

## Scholarly Commons @ UNLV Boyd Law

---

Scholarly Works

Faculty Scholarship

---

1984

### Berger v. The Supreme Court—The Implications of His Exceptions- Clause Odyssey

Thomas B. McAfee

*University of Nevada, Las Vegas – William S. Boyd School of Law*

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Constitutional Law Commons](#)

---

#### Recommended Citation

McAfee, Thomas B., "Berger v. The Supreme Court—The Implications of His Exceptions-Clause Odyssey" (1984). *Scholarly Works*. 534.

<https://scholars.law.unlv.edu/facpub/534>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact [youngwoo.ban@unlv.edu](mailto:youngwoo.ban@unlv.edu).

# BERGER v. THE SUPREME COURT—THE IMPLICATIONS OF HIS EXCEPTIONS-CLAUSE ODYSSEY

*Thomas B. McAfee\**

## TABLE OF CONTENTS

|      |   |     |
|------|---|-----|
| I.   | INTRODUCTION .....  | 220 |
| II.  | BERGER'S ORIGINAL UNDERSTANDING .....   | 223 |
|      | A. <i>The Supreme Court as Ultimate Arbiter</i> .....                                 | 223 |
|      | 1. <i>Congress v. The Supreme Court</i> .....   | 224 |
|      | a. Judicial Supremacy .....   | 224 |
|      | b. Legislative History .....  | 226 |
|      | c. Impeachment as the Sole Remedy .....   | 228 |
|      | d. The Fifth Amendment .....  | 228 |
|      | e. Answering Objections .....   | 229 |
|      | 2. Countering Criticism—1974 .....  | 230 |
|      | 3. <i>Government by Judiciary</i> .....   | 231 |
|      | B. <i>The Transition</i> .....  | 231 |
| III. | BERGER'S SWITCH IN TIME—HEREIN OF ARGUMENTS,<br>METHODS, AND THEIR APPLICATIONS ..... | 234 |
|      | A. <i>"Additional Facts"</i> .....  | 235 |
|      | B. <i>Congressional Predominance</i> .....  | 238 |
|      | C. <i>The Clear Text</i> .....  | 241 |
|      | D. <i>The Legislative History</i> .....   | 244 |
|      | E. <i>Impeachment</i> .....   | 249 |
|      | F. <i>Postratification Construction and Congressional<br/>    Acts</i> .....          | 250 |
|      | G. <i>Judicial Precedent</i> .....  | 256 |
|      | H. <i>Due Process and Hart's Postulate</i> .....                                      | 261 |
|      | I. <i>Berger's "Newer" Exceptions-Clause Theory</i> .....                             | 264 |
| IV.  | CONSTITUTIONAL INTERPRETATION .....   | 266 |
| V.   | CONCLUSION .....  | 272 |

---

\* Assistant Professor of Law, Southern Illinois University. B.S., University of Utah (1976); J.D., University of Utah (1979).

## I. INTRODUCTION

"[H]istory still has its claims."\*

If there is a hallmark to the work of Raoul Berger it is that, in both style and substance, he writes like a lawyer.<sup>1</sup> The assumption that seems to underlie his historical research is that one "party," one side of every dispute, will emerge as the clear winner.<sup>2</sup> In one of his earliest important works, *Congress v. The Supreme Court*,<sup>3</sup> Berger drew a straightforward analogy between the role of lawyer and legal historian,<sup>4</sup> and he defended that work by confidently asserting that decision-making in practical affairs cannot be neutral or detached and that even scholarship is necessarily tied up with advocacy.<sup>5</sup> And despite Berger's recent contention that the legal scholar worthy of respect rises above mere legal advocacy and result-orientation to a more neutral and de-

\* Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 609 (1942) (Frankfurter, J., concurring), quoted in Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 Nw. U.L. REV. 311, 311 n.\*\* (1979).

1. For comments on Berger's tendency to write advocacy briefs more than balanced scholarly treatments, see Cooper, Book Review, 85 HARV. L. REV. 702, 702-03 (1972); Gibbons, Book Review, 31 RUTGERS L. REV. 839, 843-46 (1978); Lynch, Book Review, 63 CORNELL L. REV. 1091, 1092 (1978); Murphy, Book Review, 87 YALE L.J. 1752, 1756-57 (1978); Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651, 655 & n.18 (1979). As for his writing style, Berger's penchant for lawyering is reflected in the generous sprinkling of lawyer's jargon throughout his published works—he "dissents" and "concur" from the views of his scholarly "brethren," alludes to his own "testimony" or to the "confessions" of his critics, and argues for the "case" he has presented and against his critics' "charges" or "briefs." Needless to say, the reader alone must judge whether Berger's scholarly work product fails to rise above the standard set by the effective but one-sided advocacy that appears to be inherent in "good lawyering."

2. The author has not seen a book or an article in which Berger has acknowledged that, after careful study of all of the records bearing on a significant modern issue, the evidence bearing on original intent was so indeterminate as to yield no clear answer.

3. R. BERGER, *CONGRESS V. THE SUPREME COURT* (1969).

4. *Id.* at viii. Berger also contended, however, that lawyering requires attention to discrepant facts and a certain objectivity, lest the unaccounted for comes to blow up in the advocate's face. *Id.* But my own experience is that the lawyer's attention to discrepant facts is frequently attuned to "explaining" them rather than weighing them on objective scales; the balance of this article will establish grounds for my conclusion that Berger's work has frequently been more the work of an advocate than that of a scholar.

5. Berger, *Judicial Review: Countercriticism in Tranquility*, 69 Nw. U.L. REV. 390, 418 & n.144 (1974). There Berger defended charges that he had engaged in one-sided advocacy by asserting that, having sifted the historical materials, he, "like a judge or any scholar worth his salt, [had] ceased to teeter between 'on the one hand and on the other hand,' made [his] choices, stated them forthrightly, defended them, and explained why [he] rejected discrepant evidence." *Id.* at 418. He went further. Relying on the work of "activists" Miller and Howell (a citation with its own ironies), Berger concluded that "'objectivity is not attainable either in the social sciences or in the natural sciences . . . value preferences inescapably intrude to guide decisions made among competing alternatives.'" *Id.* at 418 n.144 (quoting Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 665 (1960)).

tached plane of analysis,<sup>6</sup> he retains the lawyer's desire to see his own ideas become more than parchment, to see his arguments change the real world, and not alone the minds of other scholars and theorists.

It must be admitted that, to some greater or lesser extent, his arguments have done just that. Since *Congress v. The Supreme Court*, Berger's lawyerlike concern with practical decisionmaking and his commitment to historical research to the end of influencing current events have followed him through the balance of his prodigious work.<sup>7</sup> Much of that historical research yielded timely discussion of hotly disputed issues about which few firm, clear conclusions had been reached either in established constitutional practice or in judicial precedent.<sup>8</sup>

By contrast, Berger's 1977 *Government by Judiciary*<sup>9</sup> struck many as anachronistic and irrelevant, for, in seeking to turn the clock back to 1866 it challenged the constitutional validity of a large percentage of the Supreme Court's best established fourteenth amendment decisions.<sup>10</sup> In the case of the Supreme Court's "transformation" of the

6. Berger, *Paul Brest's Brief for an Imperial Judiciary*, 40 MD. L. REV. 1, 32 (1981). "Scholars command respect because they are thought to be disinterested, to stand above the battle." *Id.* Compare *supra* note 5.

7. Representative works of the period include R. BERGER, DEATH PENALTIES (1982); R. BERGER, GOVERNMENT BY JUDICIARY (1977) [hereinafter cited as R. BERGER, GOVERNMENT]; R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974) [hereinafter cited as R. BERGER, EXECUTIVE PRIVILEGE]; R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973) [hereinafter cited as R. BERGER, IMPEACHMENT]; Berger, *Residence Requirements for Welfare and Voting: A Post-Mortem*, 42 OHIO ST. L.J. 853 (1981); Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111 (1974); Berger, *Impeachment for "High Crimes and Misdemeanors,"* 44 S. CAL. L. REV. 395 (1971) [hereinafter cited as Berger, *High Crimes*].

8. E.g., R. BERGER, IMPEACHMENT, *supra* note 7; R. BERGER, EXECUTIVE PRIVILEGE, *supra* note 7.

9. R. BERGER, GOVERNMENT, *supra* note 7. In *Government by Judiciary*, Berger developed the thesis that the exclusive purpose and full scope of § 1 of the 14th amendment was the constitutionalization of the narrowly defined rights enumerated in the Civil Rights Act of 1866. *Id.* at 20, 22-36.

10. See P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 422 (2d ed. 1983). In fact, by focusing his greatest attention on modern decisions concerning reapportionment and segregation, Berger has frequently understated the extent to which *Government by Judiciary* calls into question virtually all the 14th amendment decisions of courts at all levels. E.g., R. BERGER, GOVERNMENT, *supra* note 7, at 53, 69-98, 117-33; Berger, *The Scope of Judicial Review: An Ongoing Debate*, 6 HASTINGS CONST. L.Q. 527, 626 (1979) (broad reading of equal protection—to reach segregation—"escaped the notice of the Court for three quarters of a century") [hereinafter cited as Berger, *Scope*]; Berger, "Government by Judiciary": Judge Gibbons' Argument Ad Hominem, 59 B.U.L. REV. 783, 807 (1979); Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U.L. REV. 311, 312, 358 (1979) (contending that his 14th amendment study "calls for reassessment of a very recent 'revolution'" and, in turn, referring to Jacobus tenBroek as "an early activist") [hereinafter cited as Berger, *Light from the Fifteenth*].

Berger is obviously correct that there have been substantial doctrinal developments in recent decades. Most of these recent developments, however, were foreshadowed by much earlier developments. And although it required three-quarters of a century for the Supreme Court to rule out

fourteenth amendment, changing the real world would be no easy task. So for many, the work was seen as destined to produce a vigorous debate of purely academic significance. Judicial reversal of the most significant fourteenth amendment doctrines is virtually inconceivable. Constitutional amendment or impeachment of justices<sup>11</sup> are both unlikely. Cumbersome as it might be, congressional "contraction of federal jurisdiction"<sup>12</sup> seems the only plausible route to any meaningful reform of what Berger termed "judicial usurpation" via the fourteenth amendment.

But Berger early rejected such a solution. In his 1969 *Congress v. The Supreme Court*, Berger evaluated the potential claims to supremacy of Congress and the Supreme Court under the exceptions clause of article III and found in favor of the Supreme Court.<sup>13</sup> Berger explicated a narrow construction of Congress' express power to make exceptions to the Court's appellate jurisdiction, holding that Congress' claimed power to curb judicial excess was at odds with the design of the Constitution and without historical foundation.<sup>14</sup> From 1969 to 1980, Berger reaffirmed his initial reading of the legislative history of article III no less than four times, once in an elaborate response to *Congress v. The Supreme Court's* initial reviewers.<sup>15</sup> But over the last several years, Berger apparently grew increasingly frustrated with judicial arrogation of power and increasingly anxious to find a practical remedy for judicial abuse.<sup>16</sup> Finally, in a 1982 book-length assault on the work of the Court,<sup>17</sup> Berger delivered a startling reversal of his long-held views on the scope of Congress' authority, including an explanation worthy (one might say) of similar efforts of the Court he has come to detest.

This article is premised on the view that Berger's personal odyssey is relevant on several grounds to the current debate in constitutional

---

segregation, it is also true that the Court rejected Berger's equal-protection distinction between "civil" and "political" rights in *Strauder v. West Virginia*, 100 U.S. 303 (1880). The Court's decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), rested upon lower-court precedent and dubious factual and moral arguments, which attempted to distinguish *Strauder*, rather than on any thoughtful use of intent revealed in the legislative history. My own review of the early case law, admittedly not yet completed, has not revealed a single case at any level that adopts Berger's reading of any of the principal clauses of § 1 of the 14th amendment.

11. For a discussion of impeachment and amendment as potential remedies, see J. ELY, *DEMOCRACY AND DISTRUST* 46-47 (1980); cf. Berger, *Congressional Contraction of Federal Jurisdiction*, 1980 WIS. L. REV. 801, 809 n.52.

12. Berger, *supra* note 11.

13. R. BERGER, *supra* note 3.

14. See *infra* text accompanying notes 21-66.

15. See *infra* text accompanying notes 67-99.

16. See *infra* text accompanying notes 79-103.

17. R. BERGER, *DEATH PENALTIES*, *supra* note 7.

theory and history in which Berger prominently figures. First, Berger's experience with this important issue provides one more illustration of the pitfalls that attend primary reliance upon legislative debate as the key evidence of legislative intent.<sup>18</sup> Second, an analysis of the process of Berger's own "transformation" of the meaning of the exceptions clause can assist us in determining the extent to which he has a coherent theory of, or even a consistent approach to, constitutional interpretation. Third, we shall see that some of the methods which characterized Berger's earliest study of the exceptions clause, implicitly rejected in Berger's revision, were carried over to his study of the fourteenth amendment. Although a comprehensive treatment of the issue of the original understanding of the fourteenth amendment is necessarily beyond the scope of this article, illustrative samplings from the historical record suggest that readers have grounds for approaching *Government by Judiciary* with caution. Fourth, the grounds of justification offered for Berger's change of position raise the issue whether Berger's own work matches up to his invocation of the model of the scholar as one who stands above the result-orientation of the political sphere. Finally, Berger has frequently insisted that "scholarly integrity" is always an issue of relevance, as he asks readers to discount the scholarship of others based on samplings which he believes demonstrate the scholar's lack of capacity to "sift historical materials."<sup>19</sup> While my own view is that every scholarly work must ultimately be evaluated on its merits, to the extent that human nature and the press of time lead us to generalize, Berger's work on the exceptions clause suggests that readers of his other works should carefully scrutinize the underlying sources to determine whether the inferences drawn are sound.

## II. BERGER'S ORIGINAL UNDERSTANDING

"[A] page of history is worth a volume of logic."\*

### A. *The Supreme Court as Ultimate Arbiter*

It has been said that to understand a legal doctrine one must appreciate both its origins and its line of growth.<sup>20</sup> Similarly, to appreciate the nature and scope of Berger's change of mind, it is essential to review the fruits of his initial historical research and the development of his views over the last few years. This review will serve as a backdrop to a critique of his writings justifying and elaborating his change

---

18. For relevant discussion, see *infra* text accompanying notes 162-93.

19. E.g., Berger, *Paul Dimond Fails to "Meet Raoul Berger on Interpretivist Grounds,"* 43 OHIO ST. L.J. 285, 314 (1983); Berger, *supra* note 5, at 431, 434.

\* R. BERGER, *supra* note 3, at 173.

20. *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.).

in position.

### 1. *Congress v. The Supreme Court*

Any attempt to justify a position on a controversial issue such as Congress' exceptions power necessarily involves the twofold task of setting forth the grounds for the conclusion and then responding to the arguments advanced by advocates of the opposing position. Berger's initial effort purported to discover the true historical intent for the exceptions clause from the "legislative history" of the clause, a discovery which he has long contended ends further debate; Berger has consequently felt little obligation to confront at any length opposing contentions which have been based largely on the text and historical practice. It will be of value, nonetheless, to review briefly Berger's approach at both levels of analysis.

In *Congress v. The Supreme Court*, Berger offered four distinguishable arguments against unlimited congressional power to limit the Supreme Court's jurisdiction. These arguments rested on (1) the central role of the Supreme Court in the constitutional scheme, as reflected in the historical records; (2) the narrow purpose for the exceptions clause revealed by the legislative history of the clause; (3) evidence that impeachment was deemed to be the sole limitation on judicial independence contemplated by the Framers; and (4) the limitations which the fifth amendment places on the plenary powers of Congress. Before turning to the obstacles to the restrictive reading, we will review Berger's strongly stated conclusions based on the above arguments.

#### a. Judicial Supremacy

For Berger, the starting point for analyzing the scope of the exceptions power was an inquiry into the legitimacy of judicial review itself.<sup>21</sup> Relying on the tenet "that a Constitutional grant is not to be read in isolation but in the context of the whole document,"<sup>22</sup> Berger contended that the legislative history of the exceptions clause must be read in light of historical materials showing the Framers' overriding concern with congressional abuse of power and their commitment to judicial review as a central element within the constitutional scheme.<sup>23</sup> *Congress v. The Supreme Court* thus committed 250 pages to demonstrating not only the legitimacy of judicial review, in both historical

---

21. R. BERGER, *supra* note 3, at 3-5, 285-86, 289-95, 336.

22. *Id.* at 4.

23. "Once the legitimacy of judicial review and its central role in the Constitutional scheme are granted, the power of Congress to make 'exceptions' to the Supreme Court's appellate jurisdiction cannot properly be given unlimited scope." *Id.* at 336.

and textual terms, but also the importance which the Framers attached to judicial independence and finality as the keys to protecting private rights and guarding against unconstitutional congressional acts.<sup>24</sup>

According to Berger, the drive for placing such great power in the Court was the "widespread fear of oppression by a remote federal government, centered largely in dread of 'legislative despotism.'"<sup>25</sup> Judicial review was viewed as the key to confining Congress to its enumerated powers;<sup>26</sup> indeed, the key endorsement of judicial review in the ratifying conventions was offered as part of efforts to still opposition based on the claim that the Constitution created an omnipotent Congress.<sup>27</sup> Berger's study also found that the fear of despotism reflected in the enumeration of congressional powers was further pointed up by the demands leading to the enactment of the Bill of Rights.<sup>28</sup> In response to Crosskey's attack on the notion that "the Court was to be the special protector of the people against their legislatures,"<sup>29</sup> Berger pointed to a contrary statement by James Wilson and concluded that "[a]ny shuffling of power as between Congress and the Supreme Court which impairs [the] 'security' [given the rights of man] contravenes the 'primary and principal object' of the Constitution."<sup>30</sup>

In contrast to his findings of fear of legislative despotism, Berger was at pains to demonstrate that the Framers placed great confidence in the judicial branch.<sup>31</sup> James Madison told the Virginia convention: "Were I to select a power which might be given with confidence, it would be the judicial power."<sup>32</sup> Similar statements by such prominent Framers as Hamilton, Mason, and Ellsworth, as well as Jefferson and others, constituted "positive evidence of special confidence in the judiciary."<sup>33</sup> Consequently, the Framers not only granted courts the power to

24. Professor Pollak commented that this treatment was "a species of historical overkill . . . balanced (if that be the correct word) by the dozen pages spent on the exceptions clause." Pollak, Book Review, 79 YALE L.J. 973, 975 (1970); see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 52 (10th ed. 1980).

25. R. BERGER, *supra* note 3, at 8. Indeed, Berger asserted that "the point of departure" for the ratifiers of the Constitution "was disenchantment with an all-powerful, uncurbed legislature." *Id.* at 12.

26. *Id.* at 13-16. Berger correctly observed that the provision for limited congressional powers was viewed by the drafters as a more secure guard of liberty than a bill of rights. *Id.* at 19 n.53.

27. *E.g., id.* at 15-16, 123 & n.25.

28. *Id.* at 18.

29. *Id.* at 19 (quoting W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 938 (1953)).

30. R. BERGER, *supra* note 3, at 18-19.

31. R. BERGER, *supra* note 3, at 184 n.175, 185-86.

32. 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 535 (2d ed. 1886), quoted in R. BERGER, *supra* note 3, at 185.

33. R. BERGER, *supra* note 3, at 185-86.



review legislative acts for constitutionality, but also went to lengths to provide for tenure and fixed compensation so that judges would have the "independent spirit" required if they were to be "the bulwarks of a limited Constitution."<sup>34</sup>

Finally, Berger found that the Framers considered finality a necessary incident of the power of judicial review.<sup>35</sup> According to Berger, the Framers distinguished lawmaking from "interpretation," the latter being the exclusive function of the courts.<sup>36</sup> While Congress might place a preliminary construction on constitutional provisions, a contrary interpretation by the Court is binding on Congress and precludes "a fresh legislative construction."<sup>37</sup> In short, Berger concluded that "the courts were the ultimate arbiters whether Congressional Acts were consistent with the Constitution."<sup>38</sup>

Berger's conclusions as to the legitimacy and centrality of judicial review as the bulwark against legislative oppression became the foundation for his "argument based on the purpose and structure of the Constitution."<sup>39</sup> Because "fear of Congressional despotism bulked large in the thinking of the Founders," the "check" of judicial review took on great weight and counseled "a hospitable construction of the Constitutional text."<sup>40</sup> Berger concluded that in light of the decisionmaking authority given the Court by the Framers, if we postulate an intent to vest Congress with power to curb what it deems as judicial abuse, "then the Convention was aimlessly going in circles."<sup>41</sup>

#### b. Legislative History

With his "purpose and structure" argument as backdrop, Berger turned his attention to the legislative history of the exceptions clause. There he found that the clause "was the subject of prolonged debate

34. THE FEDERALIST NO. 78, at 508 (A. Hamilton) (Mod. Libr. ed. 1937), *quoted in* R. BERGER, *supra* note 3, at 119.

35. R. BERGER, *supra* note 3, at 188-97, 83 n.168.

36. *Id.* at 148.

37. *Id.* at 194; *see also id.* at 147.

38. *Id.* at 294. In 1974, in response to criticism of his view that the judiciary is "the sole authoritative interpreter of the Constitution," Berger, *supra* note 5, at 427 (misquoting Cooper, *supra* note 1, at 707), Berger responded, "That is the conventional view, running from *Marbury v. Madison* to *Powell v. McCormack*: the Court is 'the ultimate interpreter of the Constitution;' and it is solidly rooted in the 'original intention.'" Berger, *supra* note 5, at 427 (footnotes omitted). *But see* G. GUNTHER, *supra* note 24, at 25-33; Strong, *Rx for a Nagging Constitutional Headache*, 8 SAN DIEGO L. REV. 246, 254-74 (1971); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965). Berger's treatment of judicial review was thus described as "an elaborate argument for embracive judicial review authority." G. GUNTHER, *supra* note 24, at 52.

39. R. BERGER, *supra* note 3, at 293.

40. *Id.* at 336.

41. *Id.* at 286.

which turned not at all on curbing judicial 'excess,' but was solely concerned with review of matters of 'fact.'"<sup>42</sup> Berger found that the concerns of the Framers and ratifiers with respect to the Supreme Court's appellate power focused on the Court's apparent authority to review a jury's fact-finding on appeal.<sup>43</sup> The debate in the state conventions consisted of proponents of the Constitution reassuring suspicious delegates that Congress' exceptions power would provide any needed remedy for the abuse of appellate review of facts.<sup>44</sup> Although Berger's 1969 treatment was not absolutely unequivocal as to whether the Framers intended the exceptions clause to apply *exclusively* to the power to limit review of jury findings,<sup>45</sup> when commentators took Berger as taking precisely that position,<sup>46</sup> he readily concurred.<sup>47</sup>

Consistent with his broader argument from structure and purposes, the silences in the legislative history spoke as loudly as the statements from the debate. "There is not the faintest intimation in the several convention records, nor in the contemporary prints, that the 'exceptions' clause was designed to enable Congress to withdraw jurisdiction to declare an Act of Congress void."<sup>48</sup> Moreover, the few expressed concerns about possible judicial abuse of power were never responded to by reference to the exceptions clause—a natural response if the clause were designed as a remedy to abuse of power.<sup>49</sup> Anyone who

---

42. *Id.* at 286–87. Although Berger did not explicitly draw the inference that the scope of the provision was fixed by this exclusive concern, it is clear that he drew that inference. *See infra* note 47 and accompanying text.

43. Article III grants the Court appellate jurisdiction "both as to law and fact," which apparently was read by many as including the power to try the facts *de novo*. *See* U.S. CONST. art. III, § 2, cl. 2. It should be noted, however, that the quoted phrase was added by amendment *after* the exceptions-clause language was included. *See* Strong, *supra* note 38, at 252. *But see* Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 OR. L. REV. 3, 6–7 (1973).

44. R. BERGER, *supra* note 3, at 287–89.

45. Thus Berger at one point stated: "In sum, discussion of the 'exceptions' power . . . revolved *almost exclusively* about the retrial of facts found by a jury." *Id.* at 289 (emphasis added). Yet Berger never intimated that his use of "almost" left room for a broader exercise of congressional power than merely limiting the Court's power to try facts. *Compare infra* note 47 and accompanying text.

46. *See* G. GUNTHER & N. DOWLING, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 53 (8th ed. 1970); Pollak, *supra* note 24, at 975; Bice, Book Review, 44 S. CAL. L. REV. 499, 514 n.50 (1971); *cf.* Van Alstyne, *A Critical Guide to Ex parte McCordle*, 15 ARIZ. L. REV. 229, 249 n.75 (1973).

47. In 1974, Berger recast a prior statement to emphasize that the exceptions-clause debate "was *solely* concerned with the fear that review of matters of 'fact' would infringe the right of trial by jury." Berger, *supra* note 5, at 406. In the same article, Berger referred approvingly to a previous work by Professor H.J. Merry contending that the Convention intended the exceptions powers to be limited to appellate treatment of fact issues. *Id.* at 406–07. Berger thereafter referred to the "Merry-Berger interpretation." *Id.* at 407.

48. R. BERGER, *supra* note 3, at 289.

49. *Id.* at 290.

had "toiled over the records," Berger concluded, could not "attribute to the Founders an intention" to subject the power of judicial review to the whim of Congress.<sup>50</sup>

### c. Impeachment as the Sole Remedy

One particular argument linking the Framers' intentions about judicial review and independence to the silences in the legislative history merits separate attention. Berger's 1969 study found that "[t]he sole reference to a curb on the 'independence' and 'responsibility' of the judiciary . . . was to the impeachment power. This, said Hamilton, 'is the *only* provision on the point which is consistent with the necessary independence of the judicial character.'"<sup>51</sup> According to Berger, Hamilton viewed impeachment as a sufficient deterrent to judicial abuse of power.<sup>52</sup> What Hamilton omitted thus looms large: "If the 'exceptions' power was available to Congress in order to curb judicial 'excesses,' Hamilton's reference to impeachment substituted a steamhammer where a nutcracker would suffice."<sup>53</sup> For Berger, then, Hamilton's statements not only added weight to his structural argument, but (as Berger's added emphasis suggests) quite straightforwardly excluded intrusions on the power of judicial review beyond the steamhammer remedy of impeachment.

### d. The Fifth Amendment

Finally, Berger contended that Congress' power to make exceptions to appellate jurisdiction, like any grant of authority, was subject to the constraints of the fifth amendment.<sup>54</sup> Although he provided no evidence for the claim, Berger concluded that "[h]istory affords a sure footing" for the judicial assertion that Congress may not so exercise its power to limit jurisdiction "as to deprive any person of life, liberty or property without due process of law or to take private property without just compensation."<sup>55</sup>

---

50. *Id.* at 295. Berger went on to find it implausible that the careful draftsmen who "minutely examined Article III" would have failed to be aware of the inconsistency that would be presented were the exceptions clause intended to be given literal effect. The argument, of course, cuts both ways; if these careful draftsmen had intended the provision to have a narrow scope, it is hard to believe they would not have seen the discrepancy between their intent and language.

51. *Id.* at 290 (quoting THE FEDERALIST NO. 78, at 514 (A. Hamilton) (Mod. Libr. ed. 1937)).

52. R. BERGER, *supra* note 3, at 291.

53. *Id.*

54. *Id.* at 295-96.

55. *Id.* at 296 (quoting *General Motors v. Battaglia*, 169 F.2d 254, 257 (2d Cir. 1948)).

## e. Answering Objections

Berger's 1969 work generally had little to say in response to the arguments marshaled by proponents of congressional power over jurisdiction. Most obviously, Berger's narrow reading of the clause seemed to defy the obvious import of the Constitution's text. Berger's response to the argument from "the unqualified terms of Article III,"<sup>56</sup> contained within a footnote, consisted of reliance on Judge Friendly's dictum that literalism is "peculiarly inappropriate in Constitutional adjudication."<sup>57</sup>

The other major barrier to Berger's reading was that judicial pronouncements from the earliest days of the Republic had cast the exceptions power in sweeping terms. For Berger, it was clear (but not especially reassuring) that these "incautious, all-too-sweeping Supreme Court pronouncements"<sup>58</sup> were mere "dicta" which happened to carry "the weight of 150 years of reiteration."<sup>59</sup> Far more important than the scholar's ability to "distinguish" these cases—a task which Berger left for others<sup>60</sup>—was that "sweeping dicta about the all but 'uncontrollable' power of Congress"<sup>61</sup> must necessarily give way to evidence of historical intent. The possibility that early, contemporaneous judicial pronouncements, by such prominent advocates of judicial review as John Marshall, should be given great weight in determining whether the Framers conceived of the exceptions power in extremely narrow terms, received no mention at all.<sup>62</sup>

Berger's tendency to assume that the relevant "history" of the exceptions clause consisted exclusively of its "legislative history" was further reflected in his treatment of the Judiciary Act of 1789.<sup>63</sup> Berger's original study treated the implications of the Act for arguments about the legitimacy of judicial review and reviewed its jurisdictional provisions.<sup>64</sup> Yet his treatment of the Judiciary Act paid no special attention to the Act's limitation of the Court's power to the review of enumerated state court decisions on substantive constitutional issues. Likewise,

---

56. R. BERGER, *supra* note 3, at 3.

57. *Id.* at 3 n.13 (quoting Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 396 (1964)).

58. R. BERGER, *supra* note 3, at 1.

59. *Id.* at 1 n.4.

60. *Id.*

61. *Id.* at 5.

62. Compare *infra* text accompanying notes 197–98.

63. In 1974, Berger alleged that his 12-page treatment had "dredged up all that history offered on the subject . . ." Berger, *supra* note 5, at 411 n.112. Actually, Berger did not even dredge up the complete legislative history, as is reflected by his omission of Professor Merry's material on the developments at the Philadelphia Convention. See *id.* at 406.

64. For citation to his prior treatment, see *id.* at 415 n.127.

he failed to confront the obvious implications of the fact that “an ‘almost adjourned session’ ”<sup>65</sup> of the Constitutional Convention took for granted that its power to limit the scope of jurisdiction extended beyond questions of fact.<sup>66</sup> The book’s section on the exceptions clause, moreover, made no reference to the Act.

## 2. Countering Criticism—1974

Five years after *Congress v. The Supreme Court* was published, Berger published a forty-four-page response to three scholarly reviews of the book.<sup>67</sup> The article restated and defended the central themes of Berger’s original study and answered various points raised by the critics. Obviously this occasion provided Berger an opportunity to reconsider his prior conclusions and to revise any overbroad statements in the light of critical response. Also of interest is Berger’s devotion of several pages to defending the thesis that original intent must govern in questions of constitutional interpretation.<sup>68</sup>

In addition, Berger provided a response to the point, raised by reviewer Louis A. Pollak, that the First Congress had refrained from granting the Supreme Court the full appellate jurisdiction specified in article III.<sup>69</sup> Berger answered: “Regrettably, Pollak failed to take account of the historical data which adequately explain the withholding.”<sup>70</sup> The “historical data” was that distrust of federal power and regard for state tribunals (“as a cherished first bastion” for protection against federal encroachment) led the draftsmen of the Judiciary Act to conclude that there was no need for further review when a law had “passed muster with a jealous-eyed State court.”<sup>71</sup> Hence the Act did not provide for appellate review of state court decisions upholding the constitutionality of federal action. Berger concluded that that Act evidences solicitude for States’ and individual rights rather than a purpose to “shut off access to the courts for relief from unconstitutional action

... ”<sup>72</sup>

Regrettably, Berger’s analysis failed to acknowledge that while the

65. R. BERGER, *supra* note 3, at 144 (quoting C. WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT 99 (1925)).

66. For Berger’s initial attempt to meet the objection, see *infra* text accompanying notes 69–73. See also *infra* text accompanying notes 197–98.

67. Berger, *supra* note 5. Berger asserted that he had “re-traced [his] steps, always with a readiness to confess myself mistaken,” but had found that the work of his reviewers “supply no corrections.” *Id.* at 434.

68. See *id.* at 401–05.

69. *Id.* at 414–15.

70. *Id.* at 415.

71. *Id.*

72. *Id.* at 415–16.

1789 Act may not be “holding” for unlimited congressional power, it rather clearly stands for the proposition that the First Congress did not view its power over appellate jurisdiction as limited to questions of fact.<sup>73</sup> This lapse was not the only one in Berger’s article. In the midst of defending his historical thesis that the exceptions power was to be limited to review of questions of fact, Berger tossed in Professor Goebel’s observation that within “contemporary state practice,” legislative regulation of jurisdiction had been confined largely to matters of detail and to codification of traditional exclusions of appellate review.<sup>74</sup> Although Professor Goebel’s observation may lend support to the view that the Framers had no grand expectations for the exceptions clause, its thrust actually runs counter to Berger’s original thesis in that it suggests a reading of the clause’s purpose that is narrow but not limited to review of jury findings.<sup>75</sup>

### 3. *Government by Judiciary*

While Berger was in the midst of exposing the transformation of the fourteenth amendment, he nevertheless remained firmly committed to the narrowest possible reading of the exceptions clause. Specifically, Berger reaffirmed his initial theses that the exceptions power was not intended as a check on judicial usurpation and that the exclusive remedy for judicial abuse was the provision for impeachment.<sup>76</sup> Moreover, he did not intimate that he held any reservations about any of the related conclusions stated in his earlier study.

#### B. *The Transition*

By 1979, Berger was obviously growing impatient with the Court and its scholarly defenders.<sup>77</sup> In responding to critics of *Government by Judiciary*, Berger stated that he had learned not to count on judicial self-limitation, but to look for reform by the people.<sup>78</sup> Hinting that he was considering potential remedies for usurpation, Berger also asserted that “[i]t would require only one amendment (and I do not suggest that there may be no statutory means of dealing with judicial usurpa-

---

73. For Berger’s change of mind on this issue, see *infra* text accompanying note 197.

74. Berger, *supra* note 5, at 408 n.96 (citing 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 240 (1971)).

75. See Van Alstyne, *supra* note 46, at 258 n.95, 261 n.99 (relying on Goebel’s treatment to counter the view that control of power to review jury findings was the exclusive scope of exceptions clause). Even if the purposes of the exceptions clause did not include court-curbing, it does not necessarily follow that the provision’s scope is limited to those purposes. See *infra* text accompanying note 168.

76. R. BERGER, GOVERNMENT, *supra* note 7, at 294 n.50.

77. See Berger, *Scope*, *supra* note 10.

78. *Id.* at 573.

tion) to limit the Court's jurisdiction [under the fourteenth amendment]."<sup>79</sup>

That same year, Berger published a separate article on the fifteenth amendment in which he further developed his view that section 5 of the fourteenth amendment enables Congress to eliminate the judicial role in enforcing that amendment.<sup>80</sup> Berger also offered some curious comments on the exceptions clause. On the one hand, Berger restated his thesis that the Framers "merely meant to prevent the Court from revising the findings of a jury,"<sup>81</sup> asserting that "nothing I have read leads me to alter the views I expressed about the legislative history."<sup>82</sup> Nevertheless, Berger offered that inasmuch as his conclusions had "caused scarcely a ripple in academe," and considering "its current contempt for the legislative intention, academe cannot well complain if Congress chooses to give literal effect to the plain terms of article III."<sup>83</sup>

A year later, Berger teetered on the brink of reversing his prior conclusions on the intended scope of the exceptions clause. In an article supportive of "Congressional Contraction of Federal Jurisdiction,"<sup>84</sup> Berger's emphasis changed markedly. *Congress v. The Supreme Court* had been dedicated to Henry Hart, the eminent scholar who had "lit the way"<sup>85</sup> to the proper understanding of the exceptions clause;<sup>86</sup> Herbert Wechsler had been portrayed as a professor of "great learning"<sup>87</sup> who had nonetheless failed to perceive the significance of the Founders' provision for review of state court decisions.<sup>88</sup> By contrast, in Berger's 1980 article, Hart's philosophy of judicial review went unmentioned while Wechsler's work of the mid-1960's, giving the exceptions clause a broad reading, was introduced by reference to Wechsler as "the leading

79. *Id.* at 624. Berger's reference to a potential "statutory means of dealing with judicial usurpation" probably has primary reference to his contention that courts may not give effect to the terms of the 14th amendment in the absence of congressional enforcement legislation.

80. Berger, *Light from the Fifteenth*, *supra* note 10, at 354-55.

81. *Id.* at 355.

82. *Id.*

83. *Id.*

84. Berger, *supra* note 11. In this article, Berger once again placed primary weight on his theory that Congress might, pursuant to § 5, withdraw judicial power to enforce the 14th amendment.

85. R. BERGER, *supra* note 3, at v.

86. In *Congress v. The Supreme Court*, Berger virtually began his argument by asserting "that a literal reading of the 'exceptions' clause would serve to 'destroy the essential role of the Supreme Court in the constitutional plan.'" *Id.* at 286 (quoting Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953)). See also Berger, *supra* note 5, at 409 & n.104.

87. R. BERGER, *supra* note 3, at 3.

88. *Id.* at 286 n.6.

authority in the field."<sup>89</sup> In 1969, as we have seen, Supreme Court cases reading the exceptions clause broadly represented in Berger's mind "incautious, all-too-sweeping . . . pronouncements"<sup>90</sup> and "sweeping dicta"<sup>91</sup> which could be readily distinguished, though perhaps with little comfort.<sup>92</sup> Yet by 1980, Berger was concluding that the Marshall opinion in *Durosseau v. United States*<sup>93</sup> "held" that the judicial power was subject to congressional limitation,<sup>94</sup> and reference was now made to "an attempt to distinguish an array of such cases."<sup>95</sup>

To be sure, these new points of emphasis did not prompt Berger "to renounce the legislative history,"<sup>96</sup> for he remained committed to the canon that "[t]he intention of the lawmaker is the law."<sup>97</sup> But they did lend additional weight to Berger's further elaboration of his novel argument justifying congressional action: Activists, said Berger, may not rely on the legislative history of the exceptions clause to oppose remedies for judicial abuse while at the same time insisting that the legislative history of the fourteenth amendment may be ignored in giving effect to the amendment's broad language.<sup>98</sup> Berger's new emphasis, moreover, pointed up his anxiety about finding a meaningful remedy for judicial usurpation, as well as his recognition that Congress was apparently more intrigued by the exceptions clause than by section 5. In a revealing statement in the concluding paragraph of the article, Berger contended: "The ongoing debate about the scope of judicial review would be pointless if there existed no machinery to correct judicial usurpation."<sup>99</sup>

89. Berger, *supra* note 11, at 805; cf. Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic*, 44 OHIO ST. L.J. 611 (1983).

90. R. BERGER, *supra* note 3, at 1.

91. *Id.* at 5.

92. *Id.* at 1 n.4. See also *id.* at 2 n.5.

93. 10 U.S. (6 Cranch) 307 (1810).

94. Berger, *supra* note 11, at 805.

95. *Id.* at 805 n.29 (emphasis added) (citing Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 173-84 (1960)). Berger cited the same article in 1969 and presumably relied upon it for his original conclusion that the cases were distinguishable.

The same shift of emphasis occurred with respect to *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869). Compare R. BERGER, *supra* note 3, at 2 n.5 with Berger, *supra* note 11, at 805 n.28. In both works, Berger indicates that *McCordle* "was approved in passing in *Glidden v. Zdanok*, 370 U.S. 530, 567 (1962)," but in 1969 Berger stressed Justice Douglas' dissenting view that *McCordle* would not be decided the same way today as well as Professor Hart's comments on the narrow scope of the holding. Such qualifications were simply eliminated from Berger's 1980 treatment.

96. Berger, *supra* note 11, at 806.

97. *Id.* (quoting *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903) (quoting *Smythe v. Fiske*, 90 U.S. (23 Wall.) 374, 380 (1874))).

98. Berger, *supra* note 11, at 806-07.

99. *Id.* at 809 (footnote omitted). In an accompanying footnote, Berger noted that the rem-



By 1982, Berger was ready for the final step. In *Death Penalties*,<sup>100</sup> Berger not only reemphasized the hypocrisy of the opponents to congressional exceptions power,<sup>101</sup> but also offered a full-blown argument for a broad reading of congressional power under the exceptions clause to curb "judicial excess." More recently, in the *University of Dayton Law Review's* 1983 symposium on Michael Perry's new book on constitutional theory, Berger offered amplification and qualification of his new exceptions-clause theory.<sup>102</sup> Specifically, Berger contended that the exceptions clause should be read as giving Congress power to curb illegitimate, *noninterpretive* judicial decisionmaking, but not to curtail *interpretive* judicial review.<sup>103</sup> The next section will critique the justifications for Berger's change of position and analyze his new exceptions-clause theory as a backdrop to addressing his broader views on constitutional interpretation.

### III. BERGER'S SWITCH IN TIME—HEREIN OF ARGUMENTS, METHODS, AND THEIR APPLICATIONS

*"To reason that a result is desirable, and therefore it is constitutional, is wishful thinking."\**

Berger's change in position on the scope of the exceptions clause reflected not merely an altered reading of the historical materials, but also a shift, however unwitting, in his approach to interpreting the Constitution. A review of the arguments justifying the change, moreover, reveals that Berger's implicit critique of *Congress v. The Supreme Court* raises questions about his interpretive methods that are equally relevant to Berger's work on the fourteenth amendment. Indeed, Berger's switch on the exceptions clause is of interest primarily because of the light it sheds on his overall approach to constitutional interpretation. The following critique therefore addresses the sufficiency of Berger's justifications for his new position and goes on to examine the broader implications of his arguments for his historical and interpretive theories.

As we shall see, Berger's new treatment of the exceptions clause is perhaps most noteworthy for what it omits. Berger refers to his discovery of additional facts that prompted the new evaluation, but offers no

---

edy of constitutional amendment would involve too "cumbersome" a process. *Id.* at 809 n.52. Accord R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 153-54.

100. R. BERGER, *DEATH PENALTIES*, *supra* note 7.

101. *Id.* at 160-61.

102. Berger, *Michael Perry's Functional Justification for Judicial Activism*, 8 U. DAYTON L. REV. 465, 502-06, 510-14 (1983).

103. *Id.* at 511.

\* Berger, *supra* note 11, at 801.

explanation of what they are or why it took twelve years for their relevance to become manifest. Similarly, Berger fails to account for the great weight he suddenly gives to evidence of the Framers' commitment to majoritarianism and the 1787-period distrust of the judiciary; his new emphasis on the constitutional text and devaluation of the legislative history suggesting that the Framers contemplated a relatively narrow use of the exceptions clause; or his sudden attachment of great weight to constitutional practice and judicial precedent. Finally, he offers a new theory of the constitutionally permissible functions of the exceptions clause that rests on the problematic distinction between interpretive and noninterpretive judicial review—without defining these terms or providing any reasoned account of how they are to be distinguished. And when Berger qualifies his new reading with a proposed constitutional limitation for interpretive judicial review, he fails to explain how that limitation can be reconciled with the balance of his new treatment without becoming a dead letter.

In addition, Berger's new treatment provides an implicit critique of the methods he employed in his 1969 study. Perhaps not surprisingly, we shall discover that a number of the most questionable of these methods were carried over to his study of the fourteenth amendment. In both studies, Berger gave virtually no apparent weight to the breadth and plainness of the text in his pursuit of the meaning of the provision in the context of the legislative and ratification debates. Similarly, Berger's works displayed a tendency to seize upon statements of purpose found in such debates as reflecting the exclusive purpose of the Framers—in the face of contextual factors and conflicting statements that call such an exclusive reading into question. These readings of exclusive purpose, in turn, have been maintained despite contrary contemporaneous legislative and judicial constructions of the provisions that now represent long-established practice and precedent. Berger's new treatment of the exceptions clause thus raises fundamental questions about Berger's approach to constitutional interpretation.

#### A. "Additional Facts"

Berger's most explicit confrontation with his prior position acknowledged that he had "come to believe it mistaken."<sup>104</sup> In explanation, he stated: "Twelve years of further study of the sources bearing on the *scope*, rather than the *legitimacy*, of judicial review brought many additional facts to my attention that need to be taken into account in evaluating [the] legislative history."<sup>105</sup> Berger's assertion is a

---

104. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 161 n.31.

105. *Id.*

curious one in a number of ways, not the least of which is its failure to acknowledge that his original conclusions had been reaffirmed several times during at least ten of those years. But other anomalies are even more striking.

To begin with, Berger fails to enumerate these "additional facts" or to explain their precise relevance to "evaluating" the legislative history. As we shall see, the only "facts" relied upon in the balance of Berger's argument, from evidence of distrust of judicial discretion at the time of the Convention to contemporaneous constructions of the exceptions clause and the weight of judicial precedent, were all considered by Berger in his 1969 study.<sup>106</sup> While some of this evidence was given short shrift in Berger's original study, none of it is new at all.

There are grounds, moreover, for skepticism whether Berger's post-1969 work has added much to the position he staked out on the scope of judicial review in *Congress v. The Supreme Court*. In his initial work, Berger treated (1) the clear-error rule;<sup>107</sup> (2) the evidence that proponents of judicial review did not contemplate a policy-making role for the Court, but rather assumed that the Court would merely police constitutional boundaries;<sup>108</sup> and (3) the view that change in the meaning of the Constitution must come only by amendment and not by construction.<sup>109</sup> Although Berger's treatment of these themes was offered somewhat tentatively, "in no dogmatic spirit,"<sup>110</sup> Berger's later works have only proliferated the quotations; they have not further illuminated the subjects.

Although Berger's approach to constitutional interpretation will later be treated at greater length,<sup>111</sup> it would be worthwhile to list a few salient points here. First, the fundamental premise of all of Berger's work since 1969 is that clearly discernible original intent is binding.<sup>112</sup> Second, while Berger has pointed to the clear-error rule as evi-

---

106. See, e.g., *infra* text accompanying notes 132-42 (distrust of judiciary); *infra* text accompanying notes 197-98 (contemporaneous construction); *infra* text accompanying notes 230-33 (judicial precedent).

107. R. BERGER, *supra* note 3, at 337-38, 343. The clear-error rule, sometimes called the presumption of constitutionality, calls for courts to pay deference to (at least some) other constitutional decisionmakers except where the constitutional violation is beyond doubt. For a critique of several formulations of the rule, see Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 213, 220 n.37 (1983).

108. R. BERGER, *supra* note 3, at 339-46.

109. *Id.* at 207-08.

110. *Id.* at 346.

111. See *infra* text accompanying notes 287-320.

112. See, e.g., R. BERGER, *GOVERNMENT*, *supra* note 7, at 284; R. BERGER, *supra* note 3, at 207-09; Berger, *The Scope of Judicial Review: The Continuing Dialogue*, 31 S.C.L. REV. 171, 173 (1980) [hereinafter cited as Berger, *Dialogue*]; Berger, *Scope*, *supra* note 10, at 530, 548-49.

dence of the limited scope of judicial review intended by the Framers, that formulation has played no significant role in any of Berger's constitutional arguments that I have read.<sup>113</sup> Third, Berger's treatment of the alleged prohibition on "policy-making" has been vague, ambiguous, and so severely qualified as to amount to a mere restatement of his long-held position that clearly discernible original intent is binding.<sup>114</sup> In a nutshell, Berger's views about the role of the judiciary have not changed much since 1969; it is his evaluation of the Court's performance that has been transformed.

At a broader level, it is difficult to see the relevance of further illumination of the proper scope of *judicial review* to the question whether Congress might address *judicial excess* under the exceptions clause. The scope of judicial review goes to the proper exercise of power to render final and binding decisions of law; it is not clear that it logically bears on the issue whether the exceptions power was to be a remedy for abuse. Surely in 1969 Berger did not believe that judicial finality implied an unlimited scope to the power of judicial review; indeed, *Congress v. The Supreme Court* contended that its proper scope was narrower than frequently conceived.<sup>115</sup> The debate over congressional power has never proceeded on the simplistic assumption that congressional action would invariably constitute an attempt to insulate unconstitutional congressional acts. The real concern, as Berger well knows, has always been that if the power to reach fundamental constitutional decisions of the Court is once established, there appears to be no stopping point—particularly in the face of the unqualified text of article III.

The point is well-illustrated by Berger's own treatment of the Court crisis of the 1930's. In his 1969 study, Berger made clear his view that the New Deal Era Court had stepped beyond the proper bounds of its decisionmaking authority.<sup>116</sup> Nevertheless, he drew upon President Roosevelt's selection of court-packing over jurisdiction-limiting strategies as a confirmation of the validity of his own narrow reading of the exceptions clause.<sup>117</sup> Indeed, going further, Berger quoted with approval a statement lumping together all such interferences with the Court's role: " 'When such a principle is adopted, our constitutional

---

113. A classic example is Berger's treatment of the present issue. Perhaps the most persuasive argument that the Supreme Court should uphold congressional jurisdiction-limiting legislation is that, given the breadth of text and the uncertainties presented by the historical record, the Court should defer to Congress' considered judgment as to the scope of its own power. Berger never even mentions the rule in his revised arguments.

114. See *infra* text accompanying notes 293-303.

115. R. BERGER, *supra* note 3, at 337-38.

116. *Id.* at 207 n.40, 208-09 & n.47, 292 n.39.

117. *Id.* at 291-92.

system is overthrown.'"<sup>118</sup> Moreover, Berger's treatment of impeachment as the remedy for judicial usurpation demonstrates his own awareness from the beginning of the possibility of judicial abuse, however the precise scope of judicial review might be defined.

On the whole, it seems hard to believe that Berger could have raised the issue of the scope of judicial review in his original study<sup>119</sup> and yet remained ignorant whether materials bearing on that issue might transform his confidently held position on the meaning of the exceptions clause. One is naturally led to wonder whether the "additional facts" Berger alludes to are not the same "facts" which have led him to the sober belief that during the last century the Court has fundamentally undermined our constitutional system. Such facts, of course, would relate less to the issue whether the Framers foresaw judicial usurpation and provided an adequate remedy than they would to an illumination of Berger's change of heart and mind. At any rate, it is an interesting question whether, in a search for historical truth about the intended scope of the exceptions clause, we ought not to be more interested in Berger's 1969 study, which he offered after "invoking judicial protection against . . . invasions of Constitutional rights," but at a time when he was nonetheless "not an uncurbed partisan of the Supreme Court,"<sup>120</sup> than in his 1982 analysis, offered only after he had "learned to expect no self-restraint from the justices"<sup>121</sup> and written while he anxiously awaited the "corrective measures"<sup>122</sup> of an aroused citizenry.

### B. Congressional Predominance

In stark contrast to *Congress v. The Supreme Court's* focus on the fear of legislative despotism<sup>123</sup> and its careful critique of Crosskey's historical arguments against judicial review based on evidence of belief in legislative supremacy,<sup>124</sup> Berger's new treatment suddenly discovered Madison's statement that "'in a republican form of government the legislature necessarily predominates.'"<sup>125</sup> But Madison was referring to the obvious predominance of Congress as the primary policymaker in the constitutional scheme without reference to whether Congress or the

---

118. *Id.* at 292 (quoting S. REP. NO. 771, 75th Cong., 1st Sess. 14 (1937)); see R. BERGER, *supra* note 3, at 292 n.41.

119. R. BERGER, *supra* note 3, at 346.

120. *Id.* at vii.

121. Berger, *Scope*, *supra* note 10, at 573.

122. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 9.

123. See *supra* text accompanying notes 25-30.

124. R. BERGER, *supra* note 3, at 21-36.

125. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 163 (misquoting THE FEDERALIST NO. 51, at 338 (J. Madison) (Mod. Libr. ed. 1937)).

Court must “predominate” in the sphere of constitutional decisionmaking. To the same effect is the statement of Gordon Wood, also relied on by Berger, that it was agreed that “‘the legislature was the most important part of any government.’”<sup>126</sup> Such statements tell us essentially nothing about whether the Framers believed that a simple majority of Congress might properly prevail over the Court in a clash over how the Constitution is to be interpreted.

Although Berger has been quick to chide others for preferring the general to the specific,<sup>127</sup> these statements he relies upon seem clearly to fall into the former category. In *Congress v. The Supreme Court*, Madison emerged as a strong proponent of the judicial power and an opponent of legislative omnipotence. In addition to expressing great confidence in the judiciary,<sup>128</sup> Madison stressed that judicial tenure was designed to avoid “undue complaisance” to the legislature, a situation that would make the legislature the “virtual expositor” of the laws.<sup>129</sup> Berger offered the assurance that “no one was more alive to the danger of ‘legislative omnipotence’” than Madison.<sup>130</sup>

We have seen that Berger’s 1969 study found that the Framers held great confidence in an independent judiciary as “the bulwarks of a limited Constitution.”<sup>131</sup> Without alluding to those findings, Berger in 1982 pointed instead to a statement by James Wilson that the judiciary was “an object of aversion and ‘distrust.’”<sup>132</sup> And whereas the Framers’ commitment to judicial independence, brought about partially because of actions which had been taken against judges in some states,<sup>133</sup> was originally viewed as compelling evidence of the legitimacy and importance of judicial review, Berger’s new treatment claimed that state-

126. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 163 (quoting G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 162 (1969)).

127. *E.g.*, Berger, *supra* note 19, at 309 n.224.

128. *See supra* text accompanying note 33.

129. 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 34 (1911), *quoted in* R. BERGER, *supra* note 3, at 71, 76, 118.

130. R. BERGER, *supra* note 3, at 71 n.126. Berger also went to lengths to discount Madison’s poststratification statements on judicial review as worthy of little weight. *Id.* at 80-81.

Berger might deny that his current position amounts to recognizing “legislative omnipotence” inasmuch as he purports to exempt “interpretive” judicial review from the reach of congressional power. But it appears that he gives the final say to Congress and denies to the Court the jurisdiction to decide jurisdiction, so that it might address the constitutionality of limiting legislation. *See infra* note 265. Viewed as a weapon to curb excess, this reading of the exceptions clause is “legislative omnipotence” by whatever name you call it.

131. *THE FEDERALIST* NO. 78, at 508 (A. Hamilton) (Mod. Libr. ed. 1937). *See supra* text accompanying notes 31-34.

132. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 164 (quoting 1 *THE WORKS OF JAMES WILSON* 292 (R. McCloskey ed. 1967)).

133. *E.g.*, R. BERGER, *supra* note 3, at 43. Berger found that “[t]he leaders of the Convention wasted no sympathy on such legislative reprisals.” *Id.* (citing Madison and Wilson).

ments of Hamilton and Iredell about the limited scope of judicial review were undoubtedly responsive to the distrust reflected in state actions taken against judges.<sup>134</sup> Berger then concluded that such assurances of limited judicial power would be meaningless in the absence of a remedy, and that a broad reading of the exceptions clause was therefore warranted.<sup>135</sup>

In 1969, Berger stated about similar reasoning<sup>136</sup> that “‘a page of history is worth a volume of logic,’”<sup>137</sup> asserting: “Legislative, not judicial, despotism worried the Founders; judges were trusted, legislators were not.”<sup>138</sup> Based on his exhaustive review of the ratification period, Berger found that “[b]ut few,” two to be exact, “discern[ed] the ‘counter-majoritarian’ potential of judicial review.” He also noted that there was only one state convention utterance of concern to protect Congress’ policy-making role.<sup>139</sup> Berger was confident of his conclusions: “The founders, it bears repetition, feared legislative, not judicial, tyranny.”<sup>140</sup> It is difficult to see how Berger concluded that a statement by Wilson, uttered in 1804, and new speculation about the motives of Hamilton and Iredell in stressing the limited nature of the judicial power, are sufficient to overcome (or even to qualify) Berger’s original findings as summarized above.<sup>141</sup> But it is more disturbing that Berger did not feel obliged even to acknowledge and confront the “discrepant evidence,”<sup>142</sup> particularly when he had generated it himself.

It is also anomalous that Berger suddenly became so interested in the broader context in which the power of judicial review was forged—including the historic suspicion of judges in some states—as an

134. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 164. Berger refers the reader, oddly enough, to pages 40 through 42 of *Congress v. The Supreme Court*. *Id.* at 164 n.41.

135. *Id.* at 164. Compare Berger’s pretransition statement. See *supra* text accompanying note 99.

136. R. BERGER, *supra* note 3, at 184.

137. *Id.* (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

138. *Id.*

139. *Id.* at 184–85 & n.179, 290. Compare Berger, *supra* note 102, at 495 (relying on same evidence in 1983 to support legitimacy of judicial review). Berger even found that “[u]nsparing criticism of *other* aspects of the judicial function indicates that the opposition found no fault with judicial review.” R. BERGER, *supra* note 3, at 143 (footnote omitted).

140. R. BERGER, *supra* note 3, at 185. “In those [state ratifying] conventions, *no* dissentient voices were raised, either in condemnation of judicial review or in pleas for legislative supremacy.” *Id.* at 336.

141. Wilson’s statement, it should be noted, was offered disapprovingly and included no claim that the noted distrust of the judiciary animated the Framers, the group to which Berger has normally devoted exclusive attention. Berger’s selective use of the evidence takes on special irony in light of his heavy reliance on statements by Iredell, Hamilton, and Wilson in fashioning the argument in *Congress v. The Supreme Court*. See R. BERGER, *supra* note 3, at 28, 188–89, 83 (Iredell); *id.* at 16, 291 *passim* (Wilson); *id.* at 96, 149, 189, 203 (Hamilton).

142. See, e.g., R. BERGER, *GOVERNMENT*, *supra* note 7, at 9. The failure to confront discrepant evidence is one of Berger’s frequent criticisms of other scholars.

aid to construing the exceptions clause. In his 1969 study, Berger eschewed such evidence in favor of "plain language" construction of statements made during the convention and ratification process.<sup>143</sup> Similarly, Berger has discounted the potential influence of abolitionist ideology on the drafting and consideration of the fourteenth amendment, despite quite plausible connections to individuals like Congressman John Bingham, because of the dearth of unequivocal reference to abolitionist theory during the congressional debates.<sup>144</sup>

### C. *The Clear Text*

In Berger's new treatment, the text suddenly looms large. Berger's shift of emphasis (away from primary reliance on legislative history, and away from "literalism" as "peculiarly" inappropriate) rests on two precedents, both of which he is previously on record as disapproving. First, he points to the emphasis that other scholars have placed on the text of the fourteenth amendment to support broader readings of that amendment than Berger believes justified by the legislative history. He concludes: "On this precedent, the unambiguous text [of the exceptions clause] may be given similar effect."<sup>145</sup> Second, Berger relies on Justice Marshall's formulation in *Trustees of Dartmouth College v. Woodward*: "It is not enough to say, that this particular case was not in the mind of the Convention, when the act [sic] was framed [ . . . . ] It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it [ . . . . ]'"<sup>146</sup> Berger concludes that "[g]iven the Founders' attachment to legislative paramountcy [different from "supremacy"?], their distrust of the judiciary, such an exclusion would have been extremely unlikely."<sup>147</sup>

---

143. See, e.g., R. BERGER, *supra* note 3, at 48.

144. For Berger's attack on fully developed "abolitionist" theories of the 14th amendment, see R. BERGER, *GOVERNMENT*, *supra* note 7, at 230-45. One need not embrace an antislavery theory view of the amendment, however, to conclude that Bingham's personal nature and history made him an unlikely candidate for chief draftsman of the 14th amendment, as understood by Berger. See Dimond, *Strict Construction and Judicial Review of Racial Discrimination under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462, 481-94 (1982). But see Berger, *supra* note 19, at 307-08.

145. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 160-61.

146. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 165 n.49 (quoting 17 U.S. (4 Wheat.) 518, 644 (1819)).

147. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 165 n.49. Berger does not explain why, given the Framers' "distrust of the judiciary" and "attachment to legislative paramountcy," the Framers nonetheless provided for judicial review. Nor does he explain why if "fear of Congressional despotism bulked large in the thinking of the Founders," they provided Congress with the trump card in a conflict between the branches over their respective powers. See *supra* text accompanying notes 39-41.



The first point does not call for much attention. This argument from abuse has a particularly hollow ring coming from one who rejects the notion that repetition brings legitimacy.<sup>148</sup> In a chapter on "Liberals and the Burger Court," Berger's *Government by Judiciary* lambasted recent critics of the Court for employing critical standards they had abandoned in solicitude for Warren Court decisions that better fit their predilections.<sup>149</sup> The major theme of that work was that a result-oriented jurisprudence in which cases turned not on consistent application of appropriate canons of constitutional construction, but on personal predilection—as exhibited by table-turning situations where "the name of the game is 'Two Can Play' "—was simply unacceptable.<sup>150</sup> Berger has frequently invoked the maxim that the end does not justify the means;<sup>151</sup> he might ponder its implications further, and consider as well that two wrongs do not make a right.

The second point is of greater interest. Unlike his first argument, Berger's reliance on the *Dartmouth College* case is not billed as a table-turning move. Yet in *Government by Judiciary*, Berger relied on Willard Hurst's characterization of Marshall's *Dartmouth College* opinion as "a clear-cut act of judicial law-making,"<sup>152</sup> observing that even Justice Marshall departed from the Framers' (and his own) interpretive canons.<sup>153</sup> Marshall's textual argument that Berger relies upon is precisely the point at which the "judicial legislation" occurred, as Marshall applied the contract clause to a state-granted corporate charter—an application far removed from the specific evils which the Framers sought to remedy.<sup>154</sup> In applying the principle relied upon by Berger, Marshall arguably ignored two principles of construction upon which Berger has placed heavy reliance—the rules that departure from a well-established practice or principle must be clearly stated<sup>155</sup> and

---

148. *E.g.*, Berger, *supra* note 6, at 5; Berger, *supra* note 102, at 497 & n.216.

149. R. BERGER, *GOVERNMENT*, *supra* note 7, at 338–50.

150. *See id.* at 333.

151. *E.g.*, *id.* at 409; Berger, *supra* note 102, at 486.

152. R. BERGER, *GOVERNMENT*, *supra* note 7, at 386 (quoting W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES* 63 (1970)).

153. R. BERGER, *GOVERNMENT*, *supra* note 7, at 396. Admittedly, however, Berger verged on being noncommittal in assessing Mr. Justice Marshall, as he stated: "It is true that some of his decisions may be regarded as judicial lawmaking." *Id.*

154. *See Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 644–45 (1819).

155. *E.g.*, R. BERGER, *GOVERNMENT*, *supra* note 7, at 17 (citing *United States v. Burr*, 25 F. Cas. 55, 165 (C.C.D. Va. 1807) (No. 14,693) (Marshall, J.)). Berger uses this formulation to establish a presumption against "open-ended" readings of the 14th amendment based on "the express reservation of power to the States by the Tenth Amendment." R. BERGER, *GOVERNMENT*, *supra* note 7, at 17 n.57. Applying Berger's 10th amendment presumption, it seems that Justice Marshall's specific finding in *Dartmouth College* that the contract clause was framed to deal with prodebtor legislation impairing the obligation of private contracts should have ended the inquiry in

that "the words of the Constitution were not to be 'extended to objects not . . . contemplated by the framers.'"<sup>156</sup>

At the very least, then, Berger's reliance on the principle articulated in *Dartmouth College* is reflective of unresolved tensions in his theory of constitutional interpretation.<sup>157</sup> In addition, it reflects an actual shift in interpretive methods he has applied to the problem at hand. In 1969, as we have seen, Berger had little to say about text; his interest was the "intent of the Framers." And in that study, he appeared to give the apparent lack of ambiguity in text essentially no weight at all. For Berger, that a broad construction of the exceptions clause would provide a ready tool for undermining a central element of the constitutional scheme was sufficient to condemn it. The mere lack of mention of a court-curbing use for the clause became evidence, in the face of clear provision for judicial independence and finality, that such a use went beyond the provision's intended scope. Now the text alone shifts the burden to "strict constructionists" to demonstrate an exclusively narrow purpose.<sup>158</sup>

---

favor of upholding the law. 17 U.S. (4 Wheat.) at 644. Berger is apparently persuaded that the clear-statement presumption favoring state power applies to issues arising under the Constitution and Bill of Rights as well as to later amendments. See Berger, *supra* note 19, at 290 n.48 (citing *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (Marshall, C.J.)). If Marshall had consistently employed such a presumption in favor of the 10th amendment, however, he could not have written his most famous opinions on the scope of federal power. For a critique of rules of construction that create such presumptions, see R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 205-10 (1975).

156. R. BERGER, *GOVERNMENT*, *supra* note 7, at 191 (quoting *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, J., dissenting)). See also R. BERGER, *GOVERNMENT*, *supra* note 7, at 286, 378; Berger, *supra* note 19, at 308. Berger clearly read the statement as foreclosing applications of a provision that go beyond those considered by its Framers. It is quite remarkable that Berger could rely upon two statements by the same author that seemingly go to opposite effect without any apparent notice of the discrepancy—let alone any resolution of the problems raised. Compare *supra* text accompanying note 146 (relying on *Dartmouth College* formulation for broad construction) with Berger, *supra* note 102, at 526 (relying in 1983 on Marshall's "contemplated objects" language).

In fairness to Justice Marshall, it is important to observe that Berger has taken his statement out of context. The full statement reads:

To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; *that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers;*—is to repeat what has been already said . . . .

*Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, J., dissenting) (emphasis added). Marshall's full statement articulates a textualist canon that runs counter to Berger's approach and allows for extension of terms to objects "comprehended in them" as much as to objects specifically within the contemplation of the Framers.

157. For further comments on those tensions, see *infra* Part IV.

158. Berger thus observes that the exceptions-clause debate does not contain the "overtone of exclusivity" that he finds in the debates over the 14th amendment. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 162. But even if the clause was "not thought to be limited to insulating jury

Contrast Berger's application of Marshall's formula for broad construction with the implications of the principles of strict construction Berger has applied elsewhere. Berger has consistently maintained that the power of judicial review was intentionally granted in clear text and specifically provided for so that constitutional boundaries might be policed.<sup>159</sup> If the role of policing constitutional boundaries were deliberately and emphatically given to the Court, under Berger's "clear-statement" rule it would seem that any intent to grant power to undermine that function must be clearly manifest. Yet the legislative history suggests that the Framers of the exceptions clause had far more routine matters in mind, whether or not their purposes were limited to regulating review of jury findings.<sup>160</sup> Similarly, the rule that the Constitution's words should not be extended to objects not contemplated, if taken for all it is worth, would call Berger's current reading into question. As we shall see, Berger has not in fact repudiated his prior finding that "[t]here is not the faintest intimation in the several convention records, nor in the contemporary prints, that the 'exceptions' clause was designed to enable Congress to withdraw jurisdiction to declare an Act of Congress void."<sup>161</sup>

#### D. *The Legislative History*

Consistent with his newfound emphasis on text, Berger has also discovered that, in contrast to the very narrow and exclusive purposes revealed by the history of the fourteenth amendment, the legislative

---

findings," *id.*, we might nevertheless conclude that the clear textual mandate for judicial review and its central role in the constitutional scheme suggest a tacit assumption by the Framers that the clause would not be read as granting Congress license to effectively undermine the Court's role. On the nonliteral reading of statutes based on the finding of such tacit assumptions, see R. DICKERSON, *supra* note 155, at 198-201.

If we conclude that the mandate for judicial supremacy and finality on constitutional questions is as clear as Berger originally found, there is a plausible case for finding such a tacit assumption. Without rejecting those original conclusions, however, Berger is now prepared to presume a design by the Framers to grant an ultimate court-curbing power to the Congress whose power they feared.

159. See *supra* note 38 & text accompanying notes 21-38. While Berger did not contend that the constitutional text is wholly unambiguous, he sought to demonstrate that it was clearly understood by the Framers as granting the power of judicial review. *E.g.*, R. BERGER, *supra* note 3, at 201-02.

160. See 1 J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 240 (1971). As previously noted, however, the "clear-statement" rule is a device of strict construction, with attendant pitfalls. See *supra* note 155. It is quite possible, in fact, for the meaning of a provision to outstrip either legislative purpose or intent. R. DICKERSON, *supra* note 155, at 23-24; see *infra* text accompanying note 168.

161. R. BERGER, *supra* note 3, at 289. It is doubtful, however, whether a "contemplated objects" test for determining the reach of a statute (as conceived by Berger) would yield anything beyond either crabbed readings of general language or mangled (and perhaps highly abstract) readings of extrinsic evidence of legislative "intent." See *supra* notes 155, 160.

history of the exceptions clause shows that "the Framers' preoccupation with safeguarding jury findings . . . is unaccompanied by overtones of exclusivity."<sup>162</sup> He relies on Marshall's statement that the exceptions power would "go as far as the legislature may think proper for the interest and liberty of the people."<sup>163</sup> Interestingly, the Marshall statement was also cited in Berger's original study, but dusted off with the rejoinder that Marshall would not, as a proponent of judicial review, "regard removal of that safeguard as in the 'interest' of the people."<sup>164</sup> Berger's rejoinder, however, was unaccompanied by any acknowledgment that Marshall's statement called into doubt the extremely narrow construction of the clause being offered up by Berger.

Berger's recent work, however, points to nothing in the legislative history that should have altered his basic conclusion that the provision was not contemplated to be a court-curbing tool, particularly since he has not repudiated his claim that judicial review and finality were central elements in the constitutional scheme.<sup>165</sup> Moreover, as we have noted, Berger has not explained his sudden lack of interest in the canon that legislation should not be extended beyond the objects contemplated.<sup>166</sup> Merely because the Framers did not view the clause in the exclusive terms for which Berger previously contended does not imply, as Berger now contends, that it was designed to be part of "the machinery available for correction of judicial encroachment on the paramount legislative domain."<sup>167</sup> The real point, only implicitly acknowledged by Berger in his treatment of text, is that to discover "what the Founders believed to require the inclusion of a given power among the enumerated powers of Congress . . . is scarcely dispositive of the different question respecting the breadth of power thus given."<sup>168</sup>

Berger's original study, moreover, reflected his tendency to seize on statements of purpose as exclusive without giving sufficient weight to the vagaries of legislative debate, the specific context in which the statements were made, and the nuances suggesting lack of "exclusivity."<sup>169</sup> His new reading of that history implicitly acknowledges that he

---

162. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 162. *But see supra* note 158.

163. *Id.* at 162; *see id.* at 162 n.33 (citing R. BERGER, *supra* note 3, at 286, 288).

164. R. BERGER, *supra* note 3, at 289. The statement is cited in *id.* at 288 n.21.

165. *See supra* text accompanying note 163. Although Berger has qualified his findings of unabashed enthusiasm and trust for the judiciary, he has not repudiated any of his conclusions about judicial independence and finality, nor pointed to any extrinsic evidence that a contemplated use of the exceptions clause was to curb judicial excess.

166. *See supra* text accompanying note 156.

167. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 164.

168. Van Alstyne, *supra* note 46, at 260. *See supra* note 160.

169. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 162.

fell into that trap. Three specific points are worth noting. First, the statements of purpose relied on by Berger took place in the context of discussion of concern about the potential breadth of appellate review with respect to jury findings, and not as part of a focused discussion on the precise scope of the exceptions clause.<sup>170</sup> With respect to that issue, the statements could at best stand as clues of generally narrow focus, but hardly as definitive statements of scope. Second, while Berger has subsequently learned that “[t]he argument from silence . . . is always more than a little dangerous,”<sup>171</sup> his initial study of the exceptions clause placed weight on the lack of discussion of the clause’s potential use as a curb on judicial excess.<sup>172</sup>

Third, Berger refused to consider that both what was said and not said may reflect the flow of the debates as much as the “intent of the Framers.” Even if the potential scope of the exceptions power had been thought through—a doubtful assumption—the Framers would not have stressed the court-curbing potential to adopters who looked to the judiciary as the only potential barrier to unlimited general governmental power. That strategy plays a role in what is said or not said in legislative debate is one of the reasons courts have been reluctant about the use of legislative debate material.<sup>173</sup> Having fallen into the trap of giving undue weight to particular statements of purpose, it is not surprising that Berger failed to provide any reasonable account of Marshall’s somewhat open-ended statement.<sup>174</sup>

Although the statements of purpose found in the legislative history of the fourteenth amendment upon which Berger relies need not necessarily track this same pattern, it is noteworthy that Berger’s critics have observed that this same tendency to read exclusivity into state-

---

170. See R. BERGER, *supra* note 3, at 286–90.

171. R. BERGER, *GOVERNMENT*, *supra* note 7, at 148 (quoting Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 147).

172. R. BERGER, *supra* note 3, at 286, 289–90. The silence about the court-curbing use only looms large, of course, after you have shifted the burden to proponents of the broad reading based on a “structure and purpose” argument and the corresponding inference of a tacit assumption that judicial supremacy and finality would be inviolable. See *supra* text accompanying notes 38–41. See also *supra* note 158.

173. For an excellent overview of the argument that legislative debate is generally of dubious relevance and reliability for this and other reasons, see R. DICKERSON, *supra* note 155, at 154–62. By Berger’s own standards, we should read the exceptions clause narrowly—based on the view that the failure to “disclose” any court-curbing purpose vitiates any potential ratification of such a construction. See R. BERGER, *GOVERNMENT*, *supra* note 7, at 116, 155 & n.93 (rejecting readings of 14th amendment going beyond disclosed objectives, based on the common-law principle that ratification must be based on full knowledge of material facts); accord Berger, *supra* note 102, at 495. Ironically, Berger sees political motives as the key to a great deal of human action, both on and off the Court, but he refuses to allow this simple reality a place in his assessment of the utility and reliability of legislative debate.

174. See *supra* text accompanying notes 163–64.

ments of purpose plagues his work in that area as well.<sup>175</sup> This paper cannot attempt to fully resolve whether Berger has, on the whole, fairly read the later legislative history, but this particular criticism certainly has some merit.

Two examples must suffice. The first concerns the statements which have probably been given the greatest weight in Berger's reading of section 1 of the fourteenth amendment. Berger repeatedly relied upon statements made during the congressional debates which identified the purpose of the fourteenth amendment as constitutionalizing the Civil Rights Act and placing its provisions beyond legislative repeal.<sup>176</sup> As Berger observed, Charles Fairman, whose landmark work he described as a "fastidiously detailed study," noted these same statements.<sup>177</sup> Yet Fairman provided a substantially broader reading of the amendment from the same legislative history, apparently not drawing the same inference of *exclusive* purpose from the cited remarks.<sup>178</sup> Why? One important reason I suspect is that Fairman read the statements in their setting as part of a somewhat hasty proceeding—much of the focus of debate was on the other controversial provisions;<sup>179</sup> the general subject area of section 1 had already occupied the Congress' time and attention;<sup>180</sup> and, since virtually no one saw the need (though it was acute) for careful analysis and debate of section 1's provisions, the discussion was either brief and general or extremely uneven.<sup>181</sup> Factors like these are among the reasons the Court has in the past been skeptical whether views expressed in legislative debate should be treated "as dictating the construction to be put on the Constitution by the Courts."<sup>182</sup>

---

175. *E.g.*, J. ELY, *supra* note 11, at 198 n.66; Soifer, *supra* note 1, at 670–71.

176. *E.g.*, R. BERGER, *GOVERNMENT*, *supra* note 7, at 22–23, 43, 103–04.

177. *Id.* at 9 n.27, 22–23.

178. VI C. FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1117–1388* (1971) [hereinafter cited as C. FAIRMAN, *HISTORY*]; Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *STAN. L. REV.* 5, 138–39 (1949) [hereinafter cited as Fairman, *Bill of Rights*].

179. VI C. FAIRMAN, *HISTORY*, *supra* note 178, at 1290.

180. Fairman, *Bill of Rights*, *supra* note 178, at 67–68.

181. *Id.* at 57 (need for rigorous analysis not recognized); *see id.* at 138. *See generally id.* at 43–68 (summary of legislative debate).

182. *Downes v. Bidwell*, 182 U.S. 244, 254 (1901). When the 19th century Court's practice of not consulting the legislative debates was brought to Berger's attention, Murphy, *supra* note 1, at 1763 n.59, he responded that this fact "merely testifies to their appetite for power uninhibited by limitations designed by the framers." Berger, *The Scope of Judicial Review and Walter Murphy*, 1979 *Wis. L. REV.* 341, 356. This is an odd statement from one who continually asks for "facts," not "speculations." My own review of the early case law indicates that extensive use of the legislative history of the 14th amendment in judicial opinions was virtually unheard of at any judicial level during this early period, and that judicial skepticism about the relevance of legislative debate was used as often as not to *reject* proffered readings that would have increased judicial

As Berger's focus on the statements of purpose in the exceptions clause debate blinded him to statements implying a broader scope, he was similarly blinded by the statements linking the fourteenth amendment to the Civil Rights Act.<sup>183</sup> Thus Berger has repeatedly cited the Fairman statement, noted above, and added his assurance that he had "seen no statement to the contrary."<sup>184</sup> But that is only because he is unable to perceive the contradictory statements. Oddly enough, Berger had no trouble seeing that Senator Howard's statement that the privileges or immunities clause would incorporate the Bill of Rights was implicitly contradicted by others;<sup>185</sup> he is unable to see, however, that Howard's statements—and there are others<sup>186</sup>—equally contradicted the statements identifying the Act with the amendment. Moreover, while the statements of identification on occasion carry "overtones of exclusivity,"<sup>187</sup> no speaker in the debate ever emphatically asserts the

---

power and the scope of the amendment.

Moreover, my review of the briefs filed with the Supreme Court in a number of the leading 14th amendment cases of the early years indicates that the Court was very rarely directed to the legislative history of the 14th amendment. *See, e.g.*, 13 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1-149 (P. Kurland & G. Casper ed. 1975) (briefs filed in *Plessy v. Ferguson*, 163 U.S. 537 (1896)) [hereinafter cited as LANDMARK BRIEFS]; 9 LANDMARK BRIEFS, *supra*, at 1-140 (briefs filed in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); 8 LANDMARK BRIEFS, *supra*, at 89-168 (briefs filed in *Ex parte Virginia*, 100 U.S. 339 (1879)); *id.* at 303-94 (briefs filed in *The Civil Rights Cases*, 109 U.S. 3 (1883)); 6 LANDMARK BRIEFS, *supra*, at 473-763 (briefs filed in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872)). *Cf.* VI C. FAIRMAN, HISTORY, *supra* note 178, at 1348-49 (referring to a 23-page brief filed on reargument on behalf of the butcher-plaintiffs in *Slaughter-House Cases* that was not reflected in official reporters; brief pointed to various statements from congressional debates to buttress a broad reading of the amendment—the only brief filed that relied on legislative debate).

183. Berger sees in each statement the identification of purpose between the amendment and the Act, for example, but not the qualifications that appear to leave open the possibility for finding additional meaning in the amendment. Thus Senator Stevens referred to the Act for examples of application of the principle underlying § 1, but he also asserted that "the law that operates upon one man shall operate *equally* upon all." CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866). *See, e.g., id.* at 2511 (Eliot: amendment recognizes "power to prohibit State legislation discriminating against classes of citizens . . ."); *id.* at 2766 (Howard: equal protection "abolishes all class legislation in the states and does away with the injustice of subjecting one caste of persons to a code not applicable to another"). Berger writes away all such statements as generalizations that must give way to specifics; but his contentions are question-begging inasmuch as these congressional leaders did not clearly articulate whether their specifics illustrated or limited their general statements. Even apparent identification statements were more equivocal than Berger acknowledges, as, for example, Thayer's reference to incorporating "*the principle of the civil rights bill.*" *Id.* at 2465. *Cf.* J. ELY, *supra* note 11, at 198 n.66 (referring to Berger's narrow treatment of Senator Trumbull's statement that United States citizens have fundamental rights "such as" the rights specified in the Act).

184. *E.g.*, Berger, *Dialogue*, *supra* note 112, at 185 n.81.

185. R. BERGER, *GOVERNMENT*, *supra* note 7, at 148.

186. *See* Fairman, *Bill of Rights*, *supra* note 178, at 51-53 (Bingham); *see also supra* note 183.

187. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 162. Even the most emphatic state-

contrapositive—that any application beyond the precise scope of the Act would be beyond the scope of amendment.<sup>188</sup>

The second example of Berger's marked tendency to read exclusivity into general statements of purpose concerns the equal protection clause. In an early review of *Government by Judiciary*, Professor Murphy objected that Berger had equated the term "laws" used in the clause with "statutes," so that only legislatively enacted laws would be limited by the provision's terms.<sup>189</sup> In his rejoinder, Berger acknowledged the error and welcomed the avoidance of "a gap in . . . protection,"<sup>190</sup> but asserted that the prior formulation had in any event "seemed to provide a complete scheme of protection."<sup>191</sup> A review of his original treatment, however, reveals that Berger stated this conclusion after reviewing legislative debate materials focusing on the evils of the Black Codes and referring to the provision's purpose to reach (at least some) "class legislation."<sup>192</sup> It appears that Berger was simply misled by the statutory focus of these statements in the debate; it is certainly difficult to conceive that he made a conscious decision that limiting the provision to statutory enactments would fulfill the end of ensuring equal protection of specified rights for blacks.<sup>193</sup>

### E. Impeachment

As with the shift in weight to be accorded text and narrowly stated purposes, Berger now finds a lack of exclusivity in Hamilton's state-

---

ment relied on by Berger, Senator Latham's assertion that the Civil Rights Bill "covers exactly the same ground as the amendment," CONG. GLOBE, 39th Cong., 1st Sess. 2883 (1866), was qualified in a way that robs it of the force Berger claims for it. In the same speech, Latham appeared quite tentative: "If the term 'civil rights' be construed not to include what is properly understood as 'political rights,' I think this provision just within itself . . ." *Id.* (emphasis added). One gets the impression that the senator might be surprised to find his latter statement treated as an authoritative exposition of the clause's meaning. *Cf.* Fairman, *Bill of Rights*, *supra* note 178, at 56 (puzzling over Senator Howard's statement as to how courts would "probably" construe the privileges or immunities clause).

188. Berger's reliance on the test articulated in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), in support of his new exceptions clause reading has been noted. *See supra* text accompanying note 146. If that test were applied to the 14th amendment setting, it is highly doubtful that Berger's reading could be sustained. The generality and vagueness of § 1's language were pointed out by opponents of the amendment, along with warnings that the language would encompass certain specific problems—including segregation. Far from varying the language so as to "exclude" that "particular case," 17 U.S. (4 Wheat.) at 644, proponents greeted these charges with stony silence.

189. Murphy, *supra* note 1, at 1758.

190. Berger, *supra* note 182, at 362.

191. *Id.*

192. R. BERGER, *GOVERNMENT*, *supra* note 7, at 174-76; *see id.* at 133, 191.

193. It is perplexing, however, that Berger has yet to acknowledge that a state may "deny" equal "protection" of its laws by official action or inaction, as well as by the promulgation of positive law. *See infra* text accompanying notes 201-11.



ment that impeachment would be the “*only* provision” for judicial abuse.<sup>194</sup> Whereas Berger once attached great weight to the lack of statements by Framers evidencing any other limitation on the power of judicial review, it is now enough to rest on the text of article III. Berger adds that because provision for the impeachment of judges was only “ambiguously included” within the article II impeachment clause, which generally applies to executive officers, the procedure cannot therefore be viewed as the exclusive remedy for judicial abuse.<sup>195</sup>

The entire argument, of course, rests on the bare assumption that the Framers were concerned with providing a more effective remedy for judicial abuse than impeachment. In fact, Hamilton’s arguments suggested that the Framers were but little concerned with judicial abuse, and Berger’s original study so found.<sup>196</sup> That the Framers did not view the judicial power as unlimited does not infer that they were anxious to provide a remedy for its abuse; Hamilton’s reference to the judiciary as “the least dangerous branch” reflects that proponents of judicial review simply believed that serious abuse was far less likely from the judiciary. Impeachment appears to have been viewed as a sufficient safeguard, and Berger’s materials on concern for judicial independence suggest that the Framers were well aware that cures that eroded judicial independence might well be worse than the disease.

On the other hand, Berger is certainly correct in withdrawing from the conclusion that a single statement by Hamilton demonstrated an exclusive intent of the Framers. Hamilton was not speaking to the issue at hand, and it is possible that he so took for granted a broad reading of the exceptions power that he simply did not view control of jurisdiction as a direct threat to judicial independence. Berger’s earlier reliance on Hamilton’s statement reflects his tendency, already noted, to take statements of purpose as exclusive and limiting.

#### *F. Postratification Construction and Congressional Acts*

In 1982, Berger concluded that postratification contemporaneous

---

194. R. BERGER, DEATH PENALTIES, *supra* note 7, at 164–65. Compare *supra* text accompanying note 51. The more recent treatment omits the word “only” altogether and fails to acknowledge or confront the prior treatment.

195. *Id.* at 165.

196. See *supra* text accompanying notes 31–34, 52. Indeed, Hamilton asserted that “[impeachment] is alone a complete security.” THE FEDERALIST NO. 81, at 526 (A. Hamilton) (Mod. Libr. ed. 1937). The above formulation and Hamilton’s “sole remedy” statement provide insufficient evidence by themselves to preclude a broad reading of the exceptions clause; still, Berger stepped on thin ice in claiming that Alexander Hamilton had in effect endorsed Berger’s present position when Hamilton argued against the view that the Court’s abuses would be remediless. Berger, *supra* note 102, at 503 (quoting THE FEDERALIST NO. 81, at 522 (A. Hamilton) (Mod. Libr. ed. 1937)). The statement came from a writing that referred only to impeachment as the remedy for judicial abuse.

construction of the exceptions clause should be given greater weight than he had previously acknowledged. For example, the First Congress' regulation of jurisdiction, which, as we have seen, Berger ignored in 1969 and deprecated in 1974, was now viewed as an "authoritative construction" of the exceptions clause.<sup>197</sup> Similarly, postratification statements by such notables as Marshall and Ellsworth were now given great weight in determining the proper scope of the exceptions clause.<sup>198</sup>

In his original study, of course, such postratification statements had been completely ignored, presumably because Berger viewed them as insignificant in view of the clear intent revealed by the legislative history. And this pattern, like others we have noted, was largely followed in Berger's initial study of the fourteenth amendment. With a few exceptions,<sup>199</sup> Berger limited his search for the meaning of section 1 of the amendment to the debates found in the *Congressional Globe*. In 1979, however, Berger published an article summarizing postratification materials mainly concerning ratification of the fifteenth amendment, which reinforced his original reading of the fourteenth amendment. He offered the following general approach:

[T]he primary evidence is of course what was said in the Thirty-ninth Congress during the debates on the fourteenth amendment and the immediately related Civil Rights Act of 1866. Next come utterances of the framers in subsequent Congresses which confirm their earlier statements. Subsequent utterances in conflict therewith are discounted on the premise that a later shift of opinion cannot contradict the earlier representations made to influence their fellows to adopt the amendment. Statements of nonframers, often in reliance on the earlier history, carry weight as contemporary constructions.<sup>200</sup>

An initial question is whether a careful review of all of the Reconstruction Congress debates might not have shed light on Berger's original study of the fourteenth amendment. The later study seems belated, for one is necessarily inclined to be skeptical of a work purporting to reveal

---

197. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 163. Interestingly, Berger pointed to a single secondary source to reinforce his reliance on the Judiciary Act of 1789, M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 20-21 (1980), observing that it came to his attention after the initial draft of his argument. Yet the same point had been made in a number of post-1969 works, including (as we have seen) the book review he answered in 1974. See *supra* text accompanying notes 69-72. See also Van Alstyne, *supra* note 46, at 260-61.

198. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 162; Berger, *supra* note 102, at 504.

199. In his treatment of segregation and suffrage, Berger buttressed his reading of the legislative history by pointing to historical facts which suggested that provisions clearly covering these matters would have been rejected. *E.g.*, R. BERGER, *GOVERNMENT*, *supra* note 7, at 59-63, 123-28.

200. Berger, *Light from the Fifteenth*, *supra* note 10, at 313.

“light” cast from later debates by an author who has, without referring to those debates, already published and defended highly controversial, dogmatically stated, conclusions. Moreover, if the conclusions drawn from the original debates are truly as unmistakable as Berger has insisted, the above framework would obviously discount any counterthemes that emerged.

At least two particularly striking examples from later Reconstruction debates, however, should have called for careful consideration of Berger’s original conclusions. As we have seen, Berger initially claimed that the equal protection clause forbade only discriminatory *legislation*, but later extended the analysis to discriminatory “laws,” including judge-made law.<sup>201</sup> Consistent with this view, Berger insisted that the mere failure or refusal to enforce nondiscriminatory laws does not rise to the level of an equal protection claim; moreover, the fourteenth amendment, according to this view, imposes no affirmative duties on states to protect citizens against wrongful acts of executive officials or private citizens.<sup>202</sup> This reading of the original materials is highly debatable. Even the Civil Rights Act, with which Berger identifies section 1, specifically brought acts performed “under color of any” positive law or official “custom” within its reach.<sup>203</sup>

While the text and legislative history materials raise serious questions for this narrow reading, relevant postratification materials run directly counter to it. In his own article on the later congressional debates, Berger observed that equal protection could be violated by officials acting “under color of law”<sup>204</sup> without acknowledging that even that reading ran counter to his prior insistence that only positively declared law could deny equal protection. But his real focus was on the misconception he thought manifest in 1871 congressional attempts to reach private conduct under the fourteenth and fifteenth amendments.<sup>205</sup> In particular, he relied upon James Garfield’s debate with

---

201. See *supra* text accompanying notes 189–92.

202. R. BERGER, *GOVERNMENT*, *supra* note 7, at 183–92; see Berger, *supra* note 19, at 293–94, 296, 305–09. See also Dimond, *supra* note 144, at 471–81.

203. Sections 1 and 2 of the Civil Rights Act of 1866 both contained the “under color of law” formulation. For a treatment of the intended scope of this language, see VI C. FAIRMAN, *HISTORY*, *supra* note 178, at 1207–60. Fairman’s study demonstrates that official practice, or customary law, at least, was within the contemplated reach of the phrase.

204. Berger, *Light from the Fifteenth*, *supra* note 10, at 331–32. Berger quoted with approval a statement by Congressman Shellabarger that this phrase included acts “‘done under color of State authority,’” which clearly goes beyond positive law and probably includes all acts by officials of the states. *Id.* at 332 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1294 (1866)).

205. Berger, *Light from the Fifteenth*, *supra* note 10, at 332–33. Berger displays little awareness of how truly narrow a position he staked out in *Government by Judiciary*. In the work itself, for example, in the midst of a general critique of the Court as an institution to which we should grant broad power, he quoted approvingly Leonard Levy’s assertion that “‘millions of Ne-

Congressman Bingham over the reach of section 1 of the fourteenth amendment.<sup>206</sup> But in pointing up the areas of dispute, Berger ignored that both authors clearly rejected a reading that would confine the application of the clause to challenges to unequal laws as contrasted with what Garfield called "systematic maladministration of them, or a neglect or refusal to enforce their provisions."<sup>207</sup>

That Berger's prior study had blinded him to the significance of Garfield's statement is illustrated by Berger's response to Professor Dimond, after Dimond pointed it out.<sup>208</sup> Berger claimed that "the nub" of the statement Dimond called a "broad reading" was a preceding sentence in which Garfield characterized equal protection as "'a broad and comprehensive limitation on the power of the State governments . . . .'"<sup>209</sup> Berger concluded that Dimond preferred "the general to the specific" because Garfield had stated in the same speech that section 1 "forbade the states 'to legislate unequally for the protection of life and property.'"<sup>210</sup> But, of course, in focusing on the wrong portion of Garfield's later statement, Berger had completely missed the point that Garfield's "general" statement about unequal legislation did not preclude him from making the more "specific" statement that "maladministration," "neglect," and "refusal to enforce" would equally constitute denials of equal protection.<sup>211</sup> As we have seen, this sort of seizing on particular statements to the exclusion of others plagues Berger's work.

Under Berger's own criteria, Garfield's statement deserves to be given real weight, for, as Berger acknowledges, Garfield was a Framer

groes suffered lives of humiliation for five or more decades . . . because the Court betrayed the intent of the Reconstruction Amendments.'" R. BERGER, *GOVERNMENT*, *supra* note 7, at 332 n.68 (quoting L. LEVY, *JUDICIAL REVIEW AND THE SUPREME COURT* 35 (1967)). But Levy was referring to decisions on congressional power of which Berger has approved; if the intent of the fourteenth amendment was as narrow as Berger contends, the Court never "gutted" the substance of any protection offered by it. *See id.* at 332. Even the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), which Berger has recently cited in support of his claim, Berger, *supra* note 102, at 488, combined with its "gutting" of privileges or immunities a construction of equal protection sufficiently potent to achieve the ends which Berger viewed as exhausting § 1's purpose.

206. Berger, *Light from the Fifteenth*, *supra* note 10, at 332-33. In this exchange, Bingham took the position that § 1 provided protection against private conduct, whereas Garfield insisted that Congress lacked a general power to reach private conduct.

207. CONG. GLOBE, 42d Cong., 1st Sess. app. 153 (1871), *quoted in* Dimond, *supra* note 202, at 480 n.94.

208. Compare Dimond, *supra* note 202, at 480 n.94 with Berger, *supra* note 19, at 309 n.224. *See also* Frantz, *Congressional Power to Enforce the Fourteenth Amendment against Private Acts*, 73 YALE L.J. 1353, 1358-59 (1964).

209. Berger, *supra* note 19, at 309 n.224 (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. 153 (1871)).

210. Berger, *supra* note 19, at 309 n.224 (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. 151 (1871)).

211. *See* Dimond, *supra* note 202, at 480 n.94.

of the fourteenth amendment, hardly a radical, and he had carefully reviewed the *Globe* debates prior to his exchange with Bingham.<sup>212</sup> Berger specifically commended Garfield's analysis to his readers.<sup>213</sup> Garfield surely fits into the Marshall or Ellsworth mold insofar as poststratification statements are properly given significant weight. Moreover, Congress' enactment of the Civil Rights Act of 1871, premised on views of equal protection extending substantially beyond Berger's reading, seems almost the equivalent of the First Congress' application of the exceptions clause in the enactment of the 1789 Judiciary Act. Berger offers no compelling reason why it should not also be viewed as an "authoritative construction" of the amendment's intent to impose affirmative duties on States to provide blacks with the protection guaranteed by their laws, quite apart from whether Congress correctly perceived its power to reach directly the wrongdoing of private individuals as a remedy to State inaction.<sup>214</sup>

The second example of poststratification debate and legislative action worthy of greater consideration concerns the treatment of segregation in the Civil Rights Act of 1875. Berger has insisted that the fourteenth amendment excluded "segregation" from its scope.<sup>215</sup> Unless I misapprehend his meaning, Berger contends that virtually all forms of segregation are beyond the reach of the amendment, not merely segregation in the public schools. There are two rationales for this result—one is that the activity involved (education) is neither a "civil right," nor a "privilege or immunity" of citizenship;<sup>216</sup> the other is that the amendment was intended to distinguish between "civil" or "legal" rights and mere "social" rights, the latter receiving no constitutional protection.<sup>217</sup> Content with his asserted debunking of the Court's ruling in *Brown v. Board of Education*,<sup>218</sup> Berger has never acknowledged that the 1875 Act debates and enactment confirmed, at the least, well-established understandings that segregated public transportation facili-

---

212. Berger, *supra* note 19, at 309 n.224. To the extent that Garfield's reading of equal protection, and its inclusion of state inaction, can be said to extend the clause's protection beyond the scope of the "under color" language of the Civil Rights Act, it provides additional evidence that statements articulating the purpose to constitutionalize the Act did not preclude broader readings of the 14th amendment language. See R. BERGER, *GOVERNMENT*, *supra* note 7, at 23 n.12 (citing Garfield's statement, with others, in support of the textual assertion that amendment's purpose was to "constitutionalize" the Act). See also *supra* text accompanying notes 175-83.

213. Berger, *supra* note 19, at 309 n.224.

214. For a persuasive argument for a fairly broad reading of Congress' power to reach private conduct under a state "failure to protect" theory, based upon an extensive analysis of poststratification materials, see Frantz, *supra* note 208.

215. R. BERGER, *GOVERNMENT*, *supra* note 7, at 27-29, 117-33, 169-76.

216. *Id.* at 20-36.

217. *Id.* at 30-31.

218. 347 U.S. 483 (1954).

ties implicated civil rights concerns and denied equal protection.<sup>219</sup>

Another seeker of "reflected light" in postratification congressional debates, Professor Avins, published a study of the 1875 debates more than ten years prior to *Government by Judiciary*.<sup>220</sup> No liberal activist, Professor Avins nevertheless found that those debates proceeded largely on the assumption that legally imposed segregation in public transportation (and in other public facilities) could be prohibited as unconstitutional. The debate concerned the prohibition of discrimination by private companies and was focused primarily on (1) whether particular kinds of facilities were sufficiently connected to the State to be deemed public facilities;<sup>221</sup> (2) whether Southern States by law or custom systematically abrogated common-law rights of equal access;<sup>222</sup> and (3) whether Congress had authority to prohibit acts of privately owned companies based on their public callings.<sup>223</sup> Having discounted the "perhaps too narrow construction"<sup>224</sup> of congressional Democrats, consistent with views expressed by Berger,<sup>225</sup> Avins concluded that the Republicans who enacted the Act agreed that state refusals to enforce common-law rights denied equal protection, while a portion added that "public" enterprises had independent duties not to discriminate.<sup>226</sup>

Clearly, both proffered justifications for the 1875 Civil Rights Act rejected the broad reading of the social-legal rights distinction that is reflected in Berger's analysis and the Court's decision in *Plessy v. Ferguson*.<sup>227</sup> Berger's treatment of the acts of the postratification Con-

219. See, e.g., Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 150-53 (1950). As to the "social" and "legal" rights distinctions, even the conservative opponent of the fourteenth amendment, Senator Reverdy Johnson, supported legally imposed integration in Washington's public transportation facilities based on the common-law right of equal access. *Id.* at 150. And in 1872, during Senate debates over a bill forbidding discrimination by railroads, inns, and theaters, even the "conservative opposition [whose views Berger discounts] confined its attack—unsuccessfully—to the inns and theaters sections, apparently conceding the point as to transportation." *Id.* at 153.

220. Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873 (1966) [hereinafter cited as Avins, *Civil Rights Act*]. See also Avins, *De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*, 38 MISS. L.J. 179 (1967) (agreeing with Berger that school segregation is beyond the scope of equal protection) [hereinafter cited as Avins, *School Segregation*].

221. E.g., Avins, *Civil Rights Act*, *supra* note 220, at 886-87.

222. E.g., *id.* at 900. <sup>e</sup>

223. E.g., *id.* at 899, 901.

224. *Id.* at 913.

225. See R. BERGER, *GOVERNMENT*, *supra* note 7, at 157-65.

226. Avins, *Civil Rights Act*, *supra* note 220, at 913. Without giving genuine consideration to the weight that ought to be attributed the views of a Congress containing this many Framers, Berger referred to "the faulty logic which underlay equality for accommodations in transport, inns, and theaters." Berger, *Light from the Fifteenth*, *supra* note 10, at 331.

227. 163 U.S. 537 (1896).

gresses, like many things, depends mainly on whether they confirm or rebut his prior conclusions. When such acts confirm his emphasis on evidence of original intent, he stresses the number of Framers in the group;<sup>228</sup> when a later Congress enacts legislation based on a reading of the fourteenth amendment he rejects, Berger recalls the Supreme Court's warning that "'views of a subsequent Congress form a hazardous basis for inferring intent of an earlier one.'"<sup>229</sup>

### G. *Judicial Precedent*

We have seen that prior to 1982 Berger began characterizing judicial decisions on the scope of the exceptions clause as "holding" rather than "dicta."<sup>230</sup> His 1982 treatment renewed the "holding" characterization and continued to ignore the discrepancy with his prior work.<sup>231</sup> But while his transitional work had nonetheless not given genuine weight to this judicial construction, by 1982 Berger appeared to be willing to rely upon the judicial readings as weighty evidence supporting his new reading.<sup>232</sup> In 1983, Berger took the analysis a step further, asserting that he was unaware of a "case in which the unbroken chain of such pronouncements has been questioned by the Court."<sup>233</sup> If I understand his point correctly, Berger was relying not so much on the evidentiary significance of the decisions as on the weight a well-established doctrine takes on over time.

This is an odd doctrine to encounter in the writings of Raoul Berger. In 1969, Berger contended that *Marbury v. Madison*<sup>234</sup> should be repudiated if authority for it could not be found in the text of the Constitution.<sup>235</sup> And since 1977, Berger has repeatedly contended that *stare decisis* cannot legitimate any act of judicial usurpation, effectively suggesting that the doctrine of precedent places no decision be-

228. Berger, *Light from the Fifteenth*, *supra* note 10, at 358.

229. Berger, *supra* note 19, at 294 (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). Yet Professor Avins buttressed his findings with a study of the 1875 debates, showing the presence of 16 of the 33 senators who voted for the 14th amendment. Avins, *Civil Rights Act*, *supra* note 220, at 875. Berger has never attempted to explain how it was that so many members of that original Congress rejected his conclusion that the clauses of § 1 were clearly understood terms of art and that the 39th Congress had manifested an unmistakable intent to exclude segregation from the scope of the amendment.

230. See *supra* note 95 and accompanying text.

231. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 158, 160 n.24.

232. *Id.*

233. Berger, *supra* note 102, at 505. See *id.* at 504 & n.263 ("It is one of the ironies of activist attacks on congressional control that 150 years of the Court's pronouncements to the contrary are virtually ignored").

234. 5 U.S. (1 Cranch) 137 (1803).

235. R. BERGER, *supra* note 3, at 208-09; Berger, *supra* note 5, at 391.

yond reconsideration.<sup>236</sup> Once again, Berger provides no explanation for his sudden interest in the weight of precedent.

The doctrine of precedent necessarily creates a tension within Berger's constitutional jurisprudence, with its pervasive commitment to the binding force of original intent. On the one hand, deference to established precedent might stand as a barrier to implementing original intent in particular instances; yet under Berger's own canon, there is evidence supporting the view that reliance on *stare decisis* is part of the original intent.

Berger has long contended, for example, that expressions by various Framers setting forth the purpose and scope of judicial review are as binding as if written into the text.<sup>237</sup> And he has placed particular weight on Hamilton's statement that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . ."<sup>238</sup> It thus appears that Hamilton viewed the binding quality of precedent as a crucial safeguard against discretionary decisionmaking by courts.

Berger has never explained, however, why he views us bound absolutely by Hamilton's apparent allusion to the use of traditional canons of statutory construction,<sup>239</sup> but considers us free to disregard the tradi-

---

236. *E.g.*, R. BERGER, *GOVERNMENT*, *supra* note 7, at 297 & n.57; Berger, *supra* note 102, at 497 & n.216.

237. *E.g.*, R. BERGER, *supra* note 3, at 346; R. BERGER, *GOVERNMENT*, *supra* note 7, at 362.

238. THE FEDERALIST NO. 78, at 510 (A. Hamilton) (Mod. Libr. ed. 1937), *quoted in* R. BERGER, *GOVERNMENT*, *supra* note 7, at 308.

239. *E.g.*, Berger, *Dialogue*, *supra* note 112, at 178-79. Even as to the rules of construction, of course, Berger has only felt as bound to the Framers' views as he wishes to be. In response to Professor Brest's observation that use of legislative history was virtually unheard of at the time of the drafting of the Constitution, Berger pointed out that English judges had long looked to "extrinsic circumstance" and had simply deemed inadequate legislative debates as "inconclusive." Berger, *supra* note 6, at 29. Arguing that the records he relied upon in his 14th amendment study were "unequivocal," Berger concluded that to ignore them would be "arbitrary and unprincipled," particularly since "the basic principle is to give effect to the legislative intention." *Id.* Berger's argument, of course, presumes without evidence that the reluctance about legislative debate went entirely to the quality of the record kept and not to a parol evidence rule concern about the dangers of varying a written instrument and basic suspicion of any approach that gave great weight to informal expressions of intent.

If Hamilton be an authoritative guide, the argument on behalf of textual construction runs deeper than Berger acknowledges. In his dispute with Jefferson over the First Bank, Hamilton admitted Jefferson's claim that the Convention had rejected both a general and special power to incorporate. He contended, however, that "whatever may have been the intention of the framers of a constitution or a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of the construction." *Quoted in* G. GUNTHER, *supra* note 24, at 98. Hamilton contended further that if the power to incorporate a bank might be fairly deduced from the text, "arguments drawn from extrinsic circumstances, regarding the intention of the Convention, must be rejected . . . ." *Id.* Hamilton's argument rejected the "intent" model as inconsistent



tional strictures of the doctrine of *stare decisis*. In *Congress v. The Supreme Court*, Berger acknowledged that "*stare decisis* was a less flexible doctrine in 1787 than it is today," but it appealed to the Framers' awareness that they were "drafting for posterity."<sup>240</sup> Berger then contended that "[t]here had been no occasion to consider the doctrine in the context of the interpretation of a written Constitution" where strict application of *stare decisis* would regularly necessitate resort to the cumbersome device of constitutional amendment for correction of judicial mistakes.<sup>241</sup>

Berger's *stare decisis* argument ironically echoes traditional arguments for the interpretive method, rejected by Berger, which justify modern value selection based on the generality of the text and the presumed awareness of constitutional draftsmen that they were legislating for "an undefined and expanding future."<sup>242</sup> It also provides a fasci-

with the primacy of the text as the authoritative command. *But see* R. BERGER, GOVERNMENT, *supra* note 7, at 378, 386 (calling the *McCulloch* holding into question based on Marshall's failure to confront the legislative history). Clearly, Berger is committed to the Framers' views on the traditional rules of construction only to the extent that they reinforce his insistence that interpreting a constitution is no different than construing a statute. In other words, the statements are construed at a level of generality that fits into Berger's preferred interpretive method.

240. R. BERGER, *supra* note 3, at 195.

241. *Id.* One wonders whether this analysis, contemplating as it does the power of courts to modify the historical practice of *stare decisis* to better fit the exigencies presented by a written constitution, can be squared with Berger's insistence in other contexts that established common-law practices (such as the size of juries) must be carried wholesale into generally worded constitutional provisions drawn from those practices. *See* R. BERGER, GOVERNMENT, *supra* note 7, at 397-406; R. BERGER, DEATH PENALTIES, *supra* note 7, at 59-76. Berger nowhere points to a view of the Framers that judicial review was so unique as to call for revision of conventional practices of judicial decisionmaking.

242. R. BERGER, DEATH PENALTIES, *supra* note 7, at 101 (quoting R. KLUGER, SIMPLE JUSTICE 685 (1976) (statement of Mr. Justice Frankfurter)). The more persuasive rationale for the modern approach to *stare decisis* involves the recognition that the Framers did not intend to bind future generations to a particular theory of interpretation or judicial method. One piece of evidence supporting that view is that within Berger's own published studies is found disagreement among the Framers over the issues concerning the weight (if any) to be given text, the "intent" to be drawn from the Philadelphia Convention, and the understanding of the ratifiers and the people at the time of ratification. *See, e.g.*, R. BERGER, *supra* note 3, at 120 (quoting C. WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT 67 n.1 (1925)) (Madison: look to "the State Conventions which accepted and ratified the Constitution"); R. BERGER, GOVERNMENT, *supra* note 7, at 366 (quoting 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 400, at 305 (5th ed. 1905)) (Story: rules of textual construction provide a "fixed standard"); *id.* (misquoting 1 THE WORKS OF JAMES WILSON, *supra* note 132, at 75) (Wilson: "[t]he first and governing maxim in the interpretation of a statute is to discover the meaning of those who made it."); *id.* at 367 (misquoting 4 J. ELLIOT, *supra* note 32, at 446) (Jefferson: constitutional interpretation involves "the plain understanding of the people" as reflected in "the explanations of those who advocated . . . it."); *see also* Bridwell, Book Review, 1978 DUKE L.J. 907, 912-15; Murphy, *supra* note 1, at 1761-68. Berger has reconciled these contrasting views only by construing all the statements at a level of generality that emphasizes the concepts of fixed meaning and original intent that all of the views in some sense share.

Even more telling is that the text is silent about the judicial function, suggesting that it was

nating example of the very tendency Berger has criticized elsewhere—the tendency to vary the level of generality at which a tradition is interpreted so that the desired results are found embedded there.<sup>243</sup> The Framers are thus viewed as committed to the common-law judicial method, but only to the extent that it squares with what is perceived by Berger as required to preserve the integrity of a written constitution.

Since 1969, Berger has justified his views about *stare decisis* with reliance on the precedent established by *Erie Railroad v. Tompkins*.<sup>244</sup> Berger relies on *Erie* for the propositions that “[j]udicial ‘lawlessness’ cannot be legitimated by the passage of time”<sup>245</sup> and that it is “never too late to repudiate egregious error in construction of the Constitution.”<sup>246</sup> Interestingly, although in 1971 Professor Bice pointed out the special circumstances surrounding the *Erie* case—circumstances suggesting that more than simply the extent of error will be weighed when the Court decides whether to reconsider long-established precedent—Berger has never acknowledged, let alone confronted, his contrasting treatment of his “precedent” against *stare decisis*.<sup>247</sup>

That Berger implicitly recognized that the judicial decisionmaking process does lend legitimacy to (at least some of) its own work product is illustrated by the peculiar qualifications he introduces into his formulations—“lawlessness” and “usurpation,” never defined, cannot be legitimated, and “egregious error” is always open to reconsideration. But we must assume that Berger never explored any potential distinction for “mere error,” because *Government by Judiciary* concerned itself exclusively with “clearly discernible” original intent.<sup>248</sup> Presumably the

---

not intended that the interpretive method be frozen by any precise formulation that might preclude genuine progress in the art. The Framers were either satisfied that the judiciary could be trusted with the development of its own role, as Berger's original study suggested, or they simply did not consider the issue. In any event, Berger's assumption that we are bound by statements of the Framers (not reflected in any text) begs an important question as to what constitutes binding law. One prominent modern theory of legislative interpretation, not born of liberal activism in constitutional law, calls for ascertaining the meaning of laws by reading the text in a “relevant context” that excludes reliance on statements made during legislative debate. R. DICKERSON, *supra* note 155, at 139–40. The rejection of that view requires something more than reliance on statements extrinsic to the text itself—the issue provides an example, it seems, of debate over a “preconstitutional rule.” See Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981).

243. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 106.

244. R. BERGER, *supra* note 3, at 208; R. BERGER, *GOVERNMENT*, *supra* note 7, at 297, 352, 410.

245. R. BERGER, *supra* note 3, at 208.

246. Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277, 291 (1979).

247. Bice, *supra* note 46, at 509 n.36.

248. Berger, *Scope*, *supra* note 10, at 548–49; Berger, *Dialogue*, *supra* note 112, at 173 n.13. Berger's lack of attention to a possible distinction between mere error and usurpation raises thorny questions for his new exceptions-clause theory as well. See *infra* note 266. Interpretivist scholars have acknowledged that error might well be legitimated through the process of *stare*

ignoring of unmistakable intent is always egregious error and a form of usurpation. Berger has certainly never suggested otherwise.

It is at the level of application, however, that Berger's treatment of *stare decisis* is shown to be indefensible. While insisting that repetition brings no legitimacy, Berger has studiously avoided calling for application of his teaching where it would count (and cost) the most.

Thus, although Berger found that Marshall's decision in *McCulloch v. Maryland*<sup>249</sup> ignored the intent of the Framers, and concluded that "Marshall's disregard of constitutional bounds [could not] legitimate his displacement of the Framers' 'will' by his own,"<sup>250</sup> he nonetheless has failed to call for overruling the decision. Obviously it is easier to call hypothetically for reconsideration of a case when one's own research confirms its validity, as Berger had done with *Marbury v. Madison*,<sup>251</sup> but the acid test for any theory is found in its principled application. Berger knows, as we all do, that *McCulloch* has become an indispensable feature of our constitutional system, hardly challengeable in the real world no matter how effectively we might debate its theoretical merits in the classroom each fall. If this is not legitimacy, I have lost track of the word.

Berger's bowing to the result in *Brown v. Board of Education*<sup>252</sup> is of the same stripe. Berger's acquiescence in *Brown* was initially defended in part because of "the expectations . . . aroused in our black citizenry,"<sup>253</sup> a traditional ingredient of the doctrine of precedent. More recently, the defense has shifted to the general argument "that events, like poured concrete, had hardened so that overruling *Brown v. Board* could not restore the *status quo ante*."<sup>254</sup> It is hard to know what this is supposed to mean. I am unaware of a doctrine that says

---

*decisis*. E.g., Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979).

249. 17 U.S. (4 Wheat.) 316 (1819).

250. R. BERGER, *GOVERNMENT*, *supra* note 7, at 310 n.42. For Berger's views on *McCulloch*, see *id.* at 378, 386.

251. 5 U.S. (1 Cranch) 137 (1803). Berger's insistence that the Convention decision not to grant a power to incorporate precludes the Court's holding in *McCulloch* provides a classic example of the hazards of relying on legislative debate as the source for meaning. Professor Thayer long ago pointed to evidence suggesting that decisionmaking about inclusion and exclusion of enumerated powers was influenced by political concerns over ratification prospects—hence there was no clear consensus whether refusal to include a power implied its exclusion. Thayer, *Legal Tender*, 1 HARV. L. REV. 73, 78 n.2 (1887). Berger, of course, views it as unacceptable that "political" factors would so intrude on the deliberative process as to call for indirection; in this context, however, it appears to me that the alternative analysis might well require rejection of the principle (and not merely the holding) of the *McCulloch* case and the acceptance of the strict-construction principle otherwise suggested by votes against inclusion of enumerated powers. This Berger has not done.

252. 347 U.S. 483 (1954).

253. R. BERGER, *GOVERNMENT*, *supra* note 7, at 413.

254. Berger, *supra* note 6, at 37; Berger, *supra* note 102, at 486.

the overruling of a case must restore the status quo. It is difficult to believe, moreover, that the implementation of the decision involved in *Brown's* overruling would be any more difficult than implementing *Brown* has been.

Most of us would contend that, even if wrongly decided, *Brown* has acquired any legitimacy it initially lacked—it has been firmly accepted as the law of the land, its basic principle is part of our national consciousness. But if precedent cannot acquire legitimacy, and if we should not “condone the continued employment of the unlawful means” embodied in the *Brown* decision,<sup>255</sup> it follows that we commit a continuing wrong each time we reaffirm that holding. And the mere avoidance of massive busing, as proposed by Berger,<sup>256</sup> does not terminate the wrongdoing. Nor does avoidance of the terms “legitimacy” and “*stare decisis*” change the fact that Berger would condone established practices that in his view are at odds with the Constitution. Similarly, as it suits him, Berger can grant virtually insurmountable weight to long-established precedent on the exceptions clause.

#### H. *Due Process and Hart's Postulate*

We have seen that in 1969 Berger asserted that “[h]istory affords a sure footing” for a due-process limitation on Congress’ exceptions-clause power.<sup>257</sup> At that time, he also accepted Hart’s contention that it is a “necessary postulate of constitutional government” that courts should be available to pass on claims of constitutional right.<sup>258</sup> In 1982, however, Berger purported to discover that Hart’s postulate involved “circular reasoning” that gives the Court the power to insulate its own illegitimate creation of extraconstitutional rights.<sup>259</sup> Moreover, there can be no due-process right, Berger now contends, of court access to press extraconstitutional claims.<sup>260</sup>

Needless to say, the same circularity argument could be advanced generally against the doctrine of finality articulated by Framers of the

---

255. R. BERGER, *GOVERNMENT*, *supra* note 7, at 413.

256. *Id.*

257. R. BERGER, *supra* note 3, at 296. Berger’s due-process argument is found within his exceptions-clause chapter, but seems most fittingly addressed to the case in which Congress might attempt to deny all access to court.

258. *Id.* at 284.

259. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 166–67; Berger, *supra* note 102, at 505.

260. Berger, *supra* note 102, at 505; *see id.* at 512. Berger fails to address the case, however, in which Congress forecloses relief on a valid claim. Nor does he address whether the Court could exercise jurisdiction to strike down such a law, presumably because to recognize the power would be to concede the essential point and reduce the disagreement to the merits. *See infra* note 265.

Constitution and embraced by Berger.<sup>261</sup> For just as Berger insists that limitations based on the Court's role would allow the Court "to be the judge in its own cause for the insulation of judicial wrongdoing,"<sup>262</sup> the finality doctrine generally gives the Court unreviewable power to determine at each turn the scope of its own power under the Constitution. The notion of an "ultimate arbiter" minimally means that the Court is to arbitrate conflicting claims of power between the legislative (or executive) and the judicial branches as much as conflicting claims between the other two. Berger has neither repudiated the finality doctrine that has clear support in the history nor explained how his critique of Hart's "postulate" can be viewed as consistent with it.

Berger's argument, moreover, in reality goes to the merits of a hypothetical claimant's cause of action and not to whether a valid limitation argument could be pressed despite a congressional jurisdictional limitation. In his 1983 article, Berger also contended, oddly enough, that the exceptions power could not constitutionally be used to insulate unconstitutional congressional acts from interpretive judicial review lest Congress be allowed to be the judge of its own acts.<sup>263</sup> It is strange indeed that Berger would argue both that (1) Congress' exceptions-clause power should be broadly construed because "[n]o extrapolated 'postulate' can overcome [the Founders'] expressed aim to make the legislature paramount,"<sup>264</sup> and that (2) Congress' power is constitutionally limited because it "was not the Founders' purpose to leave Congress to judge for itself whether its own laws exceeded its granted powers . . . ."<sup>265</sup> As the latter statement suggests, Berger has not denied

261. See *supra* text accompanying notes 35-38.

262. Berger, *supra* note 102, at 512; see *id.* at 514.

263. *Id.* at 511. In this article, however, Berger failed to articulate whether this proposed limitation is to be judicially enforceable and, if it is, how the Court may be empowered to draw the distinction between interpretive and noninterpretive claims without judging the scope of its own power in the face of claims of arrogation. Berger adds to the confusion two pages later by relying (despite the statement above in text) on "the Court's long-standing, invariable recognition of Congress' *plenary power* over judicial jurisdiction." *Id.* (emphasis added). See also Berger, *supra* note 89, at 622, 631-32, 646-47 (referring to Congress' "plenary" exceptions-clause power, to the Court's lack of jurisdiction to decide jurisdiction, and to Congress as having the final word). See *infra* note 265.

264. R. BERGER, DEATH PENALTIES, *supra* note 7, at 167. Berger goes on to assert that "the Founders relied 'on the representatives of the people [not the courts] as the guardians of their Rights and Interests.'" *Id.* (quoting 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97-98 (1911)). Once again, Berger ignored the tension between these general sentiments (reflecting the Framers' majoritarianism) and his prior reliance on the evidence reflecting their commitment to judicial review *and* finality for the protection of individual rights. See *supra* text accompanying notes 28-34.

265. Berger, *supra* note 102, at 511. As pointed out above, Berger fails to articulate whether this limitation is to be judicially enforceable. See *supra* note 263. At another point, however, he asserts that enabling the Court to pass on the validity of exceptions-clause legislation "would set the textual scheme at naught and enable the Court to be the judge of its own powers."

Hart's postulate, for he continues to adopt and apply it to insulate (in some sense) decisions he describes as interpretive.<sup>266</sup>

Berger's own argument appears to be not only circular, but also potentially futile. The Court is yet to acknowledge any proposed distinction between interpretive and noninterpretive review. If "the specifi-

---

*Id.* at 513. But it is hard to see how precluding judicial review of the scope of the proposed constitutional limitation on congressional power does not run afoul of the premise that Congress should not be free to judge the scope of its own power. Moreover, in light of Berger's textual and historical arguments for judicial review, it is difficult to see how a constitutional limitation on a granted power could present a nonjusticiable issue. Indeed, not many years ago Berger contended that the political question doctrine "is a self-denying judicial construct without roots in constitutional history." Berger, *High Crimes*, *supra* note 7, at 448. Berger there read judicial power broadly to include judicial review of impeachment, *id.* at 443-57, and contrasted the Framers' anxiety to limit Congress' power to their reliance on "the self-restraint of the Court" as "the ultimate guarantee that the judiciary will not step out of bounds." *Id.* at 455. See *supra* text accompanying notes 35-37. Finally, the argument was advanced in the context of a proposed hypothetical act withdrawing federal jurisdiction of busing cases—a species of clear-cut noninterpretive review, according to Berger.

Berger also obliquely relies on an argument of Charles Black that Congress could treat a judicial decision in the face of withdrawal of jurisdiction as a nullity. Berger, *supra* note 102, at 513. But Black, contrary to Berger, had recognized no constitutional limitation on congressional exceptions power, and Black was not (so far as I know) committed in advance to the final, binding power of Supreme Court decisions. In addition, while Black's argument acknowledged congressional power under the exceptions clause itself, it is certainly another step to allow Congress to bootstrap its power to ignore a judgment for "lack of jurisdiction" if the constitutional validity of the withdrawal of jurisdiction turns on Congress' disagreement with the Court on the merits of the underlying claim. Berger has ignored these issues, let alone attempted to relate them to his prior findings and conclusions about the power of judicial review. See *id.* at 494 n.201; R. BERGER, GOVERNMENT, *supra* note 7, at 351-62 (both reaffirming prior work on legitimacy of judicial review). See also R. BERGER, *supra* note 3, at 295-96 (acknowledging that the power to regulate jurisdiction, like any other granted power, is subject to judicially enforceable constitutional restraints on the exercise of such power).

266. In 1974, Berger asserted that Hart believed Berger's 1969 findings "supplied an undergirding for his postulate" that would read the exceptions clause consistently with the Court's "essential role in the constitutional plan." Berger, *supra* note 5, at 409. Berger's present assertion appears to be simply that noninterpretive decisionmaking is unprotected because outside that essential role. Berger, *supra* note 102, at 505. In short, Berger has not accepted Wechsler's limited view of judicial power, despite his invocation of Wechsler in support of his new reading. See *supra* note 38 and accompanying text.

Berger's argument, of course, presupposes that the dividing line between the two types of review is so clear that the scope of congressional power will not be highly debatable—a dubious assumption. Presumably it was in anticipation of genuine disputes over the Constitution's meaning that the Framers established judicial review, and Berger fails even to clarify whether Congress may attack jurisdiction because of mere interpretive error or only for starkly obvious employment of noninterpretive approaches. Mere error seems an insufficient candidate for "usurpation" and "wrongdoing" if the exceptions clause is to be viewed as a "check" on judicial abuse of power; and Berger observed in *Congress v. The Supreme Court* that the abuse that justifies the "check" of impeachment, according to Iredell, must involve corrupt motives rather than mere mistakes of judgment. See R. BERGER, *supra* note 3, at 383 n.85. But it seems equally true that good-faith error may develop a line of cases grossly inconsistent with the (hypothetically) correct interpretive results. If disagreement with results is grounds for court-curbing, however, there is virtually no limit on congressional exceptions power. As a practical matter, if Congress has the last word, there is no limit to the legislative power.

cation of cases 'arising under this Constitution' excludes cases drawn from external sources"<sup>267</sup> from the Court's article III jurisdiction, it adds nothing to say that the Court should bow to congressional withdrawal of jurisdiction. The Court treats these cases as constitutional cases in the strictest sense, and it would be a retreat from its own doctrine for it to ground concession to Congress on the illegitimacy of its own decisions. Berger may as well rest on a call for the Court to reverse its prior case law.<sup>268</sup>

### I. Berger's "Newer" Exceptions-Clause Theory

In 1982, Berger posed the exceptions-clause issue in this limited fashion: "Is withdrawal of jurisdiction where the Court has exercised ungranted power unconstitutional?"<sup>269</sup> Nevertheless, he pointed to the broad assertion in *Cary v. Curtis*<sup>270</sup> that Congress may withhold jurisdiction from the courts "in the exact degrees and character which *to Congress may seem proper for the public good.*"<sup>271</sup> Another view would "elevate the judicial over the legislative branch" and grant to the judiciary "powers limited by its own discretion merely."<sup>272</sup> While *Cary* actually spoke only to lower court jurisdiction, Berger applied its dicta to the exceptions-clause controversy.<sup>273</sup> Berger offered no limitation on the broad language found in *Cary* and other cases which seemingly leave federal jurisdiction wholly within congressional discretion.<sup>274</sup>

267. Berger, *supra* note 102, at 511.

268. Alternatively, it is difficult to see why Congress (or even the States) might not on Berger's view be seen as having a right to refuse to enforce judgments rendered without "jurisdiction." It is insufficient to answer that the exceptions clause grants power to withdraw jurisdiction but not to reverse decisions, *id.* at 512, for the real question (in Berger's own terms) is whether, despite a general commitment to judicial review that normally is expected to overcome simple majoritarian opposition (despite the unqualified exceptions-clause text), we are to infer a power to resist decisions in which the Court (quite plainly? baldly? explicitly?) acted in excess of its "jurisdiction" to interpret the Constitution. Berger's fixing on the text of the exceptions clause as a remedy for such abuse, especially in the face of his continuing reliance on the Court's "essential role" to justify a nonliteral reading, is akin to the early Supreme Court's fixing on the text of the commerce clause to establish its implied limitation on the States in regulating commercial activities. By his own standards, Berger's new reading also appears to reflect a species of noninterpretive constitutional decisionmaking. *Cf.* Berger, *supra* note 89, at 645 n.333 (a more recent article summarizing approvingly a power-to-resist argument similar to the one suggested here). It also takes us a long way from the "ultimate interpreter" view that Berger once embraced.

269. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 158.

270. 44 U.S. (3 How.) 236 (1845). *See* R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 158-59.

271. 44 U.S. (3 How.) at 245 (emphasis added).

272. *Id.*

273. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 158-59, 167.

274. *See id.* at 158-60. For example, Berger relied on *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868), despite the fact that the Court's review in that case would almost certainly have been interpretive in nature. The Court, in any event, did not there refer to any potential limitation on congressional withdrawal power.

In 1983, however, Berger reiterated his affirmative answer to his own narrowly posed question, but now made explicit the qualification that interpretive review would be (in theory at least) excluded from the reach of this congressional power.<sup>275</sup> While Berger acknowledged that this new position had no support in the case law,<sup>276</sup> he offered no explanation for his essentially simultaneous reliance on the chain of broad judicial pronouncements that had never been questioned by the Court.<sup>277</sup> Rather obviously, neither the text nor the legislative history of article III offer any comfort to Berger's new reading. For whereas Berger's concern lest Congress be the judge of its own power at least comports with utterances contemporary with the constitutional ratification process,<sup>278</sup> Berger's concern lest the Court judge its own power does not reflect views expressed during the legislative history of article III.<sup>279</sup> At the very least, it would have been refreshing to have Berger acknowledge, for once, that neither text, history, nor structure are truly decisive of the issue presented, but that he is formulating a scheme that (he believes) best reconciles competing constitutional values.

Berger's newer reading is equally vulnerable on functional grounds. Berger never confronts the problems raised by the vagueness of the distinction between interpretive and noninterpretive decisions. Professor Alexander has argued persuasively that our ability to draw the line between the two methods is dependent upon our having a clear and persuasive theory of interpretation.<sup>280</sup> As we shall more fully develop later, that is something that Berger lacks.<sup>281</sup>

Moreover, if Congress is to have the final decision whether to give effect to judicial decisions in defiance of limiting legislation, as Berger has implied,<sup>282</sup> any decision with which Congress disagrees might in practice be treated as noninterpretive. Berger has not to date articulated any distinction for practical purposes between decisions noninterpretive because wrong on the merits and those employing an illegitimate method. The *Civil Rights Cases*,<sup>283</sup> though correct on the merits by Berger's lights, would have been a ripe candidate for congressional limitation under Berger's exceptions-clause theory. To the extent that Berger would contend that Congress' respect for interpretive decisions

---

275. Berger, *supra* note 102, at 511.

276. *Id.*

277. *Id.* at 505.

278. See *supra* text accompanying notes 35–36, 129.

279. See *supra* text accompanying note 161.

280. Alexander, *Painting without the Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 453 (1983).

281. See *infra* text accompanying notes 287–320.

282. See *supra* notes 263, 265.

283. 109 U.S. 3 (1883).



should somehow preclude it from acting against the *Civil Rights Cases*, he must articulate why Congress might legitimately act against a decision such as, for example, Justice Black's interpretivist, but probably wrong, incorporation theory.<sup>284</sup>

Based on his writing to date, one must conclude that Berger assumes that *Government by Judiciary* will serve as the new "ultimate arbiter" for determining the lines to be drawn under the exceptions clause. It is, however, extremely unlikely that either Congress or the Court would adopt the work as its guide. In any event, Berger's new reading of the clause reminds one of his own assessment, based on his findings concerning the centrality of judicial review, that broad readings of the clause posit that "the Convention was aimlessly going in circles."<sup>285</sup> I am not certain whether the Convention was going in circles, but I am satisfied that Berger's views do exactly that.

#### IV. CONSTITUTIONAL INTERPRETATION

"But although practical men generally prefer to leave their major premises inarticulate, yet even for practical purposes theory generally turns out the most important thing in the end."<sup>\*</sup>

Berger has been quite frank as to his lack of interest in developing a complete theory of constitutional interpretation.<sup>286</sup> It is perhaps his lack of interest in theory as such that has led to the significant, unresolved tensions in his formulations of the Supreme Court's function in constitutional adjudication. On the one hand, Berger has insisted that we are bound by the Framers' intent as to the scope of judicial review and, in turn, has relied on the evidence that the Framers contemplated an extremely narrow judicial role.<sup>287</sup> On the other hand, in the course of objecting to being labeled a strict constructionist<sup>288</sup> or a "strict intentionalist,"<sup>289</sup> he has pointed to the "very narrow focus"<sup>290</sup> of *Government by Judiciary*. Berger's central theses had been that "clearly discernible" original intent is binding<sup>291</sup> and that the Framers of the fourteenth amendment had clearly excluded segregation and suffrage

---

284. See, e.g., Fairman, *Bill of Rights*, *supra* note 178.

285. R. BERGER, *supra* note 3, at 286.

\* Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 420 (1899).

286. Berger, *Dialogue*, *supra* note 112, at 175-76.

287. See *supra* notes 107 (clear-error), 155 (clear-statement rule), 155 (contemplated objects), 237-39 (rules of statutory construction) and accompanying text. See generally R. BERGER, GOVERNMENT, *supra* note 7, at 283-311, 355, 362-72.

288. Berger, *supra* note 19, at 289.

289. R. BERGER, DEATH PENALTIES, *supra* note 7, at 188. The label is Paul Brest's creation.

*Id.*

290. Berger, *Dialogue*, *supra* note 112, at 172.

291. E.g., R. BERGER, GOVERNMENT, *supra* note 7, at 284. See *supra* note 112.

from the scope of the amendment.<sup>292</sup> Perhaps because of the “narrow focus” of his initial study, Berger has never acknowledged that his narrow thesis cannot be squared with his broader arguments on the proper scope of judicial review.

For example, Berger devoted a full chapter in *Government by Judiciary* to the claim that “the Framers excluded the judiciary from policymaking . . . .”<sup>293</sup> In that chapter, Berger initially made the unqualified claim that the Framers had excluded the courts “from even a share in policymaking.”<sup>294</sup> While Berger failed to define the term “policy-making” with any precision, he contrasted it with the Court’s contemplated role of policing constitutional boundaries.<sup>295</sup> In describing that policing role, Berger relied upon Chief Justice Marshall’s dictum that “‘judicial power is *never* exercised for the purpose of giving effect to the will of the judge; *always* for the purpose of giving effect to the will of the legislature.’”<sup>296</sup> Berger thus found that the judge’s role was conceived as being the very antithesis of that of the legislator.<sup>297</sup> Yet Berger seemed oblivious to the full implications of Marshall’s apparent assumption that judicial decisionmaking can and must involve no element of choice or will.

Two years later, Berger branded as an “unfounded” allegation the assertion that he “‘would forbid *all* judicial policymaking.’”<sup>298</sup> Rather, he acknowledged that “if the terms of a particular constitutional provision are ambiguous and no framers’ choices are discernible, there is room for judicial policymaking.”<sup>299</sup> Indeed, as Holmes recognized,

292. Berger, *Dialogue*, *supra* note 112, at 172.

293. R. BERGER, *GOVERNMENT*, *supra* note 7, at 300–11.

294. *Id.* at 301.

295. *Id.* at 304. Indeed, Berger’s argument at one point became completely obscure. He contended that the Supreme Court had stayed within its policing role until the Warren Court era when it began to “initiate policy” rather than acting merely as a “nay-sayer.” *Id.* at 305. But any such distinction between the brand of activism practiced by the Warren Court and, for example, the activism of the *laissez-faire* era Court, surely has nothing at all to do with (for example) Alexander Hamilton’s assumption that, in fulfilling their interpretive role, courts exercise “judgment” but not “will.” See *infra* note 296 and accompanying text.

296. *Id.* at 310 (quoting *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824)) (emphasis added). Berger added that this sentiment does not represent an unattainable ideal, as Cardozo asserted, but “a requirement of the separation of powers.” *Id.* at 310 n.42. See also Berger, *supra* note 102, at 483 n.115. That Berger appeared to take Marshall’s statement quite literally is also illustrated by his disapproval of Marshall’s *Dartmouth College* decision, even though the reading hardly seemed precluded by the history, because it involved an act of judicial will or legislation. See *supra* notes 152–53 and accompanying text.

297. R. BERGER, *GOVERNMENT*, *supra* note 7, at 306–07, 310. See Berger, *supra* note 102, at 525.

298. Berger, *Scope*, *supra* note 10, at 613 (quoting Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the “Original Intent” Theory of Constitutional Interpretation*, 5 HASTINGS CONST. L.Q. 603, 618 (1978)).

299. Berger, *Scope*, *supra* note 10, at 613.

courts do legislate "interstitially."<sup>300</sup> He made no reference to his earlier statements. More recently, without expressing concern about the tension between these two sets of views, Berger has at least taken to referring to the Framers' rejection of "legislative policymaking"<sup>301</sup> or "'constitutional policymaking,'"<sup>302</sup> perhaps to the end of distinguishing (albeit without clarifying precisely) what he apparently deems to be the illegitimate variety that departs from discernible intent.<sup>303</sup>

At the most mundane level, all of this points to the lesson that Berger must be read critically because he is neither a precise thinker nor a careful writer. Certainly, the seeds of Berger's developed views on policy-making were found elsewhere in *Government by Judiciary*. In his chapter on "'The Rule of Law,'" Berger stated that the entire "Part II" of the book was not intended to address "the interpretation of amorphous constitutional provisions such as 'commerce,' which . . . have no historical content; nor with the weight to be accorded 'enigmatic' history."<sup>304</sup> Perhaps more of his reviewers and critics should have noted that crucial qualification, but the balance of the book (including the chapter on policy-making) seemed to point in other directions.

But there are more serious concerns raised by Berger's qualifying disclaimers and elaborations. In recent works stressing the narrow theses of *Government by Judiciary*, Berger has confirmed that he makes no claims about what to do with enigmatic history and that he does not foreclose the possibility that there are any number of "amorphous" constitutional provisions.<sup>305</sup> Consistent with his acknowledgment of the possibility for legitimate judicial policy-making, Berger now observes that he never asserted "that 'the framers' intent is a . . . *generally* applicable method of keeping faith with the Constitution . . . ." <sup>306</sup> And he has rejected the assertion that he is concerned with how the Framers "would have" applied the broad language of the fourteenth amendment, both because he is "no soothsayer" and because the Framers had clearly "excluded" suffrage and segregation from the

300. *Id.* at 578.

301. Berger, *supra* note 102, at 525.

302. *Id.* at 520, 521 (quoting M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 24 (1982)).

303. *But see* Berger, *supra* note 102, at 526-27 (referring to Founders' "insistence that courts should not engage in policymaking but *act solely* as interpreters, not makers, of the law") (emphasis added).

304. R. BERGER, *GOVERNMENT*, *supra* note 7, at 284 (footnote omitted).

305. Berger, *Dialogue*, *supra* note 112, at 173.

306. *Id.* at 173 n.13. *But cf.* Berger, *supra* note 5, at 401 ("cheerfully" admitting charge that he rejects any method of interpretation "not totally bound by the 'collective judgment' of the framers").

amendment.<sup>307</sup>

At a minimum, these broad disclaimers raise questions about what we are now to make of Berger's continuing reliance on the clear-statement rule and other rules of strict construction.<sup>308</sup> If intent and meaning are clearly discernible, you need no clear-error or clear-statement rules. Yet without leaving those rules behind, Berger has now disclaimed interest or expertise in the more refined questions raised when meaning and intent do not emerge with clarity.

More serious still is that Berger's recognition that the Framers bequeathed us "amorphous" provisions may well undermine his insistence that the meaning of the Constitution is fixed and unchanging. The conventional modern view, of which Berger has frequently appeared as critic, is that the Framers used general terms in the Constitution's open-textured provisions precisely to leave room for flexibility and (in some sense) growth.<sup>309</sup> The commerce clause provides an example. We have seen that, consistent with the modern view, Berger treats "commerce" as having essentially no historical content and appears to approve of modern developments leading to virtually no justiciable limits on that grant of power.<sup>310</sup> Yet Berger recently relied, in another context, on Madison's assertion that "it exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant and cautious definition of federal powers, should have silently permitted the introduction of words or phrases . . . rendering fruitless the restrictions and definitions elaborated by them."<sup>311</sup> Madison's classic statement, of course, speaks far more to the modern commerce clause develop-

---

307. R. BERGER, *DEATH PENALTIES*, *supra* note 7, at 188. In practice, of course, Berger treats circumstantial evidence that the Framers of a provision would likely not have viewed a given practice as contrary to its command as clear evidence that the practice was "excluded" from the provision's scope. *See, e.g.*, R. BERGER, *GOVERNMENT*, *supra* note 7, at 125-28 (relying upon evidence external to legislative debate to support the conclusion that Framers did not "conceive" equal protection's terms broadly enough to reach segregation). It is important to recognize, however, that Berger's conclusion that segregation was clearly "excluded" largely rests upon his assertion that the amendment is identical to the 1866 Civil Rights Act—segregation was not considered or discussed during the debate over § 1 of the 14th amendment.

308. *E.g.*, Berger, *supra* note 102, at 496, 509-10, 526-27.

309. In many instances, the meaning (or connotation) of a provision may remain fixed while the instances of application (denotations) change. *See* Bridwell, *supra* note 242, at 914-15. Other provisions may be so general and vague as to call for judicial development of what has been called a "'middle distance principle'"; such provisions are those "'left to gather meaning from experience.'" *Id.* at 915 n.37.

310. Berger's approval presumably may be inferred from his use of commerce as an example of an amorphous provision and his criticism of the New Deal Era Court's obstruction of federal power. *See* R. BERGER, *GOVERNMENT*, *supra* note 7, at 284; R. BERGER, *supra* note 3, at 208-09 & n.47, 292 n.39.

311. Berger, *supra* note 102, at 527 (quoting 3 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 488 (1911)). Madison's statement is a classic example of argument for strict construction of federal power; but the weight of history is against his view.

ments than to the fourteenth amendment of which Madison was ignorant.<sup>312</sup>

The above points call into question Berger's tendency to write off what he labels "open-ended" theories of the fourteenth amendment as inherently illegitimate and "noninterpretive." One recognized form of legitimate judicial creativity in modern statutory interpretation theory is the power to "legislate" intermediate rules that give effect to standards so general and vague as to require supplementation.<sup>313</sup> Modern antitrust legislation provides the classic example.<sup>314</sup> While the function is not "interpretive" in the sense of engaging in a cognitive process to determine meaning, it is certainly part of the broader judicial process reflected in the title to Professor Dickerson's book, *The Interpretation and Application of Statutes*.<sup>315</sup>

An alternative reading to Berger's construction of the equal-protection clause, for example, would view it as articulating a standard of

312. An irony of Berger's views is that the same Congress which debated its authority to enact the Civil Rights Act pursuant to the 13th amendment now legislates against a wide range of private discrimination pursuant to its commerce power—a development that undoubtedly would have surprised members of the 39th Congress. See Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1048-49 (1981).

313. See R. DICKERSON, *supra* note 155, at 240-42; see also *supra* note 309.

314. R. DICKERSON, *supra* note 155, at 240.

315. Professor Dickerson's title was intended to refer both to the "ascertainment of statutory meaning" and to the "judicial lawmaking" that is frequently a necessary part of the process of applying statutory or constitutional provisions to various fact patterns. *Id.* at 4.

Professor Dickerson makes a comment of relevance to the current constitutional debate over "interpretivism" and "noninterpretivism":

The term "statutory interpretation" itself is used to refer, on the one hand, solely to the cognitive process of ascertaining meaning and, on the other hand, to the entire process by which a court discharges its responsibility of applying statutes to specific controversies. It is hard to tell which sense is being used on which occasion.

*Id.* at 1-2. The debate over "interpretivism" has also sometimes proceeded without clarification of the two facets of the judicial role. For example, John Ely's construction of certain broadly worded provisions as requiring a creative judicial role might be called "interpretivist" or "noninterpretivist" depending on whether the term "interpretation" is used in the restrictive or more inclusive sense. See J. ELY, *supra* note 11. (Of course, Ely's readings may also be argued to be "noninterpretivist" because incorrect at the initial level of ascertaining intended meaning.) This sort of ambiguity enables scholars unimpressed by the tenor of the whole debate to conclude that "noninterpretivism" of any stripe involves "a frank resolve to detach judicial review from the Constitution itself by stipulating it purports not to be interpreting the Constitution." Van Alstyne, *supra* note 107, at 217 n.27.

My own view is that the debate might better proceed at the level of argument with respect to: (1) whether courts are obligated in constitutional as well as statutory interpretation to attempt to determine the meaning of a provision before turning to a more creative role; (2) the problems raised by the continuing debate over the use of legislative history in determining "legislative" intent and the extreme skepticism of some about the search for intent in constitutional law; and (3) whether courts have obligations of fidelity (however defined) to original content in performing the creative function called for when the cognitive search for meaning has fallen short of resolving the issue.

sufficient generality and vagueness as to require judicial supplementation. Such a reading presumes, as the early Court did, that the clause was intended to be general in its terms, not limited to protecting certain particular rights, and applicable to *all* persons (and not merely to victims of racial discrimination).<sup>316</sup> This interpretation would entail growth or change in the sense that intermediate rules constructed by the Court would gradually unfold the provision's meaning in application over time. Depending upon the resolution of how such a creative role should properly be fulfilled, this reading may or may not be essentially open-ended.<sup>317</sup>

Relying upon the legislative history, Berger rejected any such reading of the factual record. Prior to reviewing the evidence, however, he characterized a similar construction as "the classic invocation to extraconstitutional power."<sup>318</sup> But given his own admission that constitutional provisions can be extremely open-textured, Berger's *a priori* rejection of such a construction as illegitimate *per se* seems to beg the question. To reject the above reading out of hand is to presume that all constitutional provisions must have a relatively specific and ascertainable meaning—a presumption Berger now denies having relied upon.<sup>319</sup>

---

316. *Strauder v. West Virginia*, 100 U.S. 303, 307-10 (1879).

317. For a general treatment of the creative role in statutory construction, see R. DICKERSON, *supra* note 155, at 238-61.

318. R. BERGER, *GOVERNMENT*, *supra* note 7, at 99. It is important to acknowledge, however, that some of the formulations of which Berger was critical appeared to invoke a "living constitution" metaphor that would (presumably) allow for judicial discovery of change of even connotative meaning over time, no matter how clear it was initially. *Id.* at 99-116. It is my own view, however, that Bickel's treatment, to name the most prominent one, seems to have proceeded from a rather narrow approach to statutory construction that, in turn, prompted him to call forth vague images of undisclosed purposes and the uniqueness of constitutional drafting to justify his broader reading. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 61-65 (1955). Without invoking any special interpretive rules, I find altogether persuasive, to use one example, Bickel's argument that the absence of language limiting § 1's reach to racial discrimination was deliberate rather than inadvertent and reflected an intent that § 1 was not to be strictly limited by the Civil Rights Act. *Id.* at 44-45, 60; see J. ELY, *supra* note 11, at 30.

One need not adopt a wholly unique approach to constitutional interpretation, or adopt a "living constitution" model, to conclude that the text and legislative history of the 14th amendment point us beyond the Civil Rights Act. On the other hand, the constitutional context may at least strengthen the inference that general terms were used deliberately and knowingly. Presumably constitutional draftsmen generally avoid drafting legal codes because they wish to establish enduring principles more than to address specific problems or to carefully limit interpretive discretion. Compare Nathanson, Book Review, 56 TEX. L. REV. 579, 581 n.4 (1978) (observing that Berger's argument that Civil Rights Act formulation was not employed so as to avoid "prolixity of a legal code" "finessed" the question why a constitution should be so written) with Berger, *Government by Judiciary: Some Countercriticism*, 56 TEX. L. REV. 1125, 1131 n.41 (1978) (replying—without acknowledging the weight of the point—that what Nathanson deemed "a finesse" was "a self-evident proposition to Marshall").

319. See *supra* text accompanying notes 299, 305-06.

All of the above confirms our prior analysis that Berger's new exceptions-clause theory would falter on the unmanageable task of drawing the line between interpretivist and noninterpretivist judicial review. Berger has offered no theory of how that line is to be drawn, and his recent emphasis on the narrowness of his thesis reinforces the conclusion that his own views do not in theory preclude a broad judicial role. Consequently the line-drawing task, on Berger's own terms, will necessarily turn on the resolution of sharply conflicting evaluations of the historical record. Given his own rejection of the Framers' narrowest formulations of the judicial role, Berger must also now elaborate why the term interpretivism is necessarily and properly limited to his own approach of giving such primacy to extrinsic evidence of original intent.<sup>320</sup>

## V. CONCLUSION

There should be little wonder that the debate over the legitimacy of seemingly untethered judicial review continues to rage. The Supreme Court has boldly exercised power in modern times, frequently enough where the textual foundation for the decision has been dubious or non-existent. Berger's reminder to us that the Constitution is a binding legal document—binding on courts as well as on other governmental actors—strikes me as a needed call for a return to basics. *Government by Judiciary* came to us as a timely reminder that to embrace the most open-ended versions of noninterpretivism currently marketed—the ones that frankly call for attention to an unwritten constitution—is to turn our backs on the meaning of a written constitution and the weight of our constitutional heritage.

Berger's work also provides a fresh reminder, however, that present concerns of lawyers and advocates tend to color their treatment of historical materials. The Framers can be seen as enthusiastic supporters of judicial review or as highly suspicious of the judiciary, depending upon which materials are to be selected and which point is needed for the occasion. Berger's work on the exceptions clause provides a classic example, moreover, of how easy it is to "find" one's predilections embodied in text and history. It is Berger's almost self-righteous certainty about the meaning of the exceptions clause, both in 1969 and in 1982

---

320. Certainly, the cases which Berger relies upon for the proposition that intent prevails even over unequivocal text have generally been cases in which the Court avoided a literal reading of text because of the absurd or unjust result that would have otherwise occurred. *E.g.*, *Hawaii v. Mankichi*, 190 U.S. 197 (1903), *cited in* R. BERGER, *GOVERNMENT*, *supra* note 7, at 7 n.24. None of them approach the kind of wholesale revision of the text of every provision of § 1 that Berger's 14th amendment reading requires.

to 1983, that is perhaps most exasperating of all. It is as though he had simply become counsel for the other side.



