Raoul Berger's Fourteenth Amendment: A History or Ahistorical?

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Introduction

Raoul Berger's scholarship of the past decade has substantially influenced and enriched our understanding of American constitutionalism. His readers are not limited to legal and historical academicians; the timeliness of his work has often contributed to important public debates as well as to constitutional scholarship.[1] In his latest effort, *Government by Judiciary*,[2] Berger offers an impassioned critique of and assault upon what he regards as the judicial perversion of the Fourteenth Amendment.

Acting on his longstanding suspicion of judicial power,[3] Berger has scoured the congressional debates on the Amendment to find, among other things, that the framers did not intend to address the question of school segregation,[4] that they did not intend to interfere with state control over voting rights,[5] and that in general they did not intend that the Amendment should incorporate the Bill of Rights.[6] The purpose and intentions of the framers of the Fourteenth Amendment, Berger concludes, do not justify the Court's activism of the last several decades, which has resulted in judicial policymaking involving desegre-

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1. *See* R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974); R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973) [hereinafter cited as BERGER IMPEACHMENT]. *See also* R. BERGER, CONGRESS V. THE SUPREME COURT (1969).

2. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) [hereinafter cited as GOVERNMENT BY JUDICIARY].

3. *Cf.* BERGER, IMPEACHMENT, *supra* note 1, at ch. III. For criticism on this point, see Kutler, *Impeachment Reconsidered*, 1 REVS. IN AM. HIST. 480-87 (1973).

4. GOVERNMENT BY JUDICIARY at 177-233 (ch. 7).

5. *Id.* at 52-68 (ch. 4).

6. *Id.* at 134-56 (ch. 8).

gation[7] and reapportionment,[8] and the judicial management of institutions ranging from Denver public schools[9] to mental hospitals in Alabama.[10]

Berger's work attempts to revive a relatively stagnant stream of commentary. From the early twentieth century through the late 1930s, academic and liberal commentators, as well as groups such as organized labor, criticized vigorously the abusive powers of the federal judiciary. They accused judges, particularly those on the Supreme Court, of consistently frustrating desirable social policies, allegedly sanctioned by popular sentiment. Scholars and critics thus created the well-known, perjorative (and exaggerated) slogans of the time such as "Government by Judiciary" and "Judicial Supremacy."[11] The point made by the critics was that the judges had arrogated a policymaking function not conferred upon them by the Constitution. Moreover, critics argued, this exalted judicial role negated the basic principles of representative government. Judges, in short, were considered to be Platonic Guardians who thwarted the popular will and the national well-being in favor of the interests of a privileged few.[12]

What was to be done? There were periodic demands for the outright abolition of judicial review or for cosmetic changes in the practice, such as requiring a two-thirds or unanimous vote of the Supreme Court to invalidate legislation or allowing Congress to override a judicial determination of invalidity. None of these suggestions proved politically feasible or even desirable. Louis B. Boudin's 1932 work, *Government by Judiciary*, offered a powerful critique of the times, assaulting the abuses as well as the premises of judicial power. At the outset, Boudin noted that many prominent liberals, while accepting the validity of his analysis, despaired of any tangible results. Their position, he contended, could be reduced to a simple formula: "We must

7. *See, e.g.*, Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Green v. County School Bd., 391 U.S. 430 (1968); Griffin v. County School Bd., 377 U.S. 218 (1964); Cooper v. Aaron, 358 U.S. 1 (1958); Brown v. Board of Educ., 349 U.S. 294 (1955); Brown v. Board of Educ., 347 U.S. 483 (1954).

8. *See, e.g.*, Avery v. Midland County, 390 U.S. 474 (1968); Swann v. Adams, 385 U.S. 440 (1967); Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 368 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962).

9. *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

10. *See* Wyatt v. Stickney, 344 F. Supp. 387 (M. D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

11. *See* L. BOUDIN, GOVERNMENT BY JUDICIARY (1932); R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).

12. For a representative example of this view, see R. JACKSON, *supra* note 11. *See also* W. ELLIOT, THE RISE OF A GUARDIAN DEMOCRACY (1974).

pray—and occasionally argue—for *good men* in the seat of power."[13] And so liberals prayed and argued for "good men" on the courts. One wonders if Franklin D. Roosevelt's judicial appointments from 1937 to 1943 empirically demonstrated the existence of God to such liberals.

In time, however, the judges changed, and, accordingly, so did conceptions of the judicial role. After 1937, most of the judiciary's longtime critics suddenly found a new faith and promoted it with all the zealousness of new converts. Eugene V. Rostow epitomized the new concept neatly in his article, *The Democratic Character of Judicial Review*.[14] Rostow matched a new libertarianism promoting "preferred freedoms" as enumerated in the Bill of Rights with an activist judiciary to protect those values. The judges themselves pointed the way of the true faith as they rationalized a minimal judicial role for superintending economic legislation while championing civil rights and civil liberties to the maximum.[15]

The New Deal Justices soon warmed to their broadened task. Franklin D. Roosevelt's Attorney General, Robert H. Jackson, published a classic liberal account of historical judicial abuses shortly before being named to the Court in 1941.[16] Jackson applauded the new sense of judicial restraint regarding economic legislation and the Court's emerging role as a palladin for civil liberties. For Jackson, there was no conflict:

> Ordinarily, legislation whose basis in economic wisdom is uncertain can be redressed by the processes of the ballot box or the pressures of opinion. But when the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event the Court, by intervening, restores the processes of democratic government; it does not disrupt them.[17]

13. L. BOUDIN, *supra* note 11, at ix.

14. 66 HARV. L. REV. 193 (1952).

15. *See* United States v. Carolene Products Co., 304 U.S. 144 (1938), wherein Justice Harlan F. Stone articulated the new premise that his colleagues subsequently elaborated. Justice Stone commenced by stating that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *Id.* at 152 (footnote omitted). He then observed: "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." *Id.* at 152-53 n.4.

16. R. JACKSON, *supra* note 11.

17. *Id.* at 285.

The Warren Court applied this philosophy in a decade and a half of result-oriented jurisprudence which witnessed the crumbling of sometimes century-old precedents and the charting of new political and social goals that long had been proscribed by entrenched, self-protective interests. The new path of judicial review even led the Court into realms of substantive values hardly imagined by Stone or Jackson, such as birth control[18] and abortion.[19] But the liberal chorus of support was generally warm and a sense of smug self-satisfaction prevailed in such circles; the Warren Court was approvingly described by one observer as the "keeper of the national conscience."[20]

There were those, however, who did not see the Warren Court as judicial messiahs. Southern politicians molding political careers through support of segregation, state legislators insisting they represented more than cows and trees, and police and prosecutors promoting societal rights as superior to those of the criminally accused all cried "judicial usurpation." And the John Birch Society peddled its Impeach Earl Warren Kits. Occasionally, liberal veterans of the old battles complained that the applause for the new dispensation was dangerously uncritical. Their essential message, based on atavistic suspicions of judicial power, warned that social policy, however desirable, could not—and should not—be achieved by judges alone. Moreover, judges come and go, as do prevailing judicial fashions; what judges do, they can undo. In the meantime, conservatives must have been praying hard. Richard Nixon promised deliverance from judicial evil, and he delivered Warren Earl Burger so succeed Earl Warren. God does indeed work in mysterious ways.

I. The History

Now comes Raoul Berger. In a rich and detailed yet polemical and prolix analysis, Berger has sought to determine the goals and intentions of the framers of the Fourteenth Amendment. He finds not a scintilla of historical support for the Supreme Court's decisions on de-

18. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (zone of privacy created by penumbras of fundamental constitutional guaranties extends to the intimacies of married life involving contraceptives). *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972).

19. *See* Roe v. Wade, 410 U.S. 113 (1973) (constitutional right of privacy encompasses a woman's decision to terminate her pregnancy). *See also* Doe v. Bolton, 410 U.S. 179 (1973).

20. Lewis, *Historical Change in the Supreme Court*, N.Y. Times, June 17, 1962, (Magazine), at 7 (*cited in* THE SUPREME COURT UNDER EARL WARREN 73, 79, 81 (L. Levy ed. 1972)).

segregation,[21] reapportionment,[22] or the incorporation of the Bill of Rights.[23] The scholarship of Charles Fairman and Alexander Bickel,[24] and the decisions of Justices Felix Frankfurter and the second John Marshall Harlan, suggest that this is hardly new. Instead, Berger attempts to demonstrate that the Amendment's reach was limited to questions of racial discrimination, as delineated in the Civil Rights Act of 1866.[25]

Not only is Berger largely unoriginal in his effort,[26] he really does not successfully confront the reconstruction of the setting of the Fourteenth Amendment propounded in the works of scholars such as Harold M. Hyman,[27] Howard Jay Graham,[28] Michael Les Benedict,[29] Alfred H. Kelly,[30] and Leonard Levy,[31] to name only a few. These writings show that the history surrounding the origins of the Amendment is complex and deeply immersed in a context of intra-party, personal and ideological conflicts—all of which led to confusion, deception and even to a deliberate muting of differences. Berger, however, ignores all this. He exhibits little sensitivity to contexts (other than racism), alternatives, and the need to work out solutions in a progressive, piecemeal fashion. The "black letters" of the *Congressional Globe* are a literal revelation to him; significantly, he abstains from using any other sources.

The scholarly reconstruction of the history of the 1860s has been one of the most exciting, fruitful endeavors in American historical writing in the last two decades.[32] A variety of conflicting interpretations

21. *See* note 4 *supra.*

22. *See* note 5 *supra.*

23. *See* note 6 *supra.*

24. *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Fairman, *Does The Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

25. Act of April 9, 1866, ch. 31, 14 Stat. 27.

26. *See* note 24 *supra.*

27. H. HYMAN, A MORE PERFECT UNION (1973); THE RADICAL REPUBLICANS AND RECONSTRUCTION: 1861-1870 (H. Hyman ed. 1967).

28. H. GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM (1968).

29. M. BENEDICT, A COMPROMISE OF PRINCIPLE: CONSERVATIVE REPUBLICANS AND RECONSTRUCTION (1975).

30. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049 (1956).

31. L. LEVY, JUDGMENTS: ESSAYS IN AMERICAN CONSTITUTIONAL HISTORY (1972); JUDICIAL REVIEW AND THE SUPREME COURT (L. Levy ed. 1967).

32. Some of the more important works are W. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION, 1865-1877 (1963); L. & J. COX, POLITICS, PRINCIPLE, AND

has emerged, but there is a consensus that the political behavior and postures of the participants were as complex and contradictory as the issues themselves. Berger, however, never hesitates to wade into the Amendment's cloudy legislative history to isolate individuals and their statements and accordingly place them within a simplistic radical/moderate dichotomy. The Republican party of the 1860s was a cornucopia of factions—radical, moderate, conservative—with varying extremes in each of those categories.[33] Berger nonetheless offers scant respect for the complexities of political arrangements.

From his elaborate effort, Berger concludes that federal judges in general, and the Supreme Court in particular, have usurped power to promote values of their own choice, resulting in "government by judiciary." This conclusion is buttressed by a rigidity of analysis that ignores inescapable realities of governmental and social processes. For example, Berger flatly rejects any notions of constitutional change and growth—of history, in short—through means other than constitutional amendment.[34] John Marshall's famous dicta that "it is a *constitution* we are expounding," which was "intended to endure for ages to come,"[35] simply seem to have no standing with Berger. Fairman and Bickel largely followed Frankfurter and Harlan in their notions of judicial restraint,[36] but all four men would have had difficulty in submitting to Berger's constitutional straitjacket.

Unlike other historical and legal commentators, Berger finds the legislative history of the Fourteenth Amendment neither elusive nor inconclusive. His research is grounded exclusively in the published debates of the thirty-ninth Congress, the words of which he accepts throughout his work in absolutely literal fashion. Certainly, anyone who has worked in this area would acknowledge great respect for the quality of the debates, as the reports present parliamentary encounters and rationales in extraordinary form. Nevertheless, because the men of the thirty-ninth Congress engaged in their share of sham, deception, planned legislative colloquies[37] and even humor, one should be cau-

PREJUDICE, 1865-1866 (1969); D. DONALD, THE POLITICS OF RECONSTRUCTION (1965); E. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION (1961). For more extensive bibliographies, see A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION 1125-28 (4th ed. 1970); S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS, 169-73 (1968).

33. *See* Mendelson Essay at —.

34. GOVERNMENT BY JUDICIARY at 283-99 (ch. 15).

35. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 323 (1819) (emphasis added).

36. *See* note 24 *supra*.

37. A planned legislative colloquy is designed, as one congressman has written, "for the express purpose of providing a legislative interpretation of a statutory provision which might otherwise be interpreted . . . . It may be used to overcome legal, parliamentary, or political

tioned against a literal reading of their words. Remarks made during the course of those debates were not always designed to clarify proposals for future historians or the judiciary; they were often calculated to serve a congressman within his own constituency or to further his party's immediate purposes.

Berger proceeds from the view that the Fourteenth Amendment was intended merely to "constitutionalize" the Civil Rights Act of 1866.[38] As for legislative purposes beyond that goal, he insists there were none.[39] The 1866 law prohibited discrimination in civil rights or immunities on account of race; it provided that the "inhabitants of every race" would have the same right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property;" and it established that such persons would be entitled to the full and equal benefit of laws and proceedings "for the security of person and property, and shall be subject to like punishment."[40] The legislative history of the 1866 Act, as well as its later incorporation into the Fourteenth Amendment, demonstrates that supporters and opponents alike insisted that these words had nothing to do with political or social rights such as voting, serving on juries, or attending integrated schools. Democratic opponents maintained that efforts to bring about such equality were perfectly idle; blacks, they repeated *ad nauseum*, must be kept in subordination to whites. Many midwestern Republican congressmen acknowledged similar negrophobic sentiments on the part of their constituents, and therefore usually intoned that they sought only equality in civil rights, as enumerated in the language of the 1866 law.[41]

The making of the Fourteenth Amendment, Berger continues, generally forced Republicans into even more stringent explanations of their limited goals. For example, the Amendment's proponents repeatedly explained that section 1 contained nothing that could be construed as endorsing the right of blacks to vote. Time and again, they invoked notions of state sovereignty and said that only the states could fix the qualifications for voting. Berger also observes that section 2 of the Amendment, which provided for reduced congressional representation when states "denied" or "abridged" the right to vote,[42] did not violate

obstacles." Moorhead, *A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes*, 45 A.B.A.J. 1314, 1316 (1959).

38. Act of April 9, 1866, ch. 31, 14 Stat. 27.

39. *See generally* GOVERNMENT BY JUDICIARY at 20-36 (ch. 2).

40. Act of April 9, 1866, ch. 3, 14 Stat. 27.

41. GOVERNMENT BY JUDICIARY at 30-31.

42. U.S. CONST. amend. XIV, § 2 provides: "Representatives shall be apportioned

that fundamental premise.[43]

There are alternative ways of reading the words of section 2. To establish congressional acknowledgement that the Fourteenth Amendment did not interfere with the states' prerogatives, Berger cites one leading Republican after another, ranging from conservatives such as James R. Doolittle,[44] to moderates such as William Pitt Fessenden,[45] to radicals such as Thaddeus Stevens.[46] Yet their own words regarding the interpretation of section 2 negate that premise, for the Republicans acknowledged the reduced representation principle to be a remedial provision permitting national action against a state which Congress could not otherwise punish directly. In short, Berger's devotion to literalness has led him to ignore the legislative convolutions, indeed sarcasm, conveyed by such language.

Consider, for example, Berger's approving quotation of Congressman Stevens. The Pennsylvanian repeated the litany that "the States have the right . . . to fix the elective franchise," and that section 2 did nothing to alter that.[47] But the wily Stevens was at his cleverest when he said that he preferred section 2 to a direct declaration for black suffrage because he would rather that blacks not vote until they had been educated in "their duties . . . as citizens."[48] Stevens thus had the best of all worlds: he could make a gesture to northern bigotry by suggesting that blacks were not ready for suffrage, and he could erode southern white power in Congress either by reducing representation based on a denial of the franchise to blacks or by indirectly forcing the states to let them vote.

Berger's failure to manifest any feel for political context or nuance is also evident in his interpretation of the congressional attitude toward blacks. He repeatedly states that many white Americans harbored

among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

43. GOVERNMENT BY JUDICIARY at 60-68.

44. *Id.* at 62-63, 66.

45. *Id.* at 62.

46. *Id.* at 62, 67.

47. CONG. GLOBE, 39th Cong., 1st Sess. 536 (1866) [hereinafter cited as GLOBE], *quoted in* GOVERNMENT BY JUDICIARY at 67.

48. GLOBE, *supra* note 47, at 536, *quoted in* GOVERNMENT BY JUDICIARY at 67.

strong negrophobic sentiments. That, of course, is indisputable, but it does not fully explain how and why the Amendment was adopted in its final form.[49] In Congress, Democrats desperately tried to embarrass their opponents, a move which, in turn, forced tactical verbal retreats and apologies from the Republicans. But the Republican preference was clear: they desired political equality, but accepted the necessity for moderation. For example, William Pitt Fessenden, certainly a moderate Republican as well as an extraordinarily able leader, repeatedly genuflected toward state control over the suffrage. He supported the section 2 principle, however, saying that if the states use their constitutional power to "make an inequality of rights," then they would "suffer such and such consequences."[50] James Garfield wanted suffrage guaranteed, but said "I am willing . . . to take what I can get"[51] and supported section 2. Not long afterward, the Republicans had enough political clout in Congress *and* in three-fourths of the states to secure ratification of the Fifteenth Amendment.[52] That measure was designed to guarantee black voting rights in the northern states in order to further Republican party fortunes.[53] The foregoing underscores the contention that legislative history must be viewed as more than a frozen section of tissue; there also is, to repeat, a context of action, purpose, and pacing to be understood.

II. Judicial Activism

To demonstrate that modern Supreme Court decisions on school desegregation, voting, and incorporation of the Bill of Rights conflict with a monolithic, irresistible history, Berger carefully culls out every legislative statement dealing with those areas. The ultimate perversion of the original intentions, as Berger sees it, has been the judicial use of the due process and equal protection clauses of the Fourteenth Amendment. For judicial activists in the late nineteenth century, the due proc-

49. *See* Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 479, 479-507, 610-61 (1950).

50. GLOBE, *supra* note 47, at 1279, *quoted in* GOVERNMENT BY JUDICIARY at 65.

51. GLOBE, *supra* note 47, at 2462, *quoted in* GOVERNMENT BY JUDICIARY at 67. Note also similar remarks by Representatives Roscoe Conkling and John Farnsworth. *Id. See generally* W. GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT (1965).

52. U.S. CONST. amend. XV provides in part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *See generally* J. MATHEW, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT (1909).

53. *See generally* W. GILLETTE, *supra* note 51; Avins, *The Fifteen Amendment and Literacy Tests: The Original Intent*, 18 STAN. L. REV. 808 (1966).

ess clause served as the cutting edge for the protection of economic privilege; in our time, the equal protection clause has served judges who wish to further civil rights and liberties. But the framers in 1866, Berger contends, in no way intended these phrases as tools for judicial policymaking. From their words, he deduces a trinity theory whereby the equal protection and due process clauses are adjectival media for securing civil rights ("privileges or immunities") against state action: the equal protection clause bars statutory discrimination, while due process prohibits judicial discrimination.[54]

Berger's certitude is once again troublesome. Underlying his analysis is a traditional assumption that the Republicans of the era instinctively distrusted the judiciary and, what is more, constantly schemed to debilitate or destroy its functions.[55] Those expressing such views seemingly dominate the reports in the *Congressional Globe*—but only in verbiage. The record of results is absolutely clear: nothing of substance was done either to temporarily or permanently cripple federal judicial power.[56] Senator Charles Summer succeeded in delaying an appropriation for commissioning a bust of Taney for the Supreme Court library. Some triumph; some limitation. In truth, the Republicans of this era actively promoted new courts and, above all, new jurisdictional authority. They viewed the judiciary as a desirable prize in their constant struggle for political aggrandizement; they staved off attempts to destroy or limit judicial review. More significantly, the accretive force of habeas corpus, admiralty, bankruptcy, and removal legislation from 1862 to 1865 constituted a virtual revolution affecting the potential federal judicial power—a potential envisioned by the Federalists long ago in the 1790s and aborted by the Jeffersonians in 1802.[57] Furthermore, without subscribing to the crass conspiracy notions of Roscoe Conkling,[58] it can be argued that the Republican framers of the Fourteenth Amendment "may have foreseen" the judicial activism of a later period

54. GOVERNMENT BY JUDICIARY at 220.

55. *Id.* at 223, 385.

56. *See generally* S. KUTLER, *supra* note 32, at ch. 5.

57. *See generally* H. HYMAN, *supra* note 27; S. KUTLER, *supra* note 32, at ch. 5; Wiecek, *The Reconstruction of Federal Judicial Power*, 1863-1875, 13 AM. J. LEGAL HIST. 333, 340 (1969).

58. For an examination of Conkling's now discredited thesis, see Boudin, *Truth and Fiction about the Fourteenth Amendment*, 16 N.Y.U.L.Q. REV. 19 (1938); Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938); Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 48 YALE L.J. 171 (1938). *See also* authorities cited in A. KELLY & W. HARBISON, *supra* note 32.

stemming from "the possibilities of their language."[59]

The Supreme Court of this period was not exactly paralyzed by the so-called "self-inflicted wound" of the *Dred Scott* decision.[60] The terse language of *Ex parte Yerger*,[61] the feeble congressional response to *Ex parte McCardle*[62] the quantum leap in cases invalidating federal statutes,[63] and the increasing scrutiny of state public policy all testify to a rather healthy, ambulatory federal judiciary. Although Berger advocates a narrowly defined view of the Court's function, he does not reject judicial review of legislation. He instead reiterates the view expressed in an earlier work that articles III and VI of the Constitution recognize such power.[64] But he insists that the power was confined to the "policing of [constitutional] boundaries and [excluded from] policymaking reserved to the legislature."[65] Thus, policymaking is outside the pale of the judicial role, and Berger offers no quarter for those who would ask him to acknowledge the realities of practice. "Usurpation," he says, "is not legitimated by repetition."[66]

Such stern aphorisms notwithstanding, there is an abstract artificiality in distinguishing between "policing boundaries" and "policymaking." In the early decision of *Fletcher v. Peck*,[67] the Marshall Court

59. J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 227-28 (1950). *See* S. KUTLER, *supra* note 32, at 168 n.26.

60. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

61. 75 U.S. (8 Wall.) 85 (1869).

62. 74 U.S. (7 Wall.) 506 (1869). Following the Court's acceptance of jurisdiction in the *McCardle* case, Ex parte McCardle, 73 U.S. (6 Wall.) 318 (1868), Congress repealed one limited form of habeas corpus jurisdiction. Accordingly, the Justices acknowledged that they lacked jurisdiction as stipulated by McCardle's lawyers. Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869). The second ruling is usually interpreted as an indication of the congressional Republicans' vindictiveness and the Court's cowardice or impotence. A reading of Chief Justice Salmon Chase's opinion in the second case clearly dispels such notions. In closing, Chase directed his remarks directly to McCardle's attorneys, and indirectly to Congress: "Counsel seems to have supposed, if effect be given to the repealing act . . . that the whole appellate power of the court in cases in *habeas corpus* is denied. But this is an error." *Id.* at 515. The repealed measure excepted only appeals emanating from the Act of February 5, 1867. The *Yerger* case, Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869), underlined the importance of Chase's remarks, for in that case, the Court noted that its habeas corpus jurisdiction, extending back to the Judiciary Act of 1789, and even the Habeas Corpus Act of Charles II (1660), remained intact. *Id.* at 95-98. The Court's vitality is clearly evident in these opinions; what is more, Congress accepted the *Yerger* ruling with barely a whimper of protest. *See* S. KUTLER, *supra* note 32, at 77-88.

63. *See* cases collected in S. KUTLER, *supra* note 32, at 114 n.1.

64. GOVERNMENT BY JUDICIARY at 351-62 (ch. 19). *See* R. BERGER, CONGRESS V. THE SUPREME COURT 236-344 (1969).

65. GOVERNMENT BY JUDICIARY at 362.

66. *Id.* at 352.

67. 10 U.S. (6 Cranch) 87 (1810). *See* P. MAGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC (1966); Kutler, Review Essay, 42 N.Y.U.L. REV. 391 (1967).

found that Georgia had overstepped the boundaries of state power and thereby violated the Constitution's contract clause. Such a conclusion involved much more than policing a constitutional boundary: the judges unmade a state policy, provided a new one, and enunciated a wholly new dimension to the contract clause. More recently, the determination of constitutional boundaries in *United States v. Nixon*[68] resulted in significant policymaking in a long-avoided area—that of separation of powers. Whichever way the Court ruled in that case, it would have made "policy" regarding executive privilege. Such examples are legion. The point is that policing constitutional boundaries invariably involves a policy-making function. If that is not the case, then perhaps the only rationale for Berger's distinction is that of a mechanistic jurisprudence as deployed by judges of another generation who insisted that they were following the Constitution and not Herbert Spencer.

Representative John A. Bingham noted during the congressional debates that the courts had "settled" the meaning of due process long ago.[69] The Ohioan was only partly correct: the courts had immersed themselves in considerations of due process for some time, but their decisions were hardly settled.[70] As a congressman in the late 1850s, Bingham was himself one who had heaped scorn on Chief Justice Roger B. Taney's bold substantive gloss on due process in the *Dred Scott* case. In the three decades before the Fourteenth Amendment, state judiciaries wrestled mightily with a variety of implications for the centuries-old concept. The best that can be said of their efforts is that they left—as courts usually do—several streams of precedent for later judges to use. Bingham, then, was partially correct in appreciating the judicial role. And that role remained vital for the future—from the utilization of due process as a handmaiden for entrepreneurial liberty

68. 418 U.S. 683 (1974).

69. GLOBE, *supra* note 47, at 1089.

70. *See generally* Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911); Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CAL. L. REV. 583 (1930). For a discussion of the judicial role as it pertains to due process, see GOVERNMENT BY JUDICIARY at 193-220 (ch. 11). Berger offers extensive arguments that the concept of due process in 1789 and 1866 did not comprehend a role for judicial review of legislative policy. The disclaimers he cites are all too often self-serving, as for example, Alexander Hamilton's statement to New York legislators that due process had only procedural application. *Id.* at 194. Much more sensitive to contemporary settings and subtleties is Wallace Mendelson's observation that due process was one of those terms "designed to have the chameleon capacity to change their color with changing moods and circumstances," W. MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT viii (1961).

to its application by the Warren Court to matters of criminal justice. In short, judges, however lacking prescriptive warrants as Berger contends,[71] would continue to search for new parameters of due process. Their limitations, however, have been obvious: they can so act only so long as society tolerates the search for new values and standards for itself and for its law.

What does Raoul Berger want? "An end," he urges in conclusion, "to pretence."[72] Either the judiciary should return to what he interprets as the original intention underlying the Fourteenth Amendment, or it should frankly avow its actions as judicial policymaking.[73] A total rollback of recent decisions involving desegregation and reapportionment is unlikely, as he acknowledges.[74] As an alternative, however, Berger calls for submission of Court-wrought constitutional amendments to the people so as to legitimate "government by judiciary." This is his message. As such, it hardly merits this microscopic examination of his limited, selected evidence and his unrelenting, ungracious treatment of other writers.

Berger's work only begs the question of how and why the present situation developed. His tone suggests that the judges have engaged in self-conscious aggrandizement, motivated by contempt for the wishes of the sovereign people. He almost suggests a conspiracy of professionals and intellectuals. There may be more valid understanding of the judicial function if we recognize that judicial policymaking generally fills a vacuum created when politically accountable legislators, executives, and bureaucrats abdicate their proper policy roles.[75]

The persistence of segregation and malapportionment in post-World War II America are examples of grievous injustices to which the political institutions could not or would not respond. It is a matter of perception and response. Berger maintains that the *Brown* decision "did not and still does not represent the 'sense of the community'."[76] There is evidence, however, that the nation, including many Southern communities, realized the educational deprivation and financial burden inherent in segregation. The actions of a federal judge in taking over a

71. *See* GOVERNMENT BY JUDICIARY at 193-220 (ch. 11).

72. *Id.* at 418.

73. Berger urges: "If government by judiciary is necessary to preserve the spirit of our democracy, let it be submitted in plainspoken fashion to the people—the ultimate sovereign—for their approval." *Id.*

74. *Id.* at 412-13.

75. *See* Mendelson, *The Politics of Judicial Activism*, 24 EMORY L.J. 43, 44 (1975).

76. GOVERNMENT BY JUDICIARY at 328.

school system[77] probably run counter to a "national consensus," but that is not the same as condemning the ideals and values of the 1954 decision. Archibald Cox, himself somewhat leery of recent judicial activism, nevertheless remarked: "To have adhered to the doctrine of 'separate but equal' would have ignored not only the revolution sweeping the world but the moral sense of civilization."[78] Professor Cox also noted: "[T]hese impulses were not shared so strongly and widely as to realize themselves through legislation."[79] With blithe certitude, Berger sees such controversies simply as problems of "evil that the people were, and remain, unready to cure."[80] What an exquisite expression of majoritarianism—but also misguided and beside the point. For one so steeped in the wisdom of the Founding Fathers, Berger appears oblivious to their concerns about legislative tyranny and majoritarianism. Moreover, the persistence of segregation and malapportionment simply defied the theory of *The Federalist* No. 10 with its recognition of minority rights and the bargained functioning of the political process.[81]

Conclusion

The lamentable fact is that our political system has often malfunctioned when entrenched interests confront rising demands for change. What "people" had a legislative opportunity to "cure" the encrusted, vested practices of segregation and malapportionment? Certainly, all-white Southern legislatures (by design, not by chance) and malapportioned legislatures (again by design) offered no opportunity or even prospect for change. Government by judiciary is indeed fraught with dangers of tyranny, but we are similarly threatened when legislatures are unrepresentative and unresponsive. "I'll be dammed if I'll vote myself out," one Maryland legislator said in 1962 in response to a move for reapportionment.[82] How then do we implement the principle that redress of grievances lies at the polls, not in the courts?

Consider also the problem of mental institutions in Alabama in

77. *See* note 9 and accompanying text *supra*.

78. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 110 (1976).

79. *Id.* at 35.

80. GOVERNMENT BY JUDICIARY at 409.

81. THE FEDERALIST No. 10 (A. Hamilton) (Mod. Lib. ed. 1937). There is, of course, an enormous body of commentary on the political philosophy of the FEDERALIST PAPERS. No serious claims for majoritarianism have been put forth for the views of Madison, Hamilton, or Jay. Martin Diamond's essay is one of the most perceptive, particularly with his contention that these men were not "value-free social scientists." See M. Diamond, *Democracy and the Federalist: A Reconsideration of the Framers' Intent*, AM. POL. SCI. REV. 53 (1959).

82. R. HANSON, THE POLITICAL THICKET 18 (1966).

the 1970s. The grisly fact-finding that can be read in *Wyatt v. Aderholt*[83] reflects legislative, executive, and bureaucratic neglect at its worst. These governmental institutions chose to ignore the understaffing, the denial of treatment, and the sheer brutality in state mental hospitals. Worse, they denied or downplayed the very existence of such conditions. Judge Frank Johnson's intervention and orders, however, effectively provided an impetus for the state to carry out its responsibilities; the prescribed processes for correction were simply inert.[84] And, once again, it is not necessarily a fair deduction that prevailing conditions reflected the will of the "ultimate sovereign"—the people.

Admittedly, Berger has a valid point about resort to the article V amendment process as the proper means to change the constitutional framework. But the path for amendment, like that of legislation is often blocked by inertia or irresponsibility. It seems unreasonable to have expected the malapportioned Congress and state legislatures to provide an amendment mandating reapportionment or desegregation. Moreover, there are problems of adjustment and change which have been effectively and responsibly handled by the judiciary on a case-by-case basis, rather than through the larger, more cumbersome, instrument of an amendment. Certainly there are limits to judicial wisdom and to the idea of committing broad policymaking power to judges. As such, we need not deviate from the post-1937 prescriptions: judges should presume the constitutionality of legislative policy but they should apply severe scrutiny to legislation affecting processes of free political discourse, association, or balloting, which are the foundation for making substantive legislative and executive policy choices.[85]

Experience has demonstrated that by such action, judges have prompted, even forced, legislatures and executives to deal with problems they would rather ignore. That result admittedly violates Berger's notions of constitutional purity and somewhat confirms his concept of judicial policymaking, but how else should judges respond to injustice, as they perceive it? Sadly enough, our political institutions and society have come to expect—and probably accept—such a judicial role. Witness the public approval of the process and conclusion of *United States v. Nixon*.[86]

The role of our judiciary in a democratic society is a perplexing one, constantly in need of new accommodations. But there is little con-

83. 503 F.2d 1305 (1974).
84. *See* Wyatt v. Stickney, 344 F. Supp. 387 (N.D. Ala. (1972).
85. *See* note 15 and text accompanying note 17 *supra*.
86. 418 U.S. 683 (1974).

tribution to that search for accommodation when Berger uses a Toynbee-like—and fallacious—analogy between the workings of the American judiciary and the Weimar Republic, Hitlerism, and Stalinism.[87] Such urgent, hortative tones as he uses in *Government By Judiciary* simply are no substitute for a sensitive appreciation of either our institutional dilemma or our political and social realities.

87. GOVERNMENT BY JUDICIARY at 410, 412.