done as well, the record suggests that our constitutional procedures can produce a largely successful foreign policy in perilous circumstances, without jeopardizing individual liberty.

Granted, our system could use some fundamental reform. A combination of the weakening of political parties and dilution of the president's authority vis-à-vis Congress, and the diffusion of authority within Congress, has excessively fragmented the power and responsibility necessary for effective government. We probably should strengthen presidential and congressional leadership, to help reverse "the tides of individualization and decentralization that have engulfed the Congress."[11] As James Q. Wilson has written, however, "it is in this area of the unwritten constitution that remedies for the defects of the separation of powers must be found. There are no constitutional remedies short of the abolition of the principle itself, and that is a price that two hundred years of successful constitutional government should have taught us is too high to pay."[12]

REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM. By Larry W. Yackle.[1] New York, N.Y.: Oxford University Press. 1989. Pp. xii, 322. $35.00.

Elizabeth Alexander[2]

As a decidedly minor character in the drama, I read Professor Larry Yackle's history of the Alabama prison litigation with special interest. This litigation arguably set the mold for most of the significant "conditions of confinement" litigation. Professor Yackle's treatment of it is both thorough and accurate. He shares with me a deep ambivalence about the outcome of the litigation, which can now be read as a cautionary tale about the limitations of litigation as an instrument for meaningful social reform.

The book begins by describing the horrible conditions in the Alabama prison system at the time the litigation began, including the filthy, overcrowded punishment cells known as dog houses where prisoners were deprived of clothing, light, and running water.

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11. Wilson, *supra* note 5, at 52.
12. *Id.* at 52.

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Up to six prisoners were squeezed into a thirty-two square-foot cell without exercise, reading matter, or more than one meal per day. Medical care was equally shocking. A prisoner who lacked bowel control was shackled upright on a wooden bench. His untreated sores led to gangrene; a day after the resulting amputation he died. Another prisoner had maggots growing in his wounds. Because Alabama lacked any meaningful system of prisoner classification, endemic violence haunted the overcrowded dormitories, and at times guards relied on designated prisoners to enforce some sort of order.

These conditions, which in fact did not differ substantially from conditions in a number of other state prison systems, came to public attention because of the efforts of an extraordinary federal district judge, Frank Johnson, sitting in the Middle District of Alabama. Judge Johnson, an Eisenhower Republican who became famous because of historic litigation dismantling legal segregation in Alabama, had also handed down precedent-setting decisions involving conditions in the state's abysmal mental health system.

Because of Judge Johnson's experience in previous structural litigation, he did not, as other federal judges routinely did, ignore two handwritten complaints by Alabama prisoners unrepresented by counsel. One alleged denial of medical care; another complained of pervasive violence among fellow prisoners. Johnson shaped the course of future prison litigation when, instead of summarily dismissing these inartful submissions, he invited a number of lawyers to represent the prisoners.

Yackle recounts the efforts of the newly appointed prisoner lawyers to come up with a constitutional theory to graft onto the facts. That choice of theory played a critical role in determining the future path of prison litigation. Several of the lawyers favored constitutional theories that in one way or another would have focused attention on penal policies in general rather than simply physical conditions in the prisons. These theories sought to create a duty to rehabilitate, based by analogy on the claim contemporaneously developing in mental health institutional litigation that the mentally ill and mentally retarded have a right to treatment. Judge Johnson, early in the proceedings, telegraphed his ultimate legal reasoning when in the course of overruling the state's motion to dismiss one of the complaints he ruled that he would not be concerned with the state's penal policies except to the extent that the prisons fell below the standards of minimal human decency required under the eighth amendment. Johnson's ultimate opinion followed this signal; he held that the totality of conditions in the entire Alabama prison

system violated the eighth amendment's prohibition of cruel and unusual punishment.

As this book points out, the long-range effects of the litigation on the Alabama prison system fell far short of the reformers' hopes. Although conditions in the Alabama system today may not be comparable to those of the early 1970s, they remain marginal at best. In 1984, although full compliance with the court order had never been obtained, the prison reformers took Senator Aiken's advice about the Vietnam War: they declared a victory and went home.

The effect of the Alabama litigation on the development of prison litigation in general has been equally mixed. On the one hand, the decision in Alabama was a major victory for prisoner rights activists who adopted Johnson's "totality of conditions" approach in numerous other cases, so that in 1989, forty-one states, the District of Columbia, Puerto Rico, and the Virgin Islands had one or more major prisons under some form of court order to improve prison conditions.[3] Although the Reagan-dominated federal appellate courts have in recent years written several decisions appearing to reject any federal supervision over prison conditions short of torture and deliberate sadism,[4] Judge Johnson's concept that prisons are constitutionally required to provide a reasonably safe and sanitary physical plant and medical care is still the majority view.

On the other hand, Johnson's eighth amendment rationale directed prison litigators away from broader penal policies to the specific physical and security conditions prevailing within the prisons. Had prison litigation instead focused on the broader question of the appropriate purposes of incarceration, prison law would have had the potential to confront the underlying problems of prisons by addressing the question of who should be incarcerated, and who should be diverted to an alternative sanction.

Because the Alabama cases set the model, prison litigation today is fundamentally inadequate to cope with overcrowding, the overwhelming problem of today's criminal justice system. The war on drugs has resulted in unprecedented increases in prison populations, which are expected to rise by sixty-eight percent in the next

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3. THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, NATIONAL PRISON PROJECT STATUS REPORT ON THE COURTS AND THE PRISONS (Nov. 1989).

4. *See, e.g.*, Wilson v. Seiter, 893 F.2d 861 (6th Cir. 1990); Inmates of Occoquan v. Barry, 844 F.2d 828 (D.C. Cir. 1988), *reh'g. en banc denied* 850 F.2d 796; and Cody v. Hillard, 830 F.2d 912 (8th Cir. 1987) (en banc), *cert. denied* 108 S. Ct. 1078 (1988). The National Prison Project served as counsel in the Court of Appeals for the *Cody* and *Inmates of Occoquan* cases.

five years.[5] More often than not, states and localities respond to prison lawsuits charging unconstitutional conditions caused by overcrowding by building more prisons. But prison construction cannot possibly keep up with population increases of this magnitude.[6] The only prison systems that have gained control over their population increases, and thus over the conditions within the prisons, are those that have imposed "front end" criminal justice policies that control entry into the system. Thus, Judge Johnson's early rejection of constitutional scrutiny for general penal policies, including intake policy, effectively limited the potential results of prison litigation.

Yackle reports that Johnson later stated that he had found no tough factual or legal questions in any of the civil rights and human rights cases that he tried. This comment is particularly interesting because it suggests that it was Johnson's fidelity to what he took to be the law, rather than his fear of being overruled, that led to the limited scope of the constitutional theories that he adopted.[7] Whether a broader theory could have survived appellate review, or accomplished more in Alabama or in the nation, has become a moot question. Now that it is questionable whether even the most minimal federal judicial review of prison conditions will survive, one cannot blame the circumscribed legal vision of Judge Johnson or prison litigators for the limited success of prison litigation. The history of the Alabama litigation does suggest that for prison reform to have any chance of success in the next cycle of social reform, it must address the issue of who goes to prison, not just what conditions society tolerates within its prisons.

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5. Austin & McVey, "*The 1989 NCCD Prison Population Forecast*," NCCD: FOCUS, Dec. 1989 at 1.

6. The projected population increases translate into 460,000 additional prisoners. Constructing prisons to house them would cost twenty-three billion dollars. *Id.* at 7.

7. For an account of Judge Johnson's tenure on the Middle District of Alabama, see T. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA (1981). Yarbrough's account makes clear the essentially conservative nature of Judge Johnson's legal thinking.