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STATIC HISTORY AND BRITTLE JURISPRUDENCE: RAOUL BERGER AND THE PROBLEM OF CONSTITUTIONAL METHODOLOGY†

ROBERT J. COTTRILL*

No constitutional development has had a more profound impact on the lives and sensibilities of ordinary Americans than the expansion of the Supreme Court's fourteenth amendment jurisprudence since the Second World War. The seeds of the now familiar post-war constitutional revolution were sown long before the Court's 1954 decision in *Brown v. the Board of Education of Topeka Kansas*¹ created large scale public awareness of new directions in the Court's jurisprudence. *Brown* helped usher in not only a new era in American race relations but also a new public realization that state actions directed towards individuals would receive a more thorough examination by the federal courts. That realization, welcome to some, anathema to others, has helped reshape and intensify a debate older than the Constitution itself. Since *Brown*, there has been a sustained popular interest in the workings of the Court rarely matched during other periods in American history.² While the Court has rarely, in its history, suffered from a lack of either popular or professional critics, the Supreme Court's post-war examinations of state abridgment of individual rights has struck some of the most intimate nerves in the American body politic. If the court's decisions in race relations,³ school prayer,⁴ criminal justice,⁵ abortion⁶ and other areas have represented a necessary expansion of liberties to many, these pronouncements have, to others, meant an interference in local, democratic prerogative, an unwarranted intrusion by a Supreme Court anxious to present personal belief as constitutional mandate.

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¹ 347 U.S. 483 (1954).

² The amount of popular commentary on the Warren and Burger Courts has been extensive, far too extensive to discuss here. It is significant that within the last decade the Supreme Court has been the subject of a highly popular journalistic expose, B. WOODWARD AND S. ARMSTRONG, *THE BROTHERS* (1979) [hereinafter cited as *THE BROTHERS*], and a stage and screen play, *First Monday In October*. (Paramount 1981). The commercial success of both works attests to the high degree of public interest in the inner workings, real or imagined, of the Court.

³ Since the Second World War, the Supreme Court has struck down state legislation mandating segregated school systems, see *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), supplemented 349 U.S. 294 (1955), has declared that anti-miscegenation statutes are unconstitutional, see *Loving v. Virginia*, 388 U.S. 1 (1967), and has also addressed the constitutionality of affirmative action programs, see, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

⁴ See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962).

⁵ See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Katz v. United States*, 389 U.S. 347 (1967); *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁶ *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

Raoul Berger⁷ presents the latter view. In *Government By Judiciary: The Transformation of the Fourteenth Amendment*⁸ and *Death Penalties: The Supreme Court's Obstacle Course*,⁹ Berger has taken aim at both the Warren and Burger courts, asserting that both have fundamentally exceeded their constitutional mandates, usurping decisionmaking power that is properly, indeed constitutionally, left to legislative bodies. Berger's critique is less a recitation of quarrels with individual decisions, though these two studies are not lacking in such disagreements, than it is an assault on the Court's decisionmaking processes. The Court, for Berger, has ignored or, perhaps even worse, distorted history. In Berger's view this distortion is a fatal flaw, a cardinal sin in a Court whose existence and power can only be justified by its strict adherence to the intentions of the Constitution's framers.

Berger's argument, steeped in historical detail, is designed to demonstrate the distance the Court has strayed from the original intentions of the Constitution's framers. His argument is an argument from first principles, a belief that neither desirability, nor indeed necessity of result, nor even the now established precedential value of Warren and Burger Court decisions, justifies what he views as a continued failure to recognize and give strict effect to the intentions of the framers of constitutional provisions.¹⁰ As such, Berger's writings constitute a brief for a methodology of constitutional interpretation,¹¹ a methodology fundamentally at odds with beliefs, long nurtured by the Court, of an evolving Constitution adaptable to a changing social environment, realizable by a syncretization of common-law reasoning processes with constitutional text.

This article examines *Government By Judiciary* and *Death Penalties*. Like Berger, this author assumes that historical examination is critical to the process of constitutional interpretation¹² and that the intentions of original framers must be given due effect. This essay will argue, however, that Berger's works are limited, perhaps fatally so, by a historical sensibility too narrowly focused to produce either a holistically accurate picture of the intent of constitutional framers or a workable derivative jurisprudence. This article will demonstrate that the framers of constitutional provisions, particularly the framers of the fourteenth amendment, recognized that they were laying a constitutional foundation on which the courts would develop doctrine, informed but not shackled by the necessarily

⁷ Raoul Berger is a retired Charles Warren Senior Fellow in American Legal History at Harvard Law School.

⁸ R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977) [hereinafter cited as *GOVERNMENT BY JUDICIARY*].

⁹ R. BERGER, *DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE* (1982) [hereinafter cited as *DEATH PENALTIES*].

¹⁰ *GOVERNMENT BY JUDICIARY*, *supra* note 8; *DEATH PENALTIES*, *supra* note 9.

¹¹ Berger's approach is generally cited as an example of that constitutional strategy called interpretivism. While that description is certainly accurate, this author would argue that Berger presents a peculiarly rigid variant of the interpretivist school. While interpretivism posits the necessity for the Court to confine its decisions to explicit or clearly implicit values in the written Constitution, Berger carries the process a step further. His methodology would not merely confine the Court to the framer's values, but to the specific problems the framers meant to address. For example, with Berger's analysis, there would be no room for the Court to develop corollaries of constitutional values such as the author outlines. See *infra* text accompanying notes 224-70. For two discussions of interpretivism, see Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *IND. L.J.* 399 (1978), and Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *HARV. L. REV.* 781 (1983).

¹² Many of Berger's critics have been too willing to concede his essential historical accuracy. See, e.g., Perry, *Book Review*, 78 *COLUM. L. REV.* 685-86 (1978). The discussion developed *infra* text accompanying notes 137-223, points out some of the deficiencies in Berger's historical argument.

narrow focuses of the drafters. This essay will be less a point by point critique of Berger's views on different cases than a critical examination of his uses of history in building his jurisprudence. The first part of this article contains a presentation of Berger's main arguments in both books. In the second part of the article, common-law reasoning within the context of the American Constitution is examined. The third part of the article provides a history against which the intentions of the framers of the fourteenth amendment may be interpreted. *Brown* is examined as a necessary corollary of the fourteenth amendment in the fourth part of the article. Berger's view of the eighth amendment's cruel and unusual punishment clause is critiqued in the fifth part of the article. The essay concludes with an overall critique of Berger's views in the sixth part of the article.

I. THE BERGER THESIS

Berger believes the Court has severely distorted the fourteenth amendment.¹³ Critical to the thesis in both *Government By Judiciary* and *Death Penalties* is the idea that the amendment's framers had narrow objectives that cannot legitimately be reconciled with the liberal constructions of the Warren and Burger Courts.¹⁴ Berger's framers were limited men. Products of a mid-nineteenth century American culture that was at once both strongly Negrophobic and fiercely jealous of state prerogatives, they sought no radical alteration of either the status of blacks or of federal-state relations.¹⁵ Aside from a radical minority, the fourteenth amendment's framers were simply interested in insuring a bare minimum of rights to the freedman.¹⁶ That minimum of rights, designed to provide a prophylactic against southern attempts virtually to re-enslave the freedmen through the use of the Black Codes,¹⁷ was meant to insure that the hard-won Union victory would not be thwarted by legal schemes designed to reinvigorate the South's moribund peculiar institution.¹⁸

For Berger, the principal, indeed the sole purpose, of the fourteenth amendment was to remove doubts concerning the constitutional legitimacy of the Civil Rights Act of 1866.¹⁹ In *Government By Judiciary*, Berger argues that that act was narrowly drawn with

¹³ Berger sets forth his view of the limited purposes of the framers of the fourteenth amendment early in both works. See GOVERNMENT BY JUDICIARY, *supra* note 8, at 10-19 and DEATH PENALTIES, *supra* note 9, at 15-28. For further elaboration of Berger's thesis see *infra* text accompanying notes 14-98.

¹⁴ See GOVERNMENT BY JUDICIARY, *supra* note 8, at 10-19; DEATH PENALTIES, *supra* note 9, at 15-28.

¹⁵ See GOVERNMENT BY JUDICIARY, *supra* note 8, at 10-19; DEATH PENALTIES, *supra* note 9, at 15-28.

¹⁶ See GOVERNMENT BY JUDICIARY, *supra* note 8, at 10-19; DEATH PENALTIES, *supra* note 9, at 15-28.

¹⁷ See GOVERNMENT BY JUDICIARY, *supra* note 8, at 10-19, DEATH PENALTIES, *supra* note 9, at 15-28. The Black Codes were statutes enacted by southern legislatures in 1865 and 1866. Designed to insure that the newly freed blacks would continue to provide labor for plantations and other enterprises, these codes made heavy use of vagrancy laws and forced labor contracts to coerce black labor. These laws were also designed to enforce a caste-like subordination. Blacks were subject to strict curfews. Under these statutes, the freedmen were not permitted to possess firearms and they had strict limitations on their rights to speak in public. Historian John Hope Franklin argues that these measures were, in effect, a continuation of the antebellum slave codes. See J. H. FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 232 (5th ed. 1980) [hereinafter cited as FROM SLAVERY TO FREEDOM].

¹⁸ GOVERNMENT BY JUDICIARY, *supra* note 8, at 22-36.

¹⁹ *Id.*

limited objectives.²⁰ That act, according to Berger, was designed to confer a specific set of civil rights on the freedmen.²¹ The statute declared blacks citizens.²² It allowed blacks to testify and sue in court, abolishing the legal disabilities common in the former slave states.²³ The act prohibited states from abridging the privileges and immunities of the freedmen.²⁴ Those privileges and immunities were not extensive, in Berger's view they simply served to insure fundamental rights, life, liberty, and the right to acquire, use and dispose of property.²⁵ The meager civil rights agenda of 1866 contemplated neither political rights nor social equality for the freedman.²⁶

But even that limited agenda was constitutionally suspect.²⁷ The Taney Court in *Dred Scott v. Sandford*²⁸ had cast serious doubt on black citizenship. And although Lincoln's Attorney General, Edward Bates, had written a series of opinions during the Civil War declaring that free blacks were citizens of the United States,²⁹ the issue was still unresolved. Congress' power to confer citizenship by legislation was suspect, as was its power to grant other rights to blacks, an area that had previously been the exclusive province of state governments.³⁰ Equally important was the shift in political climate after Lincoln's assassination. Andrew Johnson made little secret of his anti-black views³¹ and his desire to permit southern re-entry into the Union without federal interference on behalf of the freedmen.³² Even the limited Civil Rights Act of 1866 had to be passed over Johnson's veto.³³ The restoration of southern political rights could have caused the Act's repeal.³⁴ The fourteenth amendment was thus designed to overcome likely constitutional objections to the Civil Rights Act and to make it harder to repeal the newly acquired citizenship and rights.³⁵

Berger's view of the fourteenth amendment's limited purposes is derived from his approach to the debates over the amendment's passage and his reading of the history of racism in the United States.³⁶ That reading is grim. The original Constitution was racist

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ 60 U.S. (19 How.) 393 (1857).

²⁹ 10 Op. At'y Gen. 382 (1862); 11 Op. At'y Gen. 37 (1864).

³⁰ GOVERNMENT BY JUDICIARY, *supra* note 8, at 114.

³¹ See H. HYMAN AND W. WIECEK, EQUAL JUSTICE UNDER THE LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875 303, 418, 453 (1982) [hereinafter cited as EQUAL JUSTICE UNDER THE LAW]; E. MCKITTRICK, ANDREW JOHNSON AND RECONSTRUCTION (1960). For one interpretation that argues that Andrew Johnson's racism may have backfired and contributed to increased support for egalitarian measures in the thirty-ninth Congress see Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651, 657 (1979) [hereinafter cited as Soifer]. In light of Berger's contention that there was little support for black suffrage during the thirty-ninth Congress, it is interesting to note that by 1865, even Andrew Johnson gave lukewarm, private support to black suffrage in southern states as a means of supporting Unionist politicians in southern states. See EQUAL JUSTICE UNDER LAW, *supra*, at 309.

³² See EQUAL JUSTICE UNDER LAW, *supra* note 31, at 303, 418, 453.

³³ GOVERNMENT BY JUDICIARY, *supra* note 8, at 42.

³⁴ *Id.* at 23.

³⁵ *Id.* at 22-36.

³⁶ Berger informs us that "the key to an understanding of the Fourteenth Amendment is that the North was shot through with Negrophobia, that the Republicans, *except for a minority of extremists*,

and the subsequent history of the nation in the antebellum period served to enhance rather than diminish that initial racism.³⁷ Blacks were hated North as well as South and the denials of rights to free blacks in the North were extensive. Segregation was the norm.³⁸ On the eve of the Civil War only a handful of New England states and New York permitted black men to vote.³⁹ A number of western states had laws prohibiting black settlement.⁴⁰ Before the war, anti-abolition mobs routinely attacked blacks and abolitionists.⁴¹ The states that the framers of the fourteenth amendment represented were not prepared to accord equal rights to their black populations.⁴² Their representatives were not prepared to impose such an equality on the nation.⁴³

Berger buttresses this view through his examination of the congressional debates over the fourteenth amendment's passage.⁴⁴ The framers knew the Radical Republican agenda would not stand popular scrutiny.⁴⁵ If men like Thaddeus Stevens, Charles Sumner, or John A. Bingham had far reaching purposes, a desire to bring about a political and social equality far in excess of what, in 1866, was politically feasible, calmer heads among the Republican members of Congress prevailed.⁴⁶ Bound by the limits of the possible, conscious that the amendment had to pass both a skeptical Congress and hostile state legislatures, fearful of running against anti-black Democrats who would exploit even conservative attempts at racial reform, Republican supporters of the fourteenth amendment made it an amendment of conservative dimensions, a political compromise carefully crafted to minimize offense.⁴⁷ In an attempt to show the essentially conservative nature of the fourteenth amendment, Berger devotes considerable space to a discussion designed to prove that that amendment's framers did not support black suffrage.⁴⁸ As further evidence of the conservative mood of the thirty-ninth Congress, Berger notes Congress' rejection of Charles Sumner's efforts to abolish segregated schools in the District of Columbia.⁴⁹

Berger acknowledges that the debates contain material that might mislead the unwary into believing that the framers' intentions were somewhat broader.⁵⁰ Opponents of the amendment charged that its provisions would enfranchise the freedmen, require social equality, and authorize miscegenation.⁵¹ But Berger cautions us that we should look

were swayed by the racism that gripped their constituents rather than by abolitionist ideology." GOVERNMENT BY JUDICIARY, *supra* note 8, at 10 (emphasis added). For a critical look at that history see *infra* text accompanying notes 137-223.

³⁷ GOVERNMENT BY JUDICIARY, *supra* note 8, at 87.

³⁸ *Id.* at 10-19.

³⁹ All of the New England states except Connecticut permitted black suffrage in 1860. New York allowed black men who owned \$250 or more in property to vote. See L. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860 91 (1961) (hereinafter cited as NORTH OF SLAVERY).

⁴⁰ *Id.* at 67-68.

⁴¹ GOVERNMENT BY JUDICIARY, *supra* note 8, at 11, n.35a.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 52-68.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 123-24.

⁵⁰ *Id.* at 157.

⁵¹ *Id.* at 157-65.

to the supporters of the amendment and not its opponents to discern intent.⁵² John A. Bingham welcomed the amendment as a way of making the states respect the Bill of Rights, but Berger cautions that Bingham's views were rejected by others in the Congress and that Bingham's knowledge of the Constitution was hopelessly confused.⁵³ Bingham believed that the Bill of Rights was already binding on the states.⁵⁴ If the plain language of section 2 of the fourteenth amendment suggests the framers' support for black suffrage,⁵⁵ Berger argues that the real motive was to insure Republican hegemony by reducing Southern representation.⁵⁶

That an amendment with such de minimis aims supplied the constitutional foundation for the decision in *Brown* highlights, for Berger, how far the Court has strayed from any consideration of the intent of the framers.⁵⁷ *Brown* had a good result, Berger concedes — it was, Berger borrows from Richard Kluger, "Simple Justice"⁵⁸ — and Berger acknowledges that any attempt to reverse the Court in the area of racial desegregation would so rend the social fabric of American society as to make the political cure worse than the constitutional disease.⁵⁹ Still, Berger argues, desirable results and social irreversibility do not constitute justification.⁶⁰ *Brown*, however laudable, was usurpation, and if previous overextensions by the Court must be borne in the interests of societal cohesion, present and future usurpations must be stopped by an aroused citizenry, properly jealous of its democratic prerogatives.⁶¹ Because Berger views the thwarting of the fourteenth amendment's original intent as an ongoing process,⁶² he concludes *Government By Judiciary* with a plea for a heightened public awareness of the jurisprudential legerdemain by which the Court is reshaping the Constitution.⁶³ Berger argues that the Court's decisions could not withstand such strict public scrutiny and that the Court, strictly observed, would be forced to adhere more faithfully to the original meaning of constitutional provisions.⁶⁴

If Berger acknowledges that both justice and perhaps irreversibility have come about because of the Court's activism in desegregation,⁶⁵ he concedes neither point with regard

⁵² *Id.* at 157.

⁵³ *Id.* at 143.

⁵⁴ *Id.* For further discussion on this issue see *infra* note 215.

⁵⁵ Section 2 of the fourteenth amendment calls for a reduction in representation for those states that deny the vote to male citizens on the basis of race. Section 2 provides:

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

U.S. CONST. amend. XIV, § 2 (emphasis added).

⁵⁶ GOVERNMENT BY JUDICIARY, *supra* note 8, at 15-16; for a further discussion of this issue see *infra* text accompanying notes 137-223.

⁵⁷ GOVERNMENT BY JUDICIARY, *supra* note 8, at 243-45 and 286-88.

⁵⁸ R. KLUGER, SIMPLE JUSTICE (1976) [hereinafter cited as SIMPLE JUSTICE].

⁵⁹ GOVERNMENT BY JUDICIARY, *supra* note 8, at 412-13.

⁶⁰ *Id.* at 413.

⁶¹ *Id.* at 407-18.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 415-18.

⁶⁵ See *id.* at 412-13.

to the Court's decisions on capital punishment. *Death Penalties* attacks the Court even more vigorously than *Government By Judiciary*.⁶⁶ Berger regards the Court's capital punishment decisions as usurpation at its worst.⁶⁷ The Court has again usurped the province of state legislatures, and if this critic is reading Berger's views correctly, the Court has intruded into an area where the state legislatures have had the better view of the problem.⁶⁸ In this study Berger advocates an explicit remedy: Congress should divest the Court of jurisdiction, the ultimate, democratic antidote for an overactive court.⁶⁹

Berger's concern in *Death Penalties* is with two amendments, the eighth and the fourteenth. His fourteenth amendment arguments are a reiteration of the arguments made in *Government By Judiciary*, with an understandably more stringent focus on the incorporation doctrine.⁷⁰ But Berger realizes that it is perhaps too late in the constitutional day to rest a defense of the state's right to kill on an attack on the incorporation doctrine.⁷¹ So *Death Penalties* focuses on the cruel and unusual punishment clause of the eighth amendment and how the Court has interpreted it. Unlike his discussion of the fourteenth amendment, Berger's examination of the cruel and unusual punishment clause does not offer a detailed picture of the debate surrounding the provision's adoption. The sources are simply poorer. Like others, Berger constructs his argument concerning the compatibility of the death penalty and the eighth amendment by looking at the world of crime and punishment that the framers of the eighth amendment inhabited.⁷² Death was a common punishment. The authors of the amendment also passed legislation prescribing the death penalty for federal crimes.⁷³ Corporal punishment was equally common — brandings, whippings and mutilations were regular staples of eighteenth century criminal justice.⁷⁴ In the words of eighth amendment opponent Samuel Livermore, "It is sometimes necessary to hang a man, villains often deserve whipping and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel?"⁷⁵

And if eighteenth century American law and custom failed to place death or physical punishment beyond the pale of the cruel and unusual punishment clause, preceding and

⁶⁶ DEATH PENALTIES, *supra* note 9, at 5-9.

⁶⁷ *Id.*

⁶⁸ In DEATH PENALTIES, Berger makes clear his view that the death penalty is not only constitutionally permissible, but appropriate and desirable as a matter of policy. He shares his view that the Supreme Court has been interfering in the executions of guilty murderers. DEATH PENALTIES, *supra* note 9, at 6, 57. Berger also takes issue with the Court's decision in *Roberts v. Louisiana*, 431 U.S. 633 (1977), overturning Louisiana's mandatory death penalty for the murder of police officers:

As violence in the streets increasingly mounts, policemen who patrol crime-infested areas take their lives in their hands; more and more policemen are killed in the line of duty. Not unreasonably legislators have concluded that policemen require the utmost protection in the shape of mandatory capital punishment for assailants.

DEATH PENALTIES, *supra* note 9, at 146 (emphasis added).

⁶⁹ *Id.* at 153-72.

⁷⁰ *Id.* at 10-28.

⁷¹ While Berger critiques the incorporation doctrine, especially the doctrine of selective incorporation, *see id.*, he also argues that the framers of the eighth amendment had no intention of abolishing the death penalty and that efforts to curtail capital punishment through use of the eighth amendment constitute a distortion of the framer's intentions. *See id.* at 29-58. Berger also makes the case for capital punishment on policy grounds. *See id.* at 176-78.

⁷² *Id.* at 47-50.

⁷³ *Id.* at 47.

⁷⁴ *Id.* at 39.

⁷⁵ *Id.* at 45-46.

contemporary English practice provides an even grimmer picture for opponents of capital punishment.⁷⁶ Berger correctly details the horrors of English capital jurisprudence.⁷⁷ The death penalty was imposed for trivial offenses.⁷⁸ Children were hanged for petty theft. Disembowelment while alive was the English punishment for treason despite, and Berger makes much of this fact, the prohibition against cruel and illegal punishments in the English Bill of Rights.⁷⁹ Class discrimination was rampant in the exercise of the British death penalty.⁸⁰ Those sentenced to death with "benefit of clergy" could have their sentences commuted if they could read the Bible.⁸¹ In effect this provision insured that the illiterate poor would be executed while those who were better off would escape the extreme penalty.⁸² Little in the harsh world that was eighteenth century criminal justice suggested that the death penalty, or its disproportionate or discriminatory application was beyond the pale of what was then deemed cruel and unusual.

Berger is reluctantly aware, however, that an attack on the Supreme Court's intervention in death penalty cases cannot rest solely on a foundation of eighteenth century sensibilities. The fourteenth amendment raises serious questions about discriminatory application of the death penalty. The doctrine of society's evolving standards of decency, a doctrine Berger argues is better expressed through legislative instead of judicial action, has become a firm part of eighth amendment jurisprudence.⁸³ Berger realizes these views must be answered if *Death Penalties* is to make its case.

For Berger, the fourteenth amendment problem is easily solved. Its framers had no intention of abolishing the death penalty or indeed interfering with the states' administration of criminal justice.⁸⁴ Their sole purpose was guaranteeing a certain minimum of rights to the freedmen.⁸⁵ The scope of the Court's fourteenth amendment concerns regarding a state's activities concerning crime and punishment should be properly confined to an examination of whether or not state statutes are discriminatory on their face.⁸⁶ Echoing Thaddeus Stevens's statement, "Whatever law punishes a white man for a crime shall punish the black man precisely the same way;" Berger offers a limited view of the equal protection clause.⁸⁷ For Berger, that clause is not a license for judicial inquiries into discriminatory sentencing patterns, differential exercises of prosecutorial discretion, and disparities in jury sentencing.⁸⁸ According to Berger, "nothing in the Fourteenth Amendment was designed to . . . save an undoubtedly guilty black murderer from the death penalty because a jury had sentenced a white to life imprisonment. . . ."⁸⁹ If the statute is facially neutral, Berger believes the Constitution is satisfied.⁹⁰

⁷⁶ For two examinations of capital punishment in eighteenth century England, see D. HAY, P. LINEBAUGH, J. RULE, E.P. THOMPSON, AND C. WINSLOW, *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* (1975); Baker, *Criminal Courts and Procedures at Common Law*, in J.S. COCKBURN, *CRIME IN ENGLAND, 1550-1880* (1977).

⁷⁷ *DEATH PENALTIES*, *supra* note 9, at 30-43.

⁷⁸ *Id.* at 40.

⁷⁹ *Id.* at 39-41.

⁸⁰ *See id.* at 42.

⁸¹ *Id.* at 42.

⁸² *Id.*

⁸³ *Id.* at 48-49.

⁸⁴ *Id.* at 56-57.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 55.

⁸⁸ *Id.* at 54-58.

⁸⁹ *Id.* at 57.

⁹⁰ *Id.*

Adaptation of the cruel and unusual punishment clause to take into account evolving standards of decency is, Berger argues, "judicial midwifery."⁹¹ Bound by the original intent that gave rise to the clause, the Court should defer to legislative bodies to make clear what new public sentiment has developed with respect to punishment of criminals.⁹² The public knows when a penalty is incompatible with changed public sentiment and the public, through the legislative mechanism, is properly empowered to alter or abolish punishments.⁹³ Berger puts it starkly: "At issue is not whether a man may be hanged for stealing a loaf of bread, but whether the Court is authorized to take that decision away from the legislature and the people."⁹⁴

Besides, Berger argues, the Court has severely misread public sentiment on the death penalty.⁹⁵ Capital punishment has popular support.⁹⁶ The legislatures of a majority of states have redrafted capital statutes to overcome the restrictions imposed by the Court in *Furman v. Georgia*.⁹⁷ And Berger views this public response as a reasonable effort to protect society from its more unreasonable members, and from the decisions of the Court whose pronouncements, in Berger's view, have far exceeded its constitutional mandate.⁹⁸

II. AN UNEASY SYNCRETISM: THE CONSTITUTION AND THE COMMON LAW

Berger presents an ancient complaint. Fear that a too powerful judiciary, armed with the supremacy clause, would have an unlimited license to interfere with state law was a major concern of those anti-federalists who objected to the new Constitution.⁹⁹ Even before the Constitution's enactment, the courts of the new independent states had demonstrated that judges, armed with a fundamental charter, a state constitution, could and would declare acts of popularly elected legislatures void, in conflict with the state's fundamental law.¹⁰⁰ That one of the prime supporters of the new federal Constitution, Alexander Hamilton, explained that the proposed judicial power outlined in article III would be used in such a manner, could not have lessened the fears of the Constitution's opponents.¹⁰¹ The ratification debate, carried out in eighteenth century America's vigorous pamphlet press, presaged future constitutional controversy.¹⁰² These late eighteenth century debates are central to the questions Berger examines. They can furnish us with a clue to the original understanding of the Constitution not only in terms of the allocation of power but, more importantly, a sense of the processes the Constitution's protagonists believed would be employed by the Court in interpreting the new Constitution.

⁹¹ *Id.* at 60.

⁹² *Id.* at 8.

⁹³ *Id.*

⁹⁴ *Id.* at 128.

⁹⁵ *See id.* at 125-26.

⁹⁶ *Id.*

⁹⁷ 408 U.S. 238 (1972) (per curiam).

⁹⁸ *See generally* DEATH PENALTIES, *supra* note 9.

⁹⁹ *See* THE ANTIFEDERALISTS (C.M. Kenyon, ed. 1976) [hereinafter cited as THE ANTIFEDERALISTS].

¹⁰⁰ L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973) [hereinafter cited as FRIEDMAN]. One such case was the famous Quock Walker decision in which the Supreme Judicial Court of Massachusetts declared, in 1783, that slavery was contrary to the Massachusetts Constitution. Commonwealth v. Jennison, PROC. MASS. HIST. SOC., 1873-1875, 293 (April 1783). For a good discussion of this case see A.L. HIGGINBOTHAM, IN THE MATTER OF COLOR, RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 91-98 (1978).

¹⁰¹ THE FEDERALIST NOS. 78, 79, 80 (A. Hamilton) (H. Lodge ed. 1888).

¹⁰² *See* THE ANTIFEDERALISTS, *supra* note 99; THE FEDERALIST NOS. 78, 79, 80 (A. Hamilton).

Berger's view of an original constitutional intent designed to limit strictly the powers of the Court correctly states the arguments but misstates the concerns of the Federalist framers. Berger correctly details the framers' concerns with limited government, a limited government that would adhere strictly to its delegated powers.¹⁰³ But Berger's discussion fails to present the focus of the framers' concerns. Their concern was with the legislature, the possibility that it, like the British Parliament and Crown they had so recently rebelled against, would overstep its bounds and through its ability to pass laws become oppressive. From the beginning, the Court was seen as a frankly anti-majoritarian check on potential excesses of popular passion.¹⁰⁴

Both the eighteenth century supporters and opponents of the Constitution acknowledged that the judicial activism Berger so assiduously denounces would be inherent in the powers granted to the Court. Constitutional opponent Robert Yates, writing under the name "Brutus," argued that article III gave unspecified powers to the judiciary, powers that perforce judges would employ to fill in gaps, to give meaning, where the law was ambiguous.¹⁰⁵ Because, in Yates's view, the Constitution authorized judges to employ then recognized principles of statutory construction in interpreting the demands of the Constitution and other laws, judges would have a measure of latitude, some ability to inject their views into the nation's fundamental law.¹⁰⁶ Even more disturbing from Yates's point of view was the power permitting the Court to make determinations concerning equity as well as law.¹⁰⁷ Yates saw equity jurisdiction as conferring on the Court an open-ended commission, permitting constructions according to the spirit of the law, constructions that, Yates argued, would inevitably be destructive of state sovereignty.¹⁰⁸

If Berger is consistent with caveats vigorously stressed in both books, he would caution dismissal of Yates's objection as the arguments of an opponent and therefore hardly a guide to the intentions of those who proposed article III.¹⁰⁹ It is not that simple. While the views of those who object to proposed laws cannot supply dispositive proof of legislative intent, they are nonetheless valuable sources, important to an analysis of a law's meaning. The views of critics of proposed legislation supply an important reminder of the intensely political process that lawmaking is. Compromises in language, assurances in meaning, are more often than not traceable to attempts to answer charges raised by critics. Critics are also often a major source of historical hints concerning the hidden agendas, the unspoken assumptions that motivated the supporters of legislation. Most importantly, the objections of critics are important because they can furnish evidence of what the language of a constitutional or statutory provision meant to those considering it. In this area Yates's objections are most valuable. Yates had a sense of the judicial process. His objections were those of a man who realized that even under the relatively conservative common-law processes then employed, judges exercised lawmaking powers. Written laws, particularly ones like the broadly worded new Constitution, left room for judicial discretion, for adapting law to different cases, and ultimately, changing circumstances.¹¹⁰

¹⁰³ See THE FEDERALIST NOS. 78, 79, 80 (A. Hamilton).

¹⁰⁴ THE FEDERALIST NOS. 78, 79, 80 (A. Hamilton).

¹⁰⁵ THE ANTIFEDERALISTS, *supra* note 99, at 334.

¹⁰⁶ *Id.* at 334-37.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ GOVERNMENT BY JUDICIARY, *supra* note 8, *passim*; DEATH PENALTIES, *supra* note 9, *passim*.

¹¹⁰ THE ANTIFEDERALISTS, *supra* note 99, at 334-37.

This idea that part of the original understanding of the Constitution included an ability to exercise common-law reasoning processes within the framework of the Constitution need not rest solely on an analysis of the objections raised by Yates and other opponents. The writings of constitutional advocate Alexander Hamilton also supply evidence, albeit more ambiguously, that the judiciary proposed in article III would operate in ways familiar to eighteenth century students of the common-law processes. Hamilton, in *The Federalist*, was attempting to persuade opponents and the public at large of the desirability of the new Constitution and that, among other things, the proposed judicial branch would not constitute a threat to the liberties of the people of the new republic.¹¹¹ His assurances took two directions. Hamilton pointed to the Court's relative lack of power, its possession of "neither the sword nor the purse," as the best check against potential excess on the Court's part.¹¹² Hamilton also expressed the view that the Court should be bound to adhere strictly to the law without substituting the private predilections of justices for the demands of the law.¹¹³

Hamilton's assurances that the Court would be strictly constrained must be balanced against his reasons for preferring and zealously advocating a strong, independent judiciary. He frankly expressed the view that the reasoning, what he termed the artificial reasoning, of judges, was superior to the kinds of thinking that informed legislative bodies.¹¹⁴ Judges, Hamilton emphasized, benefited from extensive, laborious training in the law.¹¹⁵ Their reasoning should not be hampered by control from their intellectual inferiors, the kind of men who inhabited legislatures.¹¹⁶ Hamilton's view of limited government was expressly a government with the power to limit the legislative excess that Hamilton feared.¹¹⁷ If Hamilton's writings indicate anything, they indicate a faith that extensive training in the common law and study of the laws of other nations, coupled with artificial reasoning, an ability to craft law to the demands of cases, would provide a necessary check on legislative excess.¹¹⁸ Hamilton conceded that "individual oppression may now and then proceed from the court," that judges could stray from their mandate.¹¹⁹ But Hamilton's view was that the Court's relative lack of power held its potential excesses in check.¹²⁰

Hamilton's view, then, was of a Court capable of construing the Constitution and other laws using the tools that common-law judges had traditionally employed. Like Yates, Hamilton viewed the Constitution as authorizing the Court to use familiar tools of judicial reasoning to decide cases and ultimately to advance law.¹²¹ In light of Hamilton's faith in the judicial reasoning process, some of his statements concerning the inevitability of strict construction of statutory provisions must be viewed as a somewhat disingenuous attempt on Hamilton's part to make the case for the Court's powers to a public already suspicious of the role of lawyers and courts in American society.¹²²

¹¹¹ See THE FEDERALISTS NOS. 78, 79, 80 (A. Hamilton).

¹¹² THE FEDERALISTS NO. 78, at 483 (A. Hamilton) (H. Lodge ed. 1888).

¹¹³ *Id.* at 487.

¹¹⁴ THE FEDERALIST NO. 83, at 503-04 (A. Hamilton) (H. Lodge ed. 1888).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ THE FEDERALIST NO. 81, at 484 (A. Hamilton) (H. Lodge ed. 1888).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² For a discussion of anti-lawyer sentiment in colonial America see FRIEDMAN, *supra* note 100, at 82-84.

If there were early indications that the judicial power included an ability to fashion constitutional provisions to meet the peculiar demands of cases and, by implication, changing circumstances, the actions of the earliest Federalist judges provided further evidence that at least that political persuasion regarded article III as a flexible commission. In *Marbury v. Madison*¹²³ and *Martin v. Hunter's Lessee*,¹²⁴ Federalist Chief Justice Marshall moved to make firm the framers' concept of judicial review with respect to both federal and state enactments.¹²⁵ In *McCulloch v. Maryland*,¹²⁶ Marshall set forth a doctrine of implied powers, conceding that no such doctrine was set forth in the Constitution but also arguing that there was no prohibition of such powers as there had been in the Articles of Confederation.¹²⁷ In the face of strong Republican¹²⁸ opposition, Marshall adhered to a flexible view of the Constitution and the Court's interpretive authority, a view enunciated in *McCulloch* where Marshall distinguished between following the prolixities of a civil code and expounding a constitution.¹²⁹

That view grew stronger in nineteenth century America. Justice Story turned his reading of the law of nations and the commercial needs of antebellum America into a constitutional license to fashion a federal common law of negotiable instruments in *Swift v. Tyson*.¹³⁰ Chief Justice Taney in his opinion in *Dred Scott* reasoned that free blacks were not citizens of the United States although nothing in the constitutional language suggested this conclusion.¹³¹ In antebellum America a policy oriented instrumental style of common-law reasoning had developed.¹³² Frankly result oriented, the American judiciary took written laws, as well as common-law precedents, as points of departure from which to weigh desired policies against legal guidelines.¹³³ If any original doubts existed that the Constitution authorized the Court to fill in the interstices of constitutional provisions, the conduct of the American judiciary made it clear that the courts felt they could not exercise their legal mandates without such power. For better or, or perhaps and, worse the American constitutional system had become, in the years before the Civil War, a hybrid, an uneasy amalgam of written statutes or constitutional provisions, interpreted by judges who held on to a common-law reasoning process, a process that permitted judges to develop law.¹³⁴

Berger claims that this history of antebellum instrumentalism is confined to state court actions concerning private law.¹³⁵ That view is not sustained by the evidence.

¹²³ 5 U.S. (1 Cranch) 137 (1803).

¹²⁴ 14 U.S. (1 Wheat.) 304 (1816).

¹²⁵ See *supra* notes 123 and 124.

¹²⁶ 17 U.S. (4 Wheat.) 316 (1819).

¹²⁷ *Id.* at 404.

¹²⁸ The term Republican here is used for the Democratic-Republican party, the party of Thomas Jefferson and the ancestor of the modern Democratic party. Subsequent use of the term in this article will refer to the modern Republican party.

¹²⁹ *McCulloch*, 17 U.S. (4 Wheat.) at 357.

¹³⁰ 41 U.S. (19 Pet.) 1 (1842). For an article praising Story's instrumental reading of the Constitution, see Keefe, *In Praise of Joseph Story, Swift v. Tyson and 'The' True National Common Law*, 18 AM. U.L. REV. 316 (1969).

¹³¹ See *supra* note 28 and *infra* note 182.

¹³² Horowitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, 5 PERSPECTIVES IN AMERICAN HISTORY 287 (1971).

¹³³ *Id.*

¹³⁴ EQUAL JUSTICE UNDER LAW, *supra* note 31, at 71-73, 347-49.

¹³⁵ GOVERNMENT BY JUDICIARY, *supra* note 8, at 306-10.

Neither Story's opinion in *Swift*, nor Taney's in *Dred Scott* are explainable solely as the reasoning of men shackled by strict constructions of the Constitution. Their decisions were made with a view towards, where there was arguable constitutional leeway, enshrining their conceptions of the public good into constitutional law. This observation is important not because of the findings and results in those and other antebellum constitutional cases. What is critical here is that the merger of constitutional guideline and common-law methodology was already, in antebellum America, familiar to students of the Court's behavior. That the Court would take the Constitution as a broad outline against which the Court would fashion constitutional doctrine was already a part of the intellectual and legal heritage of those who framed the fourteenth amendment.¹³⁶ Their intentions cannot be properly assessed without such a realization.

III. RECAPTURING THE UNALIENABLE: THE EGALITARIAN ROAD TO THE FOURTEENTH AMENDMENT

Still, a realization by the framers of the fourteenth amendment that time, circumstance and the Court would add new dimensions to the law they drafted would scarcely justify the Court's thwarting of their fundamental intentions. If Berger's understanding of the fourteenth amendment's history is essentially correct, serious questions follow concerning the Court's common-law processes and its ability to use such processes to do violence to original understandings. This question is fundamentally historical. And although it is in this area that Berger stakes his strongest claim, it is also here that his weaknesses are most serious. Berger's view of the history of the fourteenth amendment suffers from an overly narrow focus that weakens both his and his reader's understanding of the motives that brought about the fourteenth amendment's adoption. Myopia, unfortunately, is not Berger's sole deficiency as an historian. *Government By Judiciary* contains crucial sins of omission, the ignoring of evidence damaging to Berger's thesis.¹³⁷

Few men in American history, perhaps indeed the history of any nation, have made greater contributions to human rights and have been treated less generously by their nation's historians than those Republican politicians who, between the years of 1861 and 1876, abolished slavery and set the nation on the as yet unfinished path towards nonracial democracy. Their idealism has been forgotten, their faults magnified.¹³⁸ The frequent coincidence of self-interest and egalitarian legislation has served as a basis for discounting genuine Republican anti-slavery and egalitarian sentiment.¹³⁹ A generation of historians who dominated the discussion on Reconstruction earlier in this century managed successfully to impart to the nation their view of the Radical Republicans as a cynical group imposing a needlessly harsh and vindictive Reconstruction on the South to establish and maintain their dominance in national politics.¹⁴⁰ This vision is still prevalent.¹⁴¹ To that

¹³⁶ EQUAL JUSTICE UNDER LAW, *supra* note 31, at 71-73, 347-49. Hyman and Wiecek contend that many Republicans initially believed that the thirteenth amendment alone would be broad enough to permit the federal government to make far reaching inquiries into the liberties of Americans. *Id.* at 390-92. See also Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

¹³⁷ See *infra* notes 182-201 and accompanying text for a discussion on suffrage.

¹³⁸ See *infra* notes 140-43.

¹³⁹ *Id.*

¹⁴⁰ This characterization was the view of the "Dunning School" of Reconstruction historiography. For some examples, see W.A. DUNNING, RECONSTRUCTION, POLITICAL AND ECONOMIC (1906); C.G. BOWERS, THE TRAGIC ERA (1929) and W.L. FLEMING, CIVIL WAR AND RECONSTRUCTION IN

earlier vision a more recent one has been added, a modern disenchantment with that quintessential American icon, Abraham Lincoln.¹⁴² Lincoln's very real racism has served to obscure, on the part of both popular and scholarly writers his genuine anti-slavery idealism and his cautious growth towards a qualified egalitarianism by the end of his life.¹⁴³ *Government By Judiciary* suffers from a too uncritical acceptance of the harsher views American historians have expressed concerning the Republicans of the Civil War and Reconstruction era,¹⁴⁴ with an inadequate investigation and presentation of both their nobler sentiments and very real achievements. An appreciation of these latter qualities is critical to any understanding of the legal legacy they have left us.

A significant failure in Berger's discussion of the fourteenth amendment lies in his treatment of northern racism. It is treated as a consistent phenomenon, largely unaffected either by the passage of time or the sharpening of sectional rivalries.¹⁴⁵ Berger's is in large part a conceptual failure, an unwillingness to explore the subtle and delicate intermixtures of idealism and self-interest that brought about at least a temporary transformation in northern views concerning race. Sectional conflict caused a reassessment of the question of race on the part of many northerners.¹⁴⁶ That reassessment was occurring even before the Civil War, aided by what many in the North saw as an unseemly southern vigor in defense of the South's Peculiar Institution. If abolitionists were vilified and physically attacked as extremists in the 1830's, the Fugitive Slave Act and the *Dred Scott* decision in the 1850's helped anti-slavery advocates gain new, more sympathetic audiences.¹⁴⁷ The Civil War caused even more profound changes.¹⁴⁸ Neither Billy Yank nor his political supporters marched to war in 1861 with abolitionist aims, but his experience in the nation's most bloody conflict caused the North to see the South in a harsher light.¹⁴⁹ Berger argues for a dichotomy between northern desires to dominate or at least control the South and a genuine sympathy on the part of northern politicians for blacks.¹⁵⁰ Such a choice is not necessary for our understanding of the fourteenth amendment or other laws of the Reconstruction era. Instead, as one of Berger's more perceptive critics has noted, the two may be closely related. The Civil War served to increase northern hatred for the South; it also created a new concern for the rights of blacks.¹⁵¹

ALABAMA (1905). From Berger's language it appears he essentially accepts this view of the Radical Republicans. He writes of "extremist efforts to put through legislation or amendments that would confer suffrage." *GOVERNMENT BY JUDICIARY*, *supra* note 8, at 7. Massachusetts Republican Charles Sumner is described as "destined to become a spokesman for extreme abolitionist views." *Id.* at 10-11. In *GOVERNMENT BY JUDICIARY*, *supra* note 8, at 50, Berger mentions, "Southern whites fighting misrule and military government."

¹⁴¹ See generally Stamp, *The Tragic Legend of Reconstruction*, in *RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS* (K.M. Stamp and L.F. Litwack, eds. 1969) [hereinafter cited as Stamp].

¹⁴² *SIMPLE JUSTICE*, *supra* note 58, at 41-43.

¹⁴³ *EQUAL JUSTICE UNDER LAW*, *supra* note 31, at 278.

¹⁴⁴ See *supra* notes 140-43 and accompanying text.

¹⁴⁵ See *GOVERNMENT BY JUDICIARY*, *supra* note 8, at 10-16. In this discussion Berger reviews the history of northern racism prior to the passage of the fourteenth amendment without considering the changes in northern racial attitudes brought about by sharpening sectional conflict.

¹⁴⁶ See *infra* note 147.

¹⁴⁷ *GOVERNMENT BY JUDICIARY*, *supra* note 8, at 191-202; Soifer, *supra* note 31, at 668.

¹⁴⁸ *Id.*

¹⁴⁹ See *infra* note 151.

¹⁵⁰ *GOVERNMENT BY JUDICIARY*, *supra* note 8, at 14-16.

¹⁵¹ Soifer, *supra* note 31, at 687.

Perhaps nowhere is this relationship more evident than in the transformation of Lincoln's views. Lincoln entered the White House a firm believer in white supremacy, despite his genuine abhorrence of slavery.¹⁵² He changed. The demands of war transformed Lincoln into an emancipationist. The performance of nearly 200,000 black troops serving with Union forces caused Lincoln, like others, to alter his thinking further.¹⁵³ By the middle of the war, he routinely discussed the question of race with black abolitionist Frederick Douglass.¹⁵⁴ The turnabout was not immediate. He waited for the propitious political and military moment to issue his Emancipation Proclamation.¹⁵⁵ His administration waited until well into the war before deciding to pay black troops the same wage as white troops.¹⁵⁶ In 1862, Lincoln informed a black audience that colonization represented the optimal solution to the American racial dilemma.¹⁵⁷ But the turnabout occurred. By the end of his career, he had come to the conclusion that colonization was impossible.¹⁵⁸ Before his assassination, he had begun to advocate a limited black franchise, a right to vote confined to literate black men who had served with Union forces.¹⁵⁹ His growth presaged the direction his party would take after the war.¹⁶⁰

Even during the conflict, profound changes were occurring in the federal government's racial posture. The first Republican administration acted to nullify Taney's opinion that free blacks were not citizens of the United States.¹⁶¹ Attorney General Edward Bates issued opinions indicating that free blacks were citizens of the United States and thus entitled to licenses as ship's masters and military commissions.¹⁶² Bates also wrote an opinion indicating that, because free blacks were citizens at the beginning of the conflict, those who enlisted in the Union Army were entitled to the same pay and bounties as white soldiers.¹⁶³ Even the limited commissioning of black officers in the Union forces rep-

¹⁵² EQUAL JUSTICE UNDER LAW, *supra* note 31, at 169, 196-97.

¹⁵³ See generally Stampp, *supra* note 141.

¹⁵⁴ Soifer, *supra* note 31, at 687.

¹⁵⁵ J.M. McPHERSON, THE NEGRO'S CIVIL WAR: HOW AMERICAN NEGROES FELT AND ACTED DURING THE WAR FOR THE UNION 48-49 (1965) [hereinafter cited as THE NEGRO'S CIVIL WAR].

¹⁵⁶ *Id.* at 193-203.

¹⁵⁷ *Id.* at 89-92. Colonization had long been an option favored by opponents of slavery who were also hostile to the presence of a large free black population in the United States. In essence, colonization was an expatriation scheme designed to settle free blacks outside of the United States. The American Colonization Society was the largest and most successful colonization organization. Founded in 1817, it sponsored the Afro-American colonization of Liberia. Its efforts were opposed by northern free black organizations and by such white abolitionists as William Lloyd Garrison. The basis of free black and abolitionist opposition to colonization was basic and simple. Blacks and abolitionists were concerned not only with the anti-slavery struggle but also with the struggle for equal rights for free blacks. Their contention that blacks were Americans, entitled to equal rights in American society clashed sharply with the view of most colonizationists that black freedom required black expatriation.

Early in his administration, Lincoln advocated free black colonization of Central and South America. Lincoln was able to convince a small group of free blacks to attempt to establish colonies in Panama and the Caribbean. These colonies proved to be unsuccessful and towards the end of his administration, Lincoln had the colonists returned to the United States. See FROM SLAVERY TO FREEDOM, *supra* note 17, at 176-79, 213.

¹⁵⁸ THE NEGRO'S CIVIL WAR, *supra* note 155, at 96-97.

¹⁵⁹ See EQUAL JUSTICE UNDER LAW, *supra* note 31, at 278.

¹⁶⁰ *Id.*

¹⁶¹ See *supra* note 29.

¹⁶² *Id.*

¹⁶³ *Id.*

resented a significant break with previous policies, an acknowledgment of citizenship that would have been too radical to contemplate in the decades immediately preceding the war.¹⁶⁴ Sectional conflict had brought profound change in northern views.

The attitudes of the Thirty-ninth Congress that passed the fourteenth amendment were shaped by the war experience. The peace of Appomattox had left them with a nation and particularly a region to rebuild. Even the most conservative were convinced that the abolition of the institution that had brought on the war, slavery, was a prerequisite to the security of the reformed union.¹⁶⁵ The war time Emancipation Proclamation¹⁶⁶ was

¹⁶⁴ Approximately 100 black men, not counting chaplains, were commissioned during the Civil War. See *THE NEGRO'S CIVIL WAR*, *supra* note 155, at 238-39.

¹⁶⁵ For a valuable examination of the increased support gained for the abolitionist cause during the Civil War, see J.M. MCPHERSON, *THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION* 99-133 (1964).

¹⁶⁶ The Emancipation Proclamation, issued by Lincoln on September 22, 1862, took effect on January 1, 1863. Using his authority as Commander in Chief of the Armed Forces, Lincoln proclaimed freedom for those slaves in rebellious southern states. The proclamation did not free slaves held in Maryland, Delaware, Kentucky, West Virginia and Missouri all of which remained Unionist despite their slave-state status. See B. BAILYN, D.B. DAVIS, D. DONALD, J. THOMAS, R. WIEBE, G. WOOD, *THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE* 660 (1977) [hereinafter cited as *THE GREAT REPUBLIC*]. The text of the Emancipation Proclamation follows:

January 1, 1863

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA
A PROCLAMATION

Whereas, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and sixty-two, a proclamation was issued by the President of the United States, containing, among other things, the following to wit:

That on the first day of January, in the year of our Lord one thousand eight hundred and sixty-three, all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free; and the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom.

That the Executive will, on the first day of January aforesaid, by proclamation, designate the States and parts of States, if any, in which the people thereof, shall on that day be, in good faith, represented in the Congress of the United States by members chosen thereto at elections wherein a majority of the qualified voters of such State shall have participated, shall in the absence of strong countervailing testimony, be deemed conclusive evidence that such State, and the people thereof, are not then in rebellion against the United States.

Now, therefore, I, Abraham Lincoln, President of the United States, by virtue of the power in me invested as Commander-in-Chief, of the Army and Navy of the United States in time of actual rebellion against authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do, on this first day of January, in the year of our Lord one thousand eight hundred and sixty-three, and in accordance with my purpose so to do publicly proclaimed for the full period of one hundred days, from the day first above mentioned, order and designate as the States and parts of States wherein the people thereof respectively, are this day in rebellion against the United States, the following, to wit:

Arkansas, Texas, Louisiana (except the Parishes of St. Bernard, Plaquemines, Jefferson, St. Johns, St. Charles, St. James, Ascension, Assumption, Terrebonne, Lafourche, St. Mary, St. Martin, and Orleans, including the City of New Orleans), Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Virginia (except the forty-eight counties designated as West Virginia, and also the counties of Berkely, Accomac, Northampton, Elizabeth City, York, Princess Ann, and Norfolk, including

extended and formalized by the thirteenth amendment.¹⁶⁷ It proved insufficient. Through legal subterfuge, the black codes, southern state governments quickly moved to preserve as much of the antebellum social order as could survive national law and northern victory.¹⁶⁸ Lincoln's successor Andrew Johnson, a man with strong anti-black sentiments, made no objection to the South's virtual reintroduction of slavery. Concerned members of the Thirty-ninth Congress realized more was needed.¹⁶⁹

Aware that the South, if left to its own devices, would turn the abolition of slavery into a hollow mockery, the Thirty-ninth Congress passed the Civil Rights Act of 1866. It was a law at once profoundly radical, yet deeply conservative, the product of political compromise between those committed to full equality for the freedmen and those who argued that the abolition of slavery was sufficient, that further measures would interfere with the rights of the states.¹⁷⁰ The Act produced a new, national definition of citizenship covering everyone born in the United States, except Indians subject to tribal authority.¹⁷¹ It specified that the freedmen could not be denied access to state courts, that they had a right to appear as witnesses and to bring suits as plaintiffs, that the old state limitations on

the cities of Norfolk and Portsmouth; and which excepted parts are, for the present, left precisely as if this proclamation were not issued).

And by virtue of the power, and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free; and that the Executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.

And I hereby enjoin upon the people so declared to be free to abstain from all violence, unless in necessary self-defense; and I recommend to them that, in all cases when allowed, they labor faithfully for reasonable wages.

And I further declare and make known that such persons of suitable condition, will be received into the armed service of the United States to garrison forts, positions, stations, and other places, and to man vessels of all sorts in said service.

And upon this act, sincerely believed to be an act of justice, warranted by the Constitution, upon military necessity, I invoke the considerate judgment of mankind, and the gracious favor of Almighty God.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, this first day of January, in the year of our Lord one thousand eight hundred and sixty-three, and of the Independence of the United States of America the eighty-seventh.

By the President: ABRAHAM LINCOLN

William H. Seward, Secretary of State.

¹⁶⁷ The thirteenth amendment was proposed by the thirty-eighth Congress on January 31, 1865, while the Civil War was still in progress. It was ratified by the legislatures of twenty-seven of the thirty-six states on December 18, 1865. The amendment brought an end to all slavery in the United States and territories subject to United States jurisdiction. U.S. CONSR. amend. XIII. The thirteenth amendment provides as follows:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

¹⁶⁸ EQUAL JUSTICE UNDER LAW, *supra* note 31, at 319-22.

¹⁶⁹ THE RECONSTRUCTION AMENDMENTS' DEBATES, 39TH CONG. (1865-1866) 121-29, 131-34, 136-41, 161-71, 174-83, 186-210 (1967) [hereinafter cited as DEBATES]; H. WILSON, HISTORY OF THE RECONSTRUCTION MEASURES OF THE 39TH AND 40TH CONGRESSES 118-47, *passim* (1970) [hereinafter cited as RECONSTRUCTION MEASURES].

¹⁷⁰ 14 Stat. 27 (1866).

¹⁷¹ *Id.*

such rights were void.¹⁷² Also forbidden were state statutes that prescribed different criminal penalties for blacks and whites.¹⁷³ Aware that a change in the letter of the law could easily be thwarted by state courts beholden to state interests, the framers of the statute included a provision allowing blacks and white Unionists to remove their cases to federal district courts.¹⁷⁴

Champions of equal rights were painfully aware of the Civil Rights Act's limitations. The law specified in detail the rights bestowed: the right to own and dispose of property, the right to make contracts, the right to testify in court. It was a catalogue of minimal rights long denied blacks in most states.¹⁷⁵ The measure nonetheless represented a radical break with the past. It provided a basis for federal inquiry into a state's legal treatment of its citizens, a fact of which opponents of the measure were painfully and vocally aware. Over democratic opposition and Andrew Johnson's veto the Civil Rights Act became law.¹⁷⁶

Its supporters realized the measure's inadequacies.¹⁷⁷ Opponents of the law challenged its constitutionality, both with regard to its definition of citizenship and its enumeration of the citizen's rights.¹⁷⁸ Realizing that the statute alone stood little long-range chance of survival in the face of a hostile president and the probable readmission of southern congressional delegations on terms favorable to the South, supporters of equal rights pressed for the fourteenth amendment as a means of both legitimizing the Civil Rights Act of 1866 and extending further protection to blacks and others.¹⁷⁹

Berger's contention that the minimal guarantees of the Civil Rights Act of 1866 reflected the limited egalitarian agenda of the Thirty-ninth Congress is at sharp variance with the historical record. *Government By Judiciary*, properly focuses our attention on the suffrage issue as an important indicator of that Congress' views on the broader question of black equality.¹⁸⁰ Suffrage had long been a focus of concern on the part of free blacks and white advocates of equal rights.¹⁸¹ Both groups were painfully aware that free blacks had enjoyed and exercised the right to vote in most states when the Constitution was drafted, that white only voting requirements were creatures of nineteenth century law.¹⁸²

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ For a good general survey of the legal and social disabilities that even free southern blacks suffered in the antebellum years see: I. BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* (1976).

¹⁷⁶ *RECONSTRUCTION MEASURES*, *supra* note 169, at 145-47.

¹⁷⁷ *DEBATES*, *supra* note 169, at 121-29, 131-34, 136-41, 161-71, 174-83, 186-210; *RECONSTRUCTION MEASURES*, *supra* note 169, at 118-47.

¹⁷⁸ *DEBATES*, *supra* note 169, at 121-29, 131-34, 136-41, 161-71, 174-83, 186-210; *RECONSTRUCTION MEASURES*, *supra* note 169, at 118-47.

¹⁷⁹ *DEBATES*, *supra* note 169, at 149-61.

¹⁸⁰ *GOVERNMENT BY JUDICIARY*, *supra* note 8, at 52-68.

¹⁸¹ *NORTH OF SLAVERY*, *supra* note 39, at 75-79.

¹⁸² Illinois Republican Representative Richard Yates made this point in house debate on February 19, 1866. He noted that free blacks were citizens when the Constitution was adopted and were entitled to vote in New Hampshire, Massachusetts, New York, New Jersey and North Carolina. The list is actually somewhat more extensive. See *infra* this footnote. See also *EQUAL JUSTICE UNDER LAW*, *supra* note 31, at 190-92; *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 564 (1857) (Curtis, J., dissenting).

One of the problems with Berger's view that the original Constitution was racist is that it ignores the legal status of free blacks during the late eighteenth century generally and in the Constitution specifically. While the Constitution did have measures protecting slavery, see U.S. CONST. art. 1, § 9

The denial of the vote in the antebellum years had been for blacks and many of their white well-wishers one of the more visible symbols of the denial of black citizenship.¹⁸³ For many, suffrage provided the crucial distinction between the citizen and the noncitizen.

They knew what was at stake. The right to vote was necessary to protect other rights. Black enfranchisement would provide insurance that state governments would deal fairly with blacks.¹⁸⁴ For Republicans black enfranchisement in the South would also insure that southern politicians would be forced to be responsive to one group of proven Unionists.¹⁸⁵ Republicans were also well aware that they would be the likely beneficiaries of the extension of suffrage to blacks.¹⁸⁶ Republicans were not slow to come to this realization, as Berger contends;¹⁸⁷ they knew blacks had little reason to support the largely racist Democratic party.¹⁸⁸ Also Republican politicians could not have been unaware that their party received the support of black voters in those northeastern states where black suffrage was permitted.¹⁸⁹

The Thirty-ninth Congress acted to promote black suffrage. By the end of 1866 that Congress passed a bill granting suffrage to black men in the District of Columbia.¹⁹⁰ The bill became law when it survived Andrew Johnson's veto by a vote of 29 to 10 in the Senate and 113 to 38 in the House.¹⁹¹ Similar legislation was passed, again over Johnson's veto, granting the right of black men to vote in the territories.¹⁹² The territorial legislation survived Johnson's veto by a vote of 24 to 7 in the Senate and 104 to 38 in the House.¹⁹³

In his discussion of the suffrage issue, Berger emphasizes the Thirty-ninth Congress' readmission of the Tennessee congressional delegation, despite that state's restriction of the ballot to white men, as proof of that Congress' lack of support for black suffrage.¹⁹⁴ That discussion is incomplete. Massachusetts Senator Henry Wilson, a strong proponent of black suffrage, reported in his remembrances of the Thirty-ninth and Fortieth Con-

and art. IV, § 2, the Constitution had no provisions that barred free blacks from the exercise of full citizenship. Free blacks were counted as full persons for purposes of Congressional representation. U.S. CONST. art. I, § 2. Nowhere in the Constitution is race made a criterion for voting or holding office. In the late eighteenth century, free blacks were eligible to vote in a majority of states, including all of New England, New York, New Jersey, Pennsylvania, Delaware, Maryland, North Carolina and Tennessee. These rights were lost in most states in the nineteenth century except for the ones mentioned *supra* note 38. See Diamond and Cottrol, *Codifying Caste, Louisiana's Racial Classification Statute and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 260-61 (1983) [hereinafter cited as *Codifying Caste*].

¹⁸³ For one example where disfranchisement was reversed, see R. COTTROL, *THE AFRO-YANKEES: PROVIDENCE'S BLACK COMMUNITY IN THE ANTEBELLUM ERA* 67-112 (1982) [hereinafter cited as *THE AFRO-YANKEES*].

¹⁸⁴ RECONSTRUCTION MEASURES, *supra* note 169, at 36-40, 55-56, 62-63, 239-40.

¹⁸⁵ See *infra* note 189.

¹⁸⁶ *Id.*

¹⁸⁷ GOVERNMENT BY JUDICIARY, *supra* note 8, at 15-16, 30-31, 57.

¹⁸⁸ *Id.*

¹⁸⁹ Throughout the nineteenth century, black voters had a history of voting against the Democratic Party. This history considerably antedated the Civil War and was, in those Northeastern states where blacks were permitted to vote, well known to politicians of all parties. It was one of the reasons for the hostility of the Democratic Party towards blacks. See Fox, *The Negro Vote in Old New York*, 32 POL. SCI. Q. 253 (1917); *THE AFRO-YANKEES*, *supra* note 183, at 67-112.

¹⁹⁰ RECONSTRUCTION MEASURES, *supra* note 169, at 266-97; 14 Stat. 375 (1866).

¹⁹¹ RECONSTRUCTION MEASURES, *supra* note 169, at 266-97; 14 Stat. 375 (1866).

¹⁹² RECONSTRUCTION MEASURES, *supra* note 169, at 298-302; 14 Stat. 379 (1866).

¹⁹³ RECONSTRUCTION MEASURES, *supra* note 169, at 298-302; 14 Stat. 379 (1866).

¹⁹⁴ GOVERNMENT BY JUDICIARY, *supra* note 8, at 79-80, 95, 105.

gresses that a deal had been struck with the Tennessee delegation.¹⁹⁵ Tennessee was to be readmitted upon ratification of the fourteenth amendment and a pledge that that state's legislature would pass legislation permitting black suffrage.¹⁹⁶ The Tennessee legislature honored that pledge.¹⁹⁷

The suffrage issue is critical not only for its intrinsic importance, but because it is indicative of the success that the radicals had throughout the year 1866 in winning support to the cause of equal rights. It should be remembered that the Civil Rights Act of 1866 was passed in the early part of that year.¹⁹⁸ Towards the end of the year, Radical Republicans, aided by increasing dissatisfaction with Andrew Johnson, fears of a continued spirit of rebellion in the South, and reminders of black loyalty during the Civil War, had a more receptive audience for egalitarian legislation in the Thirty-ninth Congress.¹⁹⁹ The debates over the fourteenth amendment should be examined in that light.

Those debates, far from sustaining Berger's view of the fourteenth amendment as an attempt to extend a highly limited degree of protection to the freedmen, reveal a strong desire on the part of the provision's advocates to advance the cause of equal rights.²⁰⁰ Again this characterization is well-illustrated in the suffrage issue. Unlike the Civil Rights Act, the fourteenth amendment provided clear support for black suffrage. Berger's reading of section 2 as simply an attempt to deprive the South of representation is at odds with the statements of that section's supporters expressing the view that, although the South might initially elect decreased representation, the southern states would ultimately choose black enfranchisement over a loss of congressional seats.²⁰¹

In other ways the framers of the amendment demonstrated a significant break with past and contemporary prejudices. The language of the amendment alone was enough to cause alarm. As if the prospect of making blacks citizens entitled to equal rights with whites failed to generate enough opposition, the implications of the plain meaning of the amendment excited other prejudices.²⁰² A representative from California sought the exclusion of Chinese from the definition of citizenship.²⁰³ Several western representatives

¹⁹⁵ See *infra* note 197.

¹⁹⁶ *Id.*

¹⁹⁷ RECONSTRUCTION MEASURES, *supra* note 169, at 303-13; Alexander, *Political Reconstruction in Tennessee, 1865-1870*, 56-63, cited in RADICALISM, RACISM AND PARTY REALIGNMENT (Curry, ed. 1969).

¹⁹⁸ The Civil Rights Act of 1866 became law in April, 1866. 14 Stat. 27 (1866).

¹⁹⁹ The District of Columbia suffrage bill was passed in December, 1866 and survived Johnson's veto in January, 1867. 14 Stat. 375 (1867). The territorial suffrage bill was enacted in January, 1867. 14 Stat. 379 (1867).

²⁰⁰ See *infra* notes 201-05 and accompanying text.

²⁰¹ See DEBATES, *supra* note 169, at 212 (Speech of Thaddeus Stevens, May 8, 1866).

²⁰² Section 1 of the proposed amendment, declaring all persons born in the United States to be citizens, dismayed those with prejudices against numerous groups, including, of course, those with strong anti-black sentiments. See *infra* notes 203-05 and accompanying text. The text of section 1 is as follows:

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.

U.S. CONST. amend. XIV.

²⁰³ DEBATES, *supra* note 169, at 152, 224.

demanded that Indians, taxed or untaxed, remain outside of the American nation.²⁰⁴ A Congressman from Pennsylvania delivered a tirade against Gypsies declaring that they should not be made citizens.²⁰⁵ Despite the risk of adding new opponents to the proposed amendment, the advocates of universal citizenship held firm. Regional bigotries would not be given effect in this alteration of the nation's fundamental charter.

This forthright championship of both universal citizenship and universal manhood suffrage by the supporters of the fourteenth amendment furnishes strong evidence that the amendment's framers possessed ideals and concerns broader than those Berger has attributed to them. Despite their understandable focus on the question of the South and the problem of the freedman, they had also embraced an ideal of human equality, an ideal they vigorously defended in Congressional debate and an ideal they successfully wrote into the nation's fundamental law.

It is essentially impossible to appreciate the intentions of the framers of the fourteenth amendment without understanding that amendment as, in part, the intellectual product of the anti-slavery movement, a movement forced, against the prevailing beliefs of its day, to embrace both an egalitarian view of the human species and a firm belief in natural law.²⁰⁶ With antebellum America's positive law squarely arrayed on the side of slavery and slaveholders, anti-slavery thinkers had become vigorous proponents of theories of natural law.²⁰⁷ As the justification for slavery in nineteenth century America rested largely on presumptions of black inferiority, anti-slavery advocates increasingly became converts to the idea of human equality.²⁰⁸ Little in the antebellum intellectual or legal milieu supported their views.

But if their nineteenth century present offered little support for either anti-slavery or egalitarian ideals, anti-slavery thinkers realized that the natural law premises of the Declaration of Independence supported their reasoning.²⁰⁹ This realization furnished anti-slavery advocates with strong arguments that slavery, although sanctioned by positive law, was contrary to the fundamental postulates on which the Republic was founded.²¹⁰ This reliance on eighteenth century natural law principles also contributed to a focus on race and citizenship in the eighteenth century. The awareness that free blacks were regarded as citizens and that they were permitted to vote in most states in the late eighteenth century made advocates of abolition and equal rights all the more aware of ground lost in the nineteenth century.²¹¹ This realization played a major part in the thinking that shaped both the Civil Rights Act of 1866 and the fourteenth amendment.

If the fourteenth amendment should, in general, be interpreted in light of the natural law views of anti-slavery advocates, the privileges and immunities clause should be examined in light of what were generally viewed as the incidents of citizenship in post Civil War America. Berger's view of a generally understood limited view of the term privileges and immunities fails to take into account the tremendous expansion of rights

²⁰⁴ *Id.* at 225-28. The fourteenth amendment did not make citizens of Indians who were subject to tribal authority, "Indians not taxed." Those Indians who were outside of tribal authority and lived amongst the general population were made citizens by the amendment. *Id.*

²⁰⁵ *Id.* at 223-24.

²⁰⁶ R.M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 830 (1975) [hereinafter cited as *JUSTICE ACCUSED*].

²⁰⁷ *Id.*

²⁰⁸ *EQUAL JUSTICE UNDER LAW*, *supra* note 31, at 17-18, 94.

²⁰⁹ *Id.* at 17-18.

²¹⁰ *Id.*

²¹¹ *Id.* See *supra* notes 182 and 189.

that had taken place during the nineteenth century. While the federal Bill of Rights did not apply to the states, most state constitutions included provisions that paralleled the rights found in the first eight amendments.²¹² Universal white manhood suffrage had been achieved in every state.²¹³ Broad agreement existed concerning the rights of American citizens, agreement that by 1866 would have included most of the rights found in the Constitution. Ironically, Taney's enumeration of the rights of citizens in *Dred Scott*, which was a partial recitation of the federal Bill of Rights, may constitute one of the more visible examples of what were generally viewed to be the rights of citizens during this period.²¹⁴

The desire of the framers of the fourteenth amendment to protect Unionists in southern states must also be accounted for in any discussion of the meaning of the privileges and immunities clause. John Bingham pointed to the South's violation of the free speech rights of anti-slavery advocates before the Civil War as one mischief he believed the fourteenth amendment's privileges and immunities clause would remedy.²¹⁵ Whatever Bingham's previous confusion concerning the applicability of the Bill of Rights to the states, he clearly desired to bring about that result through the fourteenth amendment. Nor was he alone. Others argued the need to protect loyalists, black and white, from revenge and restrictions by southern state governments.²¹⁶ Many in the Thirty-ninth Congress were particularly concerned with Alabama's prohibition on blacks bearing arms.²¹⁷ Opponents of the fourteenth amendment argued, as they had in opposing the Civil Rights Act of 1866, that the amendment furnished the basis for federal intrusion into the activities of state governments. They also argued, correctly, that the old federalism of virtually absolute state sovereignty with respect to individual rights was being irrevocably altered.²¹⁸

Opponents also charged that the amendment was ambiguously worded, designed to permit broad constructions.²¹⁹ That charge may be of more value in discerning the meaning of the amendment than Berger cares to admit. The fourteenth amendment was a product of growth and compromise. A child of the anti-slavery movement, the fourteenth amendment would have died stillborn had that movement's views not been buttressed by general northern alarm over the South's attempts to nullify the verdict of the war and by growing resentment of the pro-southern sympathies of Andrew Johnson.²²⁰ If

²¹² FRIEDMAN, *supra* note 100, at 103-09, 303-04.

²¹³ EQUAL JUSTICE UNDER LAW, *supra* note 31, at 6-8; THE GREAT REPUBLIC, *supra* note 166, at 467.

²¹⁴ Taney argued that blacks, slave or free, were not citizens because they were denied rights commonly granted to citizens, "and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went." *Dred Scott v. Sandford*, 60 U.S. (19 How.) at 417.

²¹⁵ RECONSTRUCTION MEASURES, *supra* note 169, at 200-01; DEBATES, *supra* note 169, at 156-59, 217-18. Bingham incidentally appears to have been less confused about the applicability of the Bill of Rights to the states than Berger indicates. Bingham was aware of the Court's decision in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 242 (1833) that held that the fifth amendment did not apply to the states. He realized the state of the law and he disagreed with it. While Bingham argued that, in his view, the Court had misinterpreted the intent of the framers with respect to the Bill of Rights and its applicability to the states, he argued that the fourteenth amendment would correct that decision. See Bingham's remarks on February 28, 1866, reported in DEBATES, *supra* note 169, at 159-60.

²¹⁶ DEBATES, *supra* note 169, at 149, 155, 156.

²¹⁷ EQUAL JUSTICE UNDER LAW, *supra* note 31, at 405.

²¹⁸ DEBATES, *supra* note 169, at 149-61.

²¹⁹ *Id.*

²²⁰ See *supra* notes 31 and 169.

the radical agenda was not fully incorporated into the fourteenth amendment, neither was that agenda repudiated. The amendment adopted general language granting the federal government then revolutionary new powers to inquire into the state's treatment of its citizens. Unlike the Civil Rights Act of 1866, the amendment's general language was designed to allow for an evolution of approach, one that would permit inquiry into new circumstances and new state encroachments on the rights of citizens.²²¹

Finally, it should be recognized that any examination of the fourteenth amendment that focuses exclusively on events prior to and during the passage of that amendment is necessarily incomplete. Such an approach fails to consider the amendment as part of the ongoing process by which the once idiosyncratic egalitarianism of the abolitionists became the law of the land. As an early opinion by the Court on the fourteenth amendment reminds us, that amendment should be construed with a view towards the compelling implications of the amendment's provisions and by a holistic examination of Reconstruction era legislation including the fifteenth amendment. In *Strauder v. West Virginia*, the Court struck down a West Virginia statute restricting jury duty to whites as violative of the fourteenth amendment's equal protection clause.²²² The Court in *Strauder*, and the other cases following its line of reasoning,²²³ recognized early on an important point largely absent in Berger's analysis. To give full effect to the intentions of the framers of the fourteenth amendment, the Court must go beyond the details of whether or not the amendment was specifically designed to confer this right or protect that privilege and inquire into whether or not a state's practice is inconsistent with the concepts of citizenship and equal protection that were the central concerns of those who authored the constitutional revolution in race relations and federalism in the years following the Civil War.

IV. *Brown v. Board of Education of Topeka*: The Compelling Corollary

The Thirty-ninth Congress, whatever the views of its more radical members, probably did not plan to abolish school segregation. They did, however, intend to establish equality of treatment before the law. That was their overriding purpose in drafting the fourteenth amendment, a purpose that has been acknowledged even by the defenders of segregation in the major cases dealing with that issue.²²⁴ What is important for any discussion of the Supreme Court's rulings on desegregation is not instances of the Thirty-ninth Congress' acceptance of segregation, amply detailed in *Government By Judiciary*. Instead, what is critical is the law they enacted, the fourteenth amendment, its fundamental purpose, and whether the Court reasonably and properly decided that state mandated segregation was at odds with fundamental constitutional doctrine. This issue is less a question of whether changes in social mores should be given constitutional effect than it is a question of whether or not the Court is properly empowered to take into account experience. There also is a question, critical to any examination of Berger's thesis: should law be measured strictly by its nominal, formally stated objectives or by its persistent effects, in essence its behavior?

Those who drafted the fourteenth amendment knew a great deal about inequality and almost nothing concerning equality before the law. That was inevitable. Before the

²²¹ See *supra* note 135.

²²² 100 U.S. 303 (1879).

²²³ *Virginia v. Rives*, 100 U.S. 313 (1879); *Neal v. Delaware*, 103 U.S. 370 (1880).

²²⁴ See *infra* notes 243-70 and accompanying text.

Civil War, scarcely a handful of states made even an arguable pretense of treating black and white equally before the law.²²⁵ In the vast majority of states, blacks, even if free, were decidedly unequal before the law. The South, home of 95% of the nation's black population, enforced a vigorous nonequality between the races, designed to protect the institution of slavery.²²⁶ There was little experience based on a presumption of legal equality between the races to inform the framers of the fourteenth amendment of all the necessary implications of the revolutionary doctrine they were developing.²²⁷

In the specific area of education the framers also suffered from a severe paucity of information. The vast majority of blacks lived in the South, a region where before the Civil War it was illegal to teach most blacks to read.²²⁸ It was a region where little effort was made to educate the children of poor whites; the common school movement came late to the South.²²⁹ Schools in the North were largely segregated, but before the passage of the fourteenth amendment, even the most enlightened northern states were not operating under a presumption, much less a mandate, of equal treatment before the law.²³⁰ It should also be added that few at the time were inclined to make comparisons of the relative qualities of white and black schools.²³¹ In education, as in most other areas, the framers of the fourteenth amendment simply had little experience to help them decide whether the equality before the law that they were mandating was inconsistent with segregation.²³²

Time brought experience. By the end of the nineteenth century, southern state legislatures, freed by a national weariness and lack of concern with the issue of race, wrote a new segregation into the laws of many states.²³³ These laws helped create a segregation far more detailed than anything that had existed in the antebellum era.²³⁴ This new segregation was far more extensive than anything that would have been tolerated during Reconstruction.²³⁵ It was an American apartheid labeled with the somewhat whimsical title of Jim Crow.²³⁶ At its zenith, this American apartheid exceeded even the wildest

²²⁵ The New England states came relatively close to establishing de jure equality between black and white before the Civil War. Nonetheless legal discrimination existed in the New England states; school segregation existed in parts of New England; black men, except for those in Rhode Island, could not serve in the militia; Connecticut withheld the vote from black men until after the Civil War. Pervasive social and economic discrimination existed in antebellum New England, despite the relative liberality of New England's laws. For two studies that examine black urban life in antebellum New England, see *THE AFRO-YANKEES*, *supra* note 183, and J. & L. HORTON, *BLACK BOSTONIANS: FAMILY LIFE AND COMMUNITY STRUGGLE IN THE ANTEBELLUM NORTH* (1979) [hereinafter cited as *BLACK BOSTONIANS*].

²²⁶ See *supra* note 175.

²²⁷ See *infra* notes 228-31.

²²⁸ *FROM SLAVERY TO FREEDOM*, *supra* note 17, at 156-57.

²²⁹ *Brown v. Board of Education of Topeka*, 347 U.S. 483, 489-90 (1954).

²³⁰ See *supra* note 225.

²³¹ In Massachusetts and Rhode Island, the two New England states that came close to recognizing black equality under law, the condition of black schools was an issue in antebellum attempts to integrate the school systems. See *BLACK BOSTONIANS*, *supra* note 225, at 70-76; *THE AFRO-YANKEES*, *supra* note 183, at 90-101.

²³² See *supra* notes 225-30 and accompanying text.

²³³ C.V. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3rd ed. 1974) [hereinafter cited as *THE STRANGE CAREER OF JIM CROW*].

²³⁴ *Id.* at 67-109.

²³⁵ *Id.*

²³⁶ Woodward informs us that the term had its origins in an antebellum song and dance act. See *id.* at 7.

dreams of its late nineteenth century originators.²³⁷ Blacks and whites were separated, by law, in every measurable facet of public life. The extensive list of legally mandated separations almost constituted a reduction *ad absurdum* argument against the segregationist practices emerging in the South at the turn of the century.²³⁸

Still the laws were passed and enforced.²³⁹ Such laws were coterminous with, and part of, the process of restoring total white rule to the South.²⁴⁰ From the beginning, supporters of equal rights recognized this legislation as an attempt to reinvigorate the southern caste system, a system critically wounded by northern imposed emancipation, made more critical by an egalitarian Reconstruction and still on the sick list in the 1880's and 1890's because of lingering black political power.²⁴¹ The law was designed to single out blacks as a group apart, to reinforce views of black inferiority, to provide a constant reminder of subordinate status, to provide the supporting ritual necessary to any caste system.²⁴²

Early on the issue was joined. In their brief against Louisiana's statute mandating segregation on railroad cars, attorneys for *Plessy v. Ferguson*²⁴³ argued that the real issue in the case was not whether or not the railroad provided essentially equal facilities when they

²³⁷ *Id.*

²³⁸ *Id.* at 68-69.

²³⁹ Such laws were numerous; some examples follow:

Use of Library.

Any white person of such county may use the county free library under the rules and regulations prescribed by the commissioners court and may be entitled to all the privileges thereof. Said court shall make proper provision for the negroes of said county to be served through a separate branch or branches of the county free library, which shall be administered by custodian of the negro race under supervision of the county librarian.

TEX. REV. CIV. STAT., art. 1688 (Vernon 1962), *repealed by* 1969 Tex. Gen. Laws Ch. 130, § 1.

Separate ticket offices and entrances for white and colored races; penalty:

All circuses, shows and tent exhibitions, to which the public of more than one race is invited or at which it is expected to attend, shall provide for the convenience of its patrons not less than two ticket sellers and not less than two entrances to the performance, with individual ticket takers and receivers. In the case of outside or tent performances these ticket offices shall not be less than twenty-five feet apart. One of the entrances shall be exclusively for persons of the colored race.

Any proprietor, manager, ticket seller, or employee connected with any show, tent exhibition, or circus, who violates this section, or who is found admitting and receiving persons of several races in the same entrance, shall be fined not more than twenty-five dollars, and in default of payment shall be imprisoned for thirty days.

LA. REV. STAT. ANN. § 4:5 (West 1973), *repealed by* 1975 La. Acts 638, § 3.

Separation of white and colored races.

A. All public parks, recreation centers, play-grounds, community centers and other such facilities at which swimming, dancing, golfing, skating or other recreational activities are conducted shall be operated separately for members of the white and colored races. This shall not preclude mixed audiences at such facilities, provided separated sections and rest room facilities are reserved for members of white and colored races. This provision is made in the exercise of the state's police power and for the purpose of protecting the public health, morals and the peace and good order in the state and not because of race.

LA. REV. STAT. ANN. 4:451 to 4:455 (West 1973), *repealed by* 1972, La. Acts 254, § 1.

²⁴⁰ THE STRANGE CAREER OF JIM CROW, *supra* note 233, at 67-109, *passim*.

²⁴¹ *Id.* at 31-65.

²⁴² *Codifying Caste*, *supra* note 182, at 260-61.

²⁴³ 163 U.S. 537 (1896).

separated black and white.²⁴⁴ It was instead the legal disparagement, the state mandated reiteration of black inferiority that segregation enforced.²⁴⁵

One of Plessy's attorneys, James C. Walker, framed the issue most cogently. His brief contended that the power to designate individuals as black or white, a critical issue in *Plessy v. Ferguson*²⁴⁶ because Plessy was seven-eighths white, was the power to make a radical determination of an individual's chances in life.²⁴⁷ Walker further argued that the state's assumption of the power to make legal racial distinctions was inconsistent with the free and formally equal status that blacks enjoyed under the law, such a power was only consistent with a legal assumption of inferiority.²⁴⁸ Walker claimed that Louisiana's classification and assignment of railway passengers by race was a practice reminiscent of the defunct slave regime, a badge of slavery at sharp variance with the dictates of the thirteenth amendment.²⁴⁹ That the purpose of the Louisiana railroad statute was to reinforce notions of black inferiority was clear, and Walker bolstered this view by pointing to the sole exception that that law made.²⁵⁰ Black nurses accompanying white children were permitted to ride in white cars.²⁵¹ The law would tolerate no mixing of blacks with the general population unless their subordinate status was unquestionable.²⁵²

Louisiana's attorneys and ultimately the Court, rejected the arguments made by Plessy's attorneys.²⁵³ But even their rejections may have framed the issue in such a way as to make compelling the decision in *Brown v. Board of Education of Topeka*,²⁵⁴ fifty-eight years later. The attorneys presenting Louisiana's case rejected the psychological and sociological arguments offered by Plessy's attorneys.²⁵⁵ Still they and the Court agreed that the fourteenth amendment required equality of treatment by the state.²⁵⁶ Attorneys for Louisiana stressed that the coach facilities designated for black passengers were substantially equal to the facilities provided for white ones.²⁵⁷ Although they maintained that facilities need not be identical, Louisiana's attorneys conceded that substantial equality was required, that the fourteenth amendment would not be satisfied if the state attempted to provide unequal facilities.²⁵⁸ The Court accepted Louisiana's theory of the case. Plessy permitted separation, but it also mandated substantial equality of treatment.²⁵⁹

In the years between *Plessy* and *Brown*, southern states and quite a few non-southern states vigorously accepted the first part of the *Plessy* doctrine, separation, while ignoring the second part, equality, with an equal vigor. This essay is not the place to focus on the

²⁴⁴ 13 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, Briefs for Plaintiff in Error, *Plessy v. Ferguson*, at 3-135 (P. Kurland and G. Casper eds. 1975) [hereinafter all cited as LANDMARK BRIEFS].

²⁴⁵ *Id.*

²⁴⁶ 163 U.S. 537 (1896).

²⁴⁷ 13 LANDMARK BRIEFS, *supra* note 244, Briefs for Plaintiff in Error, *Plessy v. Ferguson*, at 36.

²⁴⁸ *Id.* at 38.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 46.

²⁵² *Id.*

²⁵³ *Plessy*, 163 U.S. at 551-52.

²⁵⁴ 347 U.S. 483 (1954), *supplemented* 349 U.S. 294 (1955); *see supra* note 3.

²⁵⁵ 13 LANDMARK BRIEFS, *supra* note 244, Briefs for Defendants in Error, *Plessy v. Ferguson*, at 143.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *See Plessy*, 163 U.S. at 549-50.

manifest inequalities that accompanied de jure segregation, still it should be stressed that such inequalities were well known before the decision in *Brown*.²⁶⁰ In the field of education, the systematic denial to black students of physically equal facilities,²⁶¹ similarly qualified teachers,²⁶² and adequate textbooks²⁶³ alone could have been the basis for a compelling claim that segregation and equality were not compatible in fact, even if the two were theoretically reconcilable. Prior to *Brown*, the Court had decided to go beyond mere state assertions of equality in university education into an examination of the facilities actually available to white and black students. In *Sweatt v. Painter*²⁶⁴ and *McLaurin v. Oklahoma*²⁶⁵ the Court found that the separate facilities available to black university students did not meet the substantial equality test enunciated in *Plessy*. The Court ordered Oklahoma and Texas to admit black students to state university facilities.²⁶⁶

Still the plaintiffs in *Brown* did not rest their complaint on a detailing of the obvious inequalities found in segregated school systems. Instead their complaint was essentially an updating of *Plessy's* complaint, an assertion that segregation constituted a stigmatization of black students, a stigmatization that not only reinforced white notions of black inferiority, but one that all too often resulted in black internalization of such notions as well.²⁶⁷ Buttressed by the social sciences, which had matured considerably in the years between *Plessy* and *Brown*, the advocates of desegregation won a decision declaring de jure segregation in education incompatible with the fourteenth amendment.

Berger's criticism of that decision in *Government By Judiciary* is a criticism that eschews consideration of the amendment's fundamental purposes in favor of an examination of the past that fails to illuminate the issue presented. The record presented in *Brown*, indeed the record of legally mandated segregation in early years of the twentieth century is clear. The Jim Crow laws and state practices, of which school segregation was a major part, were designed to perpetuate sentiments of white supremacy, to reinforce an American caste system.²⁶⁸ They were applied in a manner calculated to make such sentiments self-fulfilling prophecies. Those intentions and practices have proven incompatible with the fundamental purposes of the fourteenth amendment.

Yet, Berger's reasoning would have required the Court to ignore practices of state governments designed to perpetuate inequality before the law, an inequality that even segregation's defenders acknowledged was inconsistent with the fourteenth amendment.²⁶⁹ Berger would substitute for *Brown's* inquiry into actual state practices a mode of analysis incapable of going beyond a mechanical examination of state law, a facial scrutiny

²⁶⁰ A number of sociological studies had documented the inequalities of segregated society in the United States. Perhaps the most famous at the time the Court was considering *Brown* was the study done by Swedish social scientist Gunnar Myrdal and his associates. See G. MYRDAL, AN AMERICAN DILEMMA (1944).

²⁶¹ G. MYRDAL, AN AMERICAN DILEMMA, at 946-52 (vol. 2).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ 339 U.S. 629 (1950).

²⁶⁵ 339 U.S. 637 (1950).

²⁶⁶ *Sweatt*, 339 U.S. at 636; *McLaurin*, 339 U.S. at 642.

²⁶⁷ 49 LANDMARK BRIEFS, *supra* note 244, Briefs for Appellants, *Brown v. Board of Education of Topeka*, at 4.

²⁶⁸ See *supra* notes 156-67.

²⁶⁹ See 13 LANDMARK BRIEFS, *supra* note 244, Briefs for Defendants in Error, *Plessy v. Ferguson* at 118-22; 49 LANDMARK BRIEFS, *supra* note 244, Briefs for Appellees, *Brown v. Board of Education of Topeka*, at 83-88.

with the limited objective of discovering whether a state's statute specifically contravened a practice the Thirty-ninth Congress meant to outlaw.²⁷⁰ Such a limited inquiry would make an empty shell of the fourteenth amendment's guarantees, a thin shield of protection for individual liberties, easily circumvented by any state official intelligent enough to present a statute that was not constitutionally offensive on its face. Such an approach would sacrifice the Court's ability, indeed responsibility, to insure individual liberty to the punctilious demands of an empty formalism.

V. IS IT STILL NECESSARY TO HANG A VILLAIN, WHIP HIM, OR EVEN CUT HIS EARS OFF?

A strict, if not empty, formalism, combined with a rigid assertion that constitutional provisions must be interpreted with an exclusive reference to the specific problems the framers intended to address appears to be Berger's yardstick for assessing the constitutionality of state actions and the Court's review of those actions. His criticism of the Court in *Death Penalties* rejects any role for the Court in capital cases that would extend beyond an excruciatingly narrow reading of state statutes to determine whether or not they are discriminatory on their face. Berger rejects the view that systematic discrimination in the application of the death penalty is proper cause for the Court's concern.²⁷¹ He also disparages the notion that changing social circumstances can move the demands of the eighth amendment beyond the eighteenth century catalogue of horrors that gave rise to that amendment's adoption.²⁷²

Berger's discussion of the fourteenth amendment's implications in capital cases is, perhaps, more disturbing than his eighth amendment argument. Berger's assertion that the fourteenth amendment was not designed to "save an undoubtedly guilty black murderer from the death penalty because a jury had sentenced a white to life imprisonment,"²⁷³ is fundamentally beside the point. The thrust of the abolitionist argument with respect to discrimination and the death penalty has not been an individual one, a claim that racial prejudice in isolated cases has permitted the occasional execution of black murderers while permitting the occasional white murderer to escape with a lesser penalty.²⁷⁴ Instead the abolitionists have contended, backed by abundant statistical evidence, that the administration of the death penalty has been rife with discrimination.²⁷⁵ From the initial decision of prosecutors who determine whether a defendant should be charged with capital or noncapital homicide, to the decisions of judges and jurors who determine sentencing, through the reviews by appellate courts, and finally in the deliberations of governors and pardoning authorities, the question of who is killed and who is spared has been determined to a frightening, perhaps constitutionally impermissible, degree by race, class, sex and other criteria by which Americans discriminate.²⁷⁶ Berger's failure to

²⁷⁰ See *supra* notes 42-49.

²⁷¹ DEATH PENALTIES, *supra* note 9, at 53-58.

²⁷² *Id.*

²⁷³ *Id.* at 57.

²⁷⁴ 73 LANDMARK BRIEFS, *supra* note 244, Briefs for Appellant-Petitioner, *Furman v. Georgia*, at 397, 477.

²⁷⁵ 73 LANDMARK BRIEFS, *supra* note 244, Brief for NAACP *amicus curiae*, *Furman v. Georgia*, at 375, 465, 719.

²⁷⁶ *Id.* Hanz Zeisel argues that the prosecutor is key in this process. Prosecutors have almost unlimited discretion in deciding whether to charge a suspect with a capital or noncapital felony and whether, in the former case, to press for a death sentence if a conviction occurs. See Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, at 466-67 (1981)

recognize that this pattern raises critical fourteenth amendment questions that the Court could not properly ignore is a serious one.

Nowhere is this failure more glaring than in Berger's discussion of the death penalty for rape. *Death Penalties* criticizes the Court's decision in *Coker v. Georgia*.²⁷⁷ In *Coker*, the Court ruled that the death penalty for rape violated the eighth amendment because it was disproportionate to the offense.²⁷⁸ Berger's discussion here is far too brief. Totally absent from Berger's argument is any acknowledgment that the twentieth century application of the death penalty for rape has been so severely tainted by racism as to call it into serious question on both eighth amendment and equal protection grounds. Although *Coker* was one of the rare white rapists condemned for his crime, part of the Court's background when it decided *Coker* was evidence introduced by his attorneys and also previously introduced in *Furman v. Georgia*.²⁷⁹ That evidence showed that black men convicted of raping white women in southern states were virtually alone in being executed for their crimes. Nearly 90% of those executed between the years 1930 and 1967 for rape were black.²⁸⁰ Such a pattern raises serious equal protection problems that might legitimately concern the Court.

That pattern also poses serious eighth amendment problems. In twentieth century America, executions for rape have been so peculiarly linked to race and region as to call into serious question the public acceptability of a generalized death penalty for the crime. Public sentiment had decided through innumerable decisions that, as a general rule, death was a disproportionate punishment for the crime of rape. Statutes prescribing the death penalty for rape could only survive enforcement by virtue of a suspiciously limited application. Attorneys for *Coker* argued that the twentieth century history of the death penalty for rape did not indicate general support for it as a penal measure, but instead principally as a means of racial control.²⁸¹ The Court was aware of this history. It was also aware that of the states that re-enacted capital punishment after *Furman*, Georgia was alone in providing the death penalty for the rape of an adult female.²⁸² The peculiar application of the death penalty for rapists before *Furman* and the virtual nationwide legislative abolition of rape's capital status after, furnished strong evidence that the death penalty for rape was no longer consonant with the evolved American sense of justice.²⁸³

That evolved or evolving sense of justice is central to the dilemma. Berger would limit the Court's eighth amendment analysis to the sensibilities of the framers.²⁸⁴ And his

[hereinafter cited as *Race Bias in the Administration of the Death Penalty*]; see also Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908 (1982) [hereinafter cited as *Capital Punishment as a System*].

²⁷⁷ 433 U.S. 584, 592 (1977) (plurality opinion).

²⁷⁸ *Id.*

²⁷⁹ 97 LANDMARK BRIEFS, *supra* note 244, Briefs for Petitioner-Appellant, *Coker v. Georgia*, at 796-97; 73 LANDMARK BRIEFS, *supra* note 244, Briefs for Appellant-Petitioner, *Furman v. Georgia*, at 464.

²⁸⁰ 97 LANDMARK BRIEFS, *supra* note 244, Briefs for Petitioner-Appellant, *Coker v. Georgia*, at 796-97; 73 LANDMARK BRIEFS, *supra* note 244, Briefs for Appellant-Petitioner, *Furman v. Georgia*, at 464.

²⁸¹ 97 LANDMARK BRIEFS, *supra* note 244, Briefs for Petitioner-Appellant, *Coker v. Georgia*, at 796-97; 73 LANDMARK BRIEFS, *supra* note 244, Briefs for Appellant-Petitioner, *Furman v. Georgia*, at 464.

²⁸² 97 LANDMARK BRIEFS, *supra* note 244, Briefs for Petitioner-Appellant, *Coker v. Georgia*, at 798-99.

²⁸³ *Id.*

²⁸⁴ See DEATH PENALTIES, *supra* note 9, at 29-58.

research documenting eighteenth century hangings and dismembering of major criminals and petty miscreants provides abundant evidence that the capital crimes of today would survive the scrutiny of the framers.²⁸⁵ The Court, however, has recognized, and properly so, that its eighth amendment inquiries should not be confined to a simple comparison of current statutes with eighteenth century punishments.²⁸⁶ The Court's evolving standards approach is almost inherent in the language of the amendment. This attribute was recognized when the amendment was proposed. Livermore's lament during the debate over the amendment's ratification should serve as a reminder that even eighteenth century sensibilities recognized cruelty in the death penalty.²⁸⁷ There is additional evidence on this point. Juries in eighteenth century England often avoided the harshness of the prevailing criminal code by refusing to convict defendants in spite of strong evidence.²⁸⁸ Benefit of Clergy was, despite its inherent class discrimination, one device that permitted courts to spare lives.²⁸⁹ English convicts were often banished to the Americas in an effort to spare judge and felon the horrors of the extreme penalty.²⁹⁰ Still Livermore believed the penalty necessary and the widespread existence of laws in the eighteenth century prescribing death for numerous crimes should convince us that many of Livermore's contemporaries agreed with his view. That common agreement should alert us to the reason for the relative rarity of the death penalty in modern America. It should also inform us on why the Court has properly used the eighth amendment to subject capital punishment to a more rigorous scrutiny than that amendment's framers employed.

Death was a frequent punishment in the eighteenth century world because few alternatives existed. Those few alternatives usually involved either corporal punishment or banishment. Crime and criminal justice in eighteenth century America took place in a world where long term imprisonment was essentially unknown.²⁹¹ In the nineteenth century, often at the prompting of religious reformers anxious to provide an alternative to the death penalty, states began establishing penitentiaries.²⁹² This movement to substitute imprisonment for capital punishment began in the northeastern states before the Civil War.²⁹³ By the end of the nineteenth century some provision for long term imprisonment existed in every state.²⁹⁴ With the realization of an alternative to execution,

²⁸⁵ *Id.*

²⁸⁶ For the Court's earliest use of the evolving standards approach, see Justice McKenna's opinion in *Weems v. United States*, 217 U.S. 349, 357-82 (1909).

²⁸⁷ This recognition was pointed out by one of Berger's critics, long-time abolitionist Hugo Adam Bedau. See Bedau, *Berger's Defense of the Death Penalty: How Not to Read the Constitution*, 81 MICH. L. REV. 1152, 1160 (1983). Bedau suggests that Livermore's remarks should cause the Court to construct a balancing test for capital punishment. As the absence of long-term imprisonment made death a necessary, albeit cruel, punishment in the eighteenth century, the existence of long-term correctional facilities in the twentieth century does away with the necessity for capital punishment, and hence, its cruelty is no longer constitutionally justifiable. *Id.*

²⁸⁸ See generally D. HAY, P. LINEBAUGH, J. RULE, E.P. THOMPSON, & C. WINSLOW, *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* (1975); Baker, *Criminal Courts and Procedures at Common Law*, in J.S. COCKBURN, *CRIME IN ENGLAND 1550-1880* (1977).

²⁸⁹ DEATH PENALTIES, *supra* note 9, at 35, 42.

²⁹⁰ See *supra* note 288.

²⁹¹ See generally D.J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1977); [hereinafter cited as *THE DISCOVERY OF THE ASYLUM*].

²⁹² FRIEDMAN, *supra* note 100, at 249-51, 259-61.

²⁹³ *Id.*

²⁹⁴ *Id.* at 517-24.

sentiment concerning the purposes of punishment changed. Traditional beliefs about the retributive and deterrent effects of punishment were supplemented with a new rationale. The idea developed that somehow the prison experience might contribute to the reformation of felons, what we today would term rehabilitation.²⁹⁵ If some of the methods and theories employed in nineteenth century American penal institutions to effect this reformation seem today at once astonishingly naive and appallingly primitive, it nonetheless must be remembered that the penitentiary contributed to significant changes in public sentiment.²⁹⁶ That changed sentiment brought about the abolition of capital punishment in some states.²⁹⁷ It reduced the number of capital crimes in all states.²⁹⁸ When America entered the twentieth century, death was no longer the routine penalty exacted for most offenses.²⁹⁹ Increasingly, it was reserved for those crimes and criminals deemed most reprehensible.³⁰⁰

As the twentieth century unfolded, the use of the death penalty became rarer.³⁰¹ This trend was not constant.³⁰² The 1930's saw an increase in the number of executions, reaching a nationwide highpoint in 1935 when 199 executions occurred.³⁰³ Still the long range trend indicated a sharp decline in the willingness of state and federal governments to kill offenders.³⁰⁴ After the Second World War, particularly in the sixties, the downward trend accelerated.³⁰⁵ By 1967, the year the Court imposed a moratorium on executions to consider challenges to the constitutionality of capital punishment, only two executions were performed in the United States.³⁰⁶

This downward trend partly reflected, as supporters of the death penalty have maintained, the increased appellate scrutiny that capital cases received.³⁰⁷ It also reflected American society's increasing reluctance to apply the death penalty.³⁰⁸ By the time the Court considered *Furman*, only a small minority of those convicted of murder received death sentences.³⁰⁹ Opponents of the death penalty argued that this indicated that capital punishment was incompatible with modern American views on justice, that the punishment was such that it could only be applied if applied rarely, to minority groups and the poor, to those who were outcasts even among the population of murderers.³¹⁰ Such application, the abolitionists contended, was inconsistent with the eighth amendment.³¹¹ It was an argument that asked the Court to look beyond statutes permitting or mandating the death penalty and instead make a painstaking inquiry into the operation of law.

In *Furman*, the Court, in part, made such an inquiry. The opinions that struck down then existing capital statutes were informed by strong evidence and persuasive arguments

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ 73 LANDMARK BRIEFS, *supra* note 244, Briefs for Petitioners, *Furman v. Georgia*, at 374-75.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 577.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 373-75.

³¹⁰ *Id.*

³¹¹ *Id.*

indicating that the actual implementation of the death penalty was seriously marred by a highly arbitrary application.³¹² Compelling evidence existed that race and class played equal if not greater roles than the heinousness of an individual's crime in determining capital sentencing.³¹³ Finally, and this became the governing doctrine in *Furman*, then existing capital statutes provided no guidelines that would inform juries when capital sentences might appropriately be considered.³¹⁴ In a society where the death penalty had become the exception rather than the rule, the Court demanded that states give some indication which combination of heinous crime and individual depravity might properly permit the jury to authorize the state to take a life.³¹⁵

Furman was a somewhat conservative decision that did far less damage to the death penalty than many first believed.³¹⁶ It immediately met with strong criticism. Dissenting members of the Court anticipated many of Berger's complaints.³¹⁷ Chief Justice Burger argued for an interpretation of the cruel and unusual punishment clause that went somewhat beyond the framers' views, but fell far short of the doctrine developed in *Furman*.³¹⁸ The Chief Justice admitted that the terms *cruel* and *unusual* were not self-defining and could take into account contemporary mores, when clear.³¹⁹ He, for example, indicated that the Court could ban branding and ear-cropping, despite the prevalence of such punishments in the eighteenth century because society today clearly rejected such sanctions.³²⁰ Nonetheless, he dismissed the idea that the death penalty was prohibited because of its freakish imposition as "unwarranted hyperbole."³²¹ Justice Powell saw the decision as having grave consequences for stare decisis, federalism, judicial restraint and separation of powers.³²² Justice Rehnquist's opinion argued for judicial restraint. He

³¹² See, e.g., *Furman*, 408 U.S. at 249 (Douglas, J., concurring).

³¹³ *Id.* at 251-52 (Douglas, J., concurring).

³¹⁴ *Id.* at 248 (Douglas, J., concurring).

³¹⁵ See, e.g., *id.* at 311-12 (White, J., concurring).

³¹⁶ Many commentators believed that *Furman* would, for all practical purposes, make capital punishment impossible in the United States. This view appears to have been the initial conclusion of Chief Justice Warren Burger. According to Woodward and Armstrong, Burger is said to have expressed the view, at the time of the decision, that *Furman* effectively eliminated capital punishment in the United States. See THE BROTHERS, *supra* note 2, at 219. Although states immediately moved to reinstate the death penalty, drafting capital statutes designed to satisfy guidelines put forth in *Furman*, the constitutionality of such statutes remained in doubt until the Court's ruling in *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion). In *Gregg*, the Court sustained Georgia's capital sentencing statute, noting that it differed from pre-*Furman* laws. *Id.* at 206-07. The new statute required two phases in capital trials: the first determined guilt or innocence, the second determined penalty. *Id.* at 196-98. The Court also noted that the statute provided sufficient guidance for juries to satisfy the *Furman* standards. *Id.* at 197-98. Since *Gregg*, the number of executions performed in the United States has steadily increased. In 1977, one year after *Gregg*, the single person executed in the United States, Gary Gilmore, refused to appeal his death sentence. No executions occurred in 1978; two were performed in 1979, and none in 1980. See H. BEDAU, THE DEATH PENALTY IN AMERICA 25 (3d ed. 1982) [hereinafter cited as THE DEATH PENALTY IN AMERICA]. The great increase in executions has come since 1981. As of March 21, 1985, 41 executions had occurred in the post-*Gregg* era, 38 of these executions occurring between 1981 and 1985. See *Murderer Electrocutted in Georgia, Said His Race "Was Against" Him*, N.Y. Times, March 21, 1985, at B24, col. 5.

³¹⁷ See *infra* text accompanying notes 318-24.

³¹⁸ See *Furman*, 408 U.S. at 375 (Burger, C.J., dissenting).

³¹⁹ *Id.* at 382 (Burger, C.J., dissenting).

³²⁰ *Id.* at 384 (Burger, C.J., dissenting).

³²¹ *Id.* at 387 (Burger, C.J., dissenting).

³²² See *Furman*, 408 U.S. at 414 (Powell, J., dissenting).

indicated that the decision called into sharp question the role of judicial review in a democratic society.³²³ Justice Blackmun accepted the idea that the terms *cruel* and *unusual* might take on new meaning as society developed. He argued that the new meaning was better expressed through legislative action instead of the Court's decisions.³²⁴

After *Furman*, states moved quickly to re-establish the death penalty, providing guidelines for capital sentencing to meet the Court's constitutional objections.³²⁵ On one level Berger is correct in his assertion that this action furnishes strong evidence of public support for capital punishment. But the arguments of Berger and other retentionists should cause us, and the Court, again to make the difficult inquiry, distinguishing between formal law and the law as actually applied before we too readily accept the idea that the death penalty is consonant with contemporary American values. Berger makes certain assumptions concerning the death penalty. He sees "undoubtedly guilty murderers" escaping execution after "fair trials" because of the Court's interventions.³²⁶ Other retentionists argue that society has the right, for either deterrence or retribution, to exact the extreme penalty for the most heinous crimes.³²⁷

These assumptions express an opinion concerning the kind of death penalty that is consistent with current American values. It is an opinion that assumes less a generalized support for the death penalty than a support strongly rooted in certain assumptions of due process and selectivity. It is a set of assumptions still, despite *Furman*, at variance with the actual application of capital statutes.³²⁸ Public assumptions concerning due process, the fair trials received by murder suspects, are inconsistent with strong evidence that those ending up on the nation's death rows are overwhelmingly poor men forced to entrust their lives in trial to often marginal counsel.³²⁹ The idea that death sentences are reserved for society's most depraved criminals, those who must be disposed of, cannot be reconciled with the execution of murderers who would have received sentences far lighter than imprisonment for life had they accepted offered plea bargains.³³⁰ Such disparities

³²³ See *Furman*, 408 U.S. at 465 (Rehnquist, J., dissenting).

³²⁴ See *Furman*, 408 U.S. at 405 (Blackmun, J., dissenting).

³²⁵ DEATH PENALTIES, *supra* note 9, at 125.

³²⁶ *Id.* at 57.

³²⁷ For two supporters of this view, see W. BERNIS, *FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY* (1979); E. VAN DEN HAAG & J.P. CONRAD, *THE DEATH PENALTY: A DEBATE* (1983).

³²⁸ *Id.*

³²⁹ *Capital Punishment as a System*, *supra* note 276, at 912; Clark, *Rush to Death*, 229 *THE NATION* 385 (1979).

³³⁰ See *Race Bias in the Administration of the Death Penalty*, *supra* note 276, at 466-67; Lewis, *Killing the Killers: A Post Furman Profile of Florida's Condemned*, 25 *CRIME AND DELINQ.* 200, 204-05 (1979); Amnesty International, *Proposal for a Presidential Commission on the Death Penalty in the United States of America*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 316, at 380.

For three recent examples of convicted murderers who turned down plea bargains that would have resulted in life sentences and were subsequently condemned to death, see *Arango v. State*, 437 S.2d 1099 (Fla. 1983), *vacated and remanded sub nom. Arango v. Wainwright*, 716 F.2d 1353 (11th Cir. 1983), *cert. denied*, 457 U.S. 1140 (1982); *Autry v. McKaskle*, 727 F.2d 358 (5th Cir. 1984), *cert. denied*, 104 S. Ct. 1458 (1984); *Goode v. Wainwright*, 704 F.2d 593 (11th Cir. 1983). Of the three, James David Autry was executed on March 14, 1984, Luis Carlos Arango is still appealing his death sentence and Arthur Frederick Goode has been removed from Florida's death row and placed in a mental institution.

According to a 1984 Justice Department study, the median time actually served by convicted murderers sentenced to life imprisonment was a little over five years. See Reskin, *Majority of Lawyers*

are, of course, present in noncapital sentencing and perhaps must be borne in the interests of systemic efficiencies and economies, but to permit their continuation in capital cases belies the belief shared by abolitionists and retentionists alike that death is different. Such disparities also raise important questions concerning whether or not the apparent public acceptance of the death penalty is based on a woeful ignorance of its actual application, an ignorance which if rectified would bring about a demand for either radical change or abolition.

And although Berger would contend that such questions are properly raised by legislatures and not the Court,³³¹ the issue is still properly a matter for judicial concern. If the cruel and unusual punishment clause is to have any meaning, it must take that meaning from society's changed circumstances, from both evolved needs and sentiments. The framers authored the cruel and unusual punishment clause fully mindful of the existence of a judicial branch that could and likely would shape the demands of that clause to changing circumstances.³³² They did not essay a list proscribing boiling in oil, crucifixion and the other horrors with which they were familiar. If their intention, to safeguard even the most despised from punishments shocking to the public conscience, is to be given full effect, the Court will continue to be troubled with capital cases.

VI. SOME FURTHER CONSIDERATIONS

Throughout *Government By Judiciary and Death Penalties*, Berger's often prodigious scholarship is marred by an all too facile consideration of the materials he has developed. Both studies suffer from a rigid literalism that prevents the author from looking beyond the printed word to considerations of actual practice. Berger's work also lacks a sense of history capable of accommodating growth and change in individuals, society, or the law. There is a readily apparent self-confidence in Berger's work that has led to his uncritical acceptance and vigorous assertion of his own assumptions, with a failure to consider alternatives or to explore evidence contrary to his thesis. Such deficiencies are unfortunate because there are important issues concerning history, original understandings, and the Court's processes that must be addressed. Legal historians, perhaps especially conservative ones like Berger, have an important role to play in reminding an all too often result-oriented bench, bar, and public of the need to retain continuity with original intentions.

Support Capital Punishment, in A.B.A. J., April, 1985, at 44. The knowledge that life sentences frequently result in relatively short-term imprisonment has long been a staple of the retentionist argument. There is evidence that support for capital punishment declines significantly when life imprisonment without parole is offered as an alternative. See *id.*

Because life sentences usually result in short-term imprisonment, retentionists argue that life sentences leave the public unprotected. Murderers are paroled and are capable of killing again. See Amsterdam, *Capital Punishment*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 316, at 353-54. The argument can also be made that because most murderers are, in effect, sentenced to short-term imprisonment, the contrast between murderers condemned to death and those sentenced to prison is even starker than would be the case if those sentenced to life actually served out their full terms. This disparity makes questions concerning how the death row population is selected even more compelling.

³³¹ DEATH PENALTIES, *supra* note 9, at 48-49.

³³² Eighth amendment opponent Samuel Livermore, for example, believed that common eighteenth century punishment might one day be abolished because of the cruel and unusual punishment clause. See notes 75, 287.

In a very real sense, the more interesting problem is the one Berger has failed to address, perhaps even to consider. It is not the problem of gathering in minute detail the debates of the framers and shackling Constitution and Court to those discussions. The problem instead is to recognize that common-law processes are inherent in constitutional interpretation, while attempting to develop limits that prevent those processes from doing violence to the framers' intentions. It is a problem that acknowledges that a too pliable constitution is no constitution at all, while a too brittle one is too fragile to endure.