace only one-third as high as ours.[8] After all, we have derived directly from the British much of our legal system and many of its concepts, including the idea that law may be used to control the King himself and the State itself. But is the point a telling one? Two hundred years ago we revolted against England, not, to be sure, because of its insufficient ratio of lawyers to people, but because of what we felt to be the highly insufficient ratio of its laws to common justice. Our young republic was not too long in being when in *Marbury v. Madison*[9] the Supreme Court instituted the doctrine of judicial review, a doctrine antithetical to Parliamentary supremacy. This doctrine was founded upon revolutionary thinkers' expositions, including in par-

8. *Id.*

9. 5 U.S. (1 Cranch) 137 (1803).

ticular that of James Otis, and finding subsequent exegesis in Alexander Hamilton's Federalist Papers.[10] The subsequent development of English law and lawyers as opposed to the American experience has been, as Professor Kenneth Culp Davis[11] and Robert B. Stevens, Q.C., have remarked,[12] the difference between law in England as a narrow property-oriented, apolitical device for settling the disputes of the well-to-do as opposed to law as a vehicle for achieving social justice involving lawyers as social engineers in the United States. Small wonder that the ratio of lawyers in England should be smaller than our own, for the role of law is, or is thought to be, entirely different. The fact that courts lack the power of judicial review of parliamentary decisions does not necessarily imply a limited role, as the history of the early English common law advises. However, the contemporary English view is essentially that described by Lord Justice Devlin:

> In the old days the judges had to stretch the law to meet a new situation which otherwise would have been unregulated. Now that Parliament is willing to exert itself judges are entitled, and indeed bound, to say that it is for Parliament and not for them to make new laws.[13]

This is not, and in the nature of our pluralistic, individualistic, heterogeneous society simply cannot be, the case in the United States.

Professor Auerbach's case does not rest with his comparisons of the American system of justice to those of other countries. He goes on to suggest that because in America we think "more of anything is better," we tend to "pollute our public life and private lives" by encouraging people to act as if every human problem had a legal solution.[14] We are, in this sense, altogether too legalistic. Professor Auerbach is aware that a state-directed bureaucracy based on across-the-board decisionmaking is one alternative to our system of

---

10. THE FEDERALIST No. 78 (A. Hamilton). *See* Levy, *Judicial Review, History and Democracy: An Introduction*, in JUDICIAL REVIEW AND THE SUPREME COURT 6 (L. Levy ed. 1967).

11. Davis, *The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence*, 61 COLUM. L. REV. 201, 211-15 (1961).

12. B. ABEL-SMITH & R. STEVENS, IN SEARCH OF JUSTICE 172-73 (1968).

13. Devlin, *The Common Law, Public Policy and the Executive*, 9 CURRENT LEGAL PROB. 1, 12 (1956) (quoted in Davis, *supra* note 11, at 212).

14. HARPER'S, *supra* note 2, at 37-38.

redress through individual assertion of legal rights. This alternative would puncture what he calls the "bloated" legal profession. However, Professor Auerbach concedes that the bloated legal profession is merely a symptom, not a disease. He suggests that it reflects the "basic American values" of "consuming individualism, unrelenting contentiousness, and discordant heterogeneity."[15]

I had always thought that indiviudalism was what the Declaration of Independence and the Bill of Rights were all about, and I had never thought that that quality was consuming in the sense of burning us out or using us up. The finest hours of America and the American courts have been in the defense of individualism and individuals' rights. As for "discordant heterogeneity," I suppose this is in Professor Auerbach's eye to be viewed in opposition to concordant homogeneity. The sight on television of a million Chinese dutifully saluting their new reigning master and condemning the "leftist four" at the Gate of Heavenly Peace was just exactly the kind of concordant homogeneity which this country has always disassociated itself from and, in the case of Hitler, fought to the death against.

It may be a fault for Americans to have an "unrelenting contentiousness." Anyone involved in a judicial system, federal or state, is aware that in many cases it would be better if parties could privately settle their differences, and the courts could be avoided. Many talented minds have been and are at work on ways to bring this about by arbitration, no-fault insurance and otherwise. But is contentiousness such an unmitigated evil? Is it not a mark of a free people that one can, aggressively if he will, assert one's rights under law whether against another person, a local government, or the national sovereign? It is a mark, I suggest, of the refinement of civilization, not decay, that a common citizen can contend against his government, no matter how slender the right upon which he bases his contention. I think of the marvelous case of *Thompson v. Louisville*[16] where, on certiorari from the United States Supreme Court directly to the Police Court of Louisville, Kentucky, a little old black man "shuffling his feet in rhythm with the music of the

15. *Id.* at 38.
16. 362 U.S. 199 (1960).

jukebox"[17] in his neighborhood tavern had been arrested on charges of loitering and, after arguing with the police, for disorderly conduct. His conviction with fines of ten dollars on each offense had followed as a matter of course upon his fifty-four previous arrests. How majestic that the United States Supreme Court could take his case, factually analyze the testimony, and unanimously overturn the convictions, finding that there was such insufficient evidence to support either of the charges that it was held "a violation of due process to convict and punish a man without evidence of his guilt."[18] A right that seems tiny to some may be important to others and, as we eventually realize, may be of the utmost importance to all of us. We had a very pointed history before us in the rise and fall of the Third Reich, particularly the rise; it was only one day after the Weimar Republic's constitutional crisis engendered by the probably fraudulent Reichstag fire that Hitler, thrust into power, was able to suspend the basic civil rights of the German people, thence to launch his attack upon mankind. The decree Chancellor Hitler prevailed upon President Hindenburg to sign for the "Protection of the People and the State" provided almost the reverse of a bill of rights:

> Restrictions on personal liberty, on the right of free expression of opinion, including freedom of the press; on the rights of assembly and association; and violations of the privacy of postal, telegraphic and telephonic communications; and warrants for house searchers, orders for confiscations as well as restrictions on property, are also permissible beyond the legal limits otherwise prescribed.[19]

Individual contentiousness was a thing of the past, and the ultimte loser was society.

It is true, however, as Professor Auerbach suggests, that the plague of lawyers is rather astonishing from the standpoint of our own historical attitude toward them. Throughout much of Anglo-American legal history, lawyers have been in disrepute, and it would have been thought presumptuous to use law and public interest in the same breath. You may recall Hamlet's view of the morality of lawyers:

---

17. *Id.* at 202.
18. *Id.* at 206.
19. W. SHIRER, THE RISE AND FALL OF THE THIRD REICH 194 (1960).

> [W]hy may not that be the skull of a lawyer? Where be his quiddits now, his quillets, his cases, his tenures, and his tricks?[20]

The American experience did not immediately alter this view. Poor Richard's Almanack put it in the aphorism:

> A countryman between two lawyers is like a fish between two cats.[21]

Some early state constitutions outlawed lawyers, and a remnant of this distrust remains in Vermont in the unique, if to some extent unconstitutional, system of assistant judges.[22]

I must agree with Professor Auerbach that we have also seen in America the development of an individualism which, however much it may be revered in principle, became with the rise of the Industrial Revolution a mask for the privileged few. By the end of the nineteenth century success was, in William James' phrase, America's "bitch-goddess" and "with the squalid cash interpretation put on the word success—is our national disease."[23] The only rules governing the upward struggle for that success were those of competitive, Darwinian individualism. The liberty to contract meant the liberty to enslave,[24] and the liberty to compete meant the liberty to cut one's competitors' throats.[25] With the rise of the trusts, lawyers who could devise their creation became by the turn of the century all too much the epitome of what Professor Auerbach deplores—the protectors of the privileged, the few, the white, the Anglo-Saxon, the elite, and the rich.

This is essentially where Professor Auerbach unfortunately leaves his case; unfortunate both in terms of the article's complete-

---

20. W. SHAKESPEARE, *Hamlet* act V, scene i, line 104.

21. B. FRANKLIN, POOR RICHARD'S ALMANACK 5 (Peter Pauper Press, Mt. Vernon, N.Y. n.d.).

22. State v. Dunkerley, 365 A.2d 131 (Vt. 1976).

23. Letter from William James to H. G. Wells (Sept. 11, 1906), *reprinted in* J. BARTLETT, FAMILIAR QUOTATIONS 792b (14th ed. 1968).

24. *See* Adkins v. Children's Hospital, 261 U.S. 525 (1923), *overruled in* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937); Lochner v. New York, 198 U.S. 45, 58-59 (1905), *criticized and distinguished in* Bunting v. Oregon, 243 U.S. 426, 432 (1917).

25. *See* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

ness in its version of the law and lawyers, and from the standpoint of historical accuracy. That this mistrust of lawyers, if not law, persists into the present day, to be sure cannot be denied. Some of that distrust is warranted as too many members of the profession use their power, skills and influence for personal aggrandizement. But a new breed of lawyers is upon us and a new era of law has come into being. Let us turn then to the law's relationship to the public interest, the point at which Professor Auerbach's article leaves off.

The 1930's is an appropriate time to begin this discussion. It was only in the insecurity and turmoil of those Depression times that most sectors of American life first came to know by direct experience the extent to which the rise of industrialism in the late nineteenth century had changed the rather idyllic eighteenth century model of American life. Individual pluck and initiative were no longer enough to earn a decent standard of living in a society increasingly dominated by large and impersonal forces. Bound in precedential constraints, and a conception of the Constitution as oriented principally toward the preservation of property rights, the law and the legal profession were especially slow to respond to exigency. The Anglo-American legal tradition had been premised on the adversary clash between two approximately equal forces. The reality that many individuals needed assistance in modern mass society to protect their legal rights against large and powerful interests was consequently slow to be recognized. The very rights themselves had in the process to be redefined, the significance of which can be appreciated by recalling the skepticism that greeted Franklin Roosevelt's addition to our constitutional vocabulary of a fourth freedom, the "Freedom from Want."

The New Deal made a start. It was during this period that a bar which had been relatively small and certainly insular was opened up to some extent by the many new opportunities for lawyers in the administrative agencies and expanded executive branch which were created in the first ninety days to deal with the Depression. Many of the best young minds of the day—Frankfurter's Hot Dogs, as they came to be known—were attracted to government work. Here were lawyers with no client but the public interest; a broadened view of the meaning of legal representation was bound to result. It was at this time, too, that the federal judiciary finally ceased its militant defense of private contract and property rights

in the face of government regulation in the public interest.[26] Other developments were part of the same era: legal aid became visible and widespread;[27] labor law became a speciality as lawyers, in the days before unions were big business, helped workers, often as a matter of social conscience, protect their newly-won collective bargaining rights;[28] and the NAACP began to be a training ground for civil rights lawyers,[29] some of whom, for the first time, were blacks themselves.

But it was the proliferation of administrative law in the 1930's, '40's and '50's which was the major fountainhead of public interest law on the American scene. There was, and there continues to be, a proliferation of legislation affecting the lives of every American, especially on the economic level. This legislation is necessarily and essentially written in fairly sweeping phrases, concealing the political compromises of a highly complex, urban industrialized and pluralistic society. The ultimate resolution of the inevitable conflicts are left increasingly to the federal courts and, because of the nature of the Supreme Court's jurisdiction and capacity, very often to the lower federal courts. Essentially, the last forty years has seen the evolvement of an entirely new body of public interest law found nowhere in the Constitution—administrative law.[30] Implicit in the constitutionality of administrative action is judicial review,[31] which includes review of factual findings to determine whether they are supported by substantial evidence,[32] review of legal conclusions to determine whether they are supported by law,[33] and review of the

26. Nebbia v. New York, 291 U.S. 502 (1934); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

27. *See* Clark & Corstvet, *The Lawyer and the Public*, 47 YALE L. J. 1272 (1938).

28. Segal, *Labor Union Lawyers: Professional Services of Lawyers to Organized Labor*, 5 INDUS. & LAB. REL. REV. 343 (1952).

29. *See* J. GREENBERG, RACE RELATIONS AND AMERICAN LAW (1959); W. Hastie, *Towards an Egalitarian Legal Order*, 407 ANNALS 21-22 (1973).

30. *See* the two leading texts, K. DAVIS, ADMINISTRATIVE LAW TREATISE (1958 & Supps. 1970 & 1976); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

31. *See* Crowell v. Benson, 285 U.S. 22 (1932); ICC v. Louisville & Nashville R.R., 227 U.S. 88 (1913); R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 44-48 (1955).

32. *See* Scenic Hudson Preservation Conf. v. FPC, 453 F.2d 463 (1971), *cert. denied*, 407 U.S. 926 (1972); Murphy, *The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Carta or Agency Coup de Grace?*, 72 COLUM. L. REV. 963, 978 (1972).

33. *See* Conservation Soc'y of S. Vt. v. Secretary of Transp., 362 F. Supp. 627 (D. Vt. 1973), *aff'd*, 508 F.2d 927 (2d Cir. 1974), *vacated and remanded*, 423 U.S. 809 (1975).

vast exercise of administrative discretion to determine whether it has been exercised arbitrarily or capriciously.[34] Judicial review of administrative law rules, determinations and regulations, constituting a substantial portion of the federal work load, necessarily involves a multitude of lawyers. This of course is not to say that all, or even many, of those seeking such review are working in the public interest. But the entire concept of administrative law generally revolves around the concept of agency action "in the public interest."[35] That is the guiding principle of decisionmaking for the agencies, however vague it is in concept; it is, perhaps, another way of Congress saying to the agencies, after laying down broad purposes and a few guidelines: "Now make law for the benefit of the public, as you see that benefit." And the courts have made their contribution not just by review of the substantive decisionmaking but by broadening public participation in the administrative process, and helping to insure fairness and reasoned decisionmaking by the agencies.

Since the New Deal days we have seen a continuing interest in alternative ways through which the legal system can give better justice to more people. Legislatively in these years, for example, the Office of Economic Opportunity legal services program[36] was created and began to do excellent work in representing interests which had not previously been heard. After a partial eclipse during the Nixon years, this work has once again been taken on by the new Legal Services Corporation.[37] This trend also embraced social welfare legislation, which included newly popular private rights of action against government agencies which failed to do their duty.[38] "Great Society" legislation created new specialties in poverty law,[39] environmental law,[40] and employment discrimination law.[41]

---

34. Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (1970).

35. Cramton (moderator), *Panel I: What Is The Public Interest? Who Represents It?*, 26 ADMIN. L. REV. 385 (1974). *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.03 (1958).

36. The Economic Opportunity Act of 1964, § 222(a)(3), 42 U.S.C. § 2809(3) (repealed by Pub. L. No. 93-355 § 3(d)(2), 88 Stat. 378 (1974)).

37. Legal Services Corporation Act of 1974, §§ 1001-1010, 42 U.S.C. §§ 2996-2996*i* (Supp. V. 1975).

38. The Clean Air Amendments of 1970, § 304, 42 U.S.C. § 1857(h)(2) (citizen's suits).

39. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969).

40. National Environmental Policy Act of 1969, §§ 1-2, 101-105, 201-207, 42 U.S.C. §§

The last quarter century has also seen two major concomitant judicial or constitutional developments which have created a new concern of the law with the public interest and which have altered the relationship of the individual in America to his society. The first of these developments is in the area of criminal law.

The criminal law has gone through what by any standards is a revolution.[42] The Supreme Court has given more positive meaning to many of the rights enumerated in the fourth,[43] fifth,[44] sixth,[45] and eighth[46] amendments and has read or incorporated these into the fourteenth amendment so as to apply them in state prosecutions,[47] thus proliferating, by way of habeas corpus petitions,[48] constitutional attack in the federal courts on state court convictions.[49] The

---

4321-4347 (1970). *See* Oakes, *Environmental Litigation: Current Developments and Suggestions for the Future*, 5 CONN. L. REV. 531 (1973).

41. *See* Sovern, *The Right to Equal Employment Opportunity*, in THE RIGHTS OF AMERICANS 23 (N. Dorsen ed. 1971).

42. Mapp v. Ohio, 367 U.S. 643 (1961) is the key case and may be said to have marked the start of the revolution. Gideon v. Wainwright, 372 U.S. 335 (1963) spread the revolution to every hamlet and dale.

43. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

44. *See, e.g.*, Leary v. United States, 395 U.S. 6 (1969); Marchetti v. United States, 390 U.S. 39 (1968); Miranda v. Arizona, 384 U.S. 436 (1966); Griffin v. California, 380 U.S. 609 (1965). *See* Meltzer, *Privileges Against Self-Incrimination and the Hit-and-Run Opinions*, 1971 SUP. CT. REV. 1.

45. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964).

46. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972); Witherspoon v. Illinois, 391 U.S. 510 (1968); Robinson v. California, 370 U.S. 660 (1962).

47. One of the best recent articles on the fourteenth amendment with a good bibliography is Cord, *Neo-Incorporation: The Burger Court and The Due Process Clause of the Fourteenth Amendment*, 44 FORDHAM L. REV. 215 & n.1 (1975). *See also* Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

48. *See* Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); 28 U.S.C. § 2254 (1970).

For the term 1974-75 all the circuit courts had 871 state and 207 federal prisoner petitions, down from a peak of 1,319 for state prisoner petitions in 1971-72 and a peak of 261 for federal prisoner petitions in 1972-73. Civil rights petitions by prisoners have, however, steadily increased from 337 in 1970-71 to 694 in 1974-75. *See* [1975] Ad. Off. of the U.S. Courts, Ann. Rep. of the Director table 4, at XI-17.

49. Recent opinions granting the writ include United States *ex rel.* Leeson v. Damon, 496 F.2d 718 (2d Cir. 1974) (guilty plea based on ignorance of maximum sentence); United States *ex rel.* Dunn v. Casscles, 494 F.2d 397 (2d Cir. 1974) (guilty plea without assurance of factual basis); United States *ex rel.* Haynes v. McKendrick, 481 F.2d 152 (2d Cir. 1973) (racially prejudicial slurs in prosecutor's summation). See, for an excellent treatment of the

criminal law revolution is especially relevant to public interest law with respect to the expanding concept of the right to counsel which has been held to include not only a right to representation at a trial for a felony,[50] and ultimately for a misdemeanor involving potential imprisonment and loss of liberty,[51] but also to representation in nontrial situations, that is at time of arraignment,[52] during custodial interrogation,[53] in lineup and other identification proceedings.[54]

The second judicial or constitutional development is the expanding protection to personal property rights, including ultimately the right to property (or new property)[55] against legislative will or lack of will. This expanded protection came primarily through the resuscitation of the post Civil War civil rights acts.[56] These acts, dormant for upwards of seventy-five years because of narrow readings,[57] were given new life through a broadened interpretation of the due process clauses in the fifth and fourteenth amendments,[58] the equal protection clause in the fourteenth,[59] and the Bill of Rights generally through an expanding penumbral right to privacy,[60] or to "personhood".[61]

---

pro se prisoner's rights in the federal courts, written by two former pro se clerks in the Second Circuit, Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 159 (1972).

50. Gideon v. Wainwright, 372 U.S. 335 (1963).

51. Argersinger v. Hamlin, 407 U.S. 25 (1972).

52. Coleman v. Alabama, 399 U.S. 1 (1970).

53. Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964).

54. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

55. *See* Lynch v. Household Finance Corp., 405 U.S. 538 (1972); McClendon v. Rosetti, 460 F.2d 111 (2d Cir. 1972); Reich, *The New Property*, 73 YALE L. J. 733 (1964).

56. *See* 42 U.S.C. §§ 1981-1994 (1970). *See also* Steffel v. Thompson, 415 U.S. 452 (1974); Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Educ., 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961).

57. *See* H. COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 50 (1943).

58. *See* note 47 *supra*.

59. A most important recent article on the equal protection clause is Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as *In Search of Evolving Doctrine*]. *See also* Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

60. In my view the outstanding legal exposition of the penumbral right to privacy is a student note, the authors of which have subsequently served as law clerks on the Second Circuit, Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670 (1973).

61. Craven, *Personhood: The Right to Be Let Alone*, 1976 DUKE L. J. 699, 702 & n.15.

The courts, particularly the federal courts led by the Supreme Court, using the power of judicial review, have acted in a very real sense as the pressure cooker of American politics and society.[62] Many of the fundamental dilemmas inherent in a representative democracy form of government that is simultaneously devoted to majority rule and minority or individual rights, have been resolved,[63] if not finally, at least for the moment. In this area, where the tension between motion and inertia in the American society lies, when the legislative and executive branches have failed to act, but where elements in society demand action and have sought it by way of litigation,[64] the law has risen, I think majestically, to meet the public interest. Minority aspirations, traditions and trepidations have been given credence and succor. While reasonable philosophers may differ as to the wisdom of judicial review,[65] and the scope of its exercise in any given area or at any given time, I am one who believes with Cardozo that:

> The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by

62. Among recent papers, perhaps the one most convincingly advancing what I will call the "pressure cooker" theory is Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952). *Compare* Bickel, *Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) *with* Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964). But it is impossible to improve upon DETOCQUEVILLE, DEMOCRACY IN AMERICA pt. I, ch. 6, at 106 (Am. ed. New York 1856):

> Within these limits the power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies.

It is also deTocqueville who made the classic observation, "Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate; . . ." *Id.* pt. I, ch. 16, at 306.

63. By our form of government with its checks and balances the Supreme Court, in addition to being a court of law, is also a political institution. *See* JACKSON, *supra* note 31, at 53-83.

64. This litigation is sometimes successful, as in the case of reapportionment, Baker v. Carr, 369 U.S. 186 (1962), and sometimes unsuccessful as in the case of local property taxes as a method of school financing, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

65. *See* note 62 *supra*.

> enshrining them in constitutions, and consecrating to the task of their protection a body of defenders.[66]

That "body of defenders" of the public interest under our system is the courts and the lawyers who dedicate their time and energies, often unpaid, usually underpaid, bringing to the courts the litigation which is the stuff of public interest law. The two decades between 1950 and 1970 saw greatly increased access to the federal courts, and to many state courts, for the assertion of public interest claims. The law of standing of litigants to raise claims was broadened,[67] particularly in the environmental field.[68] Political questions, not theretofore reachable by the courts, were narrowly limited.[69] The class action was devised and brought into widespread use on behalf of consumers[70] and civil rights proponents.[71] A reinterpretation of §1983,[72] the original Ku Klux Klan Act in *Monroe v. Pape*,[73] and *McNeese v. Board of Education*,[74] remarked upon by Judge Waterman speaking in the Cecil Sims Vanderbilt Law School Lectures of a few years ago,[75] opened up the courts to minority groups,[76] women,[77] prison inmates,[78] students,[79] teachers,[80] welfare recipi-

---

66. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 92-93 (1921).

67. *See* Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150 (1970); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 471 (1970).

68. *See* United States v. SCRAP, 412 U.S. 669 (1973).

69. Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

70. West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971). *See* Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. REV. 407 (1969).

71. United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *decree corrected*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967).

72. 42 U.S.C. § 1983 (1970).

73. 365 U.S. 167 (1961).

74. 373 U.S. 668 (1963).

75. Waterman, *Whither the Concept "Affected with a Public Interest"?*, 25 VAND. L. REV. 927 (1972).

76. *See* note 71 *supra*.

77. Reed v. Reed, 404 U.S. 71 (1971).

78. Cruz v. Beto, 405 U.S. 319 (1972); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).

79. Healy v. James, 408 U.S. 169 (1972).

80. James v. Board of Educ., 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972).

ents,[81] children under state supervision,[82] mental patients[83] and others.

We also had with this newfound concern of the law for the public interest a new concept in lawyermanship—the "private attorney general," who would be paid by the losing party, some decisions held,[84] for the assertion of the public interest on behalf of an individual or class of litigants. Referring to one of these decisions, *LaRaza Unida v. Volpe*,[85] I was able to say as late as 1973, not inaccurately then, but with a somewhat clouded crystal ball:

> [S]ome years hence one may look back upon the Sixties and Seventies as an era of the law's developing its own internal self-sustaining institution meeting the social demand for law actively to subserve the public interest in environmental protection—creating in three steps (1) a public right, (2) persons (or objects) with standing to assert that right, and (3) providing the means for paying the lawyers and technical experts who do the work to assert the right. Thus evolves democracy in this wondrous law-oriented society of ours.[86]

However inaccurate this observation in terms of fees in the light of *Alyeska Pipeline Co. v. Wilderness Society*,[87] we have seen the development of the public interest law firm, like the NAACP Legal Defense Fund, the National Resources Defense Council, the National Employment Law Project, or the Suburban Action Institute, the names of which betoken their specialties. The attorneys' salaries of the public interest firms, some of which are organized for profit but most of which are nonprofit, are financed by the public,[88] by foundations and private contributions, and by the fees they earn. Much of the major litigation in the civil rights, environmental, and

---

81. Shapiro v. Thompson, 394 U.S. 618 (1969).

82. McRedmond v. Wilson, 533 F.2d 757 (2d Cir. 1976).

83. Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated and remanded*, 422 U.S. 563 (1975).

84. *E.g.*, Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974); Cornist v. Richland Parish School Bd., 495 F.2d 189 (5th Cir. 1974).

85. 57 F.R.D. 94 (N.D. Cal. 1972), *criticized in* Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 270 n.46 (1975).

86. Oakes, *supra* note 40, at 538.

87. 421 U.S. 240 (1975).

88. *E.g.*, The Suburban Action Institute is financed by the Equal Employment Opportunity Commission.

housing and employment opportunity fields has been conducted by the public interest firms. This new institution in American law, if not self-sustaining, has risen to meet the demands of our law-oriented society.

As one looks back, however, on the violent, chaotic, and insufficiently democratic past of this country, one cannot help but be struck by the strides toward better justice for more people which have been made in the recent past. If there has been a plague of lawyers, more and more of them as time has gone by have been working in the public interest. It is revealing only a little to say that such an evaluation will be one of concern, but nevertheless guardedly optimistic, recognizing that providing better justice to more people is not necessarily synonymous with solving all of society's disputes in the adversary context of judicial battle. The greatly widened access to courts, especially the federal courts, and the consequent development of a "vigorous and skillful public interest bar" have rightfully given encouragement to "a belief in the country that no matter how much injustice one perceived, the peaceful struggle for justice could bear fruit in concrete ways that actually affected people's lives."[89] Those who are dedicated to work in the law need not skulk away with tails between their legs as some would have it. The door to "equal justice under law" has been pried open by public-interest-minded judges and lawyers against the forces of restraint that would keep it closed. The fresh air let in the house of democracy by that open door has blown away much of the cobwebs and dust of the law that shrouded the rights of individual Americans. The light from that open door has made America more true to itself. A public that has seen the light this open door lets enter will surely not let the door be closed.

II.

Thus far, I have sought to demonstrate that those who see the legal profession as monolithic and self-interested overlook the rise of public interest practice and the role of the public interest lawyer in the last two decades. If there has been a plague of lawyers in America, more and more of them have been working in the public

89. N.Y. Times, Oct. 25, 1976, at 28, col. 1.

interest. Greatly widened access to the courts, especially federal courts, and the consequent development of a vigorous and skillful public interest bar, have rightfully given encouragement to a belief that the peaceful struggle for justice does bear fruit in concrete ways that actually affect people's lives. At the same time, there are currents in the Supreme Court, and elsewhere in the profession, that deeply disturb me. I now turn to an evaluation of these developments.

I do not speak of substantive rights, even if a case could be made that the Supreme Court is sometimes less than sympathetic to newly emerging societal interests and accompanying rights.[90] I speak rather of the multifaceted trend toward restricting access to the federal courts through a narrow interpretation of various procedural doctrines and devices. I am by no means a believer that all of society's disputes may or should be solved in the adversary context of judicial battle, but some of the decisions which I will discuss have curtailed the role and function of the federal courts in our society.

Procedural decisions in three categories of cases have restricted access of litigants to federal courts. Standing of litigants has been limited. The availability of class actions for the purpose of asserting claims involving small amounts to each individual has been sharply reduced. Attorneys' fees have been made unavailable, absent an act of Congress, to citizens acting as "private attorneys general."

A. *Standing*

The law of standing requires in essence that a person must have sustained "injury in fact" in order to sue in federal court. The concept of injury in fact developed over a long period of time, and seemed settled as a benign and flexible limit on entrance to the federal courts by *Association of Data Processing Service Organizations, Inc. v. Camp,*[91] and *Barlow v. Collins.*[92] In *Association of Data Processing,* the Court held that if the plaintiff "alleges that the

90. *See, e.g.,* Kelley v. Johnson, 425 U.S. 238 (1976) (policeman's hair length); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (right to education); Lindsey v. Normet, 405 U.S. 56 (1972) (right to housing); Dandridge v. Williams, 397 U.S. 471 (1970) (right to welfare benefits).

91. 397 U.S. 150 (1970).

92. 397 U.S. 159 (1970).

challenged action has caused him injury in fact, economic or otherwise,"[93] he satisfies the constitutional "case or controversy" test and has standing. That is, such an allegation is sufficient to place his interest "arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question."[94] The Court went on to say that that interest at times "may reflect 'aesthetic, conservational, and recreational' as well as economic values."[95]

A hint of dissatisfaction with the breadth of this declaration surfaced in *Sierra Club v. Morton*[96] when the Court disapproved decisions of lower courts conferring standing upon organizations that demonstrated only "an organizational interest in the problem"[97] of environmental or consumer protection. The Court said that "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA [Administrative Procedure Act],"[98] and so is also insufficient to give it standing to attack federal administrative action. However, this did not prove too great a barrier to standing. The Sierra Club was able to achieve standing by later amending its pleading to allege that individual members liked to hike in the Mineral King Valley.[99] But the most flexible Supreme Court standing case was yet to come. In *United States v. SCRAP,*[100] the Court held that even an "identifiable trifle [of injury] is enough for standing to fight out a question of principle."[101] The trifle of injury there was that of five law students who alleged that a 2.5% increase in railroad freight rates allowed by the Interstate Commerce Commission would ad-

93. 397 U.S. at 152.

94. *Id.* at 153.

95. *Id.* at 154 (quoting Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 616 (2d Cir. 1963)).

96. 405 U.S. 727, 738-39 (1972).

97. *Id.* at 739.

98. *Id.*

99. Sierra Club v. Morton, 348 F.Supp. 219, 220 (N.D. Cal. 1972).

100. 412 U.S. 669 (1973).

101. *Id.* at 689 n.14 (quoting Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 603 (1967-68)).

versely affect the environment because the increase would apply to, among other things, the transportation of recycled goods.

In the environmental field, the Court has not retreated from this very broad concept of standing, one that permits an injury to be insignificant, remote or trivial. But in four important decisions in other areas of litigation within the last three years the Court has cut back standing.

In *Schlesinger v. Reservists Committee to Stop the War,*[102] a 6-3 majority denied standing to citizens and taxpayers seeking to challenge the military reserve membership of members of Congress. Plaintiffs relied on article I, section 6, clause 2 of the Constitution providing that no person holding any office under the United States shall be a member of either House. The basis for the decision in *Schlesinger* was that the harm suffered by the individuals was not peculiar to them but rather was shared by the citizenry in general; therefore what appeared to be a clear violation of the Constitution could not be challenged in federal court because everyone in the country was harmed equally. If this doctrine of prudential standing were broadly applied, the federal courts would lose much of their function. Preferably, perhaps the decision could well have been based on the old political question doctrine, under which the Supreme Court would not interfere in the case because another branch of government was directly affected.[103]

The second restrictive standing case was *United States v. Richardson*[104] in which a 5-4 majority denied a federal taxpayer standing to challenge the constitutionality of a secret CIA budget. The taxpayer relied on article I, section 9, which denies certain powers to Congress and particularly requires that no money shall be drawn from the Treasury but in consequence of appropriations by law and "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to

---

102. 418 U.S. 208 (1974).

103. *See* Baker v. Carr, 369 U.S. 186 (1962); Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 YALE L. J. 517 (1966). *See also* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 233-41 (2d ed. 1973).

104. 418 U.S. 166 (1974).

time."[105] By denying standing, the Supreme Court may have been doing no more than reaffirming *Massachusetts v. Mellon*[106] which held that individual citizens cannot challenge congressional appropriations; but by couching the decision in the liturgy of standing, the Supreme Court made it possible to argue for cutting back individual access to the courts in other situations.

These two cases are to be looked at in contrast to *Flast v. Cohen*[107] in which the Supreme Court permitted taxpayers to challenge federal expenditures benefiting parochial schools. We are not told that *Flast* is overruled by *Schlesinger* and *Richardson,* but the constitutional provision in *Richardson* certainly seems more directly related to the protection of taxpayers than the prohibition on establishment of religion asserted in *Flast. Flast* may have been overruled *sub silentio,* but because it has not been directly overruled it is available to one who would use it at another place and time. This is the kind of decisionmaking that if it may be treated as principled is certainly dualistic. That is, it enables one to choose which decisions and what principles back up the result one wishes to reach; the decisionmaker is not required to reach a result by the Supreme Court's choice of principle.

Then there is *Warth v. Seldin,*[108] a case that was appealed by the losing plaintiffs in our court. The plaintiffs were low and moderate-income citizens of Rochester, a homebuilders' association, and an association of the residents of the Rochester suburb of Penfield. The plaintiffs sought to challenge the exclusionary zoning ordinances of Penfield, on the ground that the ordinances unconstitutionally screened out lower income and minority residents. The individual low and moderate-income plaintiffs had alleged that they desired to live in the suburb, the homebuilders' association was concerned with housing shortages for lower income people in the area, and the Penfield citizens group alleged deprival of the benefits of living in a racially and ethnically integrated area. A 5-4 majority of the Supreme Court denied all of the plaintiffs standing. The

105. U.S. CONST. art. I, § 9, cl. 7.
106. 262 U.S. 447 (1923).
107. 392 U.S. 83 (1968).
108. 422 U.S. 490 (1975).

Court held that the plaintiffs had failed to demonstrate injury in fact because they could not point to any particular housing that would have actually been built but for Penfield's ordinances, and indicated that the standing requirement could have been satisfied only if a developer of low and moderate income housing projects had actually applied unsuccessfully to the suburb for permission to build. Such a requirement would obviously place standing beyond the reach of the low and moderate-income plaintiffs and, as to the builders' association, was imposed in the words of Professor K. C. Davis in "an exteme holding having no precedent. . . . unlikely to have a following."[109] The Court went beyond this and denied the Penfield taxpayer citizens' association standing to assert the rights of other low and moderate-income individuals unable to find housing in the suburb. The majority opinion insisted that nothing interfered with other low and moderate-income individuals to assert their own rights.

Parenthetically, it may be noted that these Supreme Court cases have ripple effects in the lower courts. *Warth v. Seldin* was quickly emulated in lower courts, with the Second Circuit overturning en banc my 2-1 panel decision in *Evans v. Lynn.*[110] The Second Circuit held 6-4 that low-income residents of Westchester County who had sought without success housing in the town of Newcastle had no standing to object to HUD grants to Newcastle for outdoor recreation and sewage purposes inconsistent with low-cost housing. The court denied standing despite the fact that the Fair Housing Act of 1968[111] imposed upon HUD the duty of effectuating fair housing. We have *sub judice,* it may be stated, the next step in this kind of litigation, where the inner city itself, in this case the City of Hartford, has sued HUD to prevent its making block grants to suburbs which do not comply with the congressional requirements pertaining to the submissions for those grants. I will not comment on that decision further for obvious reasons.

One can ask, however, that if as in the environmental field only a trifling injury is sufficient to constitute "injury in fact," should

109. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES §22.02-4, at 496 (1976).
110. 537 F.2d 571 (2d Cir. 1976).
111. Fair Housing Act of 1968, §§ 801-819, 901, 42 U.S.C. §§ 3601-3631 (1970).

not inner city ghetto residents who suffer a more substantial injury, be allowed to seek to halt suburban exclusionary zoning? If the erection of a zoning wall around the inner cities, which is certainly among the most serious social problems today in American society, is not a very real and substantial injury in fact to the inner city residents, what is?

The fourth and final standing decision in this trend was *Simon v. Eastern Kentucky Welfare Rights Organization.*[112] There, at the pleadings stage, standing was denied to low-income persons unable to afford hospital services and poverty organizations seeking to challenge favorable tax treatment granted by the Internal Revenue Service (IRS) to certain private hospitals. The theory of the case was that the IRS violated the Internal Revenue Code by eliminating a requirement that nonprofit hospitals serve indigents to the extent of their financial ability. The Court found no injury in fact because the plaintiffs did not demonstrate that without such a ruling the hospitals would choose to provide the services rather than abandon their favorable tax treatment.[113]

The argument can be made on the basis of these cases, as it has been in effect by a recent publication of the Society of American Law Teachers,[114] that in effect we now have a double standard of standing, one that some would suggest is elitist in principle. The only slightly affected individual who owns a lot of land and lives in a scenic area has standing to contest the slightest injury to his environment, the argument goes, while the poor or minority citizen affected by suburban exclusionary principles or by an Internal Revenue ruling which preserves charitable exemptions for nonprofit hospitals that do not serve indigents cannot come to court. The latter must seek their relief in Congress, if at all, and where the challenge, as in *Warth,* is that a local law is unconstitutional, such relief is clearly unavailable.

One can footnote the recent standing cases by pointing out that at least one case, the most recent one, has seemed to permit a little

112. 426 U.S. 26 (1976).

113. *Id.* at 43-44.

114. Board of Governors of the Society of American Law Teachers, Supreme Court Denial of Citizen Access to Federal Courts to Challenge Unconstitutional or Other Unlawful Actions: The Record of the Burger Court (October 1976).

less injury in fact. I refer to *Singleton v. Wulff*[115] where Mr. Justice Blackmun joined the remaining dissenters in *Warth,* Mr. Justice Stevens concurring, to give standing to doctors challenging the constitutionality of a state law denying payment of Medicaid benefits to patients undergoing certain abortions. Not only could the doctors assert their own rights, but also those of the women whose exercise of the right to an abortion was hindered. The doctors, as Mr. Justice Powell pointed out in dissent to this part of the holding,[116] were therefore to be treated differently from the taxpayers' association in *Warth.*[117] It can be recalled that the association in *Warth* was not allowed to assert the rights of others. I would be the first to say that neither the doctors' rights nor their patients' injuries were trifling; I would be the last to say that they were any more significant than the interests of the inner city residents in *Warth v. Seldin* or the indigents in *Simon v. Eastern Kentucky.* I hope that *Singleton* portends the future. If not, the law of standing will remain partially tied to the concept that ownership of property is the fount of all legal rights. This medieval idea should not be allowed to skulk back into the law in procedural disguise.

B. *Class Actions*

The law of class actions has been another area of recent procedural retrenchment. A good argument can be made that to the extent the Supreme Court has cut back or reduced access to the federal courts, it has done so in large part on the strength of a 1969 class action decision, *Snyder v. Harris.*[118] That case held that where none of the plaintiffs individually claim more than the $10,000 federal jurisdictional amount, it was insufficient that their claims totaled more than $10,000 in the aggregate. *Snyder v. Harris* was first expanded in a case coming from Vermont, a class action suit brought by Lake Champlain landowners, *Zahn v. International Paper Co.*[119] In *Zahn* about 200 lakefront owners sued International Paper for polluting Lake Champlain.[120] Four of the plaintiffs did

115. 428 U.S. 106 (1976).
116. *Id.* at 122 (Powell, J., dissenting).
117. 422 U.S. at 509-10.
118. 394 U.S. 332 (1969).
119. 414 U.S. 291 (1973).
120. *See* Note, *The Battle of Lake Champlain—Interstate Pollution and the Inadequacy*

have claims of more than $10,000, and the case obviously was a substantial one. Chief Judge Leddy, "with great reluctance," held against the plaintiffs, and he was affirmed by a panel of the Second Circuit.[121] The Supreme Court found no ancillary jurisdiction, and a 6-3 majority held that each class member must have the jurisdictional amount and that a class action could not be brought on behalf of those with lesser claims.[122] Thus the smaller claimants were left to their state court remedies and without the litigative support of the larger claimants. My own reaction to this decision, even though it was arguably compelled by *Snyder,* is rather clearly expressed by my concurrence in the dissent by Judge Timbers from the denial in our court of an en banc rehearing.[123]

The other key class action case is, of course, *Eisen v. Carlisle & Jacquelin.*[124] This case also came out of our court, with my dissent, joined by Judge Timbers, from the denial of rehearing en banc,[125] of a panel opinion which went even further than the Supreme Court ultimately did to limit class actions. *Eisen* was an antitrust suit by a purchaser of odd lots of stock on the New York Stock Exchange against the two brokerage firms which handled odd lots at that time. The complaint alleged that the firms charged brokerage fees considerably in excess of those charged for purchases in block of 100 shares or more. The district judge proposed to notify the class of plaintiffs individually through the *Wall Street Journal* and other newspapers, and to give individual notice to about 7,000 out of the 2.25 million members of the class. The judge also proposed that the defendants bear ninety percent of the cost of notification because they were "more than likely" guilty of having violated the antitrust laws.[126] But the Supreme Court held that all 2.25 million people had to be notified by the plaintiff and that he had to

---

of the Judicial Process: Vermont v. New York, 1 VT. L. REV. 175 (1976) for a discussion of the efforts of the State of Vermont to halt pollution of Lake Champlain by the International Paper Company.

121. 53 F.R.D. 430, 433 (D.Vt. 1971), *aff'd,* 469 F.2d 1033 (2d Cir. 1972), *aff'd,* 414 U.S. 291 (1973).

122. 414 U.S. 291 (1973).

123. 469 F.2d at 1041 (2d Cir. 1972) (en banc), *aff'd* 414 U.S. 291 (1973).

124. 417 U.S. 156 (1974).

125. 479 F.2d 1005, 1021 (2d Cir. 1973) (en banc) (Oakes, J., dissenting), *vacated and remanded,* 417 U.S. 156 (1974).

126. 52 F.R.D. 253 (S.D.N.Y. 1971).

bear the entire cost. The plaintiff, who had already spent some $50,000 in several years of litigation, needless to say, when the case was sent back to the district court, folded up his tent and silently stole away. The *Eisen* case thus prevents class action treatment of damage actions in which a large number of people have been wronged but none to a sufficiently great extent to justify the expense of notification. Many types of consumer suits against today's industrial behemoths are thus effectively deterred. In deciding the case the Supreme Court discarded without comment my suggestion, taken up by Mr. Justice Douglas in dissent, that the huge class might have been broken down into a manageable subclass under Rule 23(c)(4)(B) as to which subclass the expense of notification could be paid, with the remainder of the classes held in abeyance. And lest one think that *Eisen* could rather readily be overturned by congressional legislation, because the Court's rationale was not that due process required such notification, but that notification was required under Federal Rule 23,[127] the Court construed the Rule in the light of cases concerning the constitutional sufficiency of notice by publication.[128]

C. *Attorneys' Fees*

The sharp circumscription of attorneys' fee awards to a prevailing party is a third trend which has resulted in diminished access to the federal courts. In *Alyeska Pipeline Co. v. Wilderness Society,*[129] the Court held that attorneys' fees could not be awarded to a successful plaintiff even though he had acted to enforce a public right or in the public interest, and had served in the role of what several lower courts and commentators have referred to as a "private attorney general."[130] In *Alyeska,* it will be recalled, the plaintiffs had been quite successful in litigation, pointing out that the pipeline company had failed to comply with the Mineral Leasing Act of 1920[131] which deals with rights of way through public lands. It took an act of Congress[132] to overrule the judicial decision

127. *See* FED. R. CIV. P. 23(c)(4)(B).
128. 417 U.S. at 174-75.
129. 421 U.S. 240 (1975).
130. *Id.* at 269-70 & n.46.
131. 30 U.S.C. § 185 (1970).
132. 43 U.S.C. § 1651 (Supp. V 1975).

and thereby let the pipeline be built. The lower court had, like four other circuit courts of appeal in similar cases,[133] allowed attorneys' fees to the successful plaintiffs on the private attorney general theory. The Supreme Court rejected this view, 5-2, holding that attorneys' fees could be awarded only when there was a congressional statute permitting them to be awarded, absent a showing that the defendants' conduct was in bad faith, vexatious, wanton or oppressive;[134] or unless a "common fund" was recovered,[135] in which case there would be funds available for the payment of attorneys' fees. Of all the limiting-access decisions this one has probably the most support in principle, because it was based upon the original doctrine of American law that whether prevailing or losing, each side pays its own attorneys' fees.[136] Where, as in England, the losing party is mandatorily liable for the prevailing party's fees, an unsuccessful plaintiff is oppressively burdened, and the resulting deterrence of meritorious suits may operate to limit access to the courts rather than increase it.[137] Coming in the context of other cases limiting access, however, the decision preventing even discretionary allowance has been perhaps the most criticized because it acts as a strong deterrent to the public interest bar which often cannot depend on its own clients for fees.[138] It has already been overruled by congressional action in the civil rights field.[139] Successful civil rights actions now presumptively carry attorneys' fees awards, just as successful actions under Title VII of the Civil Rights Act of 1964[140] and actions in connection with school discrimination[141] have for the past several years by congressional act.

---

133. *See Alyeska*, 421 U.S at 270 n.46.

134. *Id.* at 258-59.

135. *Id.* at 257 & n.30.

136. *See* Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. REV. 301, 311-13 (1973).

137. For a discussion of the working of the English system see Goodhart, *Costs*, 38 YALE L.J. 849, 854-60 (1929); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202, 204-07 (1966).

All other major nations also apparently award attorney's fees to the prevailing party. Nussbaum, *supra* note 136, at 311 n.31.

138. *See* Council for Public Interest Law, *Balancing the Scales of Justice: Financing Public Interest Law in America* 217-337 (1976).

139. The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (amending 42 U.S.C. § 1988 (1974)).

140. § 706(k), 42 U.S.C. § 2000e-5(k)(1970).

141. Emergency School Aid Act, § 718, 20 U.S.C. § 1617 (Supp. V 1975).

Interestingly, just as Congress reacted to *Alyeska* by its civil rights legislation, the lower courts have reacted by expanding the scope of conduct by a defendant which might be termed vexatious or in bad faith in order to fit the exception to *Alyeska*'s no-fee rule. One lower court decision, *Doe v. Poelker,*[142] is especially worth noting, because certiorari has been granted as to it.[143] In *Poelker* the Fifth Circuit held that a city hospital and mayor who refused to permit abortions in the hospital were required to pay attorneys' fees to a plaintiff who successfully challenged this practice. In the light of the seemingly special significance placed upon abortions, for example in *Singleton v. Wulff,*[144] perhaps *Poelker* may yet be affirmed, despite *Alyeska.*

III.

The trends mentioned in respect to standing, class actions, and attorneys' fees I have said disturb me. They disturb me for reasons of substance that I will seek to explain and not just because the methodology used in the opinions to which I have referred leaves implicit both some premises and many conclusions. In this respect I fully recognize, as Professor Anthony Amsterdam has pointed out, that courts composed of three or more judges are committees and the Supreme Court necessarily has to pass upon a limited number of isolated issues in narrow little ways at irregular intervals with a constantly changing membership.[145] Let he who casts stones not be required to live in the glass house!

These trends disturb me, nevertheless, despite the arguments that can be made for them. There are esentially three interrelated arguments: that these trends represent a return to the wise cautions of our judicial forebears and to sound prudential precedent; that they are necessary because of the tremendous caseload in the federal courts; and that by granting too much access to the federal courts the courts have promoted an unhealthy reliance on the judicial

142. 515 F.2d 541 (8th Cir. 1975), *cert. granted,* 96 S. Ct. 3220 (1976) (No. 75-442, 1975 Term).

143. *Id.*

144. *See* note 115 and accompanying text.

145. Amsterdam, *supra* note 43, at 350.

branch rather than on Congress. I will discuss each of these points briefly.

Certainly before the litigative process is invoked—and particularly before it is invoked on the constitutional level, since a constitutional interpretation is not subject to correction simply by act of Congress—the courts should be quite careful, even cautious, as to the ground upon which they are proceeding. The prudential rules advanced by Mr. Justice Brandeis concurring in *Ashwander v. TVA*[146] should generally be observed in order to avoid extending the courts' limited capacities and attenuating their powers by having them determine willy-nilly every issue, arising in a polyglot, variegated society, that calls for reconsideration or change. At the same time, these prudential rules cannot be used as some would use them. As Professor Gerald Gunther has pointed out, the "rules" do not permit courts to decline hearing cases properly before them.[147] But Justice Brandeis' injunctions against deciding constitutional issues are by and large sensible, prudent rules for the operation of a branch of government with limited powers of enforcement of its decrees and an institutionally built-in remoteness from the electorate. These rules require a court to refuse to decide constitutional issues in friendly litigation; or before it is necessary to decide them; or more broadly than the particular facts warrant; or when the case may be decided on another ground; or where the plaintiff lacks a personal right or property right affected by the challenged statute or has himself benefited from it; or where the constitutional issue may be avoided by statutory construction.[148] The courts, it may be argued, simply are not equipped to regulate everyone's life in every detail. True, we have been through a very rapid transitional period in which the courts have been much more actively coming to grips with the social issues of the day, more often than not coming down in favor of the interests of egalitarianism and fairness as well as of individual rights. But the courts do run into difficulty when making political judgments, especially when those judgments involve the commitment of financial resources. Thus, while one may object to

146. 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

147. Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 16-17 (1964).

148. 297 U.S. at 346-48 (Brandeis, J., concurring).

the abstract propositions in *San Antonio Independent School District v. Rodriguez*[149] that indigent people are not entitled to equal protection of the laws, or that education is not a fundamental right, one finds it as difficult to object to the proposition that how a state raises its school tax money should really be a matter for consideration by each state legislature rather than by the United States Supreme Court. Of course, it could be argued that if the state legislature does not act, a state supreme court might act under its own constitution, and this, of course, is a federalist solution, one that was not at issue in *Rodriguez* or in the access cases I have referred to. But one cannot too much fault a Supreme Court which seeks to hold its fire, to concentrate its artillery, and to husband its resources in attempting to perform its function as the final arbiter of conflicting interests in the society. Thus one rationale for the limited access decisions has a measure of prudential sense. Mr. Justice Powell articulates it well and frequently.[150]

Moreover, the caseload on both the lower federal courts and upon the Supreme Court has been a sharply increasing one that has created much concern, inspiring a number of people to call for cutbacks of jurisdiction, especially in diversity cases, more judges, and new courts, including a National Court of Appeals, among other solutions.[151] There continues to be what my colleague Henry Friendly calls a "litigation explosion."[152] For example, the number of cases filed in our court has increased 33 1/3% in the last five years, after having doubled in the previous decade.[153] Thus limiting access has some beneficent practical consequences, it may be contended, even though as a premise for any of the cases I have referred to this is seldom even alluded to, let alone articulated. I cannot help but say that, while this argument has some appealing force to it to some of us who feel overworked, it is to my mind the least valid one that can be advanced. For courts have no business considering caseloads

149. 411 U.S. 1 (1973).

150. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498-502 (1975); United States v. Richardson, 418 U.S. 166, 188-97 (1974) (Powell, J., concurring); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 56-59 (1973).

151. *See, e.g.*, COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, DEPARTMENT OF JUSTICE, THE NEEDS OF THE FEDERAL COURTS (1977).

152. H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW, pt. II (1973).

153. [1976] Ad. Off. of the U.S. Courts, Ann. Rep. of the Director 62.

in determining whether a case is cognizable; cases must be decided on their merits if there is jurisdiction. Congress, after all, is the arbiter of our jurisdiction by virtue of article III. Ever since Shepherd threw his squib into a crowded market and Willis threw it to Ryal who threw it so as to explode in Scott's eye,[154] people have been concerned lest the courts be inundated with claims. Nevertheless, the public adjusts to the changes in the law that make for the always threatened "flood of litigation." Insurance is invented, for example, to cover liability from exploding squibs or whatever; cases are settled in the light of settled law. Obviously, with increasing population and geometrically increasing technological complexity and commerce, there is going to be additional litigation except as new ways are devised for nonlitigative methods of resolution of controversy or new techniques of case management are utilized in the disposition process. Obviously, computers are going to have to replace the quill pens most of us judges have figuratively been using. I will also concede that a rapidly changing period of constitutional or other law will spur, temporarily, other cases testing out the extent of the changes. There have been by actual count over 100 hair and dress code cases in the federal courts until the Supreme Court recently settled—or did it?—the matter by deciding in *Kelley v. Johnson*[155] that police may be required to keep their hair above their collars.[156] Some think that by venturing into the protection of substantive personal rights—not to have a baby, for example[157]—the courts have opened a Pandora's box which in its own way is as bad as the old doctrine of liberty of contract, so-called, which invalidated child labor laws[158] and maximum hour laws[159] for decades.[160] But whatever one thinks of the personal rights substantively, is it not by virtue of default on the part of the other branches of government

154. Scott v. Shepherd, 2 Wm. Bl. 892 (1773), *reprinted in* [1558-1774] All E.R. 295 (Comm. Pleas).

155. 425 U.S. 238 (1976).

156. For an indication that the dress code issue may not yet be entirely settled, see East Hartford Educ. Ass'n. v. Board of Educ., No. 76-7005, slip op. at 1855 (2d Cir. Feb. 22, 1977), *rehearing en banc granted*, Mar. 28, 1977.

157. *See* Roe v. Wade, 410 U.S. 113 (1973).

158. *See* Hammer v. Dagenhart, 247 U.S. 251 (1918).

159. *See* Lochner v. New York, 198 U.S. 45 (1905).

160. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920 (1973).

that these controversial if not explosive issues have come to be decided in the courts? And is it not better perhaps that some of these delicate issues be decided peaceably, by reasonably objective and dispassionate arbiters, than in the heat of legislative battle? Civil rights cases take up only a relatively small percentage of the judges' total time, but I can think of no place where their time and energy is better devoted. The rest of the civil litigation explosion is essentially a product of the age, to be dealt with, to be sure, but not at the expense of civil rights litigation.

The third reason for limiting access to the courts and perhaps the soundest, at least that with the highest authority behind it, is that too easy access to, or activism by, the courts promotes an unhealthy reliance in a democracy upon the judicial rather than on the legislative branch of government. I have already hinted that this argument, however valid, has some counters.

There has always been a tension between so-called judicial activism and so-called judicial restraint; a tension between those who would treat the courts as an area for the assertion of individual and group constitutional and other rights in a diverse pluralistic democracy on the one hand, and those who would limit the courts to the narrowest possible role, that is, esentially to the handling of legal controversies involving private rights between private parties,[161] the model being the English courts. One can find support for both positive and narrow roles of the judiciary in the writings of the Founding Fathers.[162]

One can also argue that judicial review as such is not democratic, at least if one takes the views of Bishop Hoadly that "[w]hoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver to all intents and purposes, and not the person who first wrote or spoke them."[163] Distinguished jurists including Mr. Justice Brandeis,[164] Judge

161. *Compare* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962) *with* Gunther, *supra* note 147.

162. *See, e.g.*, J. GOEBEL JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 292-323 (1971).

163. Sermon by Bishop Benjamin Hoadly (Mar. 31, 1717), *reprinted in* RAGBAG OF LEGAL QUOTATIONS 126 (compiled by M.F. McNamara 1960).

164. Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

Learned Hand,[165] Mr. Justice Felix Frankfurter,[166] and distinguished scholars, including Professor James Bradley Thayer,[167] Professor Henry Steele Commager,[168] and Professor Alexander Bickel,[169] have questioned whether an overly active judicial branch saps self-government. They have pointed to a history some years behind us when judicial activism largely promoted elitist purposes. The argument is, of course, that because the courts are not responsible in the political sense they have rarely been responsive except when belatedly correcting their own mistakes under pressure. Thayer's oft-quoted summary is that the exercise of judicial review is always attended with a serious evil "that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, in correcting their own errors."[170] These sentiments were of course written long before the last twenty years, during which we saw an increasingly egalitarian and libertarian court, providing what Leonard Levy has called a "golden age" of "the constitutional law of civil liberties."[171]

The more positive role of the courts espoused in action by the Warren Court itself, particularly Justices Black[172] and Douglas[173] but articulated by Chief Justice Stone,[174] Professors Eugene V. Rostow[175] and Charles Black,[176] Judge Jerome Frank,[177] and many others, recognizes that, while judicial review is not democratic in the sense of majority rule, it is democratic in the sense of preserving minority rights, the court serving as a check against majority tyranny and in favor of individual rights. It is a truism to say that the

---

165. L. HAND, THE BILL OF RIGHTS 1-30 (1958).

166. *E.g.*, Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

167. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

168. H. COMMAGER, MAJORITY RULE AND MINORITY RIGHTS (1943).

169. A. BICKEL, *supra* note 161.

170. J.B. THAYER, LEGAL ESSAYS 40 (1927)(quoted in H. COMMAGER *supra* note 168, at 73).

171. Levy, *supra* note 10, at 20.

172. Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

173. Griswold v. Connecticut, 381 U.S. 479 (1965).

174. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

175. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

176. C.L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960).

177. J. FRANK, COURTS ON TRIAL (1949).

rule of the majority and the rights of the individual can be antithetical. We see it all the time. Indeed, it may be the genius of the Constitution, even as it is the inherent inconsistency of American democracy, that the undemocratic institution of judicial review can serve to protect the individual against the tyranny of the democratic majority. One questions whether if the institution were abolished today the system would be workable, let alone comprehensible.

Eugene Rostow would add that history belies the argument that judicial review tends to sap political responsibility.[178] He argues persuasively "that the defense of civil rights by the courts is a force not only for democractic values but for social order."[179] The truly democratic judicial decision may also serve as an exemplar for the pattern of public behavior; *Brown v. Board of Education*[180] set the standard, not Governor Faubus. The conclusion one is almost forced to reach is that judicial review asserted in favor of the Bill of Rights does not hurt the democratic process, popular responsibility, or the moral sense of the community. However, the principal intellectual and philosophical problem pertaining to the American courts, the judicial review dilemma if you will, is how the right to judicial review can be asserted in favor of the Bill of Rights without opening the door so as to permit it to be actively asserted contrary to the Bill of Rights.

In the end, the trend we have observed toward limiting access to the federal courts may be considered essentially as an expression of the tension to which I have referred, and as a phase of the cycle of restraint once again taking over after two decades of activism, with interactions going in both ways.

Thayer and his followers are right, of course, that judges are not directly politically responsible, even though this view overlooks the fact that each of us judges has a constituency in a very real sense. For example, Judge Sterry Waterman's Vermont background played a part, even if an unconscious one, in the *Texas Gulf Sulphur*[181] decision. Our lifetime tenure to some extent belies direct

178. Rostow, *supra* note 175, at 201-07.

179. *Id.* at 207.

180. 347 U.S. 483 (1954).

181. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (en banc), *cert. denied*, 404 U.S. 1004 (1972).

responsibility, but not long-term accountability. I know no judge who does not feel terribly responsible to the people and to the constitutional system under his oath of office. And it is precisely the independence gained from that lifetime tenure that enables us to resist the popular will when it needs resisting. It was unpopular, no doubt, for a Massachusetts court to release John Adams' client, a British soldier, in the murder case arising out of the Boston Massacre,[182] just as some of the decisions in the past twenty years have been quite unpopular. Earl Warren's impeachment used to be called for on billboards all over the South. But there are those who believe that historians will look back upon the days of the Warren Court by saying that the only trouble with *Brown v. Board of Education* is that it came fifteen years too late, not that it was ahead of its time.

Our discussion of a "plague of lawyers," countered by law in the public interest, with some limits imposed on access to the courts disturbing to me, has thus brought us full circle to private rights. I have said disturbing to me because limitation on assertion of rights is often equivalent to their denial.

Whether you too are disturbed may in turn depend on where you commence, that is, on your theory of justice. If you believe solidly with the utilitarians, as many people do, that society is rightly ordered and therefore just when its principal institutions are constituted to effectuate the greatest net balance of satisfaction overall to the group as an aggregate, you can argue that imposing strict limits on access is essentially wise because the courts cannot conceivably decide all issues or resolve all disputes, and in any event, the marketplace or the legislature may resolve them best. But you may conclude to the contrary, as I tend to, if you believe, as John Rawls has put it, that:

> Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. . . . Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.[183]

182. *See generally* H. ZOBEL, THE BOSTON MASSACRE (1970).
183. J. RAWLS, A THEORY OF JUSTICE 3-4 (1971).