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Restrained Perspective on Activism, A

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A RESTRAINED PERSPECTIVE ON ACTIVISM

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Discussing the federal judiciary's role in micromanaging public institutions requires consideration of three functionally related but theoretically distinct topics: (1) the article III jurisdictional requirement of a "case or controversy"; (2) the determination whether the plaintiff's rights, constitutional or statutory, have been violated; and, if so, (3) the selection of an appropriate remedy. The Chicago discriminatory redistricting case, *Ketchum v. Byrne*,[1] involves the first issue not at all and the second only indirectly. It therefore provides little opportunity for an advocate of judicial restraint to comment on the subject of this Symposium. Hence, after briefly reviewing *Ketchum* in Part I, I broaden the scope of the inquiry in Part II.

I.

The factual background of *Ketchum* painted by Messrs. Colman and Brody[2] presents an appalling picture. The various plaintiffs clearly were among those injured by the official defendants' activity/inactivity, and their claims obviously were adverse to the defendants. The case or controversy issue therefore need not detain us.

Whether the defendants' activity violated some constitutional or statutory right of plaintiffs requires more discussion. It might be argued that at least some of that activity, such as deliberately drawing ward boundaries to deprive minority voters of an established population majority, violated the fifteenth amendment. *Gomillion v. Lightfoot*[3] was the predecessor of (and probable stimulus for) *Baker v. Carr*,[4] which began federal judicial oversight of electoral processes. *Gomillion* had relied on

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1. 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).

2. Colman & Brody, Ketchum v. Byrne: *The Hard Lessons of Discriminatory Redistricting in Chicago*, 64 CHI.-KENT L. REV. 497 (1988) (Messrs. Colman and Brody's article appears in this symposium issue).

3. 364 U.S. 339 (1960).

4. 369 U.S. 186 (1962). The central issue in *Baker v. Carr* was whether challenges to voting district boundaries were nonjusticiable "political questions." Had the Court refused to intervene in *Baker*, but let *Gomillion* stand, the result would have been that such challenges were nonjusticiable political questions when brought by whites but not when brought by blacks. It is in this sense that *Gomillion* was "the probable stimulus for" *Baker*.

the fifteenth (rather than the fourteenth) amendment to hold racial gerrymandering unconstitutional in at least some circumstances.

Without the *Gomillion* focus, however, the totality of the defendants' acts in *Ketchum* violated a constitutional right of the plaintiffs only if the Supreme Court's one person, one vote interpretation of the fourteenth amendment in *Reynolds v. Sims*[5] was proper. But Justice Harlan's dissent in that case demonstrated that the decision was of dubious constitutional validity at best.[6] Moreover, in terms of the symposium topic, I share the widespread belief that the one person, one vote standard of *Reynolds* was devised by the Court deliberately to minimize (rather than to maximize) judicial intrusion into the electoral processes that otherwise would have been required by *Baker v. Carr*. But a short comment on *Ketchum* is hardly the place to exhume this constitutional archeology.

The *Ketchum* plaintiffs also relied on the Voting Rights Act.[7] The Act was amended in an important respect in 1982, after this litigation commenced. In *City of Mobile v. Bolden*,[8] the Supreme Court had held that an electoral process was unconstitutional only if it was proved to have had a discriminatory purpose; disparate racial results were not enough. The 1982 amendment to the Act, with its extensive legislative history, was aimed at changing this rule. The essence of the amendment was that a violation of the Act would be established if,

> based on the totality of the circumstances, it is shown that the political processes . . . are not equally open to participation by a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered . . . .[9]

If the amendment is interpreted as abolishing the *Mobile* requirement of discriminatory purpose and substituting a "results" standard, an argument might have been made that it would then be unconstitutional. The claim would be that if the Constitution itself requires a discriminatory purpose, Congress has no authority to abolish that substantive requirement under the pretext of "enforcing" the constitutional provision. It might have been argued on the other hand that racially discriminatory

5. 377 U.S. 533 (1964).

6. *Id.* at 589 (Harlan, J., dissenting). Professor Shane acknowledges the force of Justice Harlan's dissent in a related case. Shane, *Rights, Remedies and Restraint*, 64 CHI.-KENT L. REV. 531, 534 n.9 (1988) (Professor Shane's article appears in this symposium issue).

7. 42 U.S.C. § 1973 (Supp. 1988).

8. 446 U.S. 55 (1980).

9. 42 U.S.C. § 1973(b) (Supp. 1988).

purpose is such a notoriously difficult fact to prove by direct evidence that it was well within Congress' power to provide an easier remedy for violation by lowering the burden of proof. The claim would be that Congress had not changed the substance of the right but had only provided a more effective remedy for its enforcement. As even this superficial discussion suggests, it sometimes is hard to locate the boundary between defining a violation and selecting a remedy to correct it.

In any event, the Supreme Court seems to have resolved the issue of constitutionality decisively. *Thornburg v. Gingles*[10] was one of those splintered decisions so characteristic of the Burger Court. Divided into four opinions as the Justices were, however, not a single one of them even suggested that the Act's substitution of a "results" for a "purpose" standard was unconstitutional in broad outline; on that point they were unanimous.

All of the Justices in *Thornburg* gave meticulous attention to the factors that Congress had indicated should be canvassed as part of the "totality of circumstances" that would establish a violation, and they struggled to give them meaningful content. *Thornburg* is thus pertinent to this discussion for a number of reasons. First, it illustrates the truth of Professor Shane's observation that courts sometimes will be required by valid legislation to act in non-traditional ways.[11] Second, it supports the argument of Messrs. Colman and Brody that the *Ketchum* courts were unnecessarily timid in their approaches to the remedial phase of that litigation.[12]

Thornburg does not, however, necessarily support the Colman-Brody argument about the constitutionality of requiring supermajorities.[13] On some arguably analogous matters, such as the significance of black candidates' successes in elections, the Justices in *Thornburg* were closely divided. So that chapter remains to be written.

I know nothing about Chicago, its ward system, and the racial distribution of its population. From this pit of ignorance, it is impossible to say whether a more restrained, less activist remedy was available than the one the federal court approved in *Ketchum*. Messrs. Colman and Brody do hint, at one point, that a redistricting map might have been drawn that was entirely race-neutral.[14] If that is so, I would be prepared to argue that that map was the only one the courts could legitimately

10. 478 U.S. 30 (1986).
11. Shane, *supra* note 6, at 559.
12. Colman & Brody, *supra* note 2, at 527-28.
13. *Id.* at 525-27.
14. *Id.* at 529 n.171.

have ordered, provided it consisted of compact voting districts and did not diminish the existing voting power of racial minorities. But on the evidence available, it is impossible to claim that the courts were more interventionist than they should have been in selecting a remedy.

II.

Professors Shane and Strauss both view federal court management of public institutions to accomplish "policy reform" as desirable,[15] or at least as "necessary."[16] In the course of his essay, Professor Shane mentions litigation concerning mental health institutions.[17] It seemed entirely appropriate, therefore, to examine the most famous of these cases in some detail.

A. Jurisdiction

Wyatt v. Stickney[18] began when the Alabama legislature cut the tax on cigarettes. One result of that action was to reduce substantially the money available to run Alabama mental health institutions. The original suit was brought by two groups of plaintiffs: (1) former employees of the Alabama Mental Health Board who had been laid off because of budget cuts resulting from the tax cut, and who alleged they had been denied due process; and (2) guardians of patients in various Alabama facilities who alleged the care of their wards would become constitutionally inadequate as a result of the layoffs. The first group of plaintiffs soon disappeared. As the Court of Appeals was later to say: "[F]or reasons not entirely clear from the record before us, however, the focus of the litigation soon shifted from the effects of the . . . terminations to questions of the overall adequacy of the treatment afforded at the Alabama state mental hospitals."[19] The court was right; the evidence is not conclusive. But there are enough clues to suggest what was going on.

Professor Strauss perceptively notes that not all official defendants will be averse to plaintiffs' claims. He writes: "Those within the government who advocate reform did not have the power to accomplish their objective before the lawsuit was brought; but the district judge's decision—in some cases, the mere fact that the suit was brought—will en-

15. Shane, *supra* note 6, at 565-66.

16. Strauss, *Legality, Activism, and the Patronage Case*, 64 CHI.-KENT L. REV. 585, 596 (1988) (Professor Strauss' article appears in this symposium issue).

17. *See* Shane, *supra* note 6, at 566.

18. 325 F. Supp. 781 (M.D. Ala.), *later op.*, 334 F. Supp. 1341 (M.D. Ala. 1971), *later op.*, 344 F. Supp. 373 (M.D. Ala.), *later proceeding*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part & reserved in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

19. *Aderholt*, 503 F.2d at 1308.

hance their power and may enable their view to prevail."[20] That seems to describe Stonewall B. Stickney, the principal defendant and then Executive Officer of the Alabama Mental Health Board, precisely. Having lost his battle for funding with the Alabama legislature, he seems to have decided to play a largely passive role in the litigation, hoping (correctly) that the federal court would order the state to provide what he had been refused. For example, the defendants' answer to the amended complaint was as follows: "Defendants agree to be bound by the objective and subjective standards ultimately ordered by this Honorable Court in this cause . . . ."[21]

What kind of a lawsuit is that—when a disgruntled state official whose department is not funded as generously as he would like lets it be known that he will not resist claims that will result in increased money for his agency? The answer, of course, is that it is a collusive lawsuit, which is to say that it is not a legitimate lawsuit, not a "case or controversy," at all.[22] The moment that answer was filed the district court should have dismissed the case, as it was then framed, for lack of jurisdiction. Retaining jurisdiction to rule on the issues subsequently decided smacks of the Supreme Court's shenanigans of the *Lochner* era in cases like *Carter v. Carter Coal Co.*,[23] which struck down a federal tax whose only defender before the Court was the corporation on which the challenged tax was being imposed.

A common element of arguments by those favoring a greater role for courts in shaping public policy is impatience with jurisdictional limitations such as the ban on collusive lawsuits. Such advocates have a particular loathing for requirements governing standing, which fix the criteria a plaintiff must meet in order to bring a suit in the federal courts. The reason is clear enough. The fewer restrictions there are on the kinds of disputes over which courts have jurisdiction, the greater the power of the courts. But it is well known that the framers of the Constitution specifically rejected the concept of a "council of revision," a council of judges which, in addition to the president, would have veto power on constitutional grounds over all legislation.[24] Abandoning jurisdictional limitations is the road to creating a system in which any citizen can chal-

20. Strauss, *supra* note 16, at 597.

21. *Stickney*, 344 F. Supp. at 375 n.1.

22. *See, e.g.*, United States v. Johnson, 319 U.S. 302 (1943); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 64-66 (3d ed. 1986).

23. 298 U.S. 238 (1936).

24. G. GUNTHER, CONSTITUTIONAL LAW 14-15 (11th ed. 1985).

lenge any piece of legislation to which he objects. It is the road to creating the council of revision the framers rejected.

Congress of course has the power to expand the concept of standing to some as yet undefined extent. But Congress expanding standing is one thing; courts doing it without congressional approval is something quite different. The difference is between the democratically responsible branches of government enlarging the power of courts and the democratically unresponsive judges pulling themselves up by their own bootstraps to expand their own power.

Whatever one thinks of Professor Shane's argument that the framers intended courts to reform policy in the guise of constitutional adjudication, one thing remains clear. There is no evidence of any kind whatsoever to suggest that the framers intended the courts to be anything but courts: agencies to resolve concrete disputes between adverse parties both of whom have a real stake in the outcome.

B. Constitutional Violation

To say that the conditions in Alabama mental health institutions at the time of *Wyatt* were deplorable is an understatement; they were abominable. Patients were literally being killed by other patients; the food was close to a starvation diet and was prepared under incredibly unsanitary conditions.[25] So no argument will be made here that confining people under such circumstances is not unconstitutional.

But that was not the constitutional violation on which the trial judge based his subsequent orders. Indeed, since the facts recited in the preceding paragraph were never mentioned in any of the four opinions the trial judge wrote, they would appear to be irrelevant! The reason the trial judge did not focus on this uncontested constitutional violation is obvious: it would not have justified the elaborate management order he later entered.

The constitutional violations the trial judge actually found were two in number. First, he held that mentally ill patients "have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition," and he found that the existing programs were "scientifically and medically inadequate" to meet that standard.[26] Second, he held that mentally retarded patients "have a constitutional right to receive such individual habilitation as will give each of them a realistic opportunity to

25. *Aderholt*, 503 F.2d at 1310-12.
26. *Stickney*, 325 F. Supp. at 784.

lead a more useful and meaningful life and to return to society."[27]

As to the first of these alleged rights, the Fifth Circuit Court of Appeals affirmed the trial judge's holding on the basis of its own opinion in another case it had recently decided, *Donaldson v. O'Connor*.[28] In *Donaldson*, the court of appeals had announced essentially the same constitutional doctrine as the trial court did in *Wyatt*.[29] But *Donaldson* thereafter went to the Supreme Court.[30] That Court vacated the judgment on the ground that "the difficult issues of constitutional law dealt with by the Court of Appeals [i.e., the constitutional right to treatment] are not presented by this case."[31] To this day, the Supreme Court has never approved the constitutional right to treatment doctrine, probably because of the enormous difficulties with it that were reviewed compellingly in Chief Justice Burger's concurring opinion in *Donaldson*.[32]

As to the second alleged right found by the trial court and affirmed on appeal in *Wyatt*, the constitutional right of retardates to such "habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life," the Supreme Court has since squarely considered and flatly rejected it. *Youngberg v. Romeo*[33] held that confined retardates have a constitutional right only to a safe environment, freedom from bodily restraint, and "such training as may be reasonable" to protect those two interests.

The upshot of *Wyatt*, then, is an elaborately detailed and expensive order based on two alleged constitutional rights, one of which clearly does not exist and the other of which is highly suspect. As to the latter, indeed, the Fifth Circuit, which created the right to treatment in *Donaldson* and invoked it to affirm *Wyatt*, has since repudiated it.[34] So *Wyatt* is left with no constitutional foundation at all, except the one the trial judge ignored because it was inadequate to accomplish the goal he had in mind.

Lest one mistakenly suppose that *Wyatt* is in this respect an aberration in the galaxy of judicial activism, two other examples may be mentioned briefly. In *Harris v. McRae*,[35] the Supreme Court upheld a law (the "Hyde Amendment") forbidding the expenditure of federal funds

27. *Stickney*, 344 F. Supp. at 390.
28. 493 F.2d 507 (5th Cir. 1974).
29. *See id.* at 520 ("We hold that a person involuntarily civilly committed to a state mental hospital has a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition.").
30. O'Connor v. Donaldson, 422 U.S. 563 (1975).
31. *Id.* at 573.
32. *Id.* at 578-89 (Burger, C.J., dissenting).
33. 457 U.S. 307 (1982).
34. *See* Morales v. Turman, 562 F.2d 993 (5th Cir. 1972).
35. 448 U.S. 297 (1980).

for abortions. But roughly eighteen months earlier, a federal district judge, no doubt employing an "aspirational"[36] view of the Constitution, had invalidated the law and enjoined the government from withholding the funds. How do taxpayers recoup the money unlawfully expended under this order?

In the second example, Nicholas "Slick" Romano pleaded guilty to drug offenses and was put on probation by a state judge. When Romano later was charged with another crime, the state judge revoked his probation and sentenced him to prison, in the process complying with all of the Supreme Court's requirements regarding probation revocation. But a federal judge nevertheless ordered Romano released on a habeas corpus petition. In *Black v. Romano*,[37] the Supreme Court unanimously reversed. But Romano had meanwhile disappeared and as of this writing is still at large. How does society protect itself from convicted criminals freed by federal judicial orders that have no lawful basis?

Perhaps a persuasive case can be made for the proposition that society is required to bear such onerous burdens[38] imposed by judges in the name of non-existent constitutional rights in order to permit activist courts leeway to engage in "policy reform." If so, I have yet to hear it.

C. Selecting the Remedy

The abominable conditions that existed in Alabama's mental health institutions at the time of *Wyatt* were plainly unconstitutional. Where confinement under the challenged circumstances is unconstitutional, there is an obvious and ancient remedy: release by writ of habeas corpus. Given the facts of *Wyatt*, release would seem to have been the most appropriate remedy. The evidence that seventy percent of the inmates in one of the institutions should never have been committed in the first place[39] strengthens this conclusion substantially.

Professor Shane reports that "release is never the remedy of first resort. This can only be," he adds, "because courts recognize a proper place in the remedial process for balancing remedial interests against other legitimate social concerns."[40] That may be true in a few cases. On the whole, however, I believe courts avoid ordering release for a quite

36. Shane, *supra* note 6, at 550, *passim*.

37. 471 U.S. 606 (1985).

38. The matter was disputed, but the state estimated that complying with the *Wyatt* order would consume sixty percent of the state's entire budget except for school financing, and would require capital improvements of $75,000,000. *Aderholt*, 503 F.2d at 1317.

39. *Id.* at 1310.

40. Shane, *supra* note 6, at 557.

different reason. If a court ever ordered the wholesale release of an institution full of the mentally ill, or convicted criminals, on the ground that conditions in the institution were unconstitutional, then the full import of the real power the democratically unresponsible federal judges in fact exercise would be brought home to all citizens with a vengeance. Prior uproars about judicial activism would be as tempests in teapots by comparison. Debates over the difference between the truly unconstitutional and the aspirationally unconstitutional would no longer be confined to largely-inaccessible, arcane law reviews. Judicial opinions supporting such orders would be studied with care by large numbers of people, not just by scholars and advocates. In sum, I believe that release is never the remedy of first resort largely because that tactic protects judicial power by camouflaging it, making it appear less extensive and less threatening to democratic government than it is.

And so the trial judge in *Wyatt* did not order release. The full flavor of the order he did enter is impossible to capture in a summary. It covers eight printed pages and is divided into five major sections.[41] Besides definitions, it contains thirty-five paragraphs, some with as many as sixteen subparagraphs, and some subparagraphs with as many as five sub-subparagraphs. It lists thirty-five different kinds of employees, ranging from psychiatrists and psychologists to messengers (!) and vehicle drivers (!!), and how many of each, every Alabama institution was ordered to have on its staff. It contains detailed instructions with respect to physical facilities—how hot the water must be (110F at the fixture), for example. And so on—and on.

The point at issue is to try to relate these detailed decrees to some constitutional violation. Dealing with all, or even most, of these specifications is obviously impossible, so a few examples will have to suffice. Under the heading "Humane Psychological and Physical Environment"[42] are these two provisions of the order: (1) "the toilets will be installed in separate stalls to ensure privacy,"[43] and (2) "adequate heating [and] air conditioning . . . systems and equipment shall be afforded . . . . Such facilities shall insure that the temperature in the hospital shall not exceed 83F nor fall below 68F."[44]

No one will claim that such amenities are not desirable. The issue, however, is whether people involuntarily housed in an institution without them are being confined unconstitutionally.

41. *Stickney*, 344 F. Supp. at 379-86.
42. *Id.* at 382.
43. *Id.*
44. *Id.*

I spent roughly four years in the armed forces, about half that time living in barracks in this country (*i.e.*, not in combat zones or overseas) at a time when air conditioning was available. I was never in a barracks (and I was in plenty of them, including many in the South) that had either of these amenities. Is there a legitimate theory of constitutional interpretation that allows a judge to hold that the same living conditions that are routinely imposed on people serving their country are unconstitutional when they are imposed on prisoners, or, as in this case, the mentally ill? I believe not. Nor do I believe there is a legitimate theory of interpretation that allows judges to decree that the Constitution requires a thing just because the thing happens to be desirable. Like so many of the decrees making judges dictators of public institutions, the *Wyatt* decree simply substituted what appeared to be desirable for what the Constitution requires. "Dictators" rather than "managers" of public institutions because managers do not make the rules, dictators do. And "substitute" rather than "confuse" what is desirable for what the Constitution requires because, with some exceptions doubtless, the judges are not confused; they know full well what they are doing.

III. CONCLUSIONS

The Chicago reapportionment case is not really an example of federal courts managing public institutions. Once the redistricting map was drawn, the court's involvement was at an end. The court was required to pay considerable attention to the details of that map, to be sure, but that was inevitable, assuming the validity of both the one person, one vote standard and of the amendments to the Voting Rights Act.

The patronage case raises the issue of creating non-existent constitutional rights in a more debatable context. The creation of the Civil Service system is considered by most historians to be one of the highlights of the history of this nation. The Supreme Court now reveals, in the cases reviewed by Professor Strauss, that its most important feature—*viz.*, protection from being fired for belonging to the wrong political party—was contained in the first amendment all the time. All we ever had to do was file a lawsuit and ask a court to announce the fact.

Professor Shane describes this as "changed understandings of an unchanged Constitution."[45] He asserts that it is legitimate. I think very recent history proves that almost everyone's common sense tells them the contrary.

45. Shane, *supra* note 6, at 552.

Consider the debate in the United States Senate last May over the ratification of the Intermediate-range Nuclear Forces (INF) Treaty. At issue was an amendment stipulating that presidents were without power to interpret the Treaty in any way different from that in which the executive branch had explained its provisions at the time of its consideration by the Senate—unless the Senate subsequently approved. That amendment was prompted by what many thought was the executive branch's reinterpretation of the earlier Anti-Ballistic Missile (ABM) Treaty. The amendment passed overwhelmingly.[46]

Is that not the common sense of the matter? When individuals (Senate/"We the people of the United States") grant power to others (President/government), they expect that power to be limited in the ways they understood it would be limited; they do not expect the grantee (President/judges) to use the grant as an excuse for inventing powers that were not granted—unless the individuals agree. And the Constitution provides a method for people to express their agreement—the amendment process, which is article V, not article III.

If I understand him correctly, Professor Shane argues that "changed understandings of an unchanged Constitution" is legitimate because people have come to expect it (or, perhaps, to be resigned to it). That argument is what former Senator Thomas Eagleton called, in another context, the "bank robber proposition." Senator Eagleton's context was the debate over the president's use of the war powers. He was answering an argument that the history of presidential use of the war powers over 200 years put a practical "gloss on the Constitution," and thereby enlarged the president's powers; and this was true whether or not those prior presidential uses were constitutional. This argument is what he characterized as the bank robber proposition. To quote him directly: "[I]f a number of bank robbers proved successful, the act of bank robbery would have to be legalized."[47] That is the essence of Professor Shane's argument, as I understand it, except that he is dealing with federal judges rather than the president: because judges have consistently usurped power in the past and people have come to expect it, judges may constitutionally usurp power.

Even supposing the validity of judges creating new constitutional rights by resort to one or another of the Constitution's general provisions, the legitimacy of their managing public institutions on a continuing basis still requires some linkage between the alleged right and the

46. *See* 134 CONG. REC. S6724-84 (daily ed. May 26, 1988).
47. T. EAGLETON, WAR AND PRESIDENTIAL POWER 125 n.* (1974).

remedy that puts the judge in control. In the process of admirably demonstrating the complexity of this relationship, Professor Shane offers a textbook example of the extraordinary dangers of according judges that kind of authority. Discussing what the court might have done in the public housing case, he nonchalantly suggests that "the court might have considered the relocation of some existing tenants to accomplish the desegregation of existing public housing."[48]

Ponder that if you please! Desegregating public housing is simple. A judge merely orders some black families and some white families to exchange residences! The hopes and fears, the longings and aspirations of those families, black and white, obviously are of no concern.

Invincible self-rectitude is the hallmark of judicial activism, an attitude that judges are better qualified than other mortals to articulate the principles and formulate the policies by which this nation will be governed.

I prefer the philosophy of the late Chief Justice Harlan Fiske Stone, as summarized in two sentences of a famous dissenting opinion:

> [The arguments of the majority] are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of government that must be assumed to have capacity to govern.[49]

Shortly after Chief Justice Stone uttered these words, the Court adopted his philosophy as its guiding principle—for a time. All courts should return to that philosophy soon.

48. Shane, *supra* note 6, at 570.

49. United States v. Butler, 297 U.S. 1, 87 (1936) (Stone, J., dissenting). *See* Gerard, *Capacity to Govern*, 12 HARV. J.L. & PUB. POL'Y 501 (1989).