

# “Government by Judiciary”: What Price Legitimacy?

By LOUIS LUSKY\*

## Introduction

Raoul Berger's *Government by Judiciary*<sup>1</sup> valuably reminds us that an uncompromising morality fixes the conditions of governmental legitimacy. It reminds us to be vigilant against judicial usurpation. In Catonian terms no longer often heard, it inveighs against usurpations perceived. And, for every lawyer over the age of about 35, it provides a nostalgic reminder of the simpler standard of legitimacy—based on the holy teachings of *Marbury v. Madison*<sup>2</sup>—that Raoul Berger and I both learned in law school. Beyond all this, the book (albeit unintentionally) demonstrates how inadequate the *Marbury* approach has now become. It demonstrates how completely that approach fails to satisfy the basic requirement of *utility* in constitutional analysis, as applied to the state of affairs that the Supreme Court has created in the last quarter-century, a state of affairs which even the Nixon and Ford appointees (along with the American people) have accepted as largely irreversible.

A fortuitous circumstance has given the book a special éclat. Its wide distribution is at least partly attributable to the recognition Raoul Berger earned during the Watergate crisis through his timely though sometimes criticized historical studies of executive privilege and impeachment.<sup>3</sup> This matters not at all; what does matter is that the book

---

\* A.B. 1935, University of Louisville; LL.B. 1937, Columbia Law School; Betts Professor of Law, Columbia Law School.

I am deeply indebted to Walter Gellhorn, Betts Professor of Law Emeritus, for useful editorial suggestions and wise counsel—the more so because he disagrees with some of the things I say.

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

2. 5 U.S. (1 Cranch) 137 (1803).

3. R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974) and *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973). See also Berger, *Executive Privilege: A Reply to Professor Sofaer*, 75 COLUM. L. REV. 603 (1975); Sofaer, Book Review, 88 HARV. L. REV. 281 (1974).

©1979, Louis Lusky. All rights reserved.

(despite what I believe to be serious flaws) has crystallized for millions of non-lawyers the fear that the Court has jumped the bounds of legitimate judicial review and is pursuing a course that bears dismaying resemblance to the excesses of the pre-1937 Court—the “Nine Old Men” who nearly crippled the New Deal of Franklin Roosevelt. People who have shrunk from tackling the scholarly commentaries that have sounded this warning with increasing persistence,<sup>4</sup> have been willing and able to read *Government by Judiciary*, or at least have paid attention to the newspaper and television analyses of its thesis.<sup>5</sup>

Raoul Berger’s argument is simple. The pivotal proposition is that a court, in determining the meaning and effect of a constitutional provision, should approach its task in precisely the same way as if it were interpreting a statute. That is to say, its key inquiry should be: what were the written words intended to mean by those who employed them? Berger makes his position clear at the very outset:

[T]he “original intention” of the Framers . . . is binding on the Court for the reason earlier stated by Madison: if “the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers.”<sup>6</sup>

Later in his Introduction he dispels any lingering doubt that, for him, constitutional application and statutory interpretation involve the same process: “On traditional canons of interpretation, the intention of the [F]ramers being unmistakably expressed, that intention is as good as written into the text.”<sup>7</sup> And in the footnote supporting this statement, Berger cites three statutory interpretation cases, decided respectively in 1845, 1861 and 1903, and the seventh edition of Bacon’s *Abridgment*, published in 1832.<sup>8</sup>

As every schoolboy knows—every law student, anyway—Chief

4. A fair number of them are cited in L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 1-8, 3-6 (1978). See also text accompanying notes 40-45 *infra*.

5. For example, Raoul Berger was questioned for nearly an hour on the “Firing Line” program of William F. Buckley, Jr. The program was originally telecast by Public Broadcasting System on October 28, 1977.

6. *GOVERNMENT BY JUDICIARY* at 3 (footnote omitted).

7. *Id.* at 7.

8. *Id.* at 7 n.24. This footnote reads as follows: “A thing may be within the letter of a statute and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law. *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903); *United States v. Freeman*, 44 U.S. (3 How.) 556, 565 (1845); *United States v. Babbitt*, 66 U.S. 55, 61 (1861); Matthew Bacon, *A NEW ABRIDGMENT OF THE LAWS OF ENGLAND*, “Statutes” I(5) (7th ed. 1832); *infra* Chapter 9 note 22.” Berger’s footnote 22 in Chapter 9 reads simply, “*Id.* [referring to the CONG. GLOBE, 39th Cong., 1st Sess. (1865-66)] 506”.

Justice Marshall declared for a unanimous Court in *McCulloch v. Maryland*<sup>9</sup>: “[W]e must never forget that it is *a constitution* we are expounding.”<sup>10</sup> He delivered this admonition in response to a contention based on strict construction of article I, section 8, which the state of Maryland maintained should be interpreted in the same way as a statute. Marshall flatly repudiated this notion; he pointed out that the Constitution is a wholly different type of instrument. Superficially, therefore, it might seem that Raoul Berger’s view is a legal coelacanth, a living fossil. At first blush he appears hardly to have entered the nineteenth century. But closer consideration shows this to be wrong. Better documentation was available to him than he elected to use. The fact is that the great Chief Justice would have agreed fully with his essential point: that the Constitution should be applied in accordance with the intent of those who made it. The famous *McCulloch* dictum was uttered not to justify judicial disregard of the original intent, but to repel the suggestion that the Constitution ought to speak with the same *specificity* as a statute ordinarily does. Here is what shortly precedes that dictum:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.<sup>11</sup>

One must nevertheless undertake a modest amount of time travel in order to reach back to the period when the Berger view was at least nominally accepted by the Court, and when its consequences remained acceptable to the American people. Not as far back as 1935, when I studied Constitutional Law at Columbia Law School, or the transitional 1937 Term of the Supreme Court, when I served as law clerk to Justice Harlan F. Stone, or even (*pace* Raoul Berger) 1954, when *Brown v. Board of Education*<sup>12</sup> was decided. It would probably be necessary, however, to look to the period before 1961, when *Mapp v. Ohio*<sup>13</sup> began the “incorporation” of the Bill of Rights into the Fourteenth Amend-

---

9. 17 U.S. (4 Wheat.) 316 (1819).

10. *Id.* at 407 (emphasis in original).

11. *Id.*

12. 347 U.S. 483 (1954).

13. 367 U.S. 643 (1961).

ment; almost certainly before 1962, when *Baker v. Carr*<sup>14</sup> rewrote the standards of justiciability and gave new content to the equal protection clause; clearly before 1964, when *Reynolds v. Sims*<sup>15</sup> proclaimed one-person-one-vote as an equal protection doctrine, in the teeth of Justice Harlan's irrefutable and unrefuted demonstration in dissent that the Fourteenth Amendment was not intended to protect the right to vote, much less to guarantee that all votes have equal weight; and, by the Court's own admission, before 1965. That was the date of *Linkletter v. Walker*,<sup>16</sup> the first "prospectivity" case, in which the Court was driven to acknowledge that when *Mapp v. Ohio* overruled *Wolf v. Colorado*<sup>17</sup> and held that the Fourteenth Amendment forbids the introduction of illegally seized evidence at a state criminal trial, "[i]t was the judgment of this Court [and not a reinterpretation of the intent of the Framers] that changed the rule."<sup>18</sup>

Looking back, one perceives that by 1965 the Court had quietly accomplished two basic shifts in its approach to constitutional adjudication, and had thereby broadened the scope of judicial review by a full order of magnitude. One of the two—assertion of the power to revise the Constitution, bypassing the cumbersome amendment procedure prescribed by article V—has already been noted: that power was exercised in such cases as *Mapp v. Ohio*, *Baker v. Carr*, *Reynolds v. Sims*, and *Linkletter v. Walker*. The second basic shift was repudiation of the limits on judicial review that are implicit in the orthodox doctrine of *Marbury v. Madison*.<sup>19</sup>

The teaching of the *Marbury* case, to which the Court even now pays lip service but which has been superseded in the same manner that Newton's physical laws have been superseded by Einstein's, was that judicial review amounts to nothing more than the adjudication of lawsuits on the basis of the most authoritative governmental command that is available and applicable. The decision was a landmark primarily because it recognized the Constitution as a source, indeed the most authoritative source, of *legal* rights, that is, rights enforceable by courts, and not merely as a source of political "rights," which can be thought of as being "enforceable" through the ballot, or by passive resistance or civil disobedience or, in the last resort, by revolution. But Chief Justice Marshall's opinion for the unanimous Court, before reaching this bold

---

14. 369 U.S. 186 (1962).

15. 377 U.S. 533 (1964).

16. 381 U.S. 618 (1965).

17. 338 U.S. 25 (1949).

18. 381 U.S. at 639.

19. 5 U.S. (1 Cranch) 137 (1803).

position, first took pains to demonstrate that Marbury did indeed have a cause of action—derived from the common law and valid federal statute, *not* from the Constitution—that entitled him to an adjudication, a court ruling.

Beginning in 1962 with *Baker v. Carr*,<sup>20</sup> the Court has more and more freely disregarded the limitation on judicial review that results from refusing to decide constitutionality unless the plaintiff has stated a claim that would entitle him to judicial relief if nothing in the Constitution affected the decision.<sup>21</sup> In the *Baker* case, the Court resorted to the Constitution itself as the source of a legal right previously unknown to the law—a right against unjustifiable dilution of the weight of one's vote—in order to provide a basis for judicial review under the equal protection clause. Since then, on the questionable ground that the Court is, by its own assertion, the “ultimate interpreter” of the Constitution,<sup>22</sup> it has held that legal rights flow from a variety of constitutional provisions, including article I, section 2, clause 1,<sup>23</sup> the Fourth Amendment,<sup>24</sup> and article I, section 2, clause 2.<sup>25</sup> The logic of these decisions is extensible to many other clauses, though the Court has thus far somewhat arbitrarily refused to apply it to some of them.<sup>26</sup>

*Government by Judiciary* ignores these two seismic changes<sup>27</sup> that have taken place in the last twenty years or less, or at least assumes that they are fully reversible and may indeed be wiped away if shown to be

---

20. 369 U.S. 186 (1962).

21. Very few constitutional provisions impose legal duties on private persons. The exceptions are the Thirteenth and the now repealed Eighteenth Amendment, prohibiting, respectively, slavery, *The Civil Rights Cases*, 109 U.S. 3, 20 (1883), and traffic in intoxicating liquors, *National Prohibition Cases*, 253 U.S. 350, 386-87 (1920). The express wording of the Amendments has been held to require the exceptional result.

22. *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

23. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). Art. I, § 2, cl. 1 provides: “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .”

24. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 395 (1971). The Fourth Amendment reads: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

25. *Powell v. McCormack*, 395 U.S. 486, 491 (1969). Art. I, § 2, cl. 2 states: “No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”

26. *E.g.*, *United States v. Richardson*, 418 U.S. 166 (1974) (statement and account clause, art. I, § 9, cl. 7); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (incompatibility clause, art. I, § 6, cl. 2).

27. See text accompanying notes 13-19 *supra*.

contrary to the original intention. It is clear that Raoul Berger deplors these changes and, if he had the power, would undo them with respect to the whole Constitution as amended, not the Fourteenth Amendment alone.<sup>28</sup> His thesis, I freely acknowledge, strikes a responsive chord with me, as it doubtless does with many other lawyers who finished law school before 1965 or thereabouts. I must also admit that not until the early 1970s did I recognize the inadequacy of the *Marbury* doctrine of judicial review and then begin explaining to my Constitutional Law students the Court's new and grander conception of its own place in the governmental scheme. Such is the persistence of familiar ways and accustomed thought patterns.

In a moment I shall explain why I believe that the Berger prescription for legitimacy is not the only one possible, and indeed is not the most useful one. I shall outline the proposal I first offered in *By What Right? A Commentary on the Supreme Court's Power to Revise the Constitution*.<sup>29</sup> There I mapped a different road to judicial legitimacy, one making use of the concept of *implied judicial power to make new constitutional rules* under certain objectively verifiable conditions. Even while advancing my thesis, however, I was constrained to acknowledge the hazard it entails:

Certainly the danger of judicial usurpation would make it desirable to avoid the implication of judicial power if there were any way to do it without incurring still less tolerable risks; were we drafting a new Constitution, we would surely try to find a way to preclude the implication of judicial power—which probably could only be accomplished by precluding the *need* for it. But we deal with an existing constitution, and so our opinion as to the legitimacy of implied judicial power must turn on the single question whether it is less hazardous to societal welfare than any visible alternative.<sup>30</sup>

Moreover, I could not refrain from hinting at my own nostalgic regret that the Court—under the pressure of forces that threatened utter disruption of our society, caught as it was between the Scylla of majority rule and the Charybdis of individual freedom with only an eighteenth century Constitution and the nineteenth century Civil War Amendments to steer by—had been driven beyond the straightforward, orthodox conception of judicial review that Berger and I were taught in law school:

Note that my objective is to show that the principle of im-

---

28. See, e.g., text accompanying notes 6-8 *supra*.

29. L. LUSKY, *BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION* (1975) [hereinafter cited as *BY WHAT RIGHT?*]

30. *Id.* at 24.

plied judicial power *can* be used to evaluate the Court's work and can therefore serve to defend the Court from the accusation that it has cast off all restraint and set itself above the law. There is no need for me to say whether I believe that the need to justify the Court's decisions on the basis of implied judicial power is cause for rejoicing, *i.e.*, that the public interest has been better served by the Court's actual performance than it would have been served by its adherence to the Constitutional text. (Copernicus might have *regretted* that the Ptolemaic conception of the solar system was so hard to reconcile with [the actual] astronomical observations; but would this have justified him in remaining silent?)<sup>31</sup>

One point remains to be made before discussion of the merits of Raoul Berger's thesis. The narrow scope that is promised by his subtitle, "The Transformation of the Fourteenth Amendment," and articulated in his Introduction is curiously incongruous with the broad scope of his actual jurisprudential assumptions. The first paragraph of the Introduction declares:

The Fourteenth Amendment is the case study par excellence of what [the second] Justice Harlan described as the Supreme Court's "exercise of the amending power," its continuing revision of the Constitution under the guise of interpretation. Because the Amendment is probably the largest source of the Court's business and furnishes the chief fulcrum for its control of controversial policies, the question whether such control is authorized by the Constitution is of great practical importance.<sup>32</sup>

Though Fourteenth Amendment decisions may well be numerically preponderant, they by no means cover the entire constitutional spectrum. They deal with cases of state action (or inaction); but they do not involve problems of separation of powers, such as the Nixon tapes controversy and the unresolved problem of veto by Congress or one house of Congress, nor the ongoing debate concerning "state rights," nor even individual rights vis à vis the federal government, problems which today are at least as important as those arising in the several states.

Still more pertinent for present purposes is the fact that Raoul Berger's tunnel vision leads naturally to a historian's appraisal of the Court's performance. He has won his academic laurels mainly as a legal historian, and it is doubtless natural for him to seek out the "original understanding" of those who adopted the Fourteenth Amendment (a useful, though not highly original, exercise) and insist upon it as the

---

31. *Id.* at 270 n.\*. In the first printing, the observations were erroneously said to be those of Tycho Brahe, an anachronism that was corrected in the Foreword to the second printing. *Id.* at viii.

32. GOVERNMENT BY JUDICIARY at 1 (footnotes omitted).

sole touchstone of legitimate application of the Amendment (a narrow and, in my opinion, a useless and even destructive endeavor). Thus, he devotes the bulk of his book to the Amendment's legislative history, reserving only two chapters for justification of his basic approach. He entitles chapter 20, "Why the 'Original Intention'?", and in chapter 21, after brushing aside a few straw men,<sup>33</sup> he gets down to the serious business of countering the alternative approaches proposed in 1975 by Professor Thomas C. Grey in his article, "Do We Have an Unwritten Constitution?"<sup>34</sup> and by the present writer in *By What Right?*. This he accomplishes, to his own apparent satisfaction, in a scant ten pages.

This is not the place for a full-dress debate on the validity of Raoul Berger's contention that history provides the *only*, or at least the *predominant*, test of the legitimacy of judicial review. Instead, I shall take note of the various efforts (of which mine is only one) to show that history is at best one factor to be considered in formulating a useful test. I shall also point out, somewhat more fully than does Berger, some of the practical effects that would ensue if his prescription were followed.

## I. Theories of Legitimate Judicial Review

It has become almost *de rigueur* to start any review of the scholarly appraisals of modern judicial review by tossing a bouquet or a brickbat in Professor Herbert Wechsler's direction. His 1959 Holmes Lecture, delivered at Harvard Law School and later published both as an article in the *Harvard Law Review* and as the centerpiece of *Principles, Politics, and Fundamental Law*,<sup>35</sup> affirmed the view that all judicial actions should be governed by "neutral principles." Actually, he was not and did not claim to be the first to concern himself with the legitimacy of the Court's performance. His lecture explicitly responded to the Holmes Lecture delivered by Judge Learned Hand the year before, which raised the same question but came up with a different answer.<sup>36</sup> In 1942, an article of mine in the *Yale Law Journal* had grappled with

---

33. Berger demonstrates that certain dicta of Chief Justice Marshall and Justices Holmes and Frankfurter afford no support for the view that the Court has the power to revise the Constitution. *See id.* at 373-86.

34. 27 STAN. L. REV. 703 (1975). Evidently the author had not seen my article, *The Unwritten U.S. Constitution*, N.Y.L.J., Aug. 31 & Sept. 1, 1972, at 1, col. 5 (two part article).

35. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), reprinted in H. WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW: SELECTED ESSAYS* 3 (1961).

36. *See* L. HAND, *THE BILL OF RIGHTS* (1958).



the identical problem, also without claiming to be the first to do so.<sup>37</sup>

What has given Professor Wechsler's statement its central position is the force and elegance of his argument. Exception has been taken to the term "neutral principles" on the ground that it is redundant, every "principle" being "neutral" by definition. On the contrary, a "principle" can be constructed *ad hoc* in the form of a major premise that is adequate to rationalize a desired result in a particular case, but it lacks "neutrality" if the court stands ready to construct a different "principle" in the next case, as Justice Brennan has repeatedly done or sought to do in the pornography cases.<sup>38</sup> That, however, is a verbal quibble. More serious is the charge that since any constitutional principle must be value-laden (which I believe to be true), *therefore* it cannot be "neutral." This proposition, I submit, is a non sequitur. As I understand the Wechsler lecture, it uses the term "neutral" not to mean *value-free* but to mean both capable of consistent application because objectively verifiable, in the sense that an outsider can detect judicial deviations from it, and in fact *consistently applied*.

If my understanding is correct, the Wechsler submission affords no basis for choice between Raoul Berger's test of legitimacy and alternative tests such as that proposed in *By What Right?*<sup>39</sup> Each of them insists that courts ought to be guided by principle, that a judge should recognize the constraint of something outside his own conception of the public welfare and his calculation as to what his court can get away with. What Professor Wechsler rejects, as do Berger and I, is the notion that the Supreme Court can legitimately function as a continuing constitutional convention *enjoying the total freedom that such a convention, if regularly established, would possess*.

The list of scholars who have wrestled with the problem of the legitimacy of judicial review as actually practiced by the Supreme Court is too long to set forth here. It includes, in addition to those already named, such eminent legal analysts as Alexander Bickel, Charles L. Black, Archibald Cox, John Hart Ely, Paul A. Freund, Lino A. Graglia, Thomas C. Grey, James Willard Hurst, Leonard W. Levy, Louis H. Pollak, Frank R. Strong and Laurence H. Tribe—to mention only those whose writings are most discussed today.<sup>40</sup> They fall into

---

37. Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1 (1942).

38. Compare *Roth v. United States*, 354 U.S. 476, 489 (1957) (Brennan, J., for the Court) with *Memoirs v. Massachusetts*, 383 U.S. 413, 418 (1966) (Brennan, J., for a "plurality" of three Justices) and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73-74, 113 (1973) (Brennan, J., dissenting).

39. *BY WHAT RIGHT?*, *supra* note 29.

40. The most influential writings on the subject are discussed in GOVERNMENT BY JUDI-

three groups. Some, such as Levy<sup>41</sup> and Grey,<sup>42</sup> have argued against the necessity of "neutral principles." Others have argued that "neutral principles," though necessary, have in fact been adhered to for the most part. For example, Black finds the unwritten principles in propositions derived from the institutional structure created by the Constitution,<sup>43</sup> and Strong finds them in propositions based on the necessity of avoiding societal breakdown.<sup>44</sup> Finally, Berger, who insists that the sole acceptable "neutral principle" is adherence to the original understanding wherever it is ascertainable, and perhaps Graglia, who confines himself to the narrow field of the desegregation decisions,<sup>45</sup> appear to believe that the Court has engaged in usurpation on a wholesale basis.

I am in the second of the three groups. Members of the first, in my opinion, overlook several important considerations, including the fragility of judicial review. This fragility results partly from the fact that the Court's effectiveness is linked directly to the willingness of nearly all Americans to comply voluntarily with its pronouncements on the law, which in turn depends directly on their belief that the Court speaks for the Constitution (including, but not limited to, the written text) and not merely for the wishes of a majority of nine non-elected, politically appointed officials who preside over a marble temple and wear priestly robes. That fragility results also from the fact that the voters, if aroused to indignant resistance against perceived usurpation, can and surely will cause their delegates in Congress to employ their undoubted authority to strip away virtually all power of the federal courts to engage in judicial review.<sup>46</sup> Members of the first group also overlook or underrate, I think, the value of judicial review and the loss that would befall us if abuses led to its abolition or undue constriction. In *By What Right?* I explained why I believe wholesome judicial review to be a valuable national resource;<sup>47</sup> that explanation need not be re-

---

CIARY, especially in ch. 19, and L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978), especially in ch. 1.

41. L. LEVY, *THE SUPREME COURT UNDER EARL WARREN* 7, 10-11 (1972) and *AGAINST THE LAW* 25-36 (1974).

42. Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703 (1975).

43. See, e.g., C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

44. Strong, *Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes*, 55 *N.C.L. REV.* 1, 98-113 (1976). Probably the most recently published exposition of this viewpoint is John Hart Ely's incisive article, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *IND. L.J.* 399 (1978).

45. L. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* (1976).

46. *BY WHAT RIGHT?*, *supra* note 29, at 29-30.

47. *Id.* at 38-43.

peated here.

Raoul Berger and other members (if any) of the third group err, I believe, in the opposite direction. They appear to underestimate the value of the Court's work over the last four decades in conforming the Constitution to what its makers would, I submit—given their political philosophy, which included commitment to self-government and the open society—have prescribed for the United States of America had they been living and acting in the middle of the 20th century. Berger's insistence that the Court can only reestablish its legitimacy by overruling *Brown v. Board of Education* and the desegregation rulings it has spawned, by overruling *Baker v. Carr* and the state legislative reapportionment decisions to which it has led and by overruling the criminal procedure cases which, utilizing the "selective incorporation" fiction, have humanized the criminal process in state prosecutions, demands a heavy price.<sup>48</sup> Were we to follow the Berger recommendation with respect to desegregation, it is entirely likely that the huge and increasingly well-organized nonwhite minority would write *finis* to the open society. At the risk of seeming needlessly alarmist I say that though they lack the numbers and military strength to mount an armed revolt, nonwhites are fully capable of creating such civil disorder that wholesale searches, arrests without probable cause, official censorship, and other police state trappings would be thought essential for societal survival here, as they were in Italy during the spring of 1978 when Aldo Moro was kidnaped and killed. Public reaction to overruling the reapportionment and "incorporation" cases would be less immediate and is less predictable, but in the long run it might be quite as destructive. Moreover, the price would not only be *heavy*; it would also be *unnecessary*, given the fact that the people at large have accepted the legitimacy of the basic decisions claiming enlarged judicial power, however

---

48. GOVERNMENT BY JUDICIARY at 69-98, 117-33, 134-56 (chs. 5, 7 & 8). The grudging acknowledgment in the concluding chapter, pp. 407-18, that these decisions cannot and probably should not be overruled does not modify Berger's opinion that they were usurpations: "It would, however, be utterly unrealistic and probably impossible to undo the past in the face of the expectations that the segregation decisions, for example, have aroused in our black citizenry—expectations confirmed by every decent instinct. That is more than the courts should undertake and more, I believe, than the American people would desire. But to accept thus far accomplished ends is not to condone the continued employment of the unlawful means. If the cases listed by Grey are in fact in contravention of the Constitution, the difficulty of a rollback cannot excuse the *continuation* of such unconstitutional practices." *Id.* at 412-13 (emphasis in original). Since the remaining five pages of the book are a philippic against judicial usurpation, including a warning that "[t]he nation cannot afford to countenance a gap between word and deed on the part of its highest tribunal," *id.* at 417, the seeming acquiescence in past decisions can be no more than a concession to *force majeure*.

they may have questioned and passively resisted some recent extreme applications of those basic decisions. And so, as I have said, I find myself in the second group—those who recognize the necessity of “neutral principles” and believe that the Court’s performance evinces respect for them in the main, albeit with regrettable aberrations that can be repudiated without social loss, and ought to be. I shall briefly explain the difference between my views and those of my fellow group-members.

Two of them, Professors Black and Strong, have evidently attributed the same importance as do I to the formulation of objectively verifiable principles. I have found the Black concept of “structure”-derived constitutional rules,<sup>49</sup> and the Strong concept of rules based on societal necessity,<sup>50</sup> to be helpful in my thinking and teaching. My own writing can be regarded as an effort to develop a “neutral principle” that is rather more sharply drawn than theirs, and can be more confidently used for appraisal of particular actions of the Court. I derive less nourishment from the Ninth Amendment-natural law formulation by Professor Grey,<sup>51</sup> whose proposal was published in the *Stanford Law Review* almost simultaneously with the publication of *By What Right?* He seems to offer a rationalization for whatever the Court elects to do rather than a criterion of legitimacy.

These observations will be made clearer by drawing a nutshell description of the implied judicial power concept from *By What Right?*:

Implication of power in the Court to make constitutional rules involves two elements. The *first* is a national objective which is either spelled out in the written Constitution (notably in the preamble), or inferable from its underlying pattern or the known purposes of the Constitution. The *second* is a comprehensible reason why the Court is better fitted than other organs of government to effectuate that objective. If either of these elements is lacking, the Court’s rule is an exercise of raw power. It does not deserve the name of law, because it does not evoke the voluntary compliance engendered by respect for legitimate authority.<sup>52</sup>

Nothing that Raoul Berger has said leads me to believe that modification of this formulation is demanded either by intellectual integrity or by pragmatic considerations of social policy. His criticism of it appears to be based partly on divers misunderstandings of what I say in *By*

---

49. See note 43 *supra*.

50. See note 44 *supra*.

51. See note 34 *supra*.

52. *BY WHAT RIGHT?*, *supra* note 29, at 107.

*What Right?*<sup>53</sup> and partly on his refusal to acknowledge that purely historical arguments<sup>54</sup> are *intrinsically* incapable of refuting my contention that history must not be the sole or even the predominant factor in determining the legitimacy of the Court's performance.

Lest there be any doubt about this last proposition, it is well to remember that even usurped power can eventually win recognition as legitimate. To be sure, "the limitation period on usurpation is very long indeed."<sup>55</sup> After enough time has passed, however, the most lawless government or governmental measures will finally be accepted as legitimate,<sup>56</sup> and the time will be shorter if the lawlessness is tempered by social desirability. Perhaps the most convincing example is that of our own Constitution, which defied the unanimity requirement imposed on the 1787 Convention by the Articles of Confederation and by the specific resolutions endowing most of the state delegations with their authority.<sup>57</sup> Flying in the teeth of that requirement, the Constitution provided that it would become effective when *nine* states had ratified, a truly extra-legal and revolutionary act.<sup>58</sup> Indeed, President

---

53. For example, I say that "the Court maintained its traditional passive posture down to 1961 or 1962," *id.* at 274, meaning that the Court had not yet begun to create new causes of action as vehicles for judicial review. Berger evidently misunderstands "passive posture" and reads it to mean "self-restraint" (as opposed to activism) since he comments: "Few would regard *Brown v. Board of Education* (1954) as exemplifying the Court's 'passive posture.'" GOVERNMENT BY JUDICIARY at 392.

54. For example, he cites Hamilton's 78th Federalist, THE FEDERALIST No. 78 (A. Hamilton) 504, 506, 507, as sufficient authority to show that the Constitution can only be legitimately changed by formal amendment. GOVERNMENT BY JUDICIARY at 394-95.

55. BY WHAT RIGHT?, *supra* note 29, at 79.

56. See David Hume's classic statement in A TREATISE OF HUMAN NATURE: "Princes often seem to acquire a right from their successors, as well as from their ancestors; and a king, who during his lifetime might justly be deem'd an usurper, will be regarded by posterity as a lawful prince, because he has had the good fortune to settle his family on the throne, and entirely change the antient form of government. *Julius Caesar* is regarded as the first Roman emperor; while *Sylla* and *Marius*, whose titles were really the same as his, are treated as tyrants and usurpers. Time and custom give authority to all forms of government, and all successions of princes; and that power, which at first was founded only on injustice and violence, becomes in time legal and obligatory. Nor does the mind rest there; but returning back upon its footsteps, transfers to their predecessors and ancestors that right, which it naturally ascribes to the posterity, as being related together, and united in the imagination. The present *King of France* makes *Hugh Capet* a more lawful prince than *Cromwell*; as the establish'd liberty of the *Dutch* is no inconsiderable apology for their obstinate resistance to *Philip* the second." A TREATISE OF HUMAN NATURE 566-67 (vol. III, pt. II, sec. X) (L.A. Selby ed. 1888) (italics in original).

57. Articles of Confederation, art. 13. See 1 J. ELLIOT, DEBATES 79, 84, 126-39 (2d ed. 1836).

58. Art. VII of the Constitution provides: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." U.S. CONST. art. VII.

George Washington and the First Congress took office before North Carolina and Rhode Island ratified. Berger's logic would have it that the whole United States Government was illegitimate down to May 29, 1790, when the thirteenth ratification (by Rhode Island) came in, and would remain illegitimate even in 1979 if Rhode Island had withheld ratification and, building upon the separatist precedent set by its founder, had gone its own way as an independent nation.

I should also take a moment to pay my respects to two very recent books of exceptional brilliance by Donald L. Horowitz<sup>59</sup> and by Laurence H. Tribe.<sup>60</sup> Horowitz does not purport to deal with the problem of legitimacy, but his thesis dovetails closely with my implied judicial power test. With a keenness of perception and a precision of description that are reminiscent of de Tocqueville, he undertakes exhaustive, multi-dimensional examination of four lawsuits—two in the Supreme Court,<sup>61</sup> two in the courts of appeals.<sup>62</sup> Three of the cases involve judicial review, the other involves application of the vague, far-ranging Model Cities legislation. He endeavors to demonstrate, and does so to my satisfaction, that courts are institutionally so poorly equipped to handle polycentric cases—cases which, unlike the usual adversary litigation, have more than two “sides”—that they often fail to achieve their professed aims and indeed sometimes unwittingly defeat them. To use language employed by Dr. Samuel Johnson long ago in quite another connection, constitution-making by judges “is like a dog's walking on its hind legs. It is not done well, but you are surprised to find it done at all.”<sup>63</sup>

Of course, it does not follow that judicial constitution-making is intrinsically illegitimate. Rather, judicial overconfidence calls simply for insistent reminders that constitution-making by judges is not acceptable as standard practice, but is instead a last resort—usable only

---

59. D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977).

60. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

61. *In re Gault*, 387 U.S. 1 (1967); *Mapp v. Ohio*, 367 U.S. 643 (1961).

62. *North City Area-Wide Council v. Romney*, Civ. No. 69-1909 (E.D. Pa. Nov. 12, 1969), *rev'd*, 428 F.2d 754 (3d Cir. 1970), *on remand*, 329 F. Supp. 1124 (E.D. Pa. 1971), *rev'd*, 456 F.2d 811 (3d Cir. 1971), *cert. denied sub nom. Rizzo v. North City Area-Wide Council*, 406 U.S. 963 (1972), *on remand*, Civ. No. 69-1909 (E.D. Pa. Sept. 6, 1972), *aff'd*, 469 F.2d 1326 (3d Cir. 1972); *Hobson v. Hansen*, 265 F. Supp. 902 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968), 269 F. Supp. 401 (1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), *further relief ordered*, 320 F. Supp. 409 (1970), 320 F. Supp. 720, 327 F. Supp. 844 (1971), *unreported opinion and order denying plaintiffs' motion to hold the defendants in contempt*, Civ. No. 82-66 (D.D.C. Feb. 17, 1973).

63. Words of Samuel Johnson, July 31, 1763, *quoted in* J. BOSWELL, *LIFE OF JOHNSON* 309 (Frowde ed. 1904) (1st ed. 1791).

when the elected branches are not merely unwilling but for some reason unable to realize a basic national objective such as preservation of the common market, self-government, or the open society, or extirpation of slavery and its consequences. Under implied judicial power doctrine, as has been noted,<sup>64</sup> one of the two conditions of legitimate judicial constitution-making is the statement of a comprehensible reason why courts are better fitted than other organs of government to attain some national objective. The Justices have begun once again, after decades of chastened restraint starting in 1937, to evince belief in their omniscience. The Horowitz book is the dash of cold water that restores proportion and balance. It is to be hoped that the Justices will say of the Horowitz book, as I do, "Thanks, I needed that."

The Tribe treatise does purport to offer a formula for legitimacy, but its claim to greatness resides elsewhere. For depth of insight into nearly all of the particular problems of constitutional law that the Court now wrestles with, it has no close rivals. As a test of legitimacy, however, it offers a complex seven-"model" calculus that is so intricate, so flexible, and in some ways so metaphorical that it can easily serve as a high-toned justification for anything the Court chooses to do. Professor Tribe gave advance notice of his legitimacy test in a law review article entitled, *The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of Law-making*.<sup>65</sup> Upon reading that article, I suspended judgment on his approach until the appearance of his promised treatise would show how he applied the test to the Court's post-1961 rulings. I have now read the treatise from cover to cover—with admiration, great profit, and only occasional doubt or disagreement. As a classroom aid it is superb, and it must afford equally valuable help to brief-writers and judges in the analysis of particular thorny issues. But it swallows without protest nearly all of the Court's rulings that I believe to be highly questionable on the score of legitimacy, and in my opinion fails to contribute significantly to the formulation of a useful test. In short, I think Professor Tribe sees the trees more clearly than the forest.<sup>66</sup>

---

64. See text accompanying note 52 *supra*.

65. 10 CREIGHTON L. REV. 433 (1977).

66. At first blush, Professor Myres McDougal's 1977 Cardozo Lecture at the Association of the Bar of the City of New York, *published in* 33 THE RECORD [of the Association] 255 (May/June 1978), seems relevant to the question now under discussion. The Lecture bears the intriguing title, "The Application of Constitutive Prescriptions: An Addendum to Justice Cardozo." If Professor McDougal had in fact focused on the legitimacy problem, his observations would surely demand the most detailed attention. Instead, however, he devoted himself to a proposal for improving the decisional process through enhanced judicial self-awareness. In so far as he comments that BY WHAT RIGHT? "would appear . . . to

Whatever one may think of Professor Tribe's seven "models," he himself has plainly found nothing in *Government by Judiciary* on which to build. He agrees with nearly all other scholars that, however much we may long for the old days when general acceptance of the *Marbury* theory of judicial review made constitutional analysis relatively simple and straightforward, we cannot turn back the clock—and will not, and should not. The critical question for today is whether an alternative theory is available that will preserve the legitimacy of constitutional innovation by the Court, and hence preserve judicial review itself.

## II. Proof of the Pudding

To illustrate the difference between Raoul Berger's position and my own, I shall devote the rest of this discussion to analytical comment on the widely discussed case of *Regents of the University of California v. Bakke*,<sup>67</sup> decided by the Supreme Court on June 28, 1978. Along with a growing number of more obscure but nonetheless more important decisions,<sup>68</sup> the *Bakke* case shows that the Court is not on a healthy course. The Berger approach, I believe, can respond to those decisions only with diffuse condemnation, not discriminating criticism. The doctrine of implied judicial power sheds light on a way out; the Berger doctrine of "original understanding" offers only a way back to a past to which nobody wants to return. One promises social health, the other the tranquility of the sickbed.

At the outset, however, let us acknowledge indebtedness to Raoul Berger for his painstaking historical study. He has presented the Fourteenth Amendment's legislative history in thoroughly readable form—

---

afford little guidance for [a] particular decision," *id.* at 290 n.9, he speaks to the problem addressed in his lecture and not to the problem addressed here. The usefulness of his prescription of detailed criteria for judges to apply in deciding particular cases depends on what may be called their "court-worthiness"—that is, on whether such criteria would in fact control decision, as he supposes, or merely provide a convenient framework for rationalizing any desired result. That question would provide a fit subject for another article. On the separate question of whether judges should consider themselves bound by rules of decision prescribed by other (elected) organs of government, Professor McDougal does not indicate what approach he thinks provides more guidance than BY WHAT RIGHT?—or, indeed, as much. Moreover, as I have said, he does not focus on the legitimacy problem at all.

67. 438 U.S. 265 (1978).

68. *E.g.*, *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978); *Beal v. Doe*, 432 U.S. 438 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Craig v. Boren*, 429 U.S. 190 (1976); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

I do not by any means suggest that the *results* reached in all of the cited cases are open to criticism.



so much more tractable than the wearisome, repetitive pages of the *Congressional Globe*. In two respects this historical review is especially valuable. First, it shows the central place that the privileges or immunities clause was expected to occupy—a place that the Court's opinion in the 1873 *Slaughter-House Cases*<sup>69</sup> wrongly denied it. Had it not been for that decision, the clause would have served as a major fountainhead of congressional power.<sup>70</sup> Second, it vividly recalls that fear and hatred of the blacks, which Berger labels "Negrophobia," was rampant throughout the nation in 1868.<sup>71</sup> This review of the legislative debates is useful both to remind us how far (though, alas, how slowly!) we have moved toward a nonracial society, and to memorialize a shameful chapter in our history as did the Nuremberg trials and the Eichmann prosecution, so that new generations of Americans will also vow, "Never again!"<sup>72</sup>

The *Bakke* decision is the latest chapter in a five-year saga of burgeoning judicial activism that began, after earlier premonitory rumblings,<sup>73</sup> with the 1973 abortion decisions.<sup>74</sup> Analysis of the *Bakke* ruling calls for as much stamina and imperviousness to weeping as does the peeling down of a particularly pungent onion. One must identify the distinct legal strata that have been laid down over more than a century of constitutional adjudication concerning the nation's commitment to racial equality—each new stratum resting on the decayed but persistent detritus of those that preceded it. There was but one significant exception, namely the desegregation decisions beginning with *Brown v. Board of Education*,<sup>75</sup> which repudiated the "separate but equal" doctrine announced in *Plessy v. Ferguson*.<sup>76</sup>

This preparatory survey, essential to an understanding of the problem that faced the Court in *Bakke*, is in itself difficult enough. Objectively evaluating time-honored precedent is an uncomfortable task. The gentle genius Cardozo put it best: "Not lightly vacated is the ver-

---

69. 83 U.S. (16 Wall.) 36 (1873).

70. GOVERNMENT BY JUDICIARY at 37-51; BY WHAT RIGHT?, *supra* note 29, ch. XII; Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U.L.Q. 405.

71. GOVERNMENT BY JUDICIARY at 10-16 *et passim*.

72. It has been suggested that the recent litigation concerning the plan of the Nationalist Socialist Party of America to march in Skokie, Ill., *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill.), *aff'd* 578 F.2d 1197 (7th Cir.), *cert. denied*, 436 U.S. 953 (1978), may have the same eventual result. Safire, *Marching Through Skokie*, N.Y. Times, Mar. 27, 1978, at 19, col. 1.

73. BY WHAT RIGHT?, *supra* note 29, at 13-14.

74. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

75. 347 U.S. 483 (1954).

76. 163 U.S. 537 (1896).

dict of quiescent years."<sup>77</sup> But there is more. In discussing the *Bakke* case I must remember to be terse. Millions of words have been written about it<sup>78</sup> (none by me); billions more will doubtless be written. Here I must observe the limits set by my purpose, which is evaluation of the Berger approach to constitutional law. Four points are to be touched upon: (1) formulation of the problem that faced the Court, including a consideration of what alternatives it had; (2) evaluation of the Court's resolution of that problem, entailing a judgment as to which of the alternatives (if any) would have been wiser than the one it adopted; (3) comment on the Justices' technical craftsmanship, as evidenced by the decision and the several opinions; and finally, (4) admeasurement of the substantive quality of the Court's performance against the basic value of judicial review—the bridging of dangerous social schisms such as those resulting from race, religion and nationality that are too broad to be healed through majoritarian legislation, at least for the time being.<sup>79</sup>

I shall deal with the first point by simply asserting eleven propositions with a bare minimum of explanatory comment. Several of the eleven I realize are controversial; the first two may be disputed by some scholars, and the fourth is still disputed by most of them—a weakness that I have reason to hope will be temporary, because this proposition enjoys at least the partial support of Raoul Berger's formidable historical research. The eleven propositions are as follows:

(1) The primary purpose of the Fourteenth Amendment was to assure the constitutionality of the 1866 Civil Rights Act<sup>80</sup> (enacted over the veto of President Andrew Johnson, who denied that the Thirteenth Amendment empowered Congress to pass it<sup>81</sup>—a position which many members of Congress uneasily conceded might be sound)<sup>82</sup> and to protect the substance of the Act from repeal after the Democratic Party regained control of Congress.<sup>83</sup>

(2) The substance of the 1866 Civil Rights Act was to wipe away the vestiges of slavery as a *social* institution (the Thirteenth Amend-

77. *Coler v. Corn Exch. Bank*, 250 N.Y. 136, 141, 164 N.E. 882, 884 (1928), *aff'd* 280 U.S. 218 (1930).

78. See, e.g., Ely, *The Supreme Court, 1977 Term—I. Constitutional Law*, 92 HARV. L. REV. 57, 131 (1978).

79. BY WHAT RIGHT?, *supra* note 29, at 38-43.

80. GOVERNMENT BY JUDICIARY at 23; BY WHAT RIGHT?, *supra* note 29, at 197.

81. *Id.*

82. See note 80 *supra*.

83. C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-1868, pt.1, at 1285 (1971).

ment having abolished it at least as a *legal* institution) by declaring native-born nonwhites as well as whites to be United States citizens and providing them with federal protection for the central substantive rights appurtenant to the status of citizen: "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."<sup>84</sup> The Act was couched in terms of prohibitions against discrimination ("shall have the same right . . . as is enjoyed by white citizens") but the practical effect was to put a substantive floor under the new status of freedmen since no one supposed that white citizens would ever be stripped of any of these central rights.

(3) Of the three main clauses contained in section 1 of the Fourteenth Amendment<sup>85</sup>—the privileges or immunities clause, the due process clause, and the equal protection clause—only the first was designed to afford protection of substantive rights; the others were intended merely to be auxiliary to it.<sup>86</sup>

(4) In the 1873 *Slaughter-House Cases*,<sup>87</sup> the Supreme Court's first Fourteenth Amendment decision, the Court perverted the Amendment's leading purpose, and virtually beheaded it, by vitiating the privileges or immunities clause through an artificial and indefensible "interpretation."<sup>88</sup> There would be little ground for criticism if the Court had done no more than render that clause unavailable as a self-executing mandate to the courts—a probably justifiable position that would have been enough to support the *result* in the *Slaughter-House Cases*. But it did far more: it disabled *Congress* from clearing away the vestiges of slavery under the legislative authority granted by section 5 of the Amendment<sup>89</sup>—a wretchedly wrongheaded position which amounted to a hand-washing in the manner of Pontius Pilate, remitting the freedmen to the tender mercies of state governments controlled by

---

84. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866).

85. Section 1 of the Fourteenth Amendment reads in full: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

86. GOVERNMENT BY JUDICIARY at 18; Kurland, *supra* note 70, at 406; BY WHAT RIGHT?, *supra* note 29, at 181-82, 202.

87. 83 U.S. (16 Wall.) 36 (1873).

88. GOVERNMENT BY JUDICIARY at 37 *et seq.*; BY WHAT RIGHT?, *supra* note 29, at 188 *et seq.*

89. Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

their former owners, and which led to a full century of delay in beginning real progress toward a nonracial society.<sup>90</sup>

(5) The 1883 *Civil Rights Cases*,<sup>91</sup> following inexorably from the *Slaughter-House* precedent,<sup>92</sup> held that Congress lacked power to forbid racial discrimination in privately owned places of public accommodation such as inns, theaters, railroad trains, and river steamers.<sup>93</sup> Thus, only the state and local governments—for example, those of Georgia, Alabama and Mississippi, and of Richmond, Charleston and New Orleans—were left with constitutional power to protect blacks from private racial discrimination. Beyond this, the Court took a second step, the importance of which is not generally recognized. It opposed the great weight of its own prestige to the view that blacks should continue to be given more help than other socially isolated groups in overcoming the handicap of minority status.<sup>94</sup> The Court thus held that the heritage of chattel slavery had lost its social significance (patently false, even today, as most people can discern simply by examining their own attitudes), ignoring the historical fact that the plight of the huge black minority had been a primary cause of the one real threat to the nation's survival, and that the solution written in blood at Bull Run, Shiloh, Antietam and Gettysburg, and formalized in the Emancipation Proclamation, had been enshrined in the Thirteenth, Fourteenth and Fifteenth Amendments as a part of our organic law.<sup>95</sup> By thus ignoring history, the Court condemned us to repeat it.

(6) In 1896, *Plessy v. Ferguson*<sup>96</sup> applied the clincher. The Court there held that official segregation of the races is constitutional if equal facilities are made available to members of each race.<sup>97</sup>

(7) For more than half a century the unassimilated black minority smoldered toward eruption. After World War II, when Adolf Hitler had shown us the ugly consequences of officially endorsed racial supremacy, when blacks had proved once more their valor in defense

---

90. BY WHAT RIGHT?, *supra* note 29, at 203 *et seq.*

91. 109 U.S. 3 (1883).

92. BY WHAT RIGHT?, *supra* note 29, at 203-05.

93. For an account of subsequent developments, *see generally* C.V. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

94. 109 U.S. at 25: "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . ."

95. *See* *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70-71 (1873). This historical summary, contained in the majority opinion, evoked no dissent.

96. 163 U.S. 537 (1896).

97. *Id.* at 544.

of the nation, and when the Communist Party had begun to benefit from its loud insistence on racial equality, the Court began to relent.<sup>98</sup> In 1948 it denied enforcement to restrictive racial covenants,<sup>99</sup> and in 1953 it outlawed them.<sup>100</sup> In 1954, in *Brown v. Board of Education*,<sup>101</sup> it repudiated the “separate-but-equal” doctrine of the *Plessy* case as applied to public schools, but left untouched, then and thereafter, the equally important second point in the 1883 *Civil Rights Cases*,<sup>102</sup> thus equating blacks with all other minorities.

(8) In 1955 the Court watered down *Brown v. Board of Education* by promulgating the “deliberate speed” doctrine,<sup>103</sup> and the school desegregation process consequently remained at a virtual standstill in the deep South for the next decade.<sup>104</sup> Finally, in 1964, the Court in effect, though not in words, repudiated the state action requirement of the 1883 *Civil Rights Cases*<sup>105</sup> and gave Congress a green light for statutory prohibition of racial discrimination in privately owned places of public accommodation.<sup>106</sup> Congress promptly enacted the broad Civil Rights Act of 1964.<sup>107</sup> However, because the state action requirement had not been explicitly disaffirmed, the statute was grounded both on the commerce clause, whose reach had been greatly expanded since 1937,<sup>108</sup> and on section 5 of the Fourteenth Amendment.<sup>109</sup> It thus offered the Court a choice of two rationales, only the latter of which embodied a bold affirmation that all private racial discrimination in employment and places of public accommodation is contrary to national policy. The Court, with equal promptitude, upheld the public accommodations provisions later that year, with most of the Justices opting for the commerce clause rationale and thus leaving the state action requirement of

---

98. BY WHAT RIGHT?, *supra* note 29, at 113-14, 211 *et seq.*

99. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

100. *Barrows v. Jackson*, 346 U.S. 249 (1953).

101. 347 U.S. 483 (1954).

102. *See* text accompanying note 94 *supra*.

103. *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (implementation decision).

104. Lusk, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1171-72 (1963), *reprinted in* SOUTHERN JUSTICE 255 (L. Friedman ed. 1965).

105. *See* text accompanying note 93 *supra*.

106. *Bell v. Maryland*, 378 U.S. 226 (1964) (3-3-3 decision in a sit-in case, with six Justices agreeing that Congress has power to prohibit racial discrimination in privately owned places of public accommodation); *see* BY WHAT RIGHT?, *supra* note 29, at 234.

107. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975-1975d, 2000a-2000h-6 (1976)). *Quaere* whether the relationship between the *Bell* decision and the 1964 Act was *propter hoc* or merely *post hoc*.

108. *See, e.g., Stern, The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645 (1946).

109. *See* note 89 *supra*.

the 1883 *Civil Rights Cases*<sup>110</sup> still not explicitly disaffirmed.<sup>111</sup> The 1964 Act also followed the idea of denying special treatment to the black minority;<sup>112</sup> it prohibited *all* racial discrimination as well as discrimination based on religion or national origin or, in the case of employment, sex.

(9) In 1968, the Court inaugurated a school desegregation doctrine that has led to grotesquely destructive results. Evidently exasperated by the slowness of desegregation under the aegis of "deliberate speed," it declared that the time for deliberateness had ended.<sup>113</sup> In what amounted to a misdirected reaction as well as an over-reaction to Southern obstructiveness, and a bold revision of history, it declared that *Brown v. Board of Education* required not merely the removal of official barriers to school desegregation but also the establishment of "unitary" school systems in school districts where racial segregation had been officially enforced. The actual decision in *Green v. County School Board*,<sup>114</sup> where the "unitary school" doctrine made its appearance, was sound enough.<sup>115</sup> The broad logic of the opinion, however, has been applied to substitute a mechanical formula for intelligent pursuit of the strategic objective—dissolution of racial stereotypes<sup>116</sup>—and wantonly to wreck a number of local public school systems and outrage the communities they serve. Boston, though perhaps the best known example, is by no means the only one.<sup>117</sup>

---

110. See text accompanying note 93 *supra*.

111. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). Justices Douglas and Goldberg, in concurring opinions, expressed their preference for the Fourteenth Amendment rationale. 379 U.S. 241, 279 (Douglas, J., concurring); 379 U.S. 241, 293 (Goldberg, J., concurring).

112. See text accompanying note 94 *supra*.

113. *Green v. County School Bd.*, 391 U.S. 430, 439 (1968).

114. 391 U.S. 430 (1968).

115. A rural county in eastern Virginia, where there was no residential segregation, had two schools. Each of them served the whole county. The school system served about 1300 pupils, of whom about 740 were black and the rest white. A "freedom of choice" plan had resulted in almost complete racial segregation. A plan establishing two attendance zones would have the effect of decreasing, not increasing, the amount of busing required. 391 U.S. at 432-35, 442 n.6 (1968).

116. See Lusky, *The Stereotype: Hard Core of Racism*, 13 BUFFALO L. REV. 450 (1964). See also G. ALLPORT, *THE NATURE OF PREJUDICE* (1954).

117. See, e.g., N.Y. Times, May 30, 1978, § A at 8, col. 1 ("A Palo Alto elementary school, praised as a model of successful integration, has been ordered closed—to maintain racial integration. A San Francisco elementary school, also known for its innovative multicultural program, was barely saved from closing in a recent district-wide reorganization plan designed to insure racial balance."); report of David J. Armor of the Rand Corporation, *White Flight, Demographic Transition and the Future of School Desegregation*, presented at meeting of the American Sociological Association (September, 1978), published in Wash.

(10) In 1976, the Court overreacted once again, this time to the egalitarian excesses that had taken place in desegregation and other cases since 1968. In *Washington v. Davis*,<sup>118</sup> an employment discrimination case, it announced another new doctrine: that the *self-executing* effect of the equal protection clause is to forbid racial discrimination only if the discrimination is "intentional," though *Congress* can validly prohibit action which has the effect of putting one race at a disadvantage even if the intention to do so is not proved.<sup>119</sup> This doctrine has since been applied in other areas, such as exclusionary zoning and legislative reapportionment.<sup>120</sup>

(11) Finally, in 1977, the Court encountered for the first time an official effort to favor nonwhites<sup>121</sup> at the expense of another minority. In *United Jewish Organizations v. Carey*,<sup>122</sup> involving the revision of state legislative districts in Brooklyn, it held that effort constitutional. The Justices expressed a bewildering array of divergent views, four of them saying that Congress has power to accord special treatment to nonwhites and the others either disagreeing or remaining silent on this question. Justice Marshall abstained entirely.

In the *Bakke* case, the Supreme Court of California had held that Allan Bakke, a white applicant, had been denied the equal protection of the laws when he was excluded from admission to a state medical school (University of California at Davis) which reserved a quota of 16 places for blacks, Chicanos, Asians, and American Indians in its entering class of 100 if as many as 16 such nonwhites who applied for preferential treatment satisfied certain minimum requisites for

---

Post, Aug. 23, 1978, § A, at 6, col. 1. See also *Milwaukee Schools Found Biased*, N.Y. Times, June 2, 1978, § A, at 12, col. 5. Cf. *id.*, June 6, 1978, § A, at col. 5.

118. 426 U.S. 229 (1976).

119. This doctrine was adumbrated in *Snowden v. Hughes*, 321 U.S. 1 (1944), so far as it concerns the requirement of "intentional" discrimination to make out a violation of the equal protection clause, but any such requirement was explicitly abandoned in *Baker v. Carr*, 369 U.S. 186, 226 (1962). See BY WHAT RIGHT?, *supra* note 29, at 132-33.

120. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (legislative reapportionment); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (exclusionary zoning).

121. The nonwhites consisted of blacks, Puerto Ricans, and a small number of other nonwhites such as orientals. As will appear, I think it may be material to distinguish between discrimination in favor of blacks and discrimination in favor of other nonwhites; that is to say, I believe that in view of the history of the Civil War Amendments Congress should be held to have power to authorize discrimination in favor of blacks while not thus favoring other nonwhites. On the other hand, since the words of the Amendments do not single out blacks, I doubt that the self-executing effect of their provisions should lead to special treatment for blacks, or for other nonwhites, any more than for whites. Cf. BY WHAT RIGHT?, *supra* note 29, at 246, 335.

122. 430 U.S. 144 (1977).

consideration.<sup>123</sup> The California Court also enjoined the school from considering race as a factor in the future administration of its admissions system.<sup>124</sup> The 1964 Civil Rights Act forbade the states to engage in racial discrimination in federally financed education,<sup>125</sup> but the Supreme Court of California did not rely on the federal statute in reaching its decision. The United States Supreme Court's task was to decide whether this quota system favoring nonwhites violated either the 1964 Act or the equal protection clause, and whether the California Court had erred in holding that the equal protection clause forbids consideration of race as a factor in future admissions.

No precedent bore squarely on the issues facing the Court. It had held that the equal protection clause does not, of its own force, forbid "unintended" (probably meaning "unwanted") though foreseen disadvantage to racial groups, white or nonwhite, in employment,<sup>126</sup> zoning,<sup>127</sup> and legislative apportionment<sup>128</sup> cases, but these decisions did not involve the 1964 Civil Rights Act. On the other hand, in one of the foregoing cases<sup>129</sup> the Court had declared in considered dictum that Congress has the power to broaden the coverage of the equal protection clause by forbidding "unintended" but actual disadvantage to nonwhites in employment. And in the legislative apportionment case,<sup>130</sup> involving the 1965 Voting Rights Act rather than the 1964 Act, the Court had held that Congress had validly authorized official action favoring nonwhites at some "unintended" but foreseen cost to a white religious minority.<sup>131</sup> Thus, the Court had to break new ground in deciding whether the California Supreme Court had erred in holding, on federal grounds, that the exclusion of Allan Bakke was illegal and that the medical school could not consider race as a factor in future admissions.

Underlying the issues facing the Supreme Court in *Bakke* were

---

123. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

124. *Id.* at 38, 553 P.2d at 1155, 132 Cal. Rptr. at 683.

125. Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

126. *Washington v. Davis*, 426 U.S. 229 (1976).

127. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

128. *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).

129. *See* note 126 *supra*.

130. *See* note 128 *supra*.

131. The effect of the legislative redistricting upheld in *United Jewish Organizations v. Carey* was to diminish the political strength of a community of Hasidic Jews.



deeper questions, the answers to which could have pointed the way to a wise resolution of the controversy:

(1) Ought the Court to reaffirm, at long last, what it had proclaimed in 1873 but denied in 1883 and thereafter, namely that the primary purpose of the Civil War Amendments was extirpation of the cultural residues of *slavery*? Reaffirmation of that proposition would imply recognition that blacks, as descendants of slaves, still suffer a special handicap presently *justifying* favored treatment by Congress—though favored treatment is not constitutionally required, and indeed may often be against the interests of blacks themselves. (That reaffirmation is, I think, long overdue.)

(2) Ought the Justices to confess that the Court itself, because of its misinterpretation of the Fourteenth Amendment in the 1873 *Slaughter-House Cases*, the 1883 *Civil Rights Cases*, and the 1896 ruling in *Plessy v. Ferguson*, bears primary responsibility for the nation's slowness in making good the national commitment to extirpation of the remnants of slavery—a commitment formally embodied in the Civil War Amendments? Only such a confession would open the way to acknowledgment of the extent to which blacks have suffered unjustly at the hands of the nation, and recognition of a national obligation to repair the wrong. (That acknowledgment is, I think, also long overdue.)

(3) If it be granted that the nation as a whole owes an obligation to blacks, how can that obligation rightly be satisfied? Must the cost be borne by the nation as a whole, as through expenditure of general revenues for special training, work, housing, education, and social services needed to make up the lost century?<sup>132</sup> Or can the cost rightly be loaded upon a relatively few unlucky whites who, like Allan Bakke, must be shouldered aside if the state and local governments and their public institutions such as universities are required or invited to assume a burden that properly belongs to the whole national community? (The second alternative, I think, is acceptable only if two wrongs make a right.)

(4) Let us assume that the second of the alternatives just mentioned will be deemed unacceptable on the simple ground that whites like Allan Bakke bear no more responsibility for slavery and its aftermath than do the progeny of Yankee ship owners who fattened on the slave trade, or the progeny of Southern planters who fattened on slave

---

132. There is precedent, in the G.I. Bill of Rights and other veterans' programs, for assistance of this kind to those who have suffered or been placed at a relative disadvantage by reason of the execution of governmental policies.

labor. Then should it make a difference that the advantage to non-whites has resulted from the open, unselfconscious operation of a numerical quota system rather than the covert, hard-to-prove disingenuousness of "affirmative action" programs that take race into account "but only as one factor out of many"? (It is less than twenty years since covert *anti*-black discrimination through similar administrative abracadabra formed an effective barrier to implementation of *Brown v. Board of Education*—almost to the point of nullification.)<sup>133</sup>

The reader will have had little difficulty in divining how and on what rationale I think the *Bakke* case should have been decided. I believe that the self-executing effect of the equal protection clause should not have been passed upon, because Congress had acted: it had forbidden racial discrimination in federally financed education in the 1964 Civil Rights Act. Whether that statute be interpreted as reinforcing the equal protection clause and extending its reach, or as narrowing its scope by *permitting* anti-white discrimination that the equal protection clause would otherwise have been held to forbid, I submit that section 5 of the Fourteenth Amendment empowered Congress to enact it, previous dicta to the contrary notwithstanding.<sup>134</sup>

On the question of statutory interpretation, I know of nothing in the legislative history—at least as canvassed in the supplemental briefs that the Court invited and in the several opinions of the Justices—to suggest that Congress, in enacting the 1964 Act, was attempting to deal in any way with the allocation of the cost of repairing the effects of the century of neglect. It is doubtless true that discrimination *against* non-whites was the dominant concern of Congress. It may also be true, though this is intrinsically unprovable, that Congress if asked would have declared that discrimination *in favor of* nonwhites is consistent

---

133. See Lusky, *supra* note 104, at 1167 *et seq.*

134. In a footnote to his opinion for the Court in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), Justice Brennan—having held that Congress has power under section five of the Fourteenth Amendment to broaden the reach of the equal protection clause—declared: "Contrary to the suggestion of the dissent, . . . § 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Id.* at 651 n.10. Justice Brennan's premise appears to be too narrow to support his conclusion. At least in some cases, the effect of "broadening" the equal protection clause to favor one group will work a corresponding disadvantage on one or more others; and, as to them, the reach of the clause will be restricted. In *Katzenbach v. Morgan* itself, the effect of upholding a federal statute banning English-language literacy tests for Puerto Ricans (which the Court was not willing to prohibit under the self-executing effect of the equal protection clause) was to dilute the vote of others.

with national policy. But that question does not appear to have been raised in the debates on Title VI, perhaps because anti-white discrimination in federally financed programs seemed at that time to be so far in the future. Moreover, neither the 1964 Act nor its legislative history evidences the careful modulation—limitations based on circumstances and temporal duration—that should have, and probably would have, accompanied Congressional approval of racial inequality in the short run to achieve racial equality in the longer run.

In my opinion, Congress therefore cannot rightly be thought to have *authorized* anti-white discrimination in federally financed education. Nor do I see any basis for the utterly remarkable proposition that Congress intended to authorize covert but not overt anti-white discrimination in federally financed education; in 1964 the consequences of covert anti-black discrimination through sophisticated administrative “plans” were too painfully evident to be overlooked or used as a model for civil rights legislation.<sup>135</sup> I conclude that Congress intended the words of the 1964 Act to carry their usual meaning—that federally financed education was not to be affected by any racial discrimination, overt or covert—and that the California decision should therefore have been affirmed.

Before examining the Court’s actual disposition of the case, which was based on reasoning quite different from that which I have sketched, it is appropriate to point out that the implied judicial power doctrine combines the firmness the Court needs for enforcement of national commitments where the states and the other two federal branches cannot do as good a job, with the flexibility it needs for submission to the political branches in areas where their competence is superior. The delicate problem of making up for the long delay in moving toward the promised land, in which skin color will be regarded with no more interest or concern than hair or eye color, calls for the most careful continuing modulation with respect to time, place, and subject matter. Congress appears to be as sensitive now to the dangers inherent in racial prejudice as were the Congresses that enacted the several civil rights acts in the decade that followed the Civil War. (The Court can claim primary credit for that renewed sensitivity, by reason of its increasingly firm condemnations of white supremacist action since World War II,<sup>136</sup> and Congress will probably remain sensitive,

---

135. For example, Virginia’s “massive resistance” to school desegregation was just being dealt with by the Court. *See, e.g., Griffin v. County School Bd.*, 377 U.S. 218 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

136. BY WHAT RIGHT?, *supra* note 29, at Ch. XIII.

because the Court has at long last encouraged enfranchisement of blacks<sup>137</sup> and has opened the channels of political expression to them.<sup>138</sup>) Had the *Bakke* case been decided on the reasoning I have proposed, Congress would be entirely free to authorize such affirmative action programs as it deemed wise, while avoiding the adverse effect on a few unlucky whites, one would hope, by providing federal funds for expanding the opportunities of blacks and perhaps (though not necessarily) other nonwhites, without reducing the opportunities of others.

Those scholars who approve whatever innovations may from time to time seem desirable to a majority of the Justices, for "modernization" of the Constitution,<sup>139</sup> might have had little difficulty in proposing a judicial *modus operandi* and formulating a rationale for an opinion of the Court in the *Bakke* case. The logic of their position seems consistent with a simple procedure under which the Justices would take a vote and count heads in favor of affirmance, reversal, or remand for further findings, and then construct a constitutional rule adequate to serve as a major premise for the desired result. That rule could be sweeping if, as in *Brown v. Board of Education*,<sup>140</sup> five or more Justices agreed on a broad formulation, or, if they did not, it could be narrow. My objection would be, of course, that adoption of that approach would destroy the special utility of judicial review. The Court would be, and would soon be recognized as being, not the guardian of those basic national commitments which, together with the text, comprise our Constitution, but simply another legislative house. No longer would judicial review be available to bridge social schisms too deep to be healed through the give and take of legislation.<sup>141</sup>

Raoul Berger and others (if any)<sup>142</sup> who would bound the Fourteenth Amendment by the horizons of those who adopted it, would also have had little difficulty in proposing a judicial *modus operandi* and formulating a rationale for an opinion of the Court in the *Bakke* case. He (or they) would assert simply that the Amendment was adopted at a time of severe "Negrophobia" and that it was intended to do no more than provide for color-blind treatment of racial groups—either through its self-executing effect or through its authorization of Congressional action.<sup>143</sup> My objection to this approach would be that both Court and

---

137. *Id.* at 234-42.

138. *Id.* at 247.

139. See text accompanying notes 41-42 *supra*.

140. 347 U.S. 483 (1954).

141. BY WHAT RIGHT?, *supra* note 29, at 41-42.

142. See text accompanying note 45 *supra*.

143. See text accompanying note 71 *supra*. Actually, Berger argues that the Amendment

Congress would be left powerless to satisfy, through legitimation of affirmative action or otherwise, the national obligation to do what can be done to retrieve the century lost.

In examining the Court's actual disposition of the *Bakke* case, to which I now turn, the foregoing discussion permits me to be brief. No opinion gained majority acceptance. Indeed, no fewer than *eight* Justices dissented; only Justice Powell had the pleasure of seeing his views prevail. Each of his eight colleagues concurred in part of his opinion and not the rest of it, but four of them concurred in one part and a different four in the other. The Justices produced a total of six opinions, including that of Justice Powell, none of which was an "opinion of the *Court*" and only one of which—Justice Powell's—serves as an accurate memorandum of the reason for affirmance of the California Court's judgment in favor of Alan Bakke and reversal of its judgment forbidding consideration of race in future admissions.

Four members of the Court, Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens, joined in a single opinion authored by Justice Stevens.<sup>144</sup> Their view was that the 1964 Civil Rights Act forbids racial discrimination of the overt type exemplified by the medical school's quota system, so that the California judgment should be affirmed. They reserved judgment as to the validity of affirmative action programs that consider race as one of several material factors, which I have characterized as programs of covert discrimination,<sup>145</sup> since they understood the California judgment to contain no injunction against consideration of race in future admissions other than Bakke's. The logic of Justice Stevens' opinion, however, points to the invalidity of affirmative action programs involving covert racial discrimination.

Four other members of the Court, Justices Brennan, White, Marshall and Blackmun, disagreed *toto caelo*. Amongst them, they wrote a total of four opinions.<sup>146</sup> Their view, with minor variations of emphasis and detail,<sup>147</sup> was that the 1964 Act was not intended to change the

---

was not intended to guarantee even color-blind treatment except with respect to a "limited group of privileges." *See, e.g.*, GOVERNMENT BY JUDICIARY at 166-67, 173, 191.

144. 438 U.S. at 408-21.

145. For an explanation of this characterization, *see* text accompanying notes 151-55 *infra*.

146. Justices White, Marshall and Blackmun all concurred in Justice Brennan's opinion, 438 U.S. at 324, and each of the three also delivered an individual opinion of his own. *Id.* at 379, 387, 402.

147. Justice White, in his separate opinion, disagreed with all of his colleagues on the question whether individuals, such as Bakke, have standing to complain of violations of Title VI of the 1964 Civil Rights Act. He concluded that they do not have standing, but this conclusion did not affect his vote. *Id.* at 379-87. Justice Marshall, in his separate opinion,

scope of the equal protection clause and so is congruent with it, that the equal protection clause makes official racial discrimination presumptively, but only presumptively, unconstitutional, and that affirmative action programs designed to overcome substantial underrepresentation of nonwhite minorities in the medical profession—including but by no means limited to the medical school's quota system—possess sufficient public value to overcome the presumption of invalidity and render them lawful. They therefore voted for reversal.

Justice Powell agreed and disagreed with both groups. He agreed with the second on all points except in his view that the *particular type* of affirmative action program used in Bakke's case—a rigid, numerical quota system, involving discrimination that I have characterized as overt—is “unnecessary” for achievement of the legitimate objectives of diversifying the student body and increasing the number of nonwhite physicians, and hence fails to overcome the presumption of invalidity to which racial discrimination is subject. Thus he cast his vote with the first group for Bakke's admission; but he voted with the second group to reverse the injunction against consideration of race in future admissions.

The foregoing discussion of the case would be incomplete if I were not to reveal my evaluation of the Court's handiwork. Yet, because it has only indirect relevance to the subject matter of the present symposium, evaluation must be limited to the bare statement of a number of observations, reserving full argument and explanatory documentation for another occasion. Even thus limited, I hope and believe that my observations will serve to highlight the immensity of the stakes in the choice between Raoul Berger's approach to the application of the Fourteenth Amendment and other approaches that I have discussed.

Where, as here, the views of the Justices are fragmented so thoroughly that eight of them dissent and six opinions are written—none of which speaks for a majority of the nine, so that there is no “opinion of the Court”—it is hard to see why any opinions should be published at all. The practice that is followed when the voting Justices divide 4-4 or 3-3, namely to announce the result without opinion,<sup>148</sup> has much to commend it here. The *Bakke* case's value as a precedent is minuscule;

---

emphasized the fact that the black minority has a basis for claiming special consideration, and the fact that the Court itself had been primarily responsible for the century of delay in honoring the purpose of the Civil War Amendments, to wipe away the vestiges of slavery. *Id.* at 387-402. Justice Blackmun, in his separate opinion, emphasized that minorities are significantly underrepresented in the medical and other professions. *Id.* at 402-08.

148. R.L. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 212 (5th ed. 1978).

it leaves open the legality of all affirmative action programs that are not substantially identical with the quota system used by the particular school involved in the case, and that type of program is apparently not common. The moral authority that enables the *Court* to resolve deeply divisive conflicts through judicial review does not appertain to the Justices individually. Be they wise as Solomon, the people regard them as mere non-elected individuals; general popular respect is reserved for the Court, and for the Constitution whose "ultimate interpreter" it claims to be.

Nor can the multiplicity of opinions be justified on the ground that it helps lawyers predict how the next case will be decided. At best, the counting of judicial votes is an uncertain and unreliable procedure as compared with analysis of mature doctrine embodied in an opinion of the Court. Moreover, some of the Justices have demonstrated their readiness to shift their positions from case to case. A lawyer examining the positions of Justices Brennan and Rehnquist in *United Jewish Organizations v. Carey*,<sup>149</sup> decided in 1977, might reasonably have predicted that their votes in the 1978 *Bakke* case would be the exact opposite of what they actually were; at least, that was *my* guess. (Could the intervening debate that saturated the media have played a part?)

The most obvious explanation for fragmentation of the Justices' views is that, as I have already suggested, they lack the guidance of agreed neutral principles. Some if not all of them seem to recognize the constraint of nothing outside themselves, to follow no star except each one's conception of the public welfare, and to regard themselves as masters rather than servants of the law.

As a resolution of the important conflict that the case presented, the *Bakke* decision was almost as great a failure as the Court's remarkable refusal to decide the *DeFunis*<sup>150</sup> case, on newly invented mootness grounds, four years before. The blacks have a large and legitimate grievance; so do whites who are called on to bear a disproportionate part of the cost of redressing that grievance. Both rightly invoke basic national commitments—extirpation of the vestiges of slavery on the one hand, equality of individual opportunity on the other. Still a third basic national commitment—preservation of academic freedom, as part of the freedom of speech and the right of peaceable assembly—is also implicated. The culprits who are responsible for the present state of affairs have long since absconded to the next world. The Court's strong voice is needed to point the way to realization of all three national

---

149. 430 U.S. 144 (1977).

150. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

commitments, as nearly as may be. Even a five to four decision could have called upon Congress to play the part that it alone is well equipped to play.

The Court could also have avoided the apparent legitimation of covert racial discrimination, which school administrators and public officials so avidly seized upon the moment the decision was handed down.<sup>151</sup> I realize that Justice Powell argued vigorously against the suggestion that "an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program."<sup>152</sup> I realize further that, in taking this position, he was accepting the view tendered by the *amicus curiae* brief of Columbia University, Harvard University, Stanford University and the University of Pennsylvania, and by Professor Archibald Cox who presented oral argument on behalf of the University of California. Finally, I confess I have heard that Justice Powell's opinion has won the admiring approval of more than one distinguished member of the federal courts of appeals.

Nevertheless, I am not alone in doubting that there is a significant difference between the overtly discriminatory admissions system that confronted Bakke and more "subtle" and "sophisticated" systems that would allow his exclusion through an exercise of administrative discretion based on consideration of race as one factor out of several.<sup>153</sup> Not one of Justice Powell's eight colleagues was willing to express approval of this central proposition, adoption of which enabled him to occupy the position of lone "swing man." One cannot know what led the eight other Justices to withhold their approval, but it is easy to hypothesize a reason: Justice Powell seemed able to adduce in support of his view only an assumption of *good faith* on the part of admissions officers: "[A] court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system."<sup>154</sup> But this assumption is open to the most serious doubt. Much of the massive Southern resistance to public school desegregation was accomplished, with long-continued success, through resort to facially nondiscriminatory plans that included large room for the exercise of administrative

---

151. See, e.g., N.Y. Times, June 29, 1978, § A at 1, col. 4; *id.*, June 30, 1978, § A at 1, col. 4; 4 COLUM. UNIV. REC. No. 1, at 1, col. 1 (July 18, 1978); Huffman, *EEOC Ignores Bakke Loopholes in Affirmative Action Guides*, 1 LEGAL TIMES No. 10, at 2, col. 1 (August 7, 1978).

152. 438 U.S. at 318.

153. My doubt is not a new one. See BY WHAT RIGHT?, *supra* note 29, at 3.

154. 438 U.S. at 318.



discretion.<sup>155</sup> The same is true in other areas, such as the use of literacy tests for would-be voting registrants.<sup>156</sup> In short, however sincerely Justice Powell may have believed that administrators are *sans peur et sans reproche*, history does not seem to be on his side. If his position necessarily implies approval of systems that provide a fertile matrix for racial discrimination, it is not unfair to say that he favors such a result even if he denies it; one is held responsible for the foreseeable consequences of his acts, though he may deplore them.

The Court's unnecessary and unwarranted failure to resolve the conflict presented by "reverse discrimination" can be expected to exacerbate rather than ease existing social tensions. Proponents as well as opponents of affirmative action find support in the outcome of the case. A great increase in litigation is predictable from the face of Justice Powell's opinion. Unless and until the Court does a better job, each different type of affirmative action program must pass judicial muster as being "necessary" before its legality *vel non* can be known.

The Court has thus neglected the basic value of judicial review,<sup>157</sup> and has further jeopardized its status as legitimate keeper of the Constitution.

### Conclusion

What price must the Court pay to rehabilitate its threatened legitimacy? The price I propose—submission to the demands of the implied judicial power doctrine for (a) self-restraint and (b) articulation of the Court's *reasons* for claiming the final word on constitutional questions—may not be a light one. But the price that Raoul Berger insists upon—repudiation of much of the Court's most valuable work in such fields as racial discrimination, legislative representation, and criminal procedure—is far higher. In my opinion it is far higher than is necessary or right.

---

155. See Lusk, *supra* note 104, at 1167 *et seq.*

156. The dreary tale is related by Chief Justice Warren in his opinion for the Court in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

157. See *BY WHAT RIGHT?*, *supra* note 29, at ch. II.

