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# THE JURISPRUDENCE OF THE PLRA: INMATES AS "OUTSIDERS" AND THE COUNTERMAJORITARIAN DIFFICULTY

JAMES E. ROBERTSON\*

*"[J]udicial intervention is indispensable if constitutional dictates—not to mention considerations of basic humanity—are to be observed in the prisons."*<sup>1</sup>

*"[The federal courts are] havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."*<sup>2</sup>

## I. INTRODUCTION

In *Harris v. Fleming*,<sup>3</sup> the Seventh Circuit Court of Appeals spoke for many federal courts when it observed that "[j]udges are not wardens, but we must act as wardens to the limited extent that unconstitutional prison conditions *force us to intervene* when those responsible for the conditions have failed to act."<sup>4</sup> This admission is revealing of judicial perception and motive: rather than characterizing its actions as discretionary, the court asserted that it had no choice but to join the fray.

In 1996, Congress enacted the Prison Litigation Reform Act (PLRA)<sup>5</sup> partly in response to the judicial philosophy expressed in *Harris*. Rather than defining judicial intervention as a "force[d]" response to neglectful prison staff, congressional

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<sup>1</sup> *Rhodes v. Chapman*, 452 U.S. 337, 354 (1981) (Brennan, J., concurring).

<sup>2</sup> *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

<sup>3</sup> *Harris v. Flemming*, 839 F.2d 1232 (7th Cir. 1988).

<sup>4</sup> *Id.* at 1235 (emphasis added).

<sup>5</sup> Pub. L. No. 104-134 (April 16, 1996), 110 Stat. 1321 (1996).

backers portrayed judges as liberal busybodies giving aid and comfort to litigious inmates.<sup>6</sup> After scant deliberation,<sup>7</sup> the Congress passed and President Clinton signed legislation of far reaching consequence for courts, corrections, and the Constitution.<sup>8</sup> The PLRA constrains inmates by requiring them to exhaust administrative remedies before bringing suit,<sup>9</sup> pay filing fees;<sup>10</sup> and forgo damages for emotional injuries absent a prior physical injury.<sup>11</sup> While the Act permits the judiciary to *sua sponte* dismiss claims failing to state a cause of action,<sup>12</sup> its power to grant prospective relief cannot extend beyond correcting the right in question;<sup>13</sup> and the relief can be terminated within two

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<sup>6</sup> See, e.g., 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) (urging passage to "bring relief to a civil justice system overburdened by frivolous prisoner lawsuits"), reprinted in 1 LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, PUB. L. NO. 104-134, at doc. 14 (1997) (Bernard D. Reems, Jr. & William H. Manz eds., 1997) [hereinafter 1 LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996]; 141 CONG. REC. S14419 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham) (heralding the proposed legislation as a bar to judicial intervention "for the slightest reason"), reprinted in 1 LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, *supra* at doc. 15; United States v. Simmonds, 111 F.3d 737, 743 (10th Cir. 1997) ("The main purpose of the Prison Litigation Reform Act was to curtail abusive prison-condition litigation."); Hampton Hobbs, 106 F.3d 1281, 1286 (6th Cir. 1997) ("The legislation was aimed at the skyrocketing numbers of claims filed by prisoners—many of which are meritless—and the corresponding burden those filings have place on the federal courts."); Santana v. United States, 98 F.3d 752, 755 (3d Cir. 1996) ("Congress enacted the PLRA primarily to curtail claims brought by prisoners under 42 U.S.C. § 1983 and the Federal Torts Claims Act, most of which concern prison conditions and many of which are routinely dismissed as legally frivolous.").

<sup>7</sup> See 142 CONG. REC. S2296 (daily ed. March 19, 1996) (statement of Sen. Kennedy), reprinted in 1 LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, *supra* note 6, at doc. 23 (stating that "the PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves"); Benjamin v. Jacobson, 935 F. Supp. 332, 340 (S.D.N.Y. 1996) ("[I]t is worth noting that some believe that this legislation which has a far-reaching effect on prison conditions and prisoners' rights deserved to have been the subject of significant debate. It was not.").

<sup>8</sup> On April 24, 1996, the House of Representatives and the Senate approved of the Act by a vote of 399 to 25 and 89 to 11, respectively. See 1 LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, *supra* note 6, at viii.

<sup>9</sup> See 42 U.S.C. § 1997e(a) (West Supp. 2000).

<sup>10</sup> See 28 U.S.C.A. § 1914(a) (West Supp. 2000).

<sup>11</sup> See 42 U.S.C. § 1997e(e) (West Supp. 2000).

<sup>12</sup> See 28 U.S.C. § 1915(e)(2)(B)(ii) (West Supp. 2000).

<sup>13</sup> 18 U.S.C.A. § 3626(a)(1) (West Supp. 2000).

years or, in some instances, sooner.<sup>14</sup> In addition, the Act caps fees for attorneys<sup>15</sup> and special masters.<sup>16</sup>

Despite the growing literature about this profoundly important legislation,<sup>17</sup> the jurisprudence of the PLRA remains unstudied. This Article locates the PLRA amid the long-running debate over the interpretative authority of Article III courts. The federal judiciary has experienced a crisis of legitimacy since Alexander Bickel labeled it a "deviant institution" because of its capacity to frustrate majority will.<sup>18</sup> This Article contends that

<sup>14</sup> See 18 U.S.C.A. § 3626(b)(1) (West Supp. 2000).

<sup>15</sup> See 42 U.S.C. § 1997(d) (West Supp. 2000).

<sup>16</sup> See 18 U.S.C. § 3626(e)(2) (West Supp. 2000).

<sup>17</sup> A small slice of PLRA commentary includes: Thomas Julian Butler, *The Prison Litigation Reform Act: A Separation of Powers Dilemma*, 50 ALA. L. REV. 585 (1999); Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court—It May Be Effective, but is it Constitutional?*, 70 TEMP. L. REV. 471 (1997); Jason E. Pepe, *Challenging Congress's Latest Attempt to Confine Prisoners' Constitutional Rights: Equal Protection and the Prison Litigation Reform Act*, 23 HAMLINE L. REV. 59 (1999); James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly" Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105 (2000) [hereinafter Robertson, *Psychological Injury and the Prison Litigation Reform Act*]; James E. Robertson, *Prison Reform, A Faustian Bargain: Commentary on Prospective Relief Before and After Miller v. French*, 37 CRIM. L. BULLETIN 195 (2001); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997); Peter Hobart, Comment, *The Prison Litigation Reform Act: Striking the Balance Between Law and Order*, 44 VILL. L. REV. 981 (1999); Eugene J. Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361 (1998); Stacey Heather O'Bryan, Note, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189 (1997); Catherine G. Patsos, Note, *The Constitutionality and Implications of the Prison Litigation Reform Act*, 42 N.Y.L. SCH. L. REV. 205 (1998); Julie M. Riewe, Note, *The Least Among Us: Unconstitutional Changes In Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117 (1997).

<sup>18</sup> ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 18 (1978); cf. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 578 (1993) ("At least since Alexander Bickel's *The Least Dangerous Branch*, constitutional scholars have been preoccupied, indeed one might say obsessed, by the perceived necessity of legitimating judicial review.") (footnotes omitted). Many scholars have embraced Bickel's concerns as legitimate but have disagreed about the degree to which courts are counter-majoritarian. See, e.g., ROBERT H. DAHL, *DEMOCRACY AND ITS CRITICS* 190 (1989) (concluding that "a majority of the justices of the Supreme Court are never out of line for very long with the views . . . among the lawmaking majorities"); ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* 224 (1960) (arguing that one would have difficulty in finding "a single historical instance when the Court has stood firm for very long against . . . public demand"); Friedman, *supra*, at 587-616 (questioning "just how 'countermajoritarian' courts are"; delimiting process majoritarianism from substance majoritarianism; and concluding that "it becomes difficult to identify a 'majority' whose will courts are trumping"); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (asserting that

the PLRA represents the assertion of majoritarian supremacy over constitutional courts accused of exceeding their legitimate, limited authority.<sup>19</sup>

The Article proceeds in the following manner. The following section describes the collision between two models, one directed at prison reform and the other dominating constitutional law. From the majoritarian perspective, prison reform judges fell victim to "Lochnerization:"<sup>20</sup> they engaged in judicial policy making in the name of adjudication. By enacting the PLRA, Congress sought to forbid judicial overreaching.

The Article next questions whether inmates can secure adequate constitutional protection from abusive penal practices. The answer reveals that prisoners' rights advocates are cornered: the PLRA limits the remedial powers of federal courts;<sup>21</sup> and, in deference to majoritarian supremacy, the judiciary has rejected challenges to its constitutionality.<sup>22</sup>

I conclude by positing a "justice gap" between underlying constitutional norms and the case law providing for a piecemeal prisoners' bill of rights. This Article shows that the cornerstone of prisoners' rights—the Eighth Amendment prohibition of cruel and unusual punishment<sup>23</sup>—embodies underenforced constitutional norms. Moreover, its content reveals an inclusiveness sadly absent from the majoritarian paradigm of constitutional law.

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the Court is "never for long out of line with . . . lawmaking majorities"). On the other hand, the elected branches often do not mirror the will of the majority. *See, e.g.,* Alan D. Monroe, *Public Opinion and Public Policy, 1980-1993*, 62 PUB. OPINION Q. 6, 15-16 (1998) (finding that congressional action and public opinion achieved concurrence fifty-five percent of the time between 1980-1993).

<sup>19</sup> *See infra* notes 28-30 and accompanying text (describing the principal propositions of majoritarian supremacy).

<sup>20</sup> The term "Lochnerization" is derived from *Lochner v. New York*, 198 U.S. 45 (1905), and denotes *a priori* reasoning. In *Lochner*, the Supreme Court found "a general right . . . to contract." *Id.* at 58. *Lochner's* offspring read laissez faire values into the Constitution. *See, e.g.,* *Adkins v. Children's Hosp.*, 261 U.S. 525, 554 (1923) (ruling that minimum wage laws violated due process); *Coppage v. Kansas*, 236 U.S. 1, 25-26 (1915) (striking down legislation prohibiting "yellow dog" contracts); *see also* text accompanying *infra* note 35 (describing the "Lochner era").

<sup>21</sup> *See supra* notes 11, 13-14 and accompanying text (discussing the PLRA's provisions addressing damages and prospective relief).

<sup>22</sup> *See infra* note 57 (citing cases).

<sup>23</sup> U.S. CONST. amend. VIII.

## II. INSTITUTIONAL REFORM AND THE COUNTERMAJORITARIAN DIFFICULTY

In the decade preceding the PLRA, many federal judges became managers of systemic prison reforms and thus oversaw directly, or through special masters, the day-to-day operations of correctional institutions.<sup>24</sup> In some instances, a federal district judge effectively took control of a state's entire prison system.<sup>25</sup> Feeley and Rubin characterized "the massive intervention into state corrections . . . [as] the most striking example of judicial policy making" in modern America.<sup>26</sup> Moreover, they concluded that judicially engineered prison reform "violated nearly every accepted principle for controlling the judicial branch."<sup>27</sup>

This manner of prison reform directly confronted what Bickel famously called the "counter-majoritarian difficulty"<sup>28</sup>—that democracy means majority rule and the power of the

<sup>24</sup> See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 376-77 (1982) (describing a "more active, 'managerial' stance" among judges, leading them to "meet[] with parties in chambers to encourage settlement of disputes and to supervise case preparation"); see also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (defining the role of the trial judge as "the creator and manager of complex forms of ongoing relief"); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 46 (1979) (defining the role of the trial judge as a "political powerbroker"); cf. Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 790-853 (1978) (providing a generic, in-depth description of institutional reform adjudication). But see Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 467 (1980) (contending that institutional reform adjudication had much in common with traditional litigation but for the "undreamed-of entitlements" it dispensed) (footnote omitted).

<sup>25</sup> See, e.g., *Ruiz v. Estelle*, 503 F. Supp. 1265, 1297-402 (S.D. Tex. 1980), *modified*, 650 F.2d 555 (5th Cir. 1981), *aff'd in part and rev'd in part*, 666 F.2d 854 (5th Cir.), *modified*, 679 F.2d 1115 (5th Cir. 1982) (ordering system-wide relief in Texas); *Newman v. Alabama*, 559 F.2d 283, 289-90 286 (5th Cir. 1977), *rev'd in part sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978) (ordering system-wide relief in Alabama); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 986-89 (D.R.I. 1977), *remanded to* 599 F.2d 17 (1st Cir. 1979), *aff'd*, 616 F.2d 598 (1st Cir. 1979) (ordering system-wide relief in Puerto Rico); *Holt v. Sarver*, 309 F. Supp. 362, 382-85 E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (ordering system-wide relief in Arkansas).

<sup>26</sup> MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 13-14 (1998).

<sup>27</sup> *Id.* at 18.

<sup>28</sup> BICKEL, *supra* note 18, at 16.

federal judiciary to impede majority rule renders judicial review a "deviant institution."<sup>29</sup> Majoritarians posit a distinction between law and policy; they envisage a minimal, deferential role for the courts, with judges reading the open-ended provisions of the Constitution in light of majority opinion and the policy preferences of the elected branches of government.<sup>30</sup>

The Framers of the Constitution did not share Bickel's concerns. They distrusted majority rule<sup>31</sup> and embraced natural rights. Their notion of democracy rested on the Lockean individual rather than the collective good.<sup>32</sup> "To Locke," wrote one

<sup>29</sup> *Id.* at 27. The pervasive suspicion of judicial review finds expression in what is perhaps the most important contribution to constitutional scholarship of the past fifty years, John Hart Ely's *Democracy and Distrust*. In one revealing passage, Ely seamlessly quotes Bickel and, in so doing, bows to the majoritarian paradigm:

[M]ost of the important policy decisions are made by our elected representatives (or by people accountable to them). . . . Judges, at least federal judges—while they obviously are not entirely oblivious to popular opinion—are not elected or reelected. "[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic."

JOHN HART ELY, *DEMOCRACY AND DISTRUST* 4 (1982) (quoting BICKEL, *supra* note 18, at 19).

<sup>30</sup> See, e.g., *Furman v. Georgia*, 408 U.S. 238, 384 (1972) (Burger, C.J., dissenting) ("[I]n a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in society."); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.").

<sup>31</sup> See, e.g., THE FEDERALIST NO. 10, at 129-30 (Madison) (Benjamin Fletcher Wright, ed., 1961) (observing that "measures are too often decided, not according to the rules of Justice and the rights of the minor party, but by the superior force of an interested and overbearing majority"); see also *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (arguing that judicial review existed to prevent "the occasional tyrannies of governing majorities"); H.N. HIRSCH, A THEORY OF LIBERTY 5 (1992) ("Properly understood, American constitutionalism is meant to be countermajoritarian."); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1522 (1990) ("If the Constitution's Framers were keen on majority rule, they certainly had a bizarre manner of demonstrating their affection."); Robertson, *Psychological Injury and the Prison Litigation Reform Act*, *supra* note 17, at 122 ("The Framers intended the textually specific components of the constitutional system—the Bill of Rights, republicanism, federalism, and the separation of powers—to both guarantee and limit majority rule.") (footnotes omitted).

<sup>32</sup> See, e.g., Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 531 (1998) ("[H]istory suggests that representation in America was designed not as a means for the people to participate in government, but as a means for the people to protect themselves from their own representative government."); Chris Hutton, *Reason and Passion: A Review of Morton Horowitz' The Warren Court and the Pur-*

commentator, "the law is an institutional device that connects *the different perspectives of individuals* by harmonizing the natural rights that they equally enjoy."<sup>33</sup>

Long before Bickel's time, however, majoritarian supremacy became equated with democracy.<sup>34</sup> A constitutional sea change had occurred in 1937 with the passing of the so-called *Lochner* era:

The *Lochner* era, a period of Supreme Court jurisprudence spanning from 1899 to 1937, has long been inscribed into constitutional legend. The legend characterizes the *Lochner* era as one of the darkest chapters in the saga of constitutional jurisprudence . . . . During this time, the Court struck down numerous progressive laws involving economic and social welfare. . . . The *Lochner* era ended abruptly in 1937 when the Court began consistently to uphold New Deal legislation.<sup>35</sup>

The elevation of Felix Frankfurter from New Deal adviser to Associate Justice symbolized the constitutional dominance of majoritarianism in the post-1937 constitutional order.<sup>36</sup> He spoke on behalf of majoritarian supremacy when he announced from the bench that "[c]ourts are not representative bodies. They are not designed to be a good reflection of a democratic society . . . . We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it . . . ." <sup>37</sup> Law could be purposive but only at the majority's behest.

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*suit of Justice*, 44 S.D. L. REV. 466, 468 (1999) ("[T]o the Framers of the Constitution, democracy was a negative—the right to be free from government interference in certain respects.") (footnote omitted).

<sup>33</sup> Ulrich K. Preu, *Habermas on Law and Democracy: Critical Exchanges: Liberalism, Republicanism, and Constitutionalism: Communicative Power and the Concept of Law*, 17 CARDOZO L. REV. 1179, 1180 (1996) (emphasis added).

<sup>34</sup> See Erwin Chemerinsky, *The Supreme Court, 1988 Term: The Vanishing Constitution*, 103 HARV. L. REV. 43, 64 (1989) (describing "the dominance of majoritarianism" after 1937). That dominance continues. See Friedman, *supra* note 18, at 590-91 ("The entire pattern of judicial interpretation of constitutional rights is woven into a fabric of deference to the will of ostensibly more majoritarian branches.") (footnotes omitted).

<sup>35</sup> Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 949-50 (1999) (footnotes omitted).

<sup>36</sup> Cf. Morton J. Horwitz, *The Supreme Court, 1992 Term: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 32, 62-63 (1993) (observing that "New Deal ideologues narrowly and mechanically defined democracy simply to entail majority rule").

<sup>37</sup> *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring); cf. Brown, *supra* note 32, at 552 ("Proponents of the majoritarian paradigm . . . belie[ve] that all public policy must be made according to majority rule . . .").



Deference became the "central principle of judicial review" in the post-*Lochner* era.<sup>38</sup> When paired with the rational-basis test,<sup>39</sup> deference stood for the formal separation of law and policy; and when law and policy met in the real world, deference meant that functionaries of the emerging administrative state would not be second-guessed on their policy choices and factual assessments.

Well into the past century, courts themselves preempted judicial oversight of prisons by their adherence to the hands-off doctrine.<sup>40</sup> It represented an early, extreme form of judicial deference by questioning the competence of courts to grasp prison administration,<sup>41</sup> warning that judicial meddling would embolden inmates to disrespect and disobey their keepers,<sup>42</sup> and

<sup>38</sup> See Solove, *supra* note 35, at 949. Solove defined the "deference principle" as follows: "that the Court should not attempt to 'second-guess' or 'substitute' its judgment for the judgment of another decisionmaker or to pass on the 'wisdom' of a policy or law." *Id.* at 943.

<sup>39</sup> See *Barels v. Iowa*, 255 U.S. 407, 412 (1921) (Holmes, J. dissenting) (internal citation omitted) ("[T]he only criterion of . . . liberty under the Constitution that I can think of is 'whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat.'"). Deference to the elected branches of government formed the keystone of Justice Holmes' approach to judicial restraint:

For a Holmesian, it is up to the legislature and executive to respond to social change and "the felt necessities of the times," not the courts. Reflecting this fact, virtually all Holmesian references to a notion of evolving concepts in the Constitution occur in the context of deference to governmental decision.

R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 199 (1994) (footnotes omitted).

<sup>40</sup> See, e.g., *United States ex rel. Atterbury v. Ragen*, 237 F.2d 953, 955 (8th Cir. 1956) (declaring that "it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners") (internal quotation marks and citations omitted); *Taylor v. United States*, 179 F.2d 640, 643 (9th Cir. 1950) (positing that it "is not within the province of the courts to supervise the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there"); *United States ex rel. Palmer v. Ragen* 159 F.2d 356, 358 (7th Cir. 1947) (observing that "[u]nder repeated decisions, state governmental bodies, who are charged with prosecution and punishment of offenders, are not to be interfered with except in case of extraordinary circumstances") (internal quotation marks and citations omitted).

<sup>41</sup> See, e.g., NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 18 (1973) ("The courts refused for the most part to intervene. Judges felt that correctional administration was a technical matter to be left to experts . . .").

<sup>42</sup> See, e.g., *Callum v. California Dep't of Corrections*, 267 F. Supp. 524, 525 (N.D. Cal. 1967) (warning that "if every time a guard were called upon to maintain order he

positing that federalism shielded state prisons from Article III courts.<sup>43</sup>

By the late 1960s, however, judges abandoned the hands-off doctrine in the face of horrific prison conditions and brutal prison practices.<sup>44</sup> An ever-rising tide of prisoner lawsuits followed;<sup>45</sup> and the judiciary commenced a transformation “perhaps second in breadth and detail only to the courts’ earlier role in dismantling segregation in the nation’s public schools.”<sup>46</sup>

While the lower federal courts powered this exercise in judicial policy making,<sup>47</sup> the Supreme Court tried to break its speed. Just ten years after the collapse of the hands-off doctrine, the Supreme Court’s decision in *Bell v. Wolfish*<sup>48</sup> called for post-*Lochner* deference.<sup>49</sup> The *Bell* Court indicated that restric-

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had to consider his possible tort liabilities it might unduly limit his actions”); Golub v. Krinsky, 185 F. Supp. 783, 784 (S.D.N.Y. 1960) (concluding that “to allow such actions would be prejudicial to the proper maintenance of discipline”).

<sup>43</sup> See, e.g., *United States v. Ragen*, 323 F.2d 410, 412 (7th Cir. 1963) (stating that “[i]t is not the function of federal courts to interfere with the conduct of state officials in carrying out such duties under state law”); *Kelly v. Dowd*, 140 F.2d 81, 83 (7th Cir. 1944) (commenting that the disputes over the management of state prisons “are questions peculiarly fit to be determined in the first instance by the courts of the state”).

<sup>44</sup> See, e.g., NORMAN A. CARLSON ET AL., *CORRECTIONS IN THE 21ST CENTURY* (1999) (lamenting that the hands-off doctrine permitted “conditions of squalor and inhumane treatment by correctional personnel and had nowhere to turn for help”); KENNETH J. PEAK, *JUSTICE ADMINISTRATION* 218 (2d ed. 1998) (observing that “conditions in many prisons were almost insufferable for both staff members and inmates”); THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 159 (1967) (declaring that “[l]ife in many institutions is at best barren and futile, at worst unspeakably brutal and degrading”); MICHAEL WELCH, *CORRECTIONS: A CRITICAL APPROACH* 356 (1996) (observing that the hands-off doctrine allowed correctional officials “to operate prisons and jails free from constraints, even if physical abuse of prisoners was employed to instill discipline and horrific living conditions persisted in the prison”).

<sup>45</sup> See ADMIN. OFFICE OF THE U.S. COURTS, *U.S. COURTS: SELECTED REPORTS* AI-55 (1996) (showing that prisoner civil rights filings increased from 218 in 1966 to some 2000 in 1970, and exceeded 39,000 by 1996).

<sup>46</sup> Malcolm M. Feeley & Roger A. Hanson, *The Impact of Intervention on Prisons and Jails: A Framework for Analysis and Review of the Literature*, in *COURTS, CORRECTIONS, AND THE CONSTITUTION* 13 (John J. DiIulio Jr. ed., 1990).

<sup>47</sup> See Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 SO. ILL. L. REV. 417, 425 (1993) (stating that lower federal courts decided “the most important prisoner rights cases”) (footnote omitted).

<sup>48</sup> 441 U.S. 520 (1979).

<sup>49</sup> See, e.g., FEELEY & RUBIN, *supra* note 26, at 47 (positing that *Bell* “presented the first clear sign” of the Court’s role as “a leader in the retrenchment process”); Lisa Davie Levinson *Tenth Circuit Survey: Prisoners’ Rights*, 75 DENV. U. L. REV. 1055, 1060 (1998) (“The Court’s modern approach to prison litigation began in 1979 [with *Bell*”).

tions on inmates would survive constitutional challenge merely by being "reasonably related to the government's interest in maintaining security and order and operating the institution in a manageable fashion."<sup>50</sup> Moreover, in determining reasonableness, judges should defer to prison staff:

[C]ourts must heed our warning that "[s]uch considerations are peculiarly within the province and professional expertise of correctional officials, and in the absence of substantial evidence in the record to indicate that officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."<sup>51</sup>

Notwithstanding pronouncements of a "new" hands-off doctrine emerging from the Court,<sup>52</sup> *Bell* did not prevent institutional reform decrees.<sup>53</sup> Indeed, their breadth more than

<sup>50</sup> *Bell*, 441 U.S. at 540-41 n.23. For criticism of the Court's policy of deference, see, for example, Ronald L. Kuby & William M. Kunstler, *Silencing the Oppressed: No Freedom of Speech for Those Behind the Walls*, 26 CREIGHTON L. REV. 1005, 1023 (1993) ("[It is] simply untrue that prison administrators . . . possess some mysterious expertise that requires deference from the federal courts. Prison administrators differ widely in background, education, skills, and social attitudes.").

<sup>51</sup> *Bell*, 441 U.S. at 540 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

<sup>52</sup> See, e.g., Mark Berger, *Withdrawal of Rights and Due Deference: The New Hands-Off Policy in Correctional Litigation*, 47 UMKC L. REV. 1, 5 (1978) (discerning similar rationales for the hands-off doctrine and deference). While the Court did not return to the hands-off doctrine, it did employ deference in ruling after ruling. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 361 (1996) ("[The] principle of deference has special force with regard to that issue, since the inmates in lockdown include 'the most dangerous and violent prisoners in the Arizona prison system,' and other inmates presenting special disciplinary and security concerns.") (citation omitted); *Sandin v. Connor*, 515 U.S. 472, 482 (1995) ("[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment."); *Hudson v. McMillan*, 503 U.S. 1, 6 (1992) ("[P]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." (quoting *Bell*, 441 U.S. at 547 (citation omitted))); *Turner v. Safley*, 482 U.S. 78, 89 (1987) ("[A] standard [of deference] is necessary if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.'" (quoting *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 128 (1977) (citation omitted))); *Block v. Rutherford*, 468 U.S. 576, 589 (1984) ("[P]rison administrators are [to be] accorded wide-ranging deference. . . ." (quoting *Bell*, 441 U.S. at 547 (citation omitted))); cf. *Solem v. Helm*, 463 U.S. 277, 290, (1983) ("Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes . . .").

<sup>53</sup> For instance, *Bell* appeared to have no significant impact on the decision of the Fifth Circuit in *Ruiz v. Estelle*, 688 F.2d 266 (5th Cir. 1982), which affirmed the trial court's ambitious directives for reforming the Texas prison system. Similarly, writing

compensated for the gradual shrinkage of prisoners' substantive and procedural rights by the Court.<sup>54</sup> Nor did *Bell* dampen inmates' thirst for litigation.<sup>55</sup>

In 1996, Congress finished what *Bell* had begun: by enacting the PLRA Congress asserted its supremacy over the remedial powers of federal courts.<sup>56</sup> The judiciary, in turn, acquiesced by rejecting constitutional challenges to the PLRA.<sup>57</sup>

in 1983, James Jacobs recognized that *Bell* "failed to prevent major judicial interventions into the operation of state prisons." JAMES B. JACOBS, *NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT* 45 (1983).

<sup>54</sup> Compare, e.g., *Sandin*, 515 U.S. 483-84 (1995) (restricting state-created liberty interests that trigger procedural due process to atypical, significant hardships), with *Hewitt v. Helms*, 459 U.S. 460, 476-77 (1983) (defining state-created liberty via substantive predicates and other mandatory language found in state law); compare, e.g., *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350-51 (1987) (ruling that limitations on inmates' First Amendment rights are acceptable if reasonably related to institutional goals), with *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974) (holding that censorship of inmate correspondence must advance important and substantial governmental interests in the least restrictive manner); compare, e.g., *Wilson v. Seiter*, 501 U.S. 294, 301 n.1, 302 (1991) (ruling that the Cruel and Unusual Punishment Clause contains a state-of-mind requirement), with *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (indicating that deprivation of "life's necessities," without regard to state-of-mind, led to violations of the Eighth Amendment).

<sup>55</sup> See JIM THOMAS, *PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER* 58 tbl.3c (1988) (listing civil rights filings, with 11,195 in 1979 as compared to 20,072 in 1986).

<sup>56</sup> In contrast to the rising number of inmate lawsuits after *Bell*, the PLRA led to a dramatic decline in filings. See MARIKA F.X. LITRAS, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990-98, 5 (Jan. 2000) (reporting 41,215 filings in 1996, the year Congress enacted the PLRA, and 26,462 in 1998). In turn, many defendants sought termination of prospective remedies. See Paul Elias, *Consent Decrees Vanishing Fast*, THE RECORDER, Jan. 28, 1998 available at LEXIS, Legal News Library ("Since the act's passage, prison officials have filed a blizzard of motions seeking to get out of consent decrees they entered into years ago.").

<sup>57</sup> Inmates have unsuccessfully argued that the Act violates the equal protection clause of the Fourteenth Amendment and contravenes the separation of powers doctrine. Regarding equal protection challenges, see, for example, *Tucker v. Branker*, 142 F.3d 1294, 1301 (D.C. Cir. 1998); *Nicholas v. Tucker*, 114 F.3d 17, 20 (2d Cir. 1997); *Roller v. Gunn*, 107 F.3d 227, 234 (4th Cir. 1997); *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997); *Hanley v. Stewart*, 21 F. Supp. 2d 1088, 1093 (D. Ariz. 1998). As to separation of powers challenges, see, for example, *Davis v. District of Columbia* 158 F.3d 1342, 1345-47 (D.C. Cir. 1998); *Zehner v. Trigg*, 133 F.3d 459, 463 (7th Cir. 1997); *Craig v. Emberly* No. 95-M-368, 1997 U.S. Dist. LEXIS 22949, at \*5-7 (D. Colo. July 27, 1997); *Zehner v. Trigg*, 952 F. Supp. 1318, 1331 (S.D. Ind.), *aff'd*, 133 F.3d 459 (7th Cir. 1997); cf. U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person . . . the equal protection of the laws."). The Constitution provides no "explicit textual reference" to the separation of governmental powers. William C. Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 715 (1984).

As constitutional "outsiders," replete with their "spoiled identities,"<sup>58</sup> inmates had nary a voice in the legislative debate over the proposed legislation.<sup>59</sup> Portrayed as recreational litigators, suing over bad haircuts and the like,<sup>60</sup> they had become

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<sup>58</sup> Several commentators have employed the term "outsiders" in referring to inmates. See, e.g., Lea Brilmayer, *Carolene, Conflicts, and the Fate of the "Inside-Outsider"*, 134 U. PA. L. REV. 1291, 1293 (1986) ("The inside-outsider is *inside* the scope of state power but *outside* the processes of political participation."); Pamela S. Karlan, *Bringing Compassion Into the Province of Judging: Justice Blackmun and the Outsiders*, 71 N. DAK. L. REV. 173, 176 (1995) [hereinafter Karlan, *Bringing Compassion*] (referring to inmates as "the least sympathetic group of 'outsiders' in our constitutional jurisprudence, since their banishment from free society is the result of their willful criminal behavior"); James E. Robertson, *Four Little Eighteenth-Century Words: An Integrated Reading of the Cruel and Unusual Punishment Clause*, 37 CRIM. L. BULL. 475, 483 (2001) (footnotes omitted) (on file with author) ("[T]he Eighth Amendment performs its countermajoritarian function by safeguarding a specific category of 'people [not] like us'—'Outsiders'—from denials of equal concern and respect").

As I employ the term, "outsiders" are persons whose character has been so discredited that their identities have been "spoiled" and thus denied "respect and regard" by the community. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 8-9 (1963). Consequently, they are no longer "like us"—in other words, "outsiders." As I have written elsewhere, "Outsiders find themselves highly vulnerable to hardships bred by their civic impoverishment, which include indifference, neglect, or capriciousness." Robertson, *supra* at 484. Imprisonment almost invariably imposes "outsider" membership:

First, the loss of liberty embodies physical removal from the broader community and, symbolically, "represents a deliberate, moral rejection of the criminal by the free community." In turn, the rules regulating virtually every aspect of daily life deprive one of autonomy and thus threaten "the prisoner's self-image as a fully accredited member of adult society."

*Id.* at 484-85 (footnotes omitted) (quoting GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES* 65, 76 (1958)).

<sup>59</sup> See *supra* note 7 and accompanying text (discussing the "scant deliberation" given the PLRA).

<sup>60</sup> Throughout the *Congressional Record*, Senators Dole, Hatch, Kyl, and Reid denigrated the legitimacy of inmate litigation by anecdotal accounts of seemingly outlandish suits. They retold some alleged abuses, such as an inmate suing over a bad haircut, again and again. See, e.g., 141 CONG. REC. S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole) (containing various anecdotes, including an inmate suing over a bad haircut), reprinted in 1 LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, *supra* note 6, at doc. 16; 141 CONG. REC. S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch) (containing various anecdotes, including, once again, an inmate suing over a bad haircut), reprinted in 1 LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, at doc. 16; 141 CONG. REC. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (containing various anecdotes, including an inmate suing because of a "defective haircut"), reprinted in 1 LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, at doc. 12. Jim Thomas described this terminology as "[a]ccount-generating rhetoric," which "tends to replace data, and arguments against prisoner suits are packaged in ways that distort rather than illuminate the nature and processes of prisoner grievances." Jim Thomas, *The "Reality" of Prisoner Litigation: Repackaging the Data*, 15 N. ENG. J. CRIM. & CIV. CONFINEMENT 27, 29 (1989).

"untouchables"<sup>61</sup>—to be kept at arm's length from the civil community. Nor was their exclusion inconsistent with majoritarian supremacy. "[T]he ideal of democracy," wrote Morton J. Horwitz, "came to be understood to have nothing to say about the protection of minorities."<sup>62</sup>

### III. FOOTNOTE FOUR: THE LAST REFUGE OF CONSTITUTIONAL "OUTSIDERS?"

Can the majoritarian paradigm adequately protect powerless, stigmatized groups?<sup>63</sup> Some of their number, such as African-Americans, are largely identified and defined by physiological attributes. Other groups, including inmates, are socially constructed.

The most influential attempt at reconciling their protection with majoritarianism came at the height of the New Deal in *United States v. Carolene Products Co.*<sup>64</sup> The facts of *Carolene Products* do not bear repeating because the decision is synonymous

Judge Jon O. Newman found that some of the more highly publicized examples of frivolous litigation "were at best highly misleading and, sometimes, simply false." Hon. John O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOKLYN L. REV. 519, 520-27 (1996). The number of truly frivolous inmate suits amounted to "needles" in "the 'haystacks' of prisoner lawsuits." *Id.* at 52. Two other studies reached similar conclusions. After examining filings in Arkansas, Illinois, and Missouri, Howard Eisenberg concluded that an inmate's notion of "some arbitrary, irrational, bureaucratic, or dehumanizing" aspect of confinement might appear to a court as frivolous. Eisenberg, *supra* note 47, at 438. "What to most people would be a very insignificant manner becomes, because of the nature of prison life, a matter of real concern to the inmate." *Id.* at 438-39. In his study of California filings, Theodore Eisenberg deduced that "most prisoner section 1983 complaints were not plainly trivial assertions . . ." Theodore Eisenberg, *Section 1983: Doctrinal Foundations and An Empirical Study*, 67 CORNELL L. REV. 482, 537 (1982).

<sup>61</sup> See George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1898 (1999) (describing felons as "the untouchable class of American society").

<sup>62</sup> Horwitz, *supra* note 36, at 62.

<sup>63</sup> See, e.g., ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 79 (1955):

Judicial power to nullify a law . . . is a restriction upon the power of the majority to govern the country. Unrestricted majority rule leaves the individual in the minority unprotected. This is the dilemma . . . . The Constitution-makers made their choice in favor of a limited majority rule.

See also, e.g., Normal R. Williams III, Note, *Rising Above Factionalism: A Madisonian Theory of Judicial Review*, 69 N.Y.U. L. REV. 963, 963 (1994) ("The central problem of democratic government is protecting minorities from the tyranny of the majority. In drafting the Constitution, the Framers were sensitive to this concern . . .").

<sup>64</sup> 304 U.S. 144, 152-53 n.4 (1938).

with its famous footnote four.<sup>65</sup> It provided for "more searching" or "more exacting" judicial scrutiny when legislation (1) endangered specific textual rights; (2) interfered with democratic processes; or (3) evidenced prejudice against "discrete and insular minorities."<sup>66</sup> Footnote four has become the basis for "tiered" scrutiny of legislation, with statutory burdens on fundamental rights<sup>67</sup> or suspect classes<sup>68</sup> receiving enhanced ju-

<sup>65</sup> See, e.g., LIEF H. CARTER, *CONTEMPORARY CONSTITUTIONAL LAWMAKING: THE SUPREME COURT AND THE ART OF POLITICS* 86 (1985) (describing footnote four as "the most commonly cited justification for . . . active [judicial] protection of civil rights and liberties"); ELY, *supra* note 29, at 75 (asserting that footnote four foreshadowed the groundbreaking decisions of the Warren Court); Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1088 (1982) ("[M]any scholars think it [i.e., footnote four] actually commenced a new era in constitutional law"); Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE, L.J. 111, 115 (1983) (observing that "[t]he famous . . . footnote four first suggests that the normal presumption of constitutionality may not operate in cases involving certain distinctions").

<sup>66</sup> *Carolene Products*, 304 U.S. at 152-53 n.4:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth Amendment . . . .

It is unnecessary to consider whether legislation which restricts these political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . .

Nor need we inquire whether similar considerations into the review of statutes directed at particular religious . . . or national . . . or racial minorities: whether prejudice against discrete and insular minorities may be a specific condition, which tends seriously to curtail and operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

<sup>67</sup> Fundamental rights are those liberties "so rooted in the tradition and conscience of our people as to be ranked as fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The Due Process Clause of the Fourteenth Amendment incorporates fundamental rights, thus making them applicable to the states. See, e.g., *Benton v. Maryland*, 395 U.S. 784, 787 (1969) (holding that the right against double jeopardy is fundamental); *Shapiro v. Thompson*, 394 U.S. 618, 629-30 (1969) (holding that the right to travel is fundamental); *Duncan v. Louisiana*, 391 U.S. 145, 161-62 (1968) (holding that the right to trial by jury is fundamental); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (holding that the right to counsel is fundamental). See generally U.S. Const. amend. XIV, § 1 (prohibiting, in relevant part, states from "depriv[ing] any person of life, liberty, or property, without due process of law").

<sup>68</sup> See, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (ruling that legislation preventing aliens from receiving welfare benefits contravenes the Equal Protection Clause); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that school segregation violates the Equal Protection Clause). The burden falls upon the government to

dicial scrutiny. Strict scrutiny usually invalidates the legislation in question.<sup>69</sup> On the other hand, non-suspect legislative classifications must merely be rational<sup>70</sup> and enjoy a strong presumption of constitutionality.<sup>71</sup>

Lower federal courts have uniformly rejected heightened protection for inmates.<sup>72</sup> *Boivin v. Black*<sup>73</sup> aptly illustrates their

demonstrate that the statute advances a compelling state interest in a narrowly tailored manner. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (upholding the relocation of Japanese-Americans during World War II); *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (permitting restrictions on third trimester abortions); *cf.* *NAACP v. Alabama*, 357 U.S. 449, 463 (1958) (articulating the phrase "compelling interest" for the first time).

<sup>69</sup> Strict scrutiny is nearly always "strict" in theory and fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *But see* *Adarand Contractors v. Peña*, 515 U.S. 200, 237 (1995) ("We wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))).

<sup>70</sup> *See, e.g.*, *FCC v. Beach Communications*, 508 U.S. 307, 314 (1993) ("On rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity.") (citation omitted); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) ("[L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (observing that rationality review "presume[s] the constitutionality of the statutory discrimination"); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) ("State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequity."); *cf.* *Heller v. Doe*, 509 U.S. 312, 319 (1993) (positing that the party challenging the constitutionality of a statute must negate "every conceivable basis which might support" it (quoting *Lehnhausen v. Lacke Short Auto Parts Co.*, 410 U.S. 356, 364 (1973))).

<sup>71</sup> *See, e.g.*, *City of Cleburne*, 473 U.S. at 440 (ruling that rational-basis review applied to classifications based on mental retardation); *Maher v. Roe*, 432 U.S. 464, 471 (1977) (concluding that rational-basis review applied to age classification); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-14 (1976) (holding that rational-basis review properly determined the constitutionality of age classifications); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28-29 (1973) (ruling that rational-basis review governed classifications based on wealth).

<sup>72</sup> *See, e.g.*, *Boivin v. Black*, 225 F.3d 36, 42 (1st Cir. 2000); *Nicholas v. Tucker*, 114 F.3d 17, 20 (2d Cir. 1997); *Carson v. Johnson*, 112 F.3d 818, 821-22 (5th Cir. 1997); *Roller v. Gunn*, 107 F.3d 227, 233 (4th Cir. 1997); *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997); *U.S. v. King*, 62 F.3d 891, 895 (7th Cir. 1995); *Newell v. Brown*, 981 F.2d 880, 887 (6th Cir. 1992); *Wilson v. Giesen*, 956 F.2d 738, 744 (7th Cir. 1992); *Abdullah v. Gunter*, 949 F.2d 1032, 1037 (8th Cir. 1991); *Pryor v. Brennan*, 914 F.2d 921, 923 (7th Cir. 1990); *Moss v. Clark*, 886 F.2d 686, 690 (4th Cir. 1989); *Morrison v. Davis*, 88 F. Supp. 2d 799, 804 (S.D. Ohio 2000); *Beck v. Symington*, 972 F. Supp. 532, 536 (D. Ariz. 1997); *Zehner v. Trigg*, 952 F. Supp. 1318, 1333 (S.D. Ind.), *aff'd*, 133 F.3d 459 (7th Cir. 1997); *Craig v. Emberly No. 95-M-368*, 1997 U.S. Dist. LEXIS 22949, at \*5-7 (D. Colo. July 27, 1997). *But cf.* *Robert C. Farrell, Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 56 (1992)



perfunctory treatment of this issue: the First Circuit dispensed of the plaintiff's claim to being a member of a suspect class by the glib rejoinder "[w]e need not linger long over . . . [the inmate-plaintiff's] suggestion."<sup>74</sup>

Nonetheless, Congress enacted the PLRA in the face of flagrant wrongs inflicted on inmates.<sup>75</sup> An informal sampling yields the following: confining an inmate for twenty-three hours a day in a windowless, unlit cell frequently awash with sewage;<sup>76</sup> subjecting inmates to ". . . violence, robbery, rape, gambling, and use of weapons . . ." in open, unsupervised barracks;<sup>77</sup> "[r]epeatedly stabbing, beating and kicking a prisoner who has been disarmed and knocked to the ground;"<sup>78</sup> refusing to provide a wheelchair to a paraplegic inmate;<sup>79</sup> and failing to provide protective clothing to inmates working in the prison's sewers.<sup>80</sup>

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(stating that "the Supreme Court has never explained how to decide which form of rationality review is appropriate in a particular case.").

<sup>75</sup> 225 F.3d 36 (1st Cir. 2000).

<sup>74</sup> *Id.* at 42.

<sup>75</sup> See, e.g., KENNETH C. HAAS & GEOFFREY P. ALPERT, *Introduction*, in *THE DILEMMAS OF CORRECTIONS* 81, 81 (3d ed. 1991):

[A]nyone who reads the evidence accrued in the hundreds of lawsuits brought to the courts by state prisoners in the past few years can only conclude that all too many American prisons—perhaps the majority—are depressing, rat-infested, heavily overcrowded fortresses that have created perverse societies in which violence, homosexual rape, and other assorted cruelties are everyday occurrences.

Since the above observation, we have entered a new century to no avail; the state of our prisons remains perilous. The sad tale of Texas' prisons is a case-in-point:

The evidence before this court revealed a prison underworld in which rapes, beatings, and servitude are the currency of power. Inmates who refuse to join race-based gangs may be physically or sexually assaulted. To preserve their physical safety, some vulnerable inmates simply subject to being bought and sold among groups of prison predators, providing their oppressors with commissary goods, domestic services, or sexual favors. The lucky ones are allowed to pay money for their protection. Other abused inmates find that violating prison rules, so that they may be locked away in single cells in administrative segregation, is a rational means of self-protection, despite the loss of good time that comes with their "punishment." To expect such a world to rehabilitate wrongdoers is absurd. To allow such a world to exist is unconstitutional.

Ruiz v. Johnson, 37 F. Supp. 2d 855, 916 (S.D. Tex. 1999).

<sup>76</sup> See *McCord v. Maggio*, 927 F.2d 844, 846 (5th Cir. 1991).

<sup>77</sup> *Smith v. Arkansas Dep't of Corr.*, 103 F.3d 637, 644 (8th Cir. 1996).

<sup>78</sup> *Bogan v. Stround*, 958 F.2d 180, 185 (2d Cir. 1992).

<sup>79</sup> See *Weeks v. Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993).

<sup>80</sup> See *Fruit v. Norris*, 905 F.2d 1147, 1148-49 (8th Cir. 1990).

Why do these abuses occur in the face of scrutinizing courts and more than three decades of judicially engineered reforms?<sup>81</sup> First, prisons remain "closed institutions"<sup>82</sup> that confine inmates as well as inhibit outside scrutiny. Second, to many people, inmates are unworthy of concern.<sup>83</sup> Finally, their disenfranchisement,<sup>84</sup> poverty,<sup>85</sup> and pariah status<sup>86</sup> render them powerless before the elected branches of government.<sup>87</sup>

Several commentators favor extending suspect status to inmates. Professor Karlan spoke of inmates as "... the least sympathetic group of 'outsiders' in our constitutional jurisprudence."<sup>88</sup> Similarly, Professor Chemerinsky asserted, "There are other discrete and insular minorities. I believe that prisoners, for example, will get no protection from the political process. They have no political constituency. The only way to protect prisoners from inhumane treatment is the federal judi-

<sup>81</sup> See FEELEY & RUBIN, *supra* note 26, at 368 (concluding that "[the prison] reform cases were an important contribution to three major developments: the emergence of a national corrections profession, the formulation of national standards for corrections, and the general bureaucratization of prisons."); M. KAY HARRIS & DUDLEY P. SPILLER, JR., AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS 21 (1977) ("The judicial intervention in each of the correctional law cases studied had impact that was broad and substantial."); Alvin J. Bronstein, *15 Years of Prison Litigation*, 11 J. NAT'L PRISON PROJECT 1, 6 (Spring 1987) ("Litigation has resulted in profound and permanent changes in the conditions under which tens of thousands of prisoners must live."); Susan P. Strum, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 670 (1993) (concluding that "court intervention generally has improved the living conditions and practices in the facilities at issue"); William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in Federal Courts*, 92 HARV. L. REV. 610, 639 (1979) (observing that "nearly everyone we interviewed believed that the [prisoner] cases had great impact").

<sup>82</sup> MICHAEL WELCH, PUNISHMENT IN AMERICA 189 (2000) (emphasis omitted).

<sup>83</sup> See James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 HOUSTON L. REV. 1003, 1028 (1997) ("Inmates have joined the ranks of those persons deemed undeserving of aid, comfort, or compassion.")

<sup>84</sup> With the exception of Maine, Massachusetts, New Hampshire, and Vermont, all states disenfranchise imprisoned felons. See Fletcher, *supra* note 61, at 1898.

<sup>85</sup> About one-half of inmates free for a year or more before their arrest reported incomes under \$10,000; nineteen percent reported incomes less than \$3,000. See JEFFREY REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON 101-36 (5th ed. 2000).

<sup>86</sup> See JAMES AUSTIN & JOHN IRWIN, IT'S ABOUT TIME 111 (3d ed. 2001) (describing inmates as "among society's leading pariahs").

<sup>87</sup> See, e.g., CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 288 (1993) ("Incarcerated criminal offenders constitute a despised minority without political power to influence the policies of legislative and executive officials.")

<sup>88</sup> Karlan, *supra* note 58, at 176.

ciary.”<sup>89</sup> A student commentator agreed: “While not a suspect class as traditionally defined, prisoners nonetheless comprise a politically vulnerable and underrepresented group that must rely on the courts for protection . . . .”<sup>90</sup> Elsewhere, I have argued that inmates possess attributes strikingly similar to the “paradigmatic *Carolene*-group,”<sup>91</sup> African-Americans circa 1938.<sup>92</sup> Justice Stevens has sided with us. In his dissenting opinion in *Hudson v. Palmer*,<sup>93</sup> he lamented that “[p]risoners are truly the outcasts of society. Disenfranchised, scorned and feared . . . , [and] shut away from public view, prisoners are surely a ‘discrete and insular minority.’”<sup>94</sup>

#### IV. THE PLRA AND THE JUSTICE GAP

New inmates enter a “total institution”<sup>95</sup> with little education or training.<sup>96</sup> They are often afflicted with substance abuse<sup>97</sup> and

<sup>89</sup> See Transcript, *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates Edited Transcripts from the Panel Discussions Held in Phoenix, Arizona on November 3rd and 4th, 1995*, 28 ARIZ. ST. L.J. 17, 30-31 (1996) (remarks of Erwin Chemerinsky) [hereinafter Chemerinsky, *The Goldwater Institute and the Federalist Society*]; see also Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 449-60 (1999) (“Those in the military, in prisons, and in schools are classic examples of discrete and insular minorities, who have little political power.”); cf. Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead?: Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 686, 695-96 (1991) (commenting that “the reference [in footnote four] to ‘discrete and insular minority’ [in the third paragraph of footnote four] may refer to groups other than blacks and religious and national-origin minorities,” adding the “lack of political power may justify heightened judicial solicitude for other groups in the future.”).

<sup>90</sup> Riewe, *supra* note 17, at 143.

<sup>91</sup> Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 732 (1985); see also ELY, *supra* note 29, at 147 (stating that race is “the clearest case of a classification that should count as suspect.”).

<sup>92</sup> Robertson, *Psychological Injury and the Prison Litigation Reform Act*, *supra* note 17, at 124-40 (describing inmates as a largely black subgroup that experiences racial segregation, prejudice, disenfranchisement, and impoverishment); see also, e.g., SMITH, *supra* note 87, at 288 (“Incarcerated criminal offenders constitute a despised minority without political power to influence the policies of legislative and executive officials.”).

<sup>93</sup> *Hudson v. Palmer*, 468 U.S. 517 (1984).

<sup>94</sup> *Id.* at 557 (1984) (Stevens, J., dissenting).

<sup>95</sup> ERVING GOFFMAN, *ASYLUMS* 6 (1961):

The central feature of total institutions can be described as a breakdown of the barriers separating three spheres of life. First, all aspects of life are conducted in the same place and under the same single authority. Second, each phase of the member's activity is carried on in the immediate company of a large batch of others, all of whom are treated alike and required to do the same thing together. Third, all phases

varying degrees of mental illness.<sup>98</sup> Already damaged,<sup>99</sup> many inmates experience imprisonment as “. . . a series of abasements, degradations, humiliations, and profanations of self.”<sup>100</sup> Not surprisingly, many will leave prison further damaged, with their “outsider” status more deeply engrained. Many will return.<sup>101</sup> “[W]e are producing prisoners,” concluded James Austin and John Irwin, “who have deteriorated in prison and return to the outside much less well-equipped to live a conventional life than they were when they entered prison.”<sup>102</sup> In exchange, the public accrues few if any benefits: “The universal wisdom is that our prisons have fallen woefully short in achieving their objectives—community protection, crime reduction, and offender rehabilitation.”<sup>103</sup>

Several lower federal courts have read the Eighth Amendment to forbid prison conditions that foster recidivism<sup>104</sup> and

of the day's activities are tightly scheduled. Finally, the various enforced activity are brought together into a single rational plan purportedly designed to fulfill the official objectives of the institution.

<sup>96</sup> See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1994, 551 tbl.6.30 (1995) (indicating that in 1992 the median education of inmates in 38 states was the eleventh grade).

<sup>97</sup> See Charles Blanchard, *Drugs, Crime, Prison, and Treatment*, 34, 34 CORRECTIONS 01/02 (2001) (stating that as many as eighty percent of inmates are afflicted by substance abuse).

<sup>98</sup> See James R.P. Ogloff et al., *Mental Health Services in Jails and Prisons: Legal, Clinical, and Policy Issues*, 18 LAW & PSYCHOL. REV. 109, 109 (1994) (citing studies showing that 6.5%-10% of inmates battle serious mental illness and an additional 15%-40% confront moderate mental illness).

<sup>99</sup> See AUSTIN & IRWIN, *supra* note 86, at 110.

<sup>100</sup> GOFFMAN, *supra* note 95, at 14.

<sup>101</sup> See ALLAN BECK & BERNARD SHIPLEY, RECIDIVISM OF PRISONERS RELEASED IN 1983 tbl.2 (U.S. Department of Justice, Bureau of Justice Statistics 1989), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr83.pdf>.

<sup>102</sup> See IRWIN & AUSTIN, *supra* note 86, at 110. See also, e.g., Craig Haney, *Psychology and the Limits of Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCH. PUB. POL'Y & L. 499, 533 (1997) (“Inmates who adjusted most successfully to a prison environment actually encountered the most difficulty making the transition from institutional life to freedom.”); Robert Johnson & Hans Toch, *Introduction*, in THE PAINS OF IMPRISONMENT 11, 11 (Robert Johnson & Hans Toch eds., 1988) (“[T]he prison's survivors become tougher, more pugnacious, and less able to feel for themselves, while its nonsurvivors become weaker, more susceptible, and less able to control their lives.”).

<sup>103</sup> Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373, 374 (1995).

<sup>104</sup> See, e.g., *Battle v. Anderson*, 564 F.2d 388, 403 (10th Cir. 1977); *Hendrix v. Faulkner*, 527 F. Supp. 435, 525 (N.D. Ind. 1981); *Ramos v. Lamm*, 485 F. Supp. 122, 131-32 (D. Colo. 1979), *aff'd in part, vacated in part, and remanded*, 639 F.2d 559 (10th Cir.), *cert. denied*, 450 U.S. 1041 (1980); *Laaman v. Helgemoe*, 437 F. Supp. 269, 323

consequent reimprisonment. At the apex of this case law stands *Laaman v. Helgemoe*.<sup>105</sup> It ruled that confinement in a New Hampshire prison inflicted cruel and unusual punishment by "... cost[ing] a man more than part of his life; it robs him of his skills, his ability to cope with society in a civilized manner, and most importantly, his essential human dignity."<sup>106</sup> Justices Brennan and Blackmun later adopted *Laaman's* concept of cruel and usual punishment. In his concurring opinion in *Rhodes v. Chapman*,<sup>107</sup> Justice Brennan, joined by Justice Blackmun, wrote: "When 'the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration,' the court must conclude that the conditions violate the Constitution."<sup>108</sup>

By asserting a crimeogenic relationship between the prison and the neighborhoods that channel young men into its walls,<sup>109</sup> this concept of the Eighth Amendment parts with tradi-

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(D.N.H. 1977); *Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976), *aff'd as modified sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd on other grounds sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978); *Holt v. Sarver*, 309 F. Supp. 362, 379 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

Reading the Eighth Amendment to prohibit prison conditions that perpetuate an inferior, caste-like social status can be traced to *Weems v. United States*, 217 U.S. 349 (1910) and *Trop v. Dulles*, 356 U.S. 86 (1958). The *Weems* Court held that punishments grossly disproportionate to the offense inflicted cruel and unusual punishment. *Weems*, 171 U.S. at 373. In so ruling, the Court condemned a sanction that permanently excluded the offender from civil society. See *id.* at 100 ("He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him . . . . No circumstance of degradation is omitted.").

Later, in *Trop*, the Court again employed the Eighth Amendment to bar denationalization. See *Trop*, 356 U.S. at 103. Its rationale again invoked the evil of exclusionary sanctions: "There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society . . . . He may be subject to banishment, a fate universally decried by civilized people . . . ." *Id.* at 101-02.

<sup>105</sup> 437 F. Supp. 269 (D. N.H. 1977).

<sup>106</sup> *Id.* at 323.

<sup>107</sup> 452 U.S. 337 (1981).

<sup>108</sup> *Id.* at 354 (Brennan, J., concurring) (quoting *Laaman v. Helgemoe*, 437 F. Supp. 269, 323 (D.N.H. 1977)).

<sup>109</sup> See, e.g., Robertson, *Psychological Injury and the Prison Litigation Reform Act*, *supra* note 17, at 128 (footnotes omitted):

The social construction of criminality presents the chronically unemployed underclass—the pejorative label for impoverished inner-city residents—as crimeogenic and thus properly housed in prison. Indeed, the nation's ghettos function as farm clubs for our major league prisons given the movement of offenders between them. Managing this urban rab-

tional notions of individual blameworthiness.<sup>110</sup> Prisons that foster recidivism soil the hands of the state and the social system it protects.<sup>111</sup> Moreover, they weaken the moral barrier between

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ble drives contemporary penal policy toward incapacitating offenders irrespective of their dangerousness.

See also, e.g., Edward P. Sbarbo & Robert L. Keller, *Introduction*, in PRISON CRISIS: CRITICAL READINGS 1, 11 (Edward P. Sbarbo & Robert L. Keller eds., 1995) (asserting that the "[s]ocial junk"—the inner city poor and minorities—form "a dangerous class," which the criminal justice system seeks to control); cf. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 455 (1992):

The term *underclass* is used today to characterize a segment of society that is viewed as permanently excluded from social mobility and economic integration. The term is used to refer to a largely black and Hispanic population living in concentrated zones of poverty in central cities, separated physically and institutionally from the suburban locus of mainstream social and economic life in America.

Inmates as a collective are confined for their crimes *and* their race. See, e.g., Theodore G. Chiricos & Charles Crawford, *Race and Imprisonment: A Contextual Assessment of the Evidence*, in ETHNICITY, RACE, AND CRIME 281, 297 (Darnell F. Hawkins ed., 1995) (concluding that "race is a consistent and frequently significant disadvantage when . . . [incarceration] decisions are considered."). Blatant, uniform racial discrimination has been largely replaced by so-called "contextual" discrimination, i.e., disparate treatment appears in some stages of the criminal justice system in some jurisdictions for some offenses. See, e.g., SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE* 230 (1996) (arguing that contextual discrimination occurs in that "[r]acial minorities are treated more harshly than whites at some stages of the criminal justice process but no differently than whites at other stages."); Margorie S. Zatz, *Race, Ethnicity and Determinate Sentencing*, 22 CRIMINOLOGY 147, 147 (1984) ("The sum of our knowledge is that for some offenses in some jurisdictions . . . some groups are differentially treated."). Perhaps the manifest disparity appears in the long-running war on drugs: blacks comprise thirteen percent of monthly drug users, an amount proportionate to their presence in the population, but account for seventy-four percent of prison sentences for drug-related offenses. See MARC MAUER & TRACY HULING, *YOUNG BLACK MALES AND THE CRIMINAL JUSTICE SYSTEM* 12 fig.1 (1995).

Moreover, lack of employment exercises a "significant, strong, and independent impact" on pretrial and pre-sentencing incarceration decisions. Theodore Chiricos & William Bales, *Unemployment and Punishment: An Empirical Assessment*, 29 CRIMINOLOGY 701, 719 (1991); see also Michael Welch, *Racial and Social Class in the Examination of Punishment*, in JUSTICE WITH PREJUDICE 156, 166 (Michael J. Lynch & Edwin Patterson eds., 1996) (reviewing the scholarly literature and concluding that "in the case of imprisonment there is a pattern of discrimination against the unemployed that is even more apparent for minorities processed by the criminal justice system").

<sup>110</sup> Judge Lois G. Forer wrote of "the medieval legacy of the conflation of sin and punishment." LOUIS G. FORER, *A RAGE TO PUNISH* 28 (1994). She asserted that this legacy rests on the three assumptions, which continue to prevail in popular opinion and public policy. These assumptions are: "1. Crime is sin; 2. All persons except the mentally ill must be punished; 3. Sinners must be punished." *Id.*

<sup>111</sup> See Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 121 (2001) (observing that

the prison and the community: inmates can no longer be regarded as "outsiders" when their criminality may arise out of the manner of their punishment.

Nonetheless, what Lawrence Sager described as the "under-enforcement" of constitutional norms has blocked this expansive reading of the Eighth Amendment.<sup>112</sup> He contended that courts sometimes understate "the legal scope of a constitutional norm" because of institutional considerations—such as deference.<sup>113</sup> Consistent with Sager's hypothesis, the Supreme Court since *Bell* has repeatedly superimposed deference,<sup>114</sup> the handmaiden of the majoritarianism,<sup>115</sup> over the dignitary interests advanced by *Laaman*<sup>116</sup> and explicitly embraced in Justice Brennan's concurring opinion in *Rhodes*.<sup>117</sup>

Through the PLRA, Congress came to the aid of the post-*Bell* Supreme Court. While the Act does not directly tread upon the concept of cruel and unusual punishment, it indirectly controls the reach of the prohibition. By limiting the authority of the federal judiciary to remedy prison conditions, Congress will not allow the courts to answer questions of social justice raised by who we imprison and why we imprison them. Through the PLRA, Congress sought to ensure "the thinness of constitutional law" as it applies to inmates.<sup>118</sup>

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"[e]very prison remains intimately connected to the state, incarcerating inmates arrested, prosecuted, and sentenced by the state . . .").

<sup>112</sup> Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

<sup>113</sup> *Id.*

<sup>114</sup> See *supra* notes 48-51 and accompanying text (discussing *Bell*'s entreaty for deference and subsequent pronouncements to that effect).

<sup>115</sup> See *supra* notes 38-39 and accompanying text (discussing majoritarianism and its judicial acknowledgment via deference to legislative and administrative policy making).

<sup>116</sup> See *supra* text accompanying notes 105-06 (briefly recounting *Laaman*'s prohibition of prison conditions fostering recidivism).

<sup>117</sup> See *supra* text accompanying notes 107-08 (briefly recounting Justice Brennan's adoption of *Laaman*'s concept of cruel and unusual punishment).

<sup>118</sup> See Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 410 (1993):

Constitutional case law is thin in this important sense: the range of those matters that are plausible candidates for judicial engagement and enforcement in the name of the Constitution is considerably smaller than the range of those matters that are plausible understood to implicate serious questions of political justice. This moral shortfall is one of the most durable and salient features of our constitutional life.

Injustices inflicted by government on the most despised persons especially call for an effective remedy.<sup>119</sup> While the tiered review inspired by *Carolene Products*<sup>120</sup> gives the appearance that the despised and the powerless can secure such a remedy from the courts, the PLRA suggests that majoritarian supremacy remains the final arbiter in such matters.<sup>121</sup> Because of the PLRA, protecting the most vulnerable of "outsiders"—those who are stigmatized, powerless, and confined to "total institutions,"—will remain an enigma to a constitutional system whose grundnorm<sup>122</sup> is majority status.

## V. CONCLUSION

Majoritarian supremacy represents an exclusionary concept at odds with the pluralism, diversity, and conflict that both invigorates and divides the body politic. By deferring to legislative judgments, federal courts have acquiesced to majoritarian supremacy in matters of consequence for inmates. Given the frequent lapses of the body politic in providing humane conditions of confinement, future generations may indeed judge our courts poorly for failing to exercise their full judicial authority.<sup>123</sup>

<sup>119</sup> See *Carey v. Phipus*, 435 U.S. 237, 254 (1978) ("Rights . . . do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests . . ."); see also Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1434 (1972) ("Once substantive legal norms have been declared to be in the Constitution, there is much to be said for a judicial prerogative to fashion remedies that give flesh to the word and a fulfillment to the promise those norms embody.").

<sup>120</sup> See *supra* notes 67-71 and accompanying text (examining the heightened scrutiny mandated by footnote four of *Carolene Products*).

<sup>121</sup> Several commentators question the utility of footnote four. See, e.g., Ackerman, *supra* note 91, at 717 ("A reappraisal of *Carolene* is a pressing necessity . . ."); Geoffrey Miller, *The True Story of Carolene Products*, in 1987 THE SUPREME COURT REVIEW 397, 428 (Philip B. Kurland et. al. eds., 1988) ("The political theory underlying the *Carolene Products* footnote needs to be updated."); Lawrence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073 (1980) (implying that footnote four is "radically indeterminate and fundamentally incomplete").

<sup>122</sup> A "grundnorm" is "the basic norm" of a legal system. David Dyzenhaus, "How the Machine Runs Itself," *Carl Schmitt on Hobbes and Kelsen*, 16 CARDOZO L. REV. 1, 10 (1994).

<sup>123</sup> Cf. Chemerinsky, *The Goldwater Institute and the Federalist Society*, *supra* note 89, at 70 ("Virtually all judicial protection of individual liberties involves at least some degree of value selection by unelected judges."); Wojciech Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV. 339, 397 (1987) (observing that judicial decision-making invariably requires judges to come to a moral Rubicon—to make moral choices or to abdicate).



