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TOWARD A JUDICIAL ROLE FOR THE TWENTY-FIRST CENTURY

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Just about a week less than seven years ago—the week's difference being explained by my daughter's insistence this year that I not again miss her April 29th birthday—I had the honor to begin the 1970 Holmes Devise Lectures at this law school. I spoke then of *The Unfinished Business of the Warren Court*.[1] We know a great deal more tonight than we did then about the state of that agenda. Let me above all remind you that whatever that state may be is for the time being only. John Marshall, as I then said, died a disappointed man, surrounded by omens of the impending wreckage of his dreams, and twenty-five years after his death the country seemed, in the most decided manner, to have rejected his vision of a single sovereign nation. Yet, thirty-five years after his death, this vision had entirely prevailed. The setbacks of today—and the picture even now is not of setbacks only—ought to be viewed in that kind of time-scale.

Tonight, I am shifting to a new perspective in time. I would ask you to think of us as standing at a midpoint, just about equally distant from the decision in *Brown v. Board of Education*[2] and the beginning of a new century, some twenty-three years back and forward. I remember the day the *Brown* case was decided; I learned of it, on a May afternoon still fragrant, from a group of Columbia law students in the drugstore-luncheonette on the corner of 116th Street and Broadway in New York. If you remember that day, or some other day in that year, as freshly as I do—as freshly as if it were yesterday—then you will, with me, perceive the twenty-three years left in this century as a pretty short time. To those of you who cannot remember the

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1. 46 WASH. L. REV. 3 (1970).
2. 349 U.S. 294 (1955).

day or year of the *Brown* decision—those of you who are the best hope of that new century—I have to say, with a sadness softened by the knowledge that you will not quite believe me, that it will come sooner than you can now conceive possible. It is not too early to begin thinking about the role of the courts—and especially of the Supreme Court—in that century. For that role—and I speak here again chiefly to the young, or at least to the younger than I—will be determined in great part by the planning, the advocacy, the views of propriety and professional rightness, which you choose to espouse and put forward.

But time is always and endlessly paradoxical. Though I have emphasized the shortness of the time remaining in this century, I have on the other hand chosen to point to the near equidistance, from us now, of the *Brown* case and of the year 2000, for the very purpose of reminding you how much change can occur in twenty-three years. Professor Cox, in his own lecture here last year,[3] has so well described the change since *Brown* that I shall not go over the ground again, but will only add a few personal touches.

Before 1954—and indeed as to some matters even for a good time thereafter—the philosophy of "judicial restraint" was largely dominant on the Court. Its domination of the academic world was more nearly total. Professor Cox last year described this philosophy, quite correctly,[4] but I think he may not sufficiently have conveyed the feelings that went with the philosophy. When, as late as 1960, I published a book called *The People and the Court*,[5] a piece of advocacy for the unstintedly vigorous use of the judicial power to protect human rights guaranteed by the Constitution, I did so in full anticipation, amply confirmed, that the taking of such a stance would stamp me indelibly as "unsound" in the view of the mandarinate of those days. It was not so much—and here is the truth so hard to structure and hand over intellectually—that the particular contentions in the book were refuted, or even addressed. For example, it might readily be conceded, preferably *privatim*, that less presumption of constitutionality ought to attach to state enactments than to federal enactments; hadn't Holmes hinted as much, and hadn't even James Bradley Thayer

3. Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791 (1976).
4. *Id.* at 793–94.
5. C. BLACK, THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960).

plainly said so? It was just that "sound" people didn't bring up such points; their concern was rather with the urgent business of emphasizing the dangers of judicial activism, anytime, anywhere, against any power, and toward any end. There was in those days, and for a good many days thereafter, a certain subtle ostracism of people who believed that the judicial power had its time to hammer as well as its time to sit still, and that health was not invariably to be found in abstention from acting.

It is a measure of the change that has occurred that if some law student, attracted by the catchy title, were to pick up that book today, I think he or she would find it puzzling. It argues passionately, for example, the case for the bedrock legitimacy of judicial review of governmental acts for their constitutionality. I think young people today must find this quite archaic; can anyone really have thought, some twenty years ago, that the Supreme Court had no warrant in law to rule on constitutionality? Yes, Judge Learned Hand, probably the most prestigeful figure in law in that day, had argued something close to that, rejecting, one had almost said airily, the conventional arguments, and conceding only a small part of the whole ground, a part that had little relevance to the normal work of the Court.[6] When my book came out, a reviewer or two (and I will not water the tree of memory by naming them) poured upon my book's contentions—the now universally accepted contentions that vigorous judicial activity was warranted by law and could be of benefit—that toplofty scorn which the confidently orthodox sometimes permit themselves with respect to plain heresy. How far we have come in seventeen years! To the student of today, all this must seem like the debate over the question whether Congress could forbid slavery in the territories. Not only the intellectual structure but the whole tone of those other days is perhaps perfectly remembered only by one who was a victim of it.

But if there is one thing history teaches it is that extrapolation even of the strongest trends is perilous. And history exhibits, if it has not always been read to teach, that those who come after may write history, but that those who are in it must make it. I have not come here tonight to conjecture, however plausibly, what the role of the courts in the twenty-first century will be. I am concerned rather to suggest ways in which this role may possibly be molded to desire. My own desires,

6. L. HAND, THE BILL OF RIGHTS (1958).

and my own judgments as to the manner and means of attaining these, are altogether tentative; I say this once for all, to cover the whole ground, and so to save saying it over and over again. What is not tentative is the truistic but keystone fact that the judicial role in the twenty-first century will be the product of human desires, expressed in concrete measures, in contentions, and in acceptances.

I have called this a truism, yet I wonder if it is obvious to all. The judicial role may seem, even to students of the vast changes of the last twenty-three years, a thing given from on high—if not from the ultimate height, at least from the penultimate height of the judiciary itself. The courts, and the Court, have been perceived as making their own role, responding selectively, to be sure, to the initiatives of parties litigant, but otherwise wholly independent. The "planning" of a role for the judiciary may seem anomalous, perhaps even improper.

But I remind the lawyers here—and in so doing may surprise some of the non-lawyers—that the jurisdiction of our national courts, and their empowerment in ways ancillary to jurisdiction, are of human making. And I do not mean of human making, once for all, in the years 1787–89, or of making by the humans on the bench, but of human making in Congress, from year to year and from week to week, whether by action or by uncoerceable acquiescence. On the face of the Constitution's text, it appears that Congress has control over the jurisdiction, the manning, and the furnishing with means of the lower federal courts and of the Supreme Court.[7]

I am aware that there are some who think this congressional power to be less full than the text seems to make it; summarily, I think not only that these people are wholly or almost wholly wrong on the merits, but also that their arguments are the reverse of legitimizing to the judicial power, for that power can from decade to decade be legitimized, in a democracy, only by the fact, conspicuous throughout our history, that the democratic organs acquiesce or more than acquiesce in its exercise, when they might refuse to acquiesce. And I think that this attempt to put a limiting gloss on what seems to be full congressional power is ironic as well, for in a real showdown it could not possibly prevail against a resolute Congress conscientiously convinced, as it might easily be, of its own constitutional rightness; its only important function, to me, is therefore its weakening of the case for the

7. U.S. CONST. art. III, §§ 1–2.

foursquare legitimacy, in a democracy, of the exercise of great power by officials neither elected by the people nor continually overseen and controlled by officials so elected.

But I need not here argue this ultimate and general case. For unless we have gone wrong through all history, the powers of Congress over the jurisdiction of courts are beyond any question ample to channel the courts into a fruitful role for the century to come. Let us look at a single but vastly important development in the past. Until 1875, the lower federal courts enjoyed no general federal-question jurisdiction.[8] Their business was mainly diversity business, with some specialized federal-question areas, such as admiralty and patents, added in. In 1875, the general federal-question jurisdiction, with a jurisdictional-amount requirement, was created,[9] and at about the same time the lower federal courts were given jurisdiction, without reference to jurisidictional amount, over certain deprivations of constitutional rights.[10] The most important component of the modern role of the lower federal courts is therefore entirely a creation of Congress, a creation that did not occur until eighty-six years after the first Judiciary Act. And this is only the most important event, or set of events. In numerous lesser but still important ways Congress has shaped and molded the role of the federal courts.

It has been said that substantive law is secreted in the interstices of procedure; this principle is working today, for our almost totally flexible modern procedures have made possible much new law. But it is a closely associated truth that the possibility of effective substantive law may be secreted in the interstices of jurisdiction.

Professor Cox has brought to our attention, for example, the decree of the federal district court in Alabama, minutely setting forth the manner in which a state mental institution was to be run, down to the temperature of the hot water, with a difference in this respect between hot water in the washing machines and hot water in the washroom.[11] Such a decree may fail of attaining its full objectives even now; Professor Cox informs us that one result has been the discharge of about

8. Except for, literally, a few weeks in 1801. *See* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 39 (2d ed. 1973).
9. Judiciary Act of Mar. 3, 1875, ch. 137, §§ 1–2, 18 Stat. 470.
10. Act of Apr. 20, 1871, ch. 22, §§ 1–2, 17 Stat. 13; Act of Feb. 5, 1867, ch. 27, § 1, 14 Stat. 385; Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27.
11. Cox, *supra* note 3, at 817–19.

half of the patients at the hospital.[12] But such a decree—and hence, as a practical matter, the substantive law underlying it—would have been simply unthinkable before the post-Civil War jurisdictional statutes were enacted. The only federal court relevantly empowered was the Supreme Court, with its writ of error jurisdiction. Quite apart from all the technicalities of the writ of error, I am sure that anyone who suggested that the Supreme Court could, under its writ of error jurisdiction, send down mandates for the entry of detailed decrees on operation of state mental institutions would have been regarded more in the light of a candidate for admission to one of these than in the light of a serious pleader at the bar of the Court.

The doctrine of *Ex parte Young*,[13] that a state official may be enjoined against violation of the Federal Constitution—a doctrine central to the modern American constitutional system, but actually not settled until 1908—could have had some force, perhaps, in a pre-1875 jurisdictional world. But in that world the federal courts would have been confined from molecular to molar motions; the Supreme Court could have reversed final state court judgments refusing to enjoin state official action, where the Supreme Court's judgment was that the state statute was invalid on its face, or that its application was invalid in the light of facts established in the state court record, as those facts appeared through the gridscreen of presumptions, as to lower court findings, on appeal. That is something, but not much, when compared with modern practice.

In sum, very nearly all of the judicial activism of the modern federal courts, so well described by Professor Cox, depends essentially on a jurisdictional pattern set up by statute in and around 1875, probably not within the memory of anybody now alive, but certainly within the lifetimes of a few still living. That activism would have been unthinkable within the jurisdictional pattern that prevailed, without any serious constitutional questions being made, during the first eighty-six years of our Constitution's life. The Supreme Court did not create either of these jurisdictional patterns. They were created by Congress, exerting its own constitutional power. They could be changed by Congress.

Many lesser congressional actions have gone into defining the role

12. *Id.* at 827.
13. 209 U.S. 123 (1908).

of the federal courts. I may mention the Norris-LaGuardia Act,[14] prohibiting most labor injunctions, and the three-judge court acts.[15] Even an action—or an inaction—not explicitly directed to jurisdiction may have its impact. For nearly a hundred years after *Swift v. Tyson*,[16] Congress failed to amend the Rules of Decision Act[17] to provide that the federal courts must follow state decisional authority in cases raising questions of state law. I cannot believe that at any time such an amendment would have been held unconstitutional. Yet it was this failure which, for good or ill, cast the federal judiciary in the important role of a common-law court system, with the Supreme Court at the top, until, in *Erie Railroad v. Tompkins*,[18] the Court bowed out *sua sponte*.

Now I do not mean, in any of the foregoing, to express an opinion, least of all disapproval, concerning the 1875 jurisdictional pattern. As a matter of now irrelevant fact, my opinion—which will later come clear—is that a federal court system unempowered to inquire into violations of personal constitutional rights, and to redress these violations, would be without any moral reason for being, and might as well be closed down altogether. The points I have meant to make are that the role of courts in the twenty-first century will be in great part a function of the congressionally established jurisdictional pattern—whether new or old—with which we enter that century, and that those who would project upon the courts some better role ought therefore to be thinking in the first instance not of what the courts can be persuaded to do—for that way lies mere conjecture—but of what Congress can be persuaded to do. Now along what lines ought we to move?

"Time, gentlemen, time." This announcement, so dreary to so many brave British hearts on so many midnights, is quite properly the theme of much modern thought on the judicial role.

Let me return to one of the concrete cases described by Professor Cox—the case of the decree governing the running of a state mental

14. 29 U.S.C. §§ 101–115 (1970).
15. 28 U.S.C. §§ 1253, 2281–2284, 2325 (1970 & Supp. V 1975) (§ 2325 repealed 1975); 42 U.S.C. § 1973h(c) (1970); 49 U.S.C. § 44 (1970 & Supp. V 1975) (1974 amendment strikes three-judge court requirement for certain interstate commerce actions but retains three-judge court requirement for certain suits against monopolies).
16. 41 U.S. (16 Pet.) 1 (1842).
17. Judiciary Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73.
18. 304 U.S. 64 (1938).

institution. There is nothing inherently implausible in the proposition that the incarceration of the treatable without treatment, under humiliating, unsanitary, and painful conditions, is a deprivation of liberty without due process of anything you or I would want to be caught calling "law," if it is not also a cruel and unusual punishment for no offense. A sensible court of equity, possessed of wide power to mold its remedy, would likely conclude that the best redress was the forcing of amelioration in treatment and in the conditions surrounding treatment. The resultant decree would have to be detailed, and compliance well-supervised, for the decree operates, to put it mildly, *in invitos.* Our culture does not contain anybody better fitted to draw up such a decree than a good federal judge, a generalist advised and informed, through the testimonial process, by specialists in each of the things that make up the whole life of the mental patient. Federal judges have run railroads. Why, then, are we uneasy?

The answer, of course, is time. It is very hard to imagine that the few hundred federal district judges now in being, after all the grudging expansions that have gotten through Congress, have time to do intelligently and well all the things of constitutional and moral urgency, and of a concurring complexity, resembling those that concern the running of a mental hospital—especially while conducting such criminal trials as may, in largely unpredictable and uncontrollable number, be coming up, while trying trademark suits, judging patent validity, considering environmental impact statements, even running railroads.

At the appellate level, it is time, again, that is the heart of the matter. I know there are some, even some highly and most relevantly placed, who have said that the Justices of the Supreme Court have plenty of time to do their job well. That is one of those statements one has to believe the result of some misapprehension, no matter whence it emanates. It is contradicted by all arithmetic, and by all one's own intuitions as to the study and thought it would take to vote wisely on all the issues that come before the Court. Perhaps it is enough to point to the fact that some Justices, at least, feel time to be insufficient, because, on a Court where each Justice votes, the very definition of insufficiency is *felt* insufficiency. I have elsewhere put forward a proposal for easing the certiorari-petition load.[19] But that is minor

19. Black, *The National Court of Appeals: An Unwise Proposal,* 83 YALE L.J. 883 (1974).

surgery. The time problem remains, throughout the federal court system, up and down.

Since time available is inelastic, given the precise inexorability of clock and calendar and the no less certain though less precise needs of the human being for relaxation and rest, the only place to look for relief is in the definition of the job. With a court system, that means jurisdiction. And jurisdiction leads us to Congress.

What I propose, then, is a zero-base study of jurisdiction of the federal courts. I strongly stress the now fashionable phrase, "zero-base," for I would like to invoke the vogue of this phrase to expose and scotch an idea which seems to me to have the thing just backwards—the idea, espoused in some high places, that each proposal in Congress for a new federal cause of action should be defeated unless it is accompanied by the creation of adequate new judgeships for dealing with the increased volume of litigation. The silent assumption underlying this demand is, of course, that all the business now within federal court jurisdiction is and ought to be there to stay. I have said that this gets the thing just backwards, because I would judge that, on the average, a new federal right urgent enough to win passage in Congress this year would be more important than the run-of-the-mill business taken in partly through inertia. But the least one can possibly say is that the new cause of action ought to compete on absolutely equal terms with the old—that consumer class actions for fraud have, *prima facie,* just as much title to be on the federal court docket as do trademark infringment actions. The only way to range all these things, and match them against available time, is through a zero-base study of federal jurisdiction.

Now does not the time-frame I have put us in strongly suggest summary judgment on some features of federal jurisdiction as now defined? First of all, we may be able to imagine that custom-thought will continue to make the judgment, say about this time next year, that, as against all the other pressing vital claims on federal court action, our concern about state court prejudice against the nonresident is still serious enough to uphold the so-called diversity jurisdiction. But can you imagine our still sticking to that position in the year 2000? Remember, again, that we are at zero-base, and that the time and energy at our disposal are anything but unlimited. The question is not at all whether there lingers some slight state court prejudice against the citizens of other than the forum state. It is not whether

some side-benefits result from exercise of the general diversity jurisdiction. Let us cheerfully concede that the answer to each of these questions may be a none too hearty, none too assured "Yes." At zero-base, with limited resources, the question will rather be how these needs weigh against other needs. I cannot think the diversity jurisdiction has or ought to have a long future.

Is this ought-judgment not clinched, made absolutely certain, by the jurisdictional-amount requirement in diversity cases? Can it be a serious judgment that prejudice against the nonresident exists, but is important only when a lot of money is involved? A recent and to me lamentable Supreme Court decision directed dismissal of a consumer class action, on the ground that no single member of the class claimed to be damaged ten thousand dollars worth.[20] Can you possibly be clear on the point that, whatever may be the benefits of diversity jurisdiction, these benefits are less important to the defrauded consumer than to the large business firm suffering a loss just over ten thousand dollars through breach of contract? The imposition of a jurisdictional amount in diversity cases seems to me to signal that we don't really believe very much in these benefits; if we did, how could we bring ourselves to deny them to suitors who have suffered some loss smaller in absolute numbers than the damage claim that gets you in, but in many cases much more important to the excluded litigant than the ten thousand dollars may be to the litigant who finds himself among the elect under section 1332?[21]

But I go a long step further. I think, at zero-base, that we have to generalize the question about jurisdictional amount. I submit that it does not comport with modern ideas of justice to erect a high money barrier between the litigant and whatever law anyone can get in federal court. We do not impose such a requirement in patents, in admiralty, in trademarks, and in many other fields. It seems to me that by 2000 A.D. we should expect to find accepted a generalization that the availability of the scarce resource of federal jurisdiction ought to rest on some other ground or grounds than the amount of money at stake. (I am not speaking here, of course, of some genuine *de minimis* rule,

20. Snyder v. Harris, 394 U.S. 332 (1969); *see* Zahn v. International Paper Co., 414 U.S. 291 (1973) (each plaintiff in a rule 23(b)(3) class action must satisfy the jurisdictional amount and any plaintiff who does not must be dismissed from the case).

21. 28 U.S.C. § 1332 (1970).

but of the requirement of a quite substantial money claim, a requirement high enough, for example, to keep out the seriously defrauded consumer.)

Now of course the abolition of jurisdictional amount, as unsuited to modern conceptions of entitlement to justice, would momentarily and in contemplation expand rather than contract federal jurisdiction. But the expansion would be only momentary, and in concept only. For the abolition of this false criterion of access would necessitate and precede a thorough reconsideration of the whole field. At zero-base, reckoning up our resources, we should seek to rank all the claims on the time of federal courts in an order of their importance to the nation. How can we give structure to this material?

I would suggest that we have help in the Constitution itself, viewed as a whole. The Constitution set up a government to act directly on the people, largely through its own courts. And it is a Constitution guaranteeing personal rights in the name of national morality. It seems to me that the two most important jobs the federal courts can have are the furnishing of their authority to the national government —in cases, substantially, to which the United States shall be a party— and in their vindication of the personal rights annexed, substantially, to membership in the national polity. I would want to be sure that there would be adequate time and energy to deal with racial discrimination, with constitutionally wrongful imprisonment and other deprivation, and with infringements upon the freedom and privacy guaranteed by our Constitution as substantively interpreted. I would want to be sure that there was time and energy to assist the policy-forming and policy-executing organs of national government in giving expression to the national interests politically arrived at as authentic and important—antitrust, environment, tax collection and, of course, crime. Then, these things provided for, I would look around and see how much time and energy was left for barge accidents in New York harbor, for interstate interpleader, for unfair competition cases pendent to trademark cases, and so on.

Now this approximation to a beginning at ranging and ranking, from zero-base, the subjects of federal jurisdiction, needs immediately to be trued up in at least one major way. It would undoubtedly be found that some litigation between private parties vitally implements national policy, and can do so efficaciously only in national courts. This suggests the general question which should be addressed to each

exercise of federal jurisdiction beyond the use of the courts for the two purposes mentioned above. Beyond those two areas, there can be no general answer. The experience and thoughts of many specialists would have to be consulted—with the caveat, obviously, that specialists may sometimes have vested emotional interests in a pattern which seems to validate their own expertise.

I do not know what would happen if the enforcement of federal trademarks were left to the state courts. I am sure that that step would not be as totally beyond moral defense, under a regime of a national bill of rights, as would be the leaving to state courts of questions about unconstitutional deprivation of the right to counsel. I do know, or think I know, that many cases now routinely brought within the admiralty jurisdiction might just as well be started and finished in the state courts. From zero-base, every such part of the pattern of jurisdiction, however traditional, however wrapped in mystique, should be freshly scrutinized. It cannot be the whole answer that there is some good in federal jurisdiction over New York harbor barge accidents; the question must rather be where this good stands in a ranking beginning with *habeas corpus*, going down through antitrust, and so on. I believe that a firm and detailed study of this kind, with a view to action by Congress, would result in the sloughing off of a great deal of jurisdiction. But when we were through, the jurisdictional changes wrought would be no more revolutionary than the changes of 1875 and thereabout.

Now one thing that troubles people like me, and Professor Cox, about the Alabama mental institutions decree is its *detailed* character —the two separate temperatures for hot water. Behind all this detail one projects a load of work that, regardless of changes in jurisdiction, must swamp any now conceivable number of district judges. Yet, as I suggested above, detail is of the essence; general commands, addressed to those not in sympathy with the court's objectives, are vain.

I think I spy the shadow of a solution, or a partial solution—and half a solution, in the real political world, is a whole lot better than none. I was of counsel in *Alexander v. Holmes County*,[22] the case that decisively broke away from the "all deliberate speed" formula in school segregation cases, and I was not paid, so I suppose I can talk a little about its wholly public aspects. The precise pattern of the Su-

22. 396 U.S. 19 (1969).

preme Court's mandate, and the background which made that mandate possible, are of great interest.

There were in existence certain plans, for desegregation in the affected school districts, drawn up—and this is the crucial point—by the Department of Health, Education and Welfare. To be sure, the Nixon administration, in an early burst of that general ingloriousness which was later to come to full flower, had withdrawn these plans. But they existed, and hence all the courts concerned, from bottom to top, had before them detailed plans for dealing with the situation, drawn, in their detail, not by the judge, not by one of the parties, but by a responsible government agency acting in the name of the general public interest.

The Supreme Court's mandate was that the Fifth Circuit Court of Appeals might put these plans into effect forthwith, and that the resultant decrees were to be changed or departed from only *after* the affirmance, in the Fifth Circuit Court of Appeals, of a district court order effecting such variance. In the background, of course, was the Supreme Court's own power of certiorari, before as well as after judgment in the Fifth Circuit Court of Appeals.

Now I do not think the Court would or, in most cases, ought to have taken such an extraordinary step except on the basis of a plan at some time, at least, authenticated by a governmental authority charged with the duty of acting for the nation. It was reasonable, given this authentication, to cast on the defendants the burden of complying *pendente lite*, rather than requiring the plaintiffs to wait, *pendente lite*, for any relief, or to suffer, while appeals were working their way up, any changes the district judge desired to make from time to time.

Now this case, as you will have seen, involved a mandate of peculiar form, tailored to the known circumstances. But it did not involve any submission of the judicial power to members of the administration. The Supreme Court adopted the plans as an exercise of judicial power, uncoerced by anybody. The Court might at any time have allowed modifications in the plan, quite independently of the administration. The only change from the more usual practice was that the defendants had to comply, and the plaintiffs did not have to wait, pending the lawsuit and pending any appeals.

But I doubt, as I have said, that this course would have been possible if these HEW plans had not been in existence. And the obvious

wider suggestion of the case is that much judicial time could be saved if far wider use were made than is now done of the device of having detailed plans for the redress of constitutional wrongs drawn up somewhere in the government, by qualified people acting independently of the parties. No judge would have to follow these, and no litigant would be barred from applying for modifications, but at least, as with the HEW desegregation plans, the basic work would have been done by public officials responsible for acting in the public interest. I do not think it would be necessary, or even wise, for every HEW plan—say, for the running of a mental hospital—to be treated procedurally as the HEW plans were in *Alexander v. Holmes County*—though there would undoubtedly be cases where this treatment would fit the circumstances. But I am thinking, more generally, that the wider use of this device might take strain off the courts, and save them time, with no more incursion on the judicial power than happened in *Alexander*. That case exhibited a happy co-action between the judicial power and administrative planners; if the efficacious—and therefore sometimes detailed—enforcement of constitutional rights is desirable, then I think the pattern suggested may be of great service. For its wide use, we must apply to Congress; the courts, though they may gratefully use such plans as a resource, cannot direct their formation within another branch.

Very closely connected, and now obviously in a lusty and life-promising infancy, is the device of using the judiciary to force executive and administrative officials to do the detailed work that ought to underly their judgments. It may be too much to expect of a court that it play a final deciding role in respect of the acceptability of the environmental impact of some new industrial development. But it is much easier for a court to make out that the official charged with doing the work underlying such a decision has done it and not just scamped it. Judge Jack Weinstein's recent decision on the gross insufficiency of the environmental impact statement as to northeast coast offshore oil drilling is a splendid example.[23] Such a decision gives new life to the phrase, "*due* process of *law*."

Let us not forget that the traditional nature of a jurisdictional pat-

23. New York v. Kleppe, 9 E.R.C. 1798 (Feb. 17, 1977). After the delivery of this lecture, the Court of Appeals for the Second Circuit reversed. Suffolk County v. Secretary of the Interior, Nos. 77-6049, 77-6050 (2d Cir. Aug. 25, 1977), *noted in* 46 U.S.L.W. 2131 (Sept. 13, 1977).

tern is no warrant for its claim to being constitutionally compelled. In some sorts of litigation, for example, appeals from the state court system to the federal courts of appeal might be a method of choice for keeping the states in line, while not overburdening the Supreme Court's docket. If you don't like the word "appeal" here, call it "removal," and you have effected a verbal link, if you need it, with what has been done since the beginning. Protection of national rights might, moreover, sometimes be most efficaciously effected by removal at the first tier where a *defense* to a state court suit, civil or even criminal, tenders a substantial issue of personal constitutional rights. I am inclined to think, for example, that the pornography situation might be much improved by exploration of such devices.

Well, I have come to the end of what I can possibly consider my time, and I am hardly well begun. And I have no peroration, no summing up, really, for I have only started a few ideas, perhaps, in your minds. Above all, these ideas are invitations to action. The courts, within limits, will make their own role in the twenty-first century, and of course some of you will be in on that, from the inside. But the limits are as important as action within the limits. And helps from outside may be planned for and structured too, beyond the power of the judiciary acting on its own. In framing these limits, and in proferring these helps, Congress will be the acting party, and Congress will do, by and large, what you tell them to do. So it all comes back to you. What do you want to be the judicial role in the twenty-first century? If you haven't asked yourself that question before, and if I have caused you to ask it searchingly now and in the future, the aim of this talk will have been attained.