"Equal Justice Under Law" or "Justice At Any Cost"? The Judicial Role Revisited: Reflections on *Government by Judiciary: The Transformation of the Fourteenth Amendment**

By HENRY J. ABRAHAM**

Introduction

As Raoul Berger's subtitle, *The Transformation of the Fourteenth Amendment*, suggests, he endeavors to buttress the main theme of his important, trenchant and controversial work by providing a pertinent case study *cum* indictment. It is difficult to conceive of a more appropriate study with which to make his point, and Berger has indubitably succeeded in advancing the desired indictment. There may well never be a final or otherwise conclusive verdict from a jury of his peers; indeed, as post-publication deliberations have made clear, a hung jury is certain.[1] But any genuinely objective, factual and rigorous examination of the debates and history of the framing of the Fourteenth Amendment demonstrates that the authors and supporters of that provision specifically rejected its application to segregated schools and the franchise;[2] that, to the contrary, they designed the Amendment "to

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

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1. *See, e.g.*, Clark, *History and Constitutional Interpretation*, 56 TEX. L. REV. 947, 960 (1978); Murphy, *Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?*, 87 YALE L.J. 1752 (1978); Nathanson, *Constitutional Interpretation and the Democratic Process*, 56 TEX. L. REV. 579 (1978); Perry, *Book Review*, 78 COLUM. L. REV. 685 (1978).

2. GOVERNMENT BY JUDICIARY 283-99, 363-72. In these chapters, Berger analyzes the conflict between adherence to the "original intention" of the Amendment's framers and the latter-day judicial policymaking of the Warren Court.

leave suffrage and segregation beyond federal control, to leave it with the States, where control over internal, domestic matters resided from the beginning."[3] The question of suffrage was addressed separately in the Fifteenth Amendment[4] a few years later, thus underscoring Berger's point.

To grant the correctness of his rigid historical interpretation of the Fourteenth Amendment, and I do so, does not mean, however, that one must necessarily embrace Berger's corollaries. As has been demonstrated elsewhere,[5] I have long disagreed with Berger's undiluted support for Professor Charles Fairman's view of the intention of the Amendment's framers with regard to the "incorporation" of the Bill of Rights via the first section of the Fourteenth Amendment.[6] Although Berger concurs with Fairman that " '[t]he freedom that states traditionally have exercised to develop their own systems of administering justice, repeals any thought that . . . Congress would . . . have attempted [to incorporate the Bill of Rights] . . . , [for] the country would not have stood for it, the legislatures would not have ratified,' "[7] a fair reading of the same historical record justifies a contrary determination.[8] Nor need one, and I emphatically do not, reject Professor Alexander M. Bickel's conclusion that the authors of the Fourteenth Amendment ultimately chose language which would be capable of *growth* (or contraction, for that matter); that, consequently, "the record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the Union in 1954,

3. *Id.* at 245.

4. The Fifteenth Amendment to the Constitution provides: "Section 1: The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2: The Congress shall have power to enforce this article by appropriate legislation."

5. *See* H. ABRAHAM, FREEDOM AND THE COURT 33-56 (3d ed. 1977). This section of the book examines the historical background of the applicability of the Bill of Rights to the States.

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

7. GOVERNMENT BY JUDICIARY 156 (quoting Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 137 (1937)).

8. *See* H. ABRAHAM, *supra* note 5, at 38-48. Contradicting Fairman's argument, this section of the book concludes that "there seems little doubt that the Amendment's principal framers and managers . . . did believe the Bill of Rights to be made generally applicable to the several states via Section 1." *Id.* at 47-48.

not 1866."[9] Bickel's view is especially notable given the results of his painstaking research while serving as Justice Felix Frankfurter's law clerk during the Court's deliberations leading to its decision in *Brown v. Board of Education*.[10] In his report to "F.F." Bickel concluded that there was "no evidence that the framers of the Amendment had intended to prohibit school segregation;"[11] that, in effect, " 'it is impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting.' "[12] Yet even the liberalist-absolutist Justice Hugo Black, a strict constructionist, found justification for growth in the tenets of the Fourteenth Amendment and thus reluctantly joined the Court's unanimous *Brown* opinion.[13]

It is one thing to recognize and grant growth potential in our basic law; it is quite another, however, to endeavor to determine the constitutionally permissible, let alone viable, parameters of such growth. And there hangs the gravamen of the development of constitutional law and constitutional history in general, and the application of the Fourteenth Amendment in particular. Thus, a good many thoughtful and qualified observers of evolving racial segregation law, who have criticized Berger's reading of the genesis of the Amendment in relation to its historic application in *Brown* as being far too constitutionally rigid and confining, are supportive, on the other hand, of his condemnation of the Court's subsequent, expansive application of constitutional doctrine in such *Brown* offspring as forced busing,[14] racial quotas,[15] and other integrative measures.[16]

There is, of course, a crying need to find and establish lines and limits between judicial "self-restraint" and "judicial activism", or be-

9. A. BICKEL, POLITICS AND THE WARREN COURT 261 (1965). Bickel was referring specifically to the Court's seminal desegregation decisions in Bolling v. Sharpe, 347 U.S. 497 (1954), and Brown v. Board of Educ., 347 U.S. 483 (1954). *See also* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

10. 347 U.S. 483 (1954).

11. R. KLUGER, SIMPLE JUSTICE 655 (1975) (summarizing Bickel Memorandum to Frankfurter (1953)).

12. *Id.* at 654 (quoting Bickel Memorandum to Frankfurter (1953)).

13. *Id.* at 678-99.

14. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

15. *See, e.g.*, Contractors Ass'n v. Hodgson, 404 U.S. 854 (1971).

16. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976) (admission policies of racially segregated private schools); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976) (racially discriminatory labor practices under Title VII of the 1964 Civil Rights Act); Lau v. Nichols, 414 U.S. 563 (1974) (Chinese students' right to English language instruction under Title VII).

tween judicial "finding" and "making" of law.[17] It is not a question of judicial institutional *capacity*; it is rather one of judicial constitutional *legitimacy*. But those lines and limits have been elusive in both definition and application ever since the Supreme Court's first term began in 1790 at the Royal Exchange Building in New York.[18] To be sure, the record is replete with honest efforts, often carefully reasoned and articulated, to find and to draw such lines.[19] Among these efforts have been: (1) the frank resort to judicial activism based on personal philosophical commitments to policy goals;[20] (2) reasoned endeavors to live by the tenets of judicial restraint;[21] (3) an avowed pragmatism about

17. Some would properly find it more forthright to speak of judicial "judging" and judicial "legislating."

18. *See* H. ABRAHAM, THE JUDICIAL PROCESS 189 n.75 (3d ed. 1975) (detailing the various physical, rather than philosophical, structures in which the Court has been housed since 1790).

19. *See, e.g.*, Justice Roberts' majority opinion in United States v. Butler, 297 U.S. 1 (1936). In *Butler*, Justice Roberts wrote for the majority: "It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles its lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends." *Id.* at 62-63.

20. *See, e.g.*, Justice Douglas' jurisprudence throughout more than 36 years on the Supreme Court, the longest tenure of any Justice in the history of the Court. For selected excerpts from his opinions, see *Mr. Justice Douglas, One Man's Opinions*, 3 HASTINGS CONST. L.Q. 3 (1976). For studies of his contributions to the development of various areas of the law while serving on the Court, see *e.g.*, Countryman, *Justice Douglas' Contribution to the Law: Business Regulation*, 74 COLUM. L. REV. 366 (1974); Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 YALE L.J. 920 (1964); Powe, *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 COLUM. L. REV. 371 (1974); Wolfman, Silver & Silver, *The Behavior of Justice Douglas in Federal Tax Cases*, 122 U. PA. L. REV. 235 (1973); Note, *Toward a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas*, 87 YALE L.J. 1579 (1978).

21. *See, e.g.*, Justice John Marshall Harlan's dissenting opinion in Reynolds v. Sims, 377 U.S. 533, 589 (1964): "[T]hese decisions [on reapportionment] give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in

the "felt necessities of the time"[22] or "the mores of the day";[23] (4) attempts to follow an interpretative course based on a "literal" reading of the Constitution;[24] (5) protestations in favor of embracing a "sliding scale of values";[25] (6) a course of judicial response based upon the notion of whether or not an action by government "shocks the conscience";[26] and (7) a diligent search for "neutral principles" of constitutional law.[27] The record also contains other efforts at viable line drawing, although they are often similar or derivative. But the seven just enumerated are illustrative of the dilemma and the ubiquitous difficulties inherent in the search for definable limits to permissible

function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process." *Id.* at 624-25 (Harlan, J., dissenting).

22. O. HOLMES, JR., THE COMMON LAW 1 (1881). The quoted phrase appears in the following context: "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." *Id.*

23. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); Runyon v. McCrary, 427 U.S. 160, 189-92 (1976) (Stevens, J., concurring). In *Gregg*, Justice Brennan remarked: "This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, 'moral concepts' require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society." 428 U.S. at 229 (footnote omitted).

24. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (Black, J., concurring, joined by Douglas, J.) ("Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunction, or prior restraints." *Id.* at 717); Rochin v. California, 342 U.S. 165, 174-77 (1952) (Black, J., concurring).

25. *See, e.g.*, Justice Marshall's dissenting opinions in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) and Dandridge v. Williams, 397 U.S. 471, 519-21 (1970). Rejecting the "traditional test" with its "rational basis" standard as well as the "fundamental rights test" with its standard of "compelling state interest," Justice Marshall proposed a more flexible approach to equal protection analysis which would weigh competing interests: "[C]oncentration must be placed on the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." *Id.* at 520-21. *See generally* Wilkinson, *The Supreme Court, The Equal Protection Clause and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); *Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645 (1975). *Compare* Gunther, *The Supreme Court: 1971 Term; Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

26. Rochin v. California, 342 U.S. 165, 172 (1952) (opinion by Frankfurter, J.).

27. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

constitutional adjudication. It is a quest at once frustrating and controversial. Yet it is one crucial to the exercise of the judicial function, to the articulation of the appropriate judicial role in the American constitutional constellation, and to an essayed response to charges such as that recently voiced in the *American Bar Association Journal* that the "United States Supreme Court has become our Legiscourt. Why not candidly face that fact and let the justices decide issues on policy rather than strained constitutional grounds?"[28]

I. The Development of the Double Standard

It is because Raoul Berger carefully enunicates and analyzes the judicial role in the governmental process, thus once again bringing us face to face with the eternal dilemma of the limits of judicial power, that his work is so significant. Yet, at least in this observer's judgment, his scholarship is far more important in illuminating the broader perspective than in the particular case study indicated by his subtitle. That he would choose to focus on the transformation of the Fourteenth Amendment is quite natural, for it is at the heart of the present controversy surrounding the judicial role in racial matters, pointing frankly to the contemporary transformation of the imperative of equal opportunity for individuals into guaranteed results based upon group statistics.

Notwithstanding his persuasive evidence on the *raison d'etre* of the Fourteenth Amendment, it is the primary title of Berger's work, *Government by Judiciary*, that poses the central question at issue. His condemnation of what he regards as past, present, and presumably future bald resort to judicial government concerns—or certainly ought to concern—all those who govern and who authorize governance. As a lifelong admirer and supporter of the United States judiciary in general, and the Supreme Court at its apex in particular, and as one who views the Court as *the* branch of government to which the people can look with hope when the others falter or fail[29]—witness its decisive savior role in the "Watergate" crisis—I nevertheless concur with the heart of Berger's charge: that the judicial branch has indeed been guilty of engaging in vital aspects of governmental policy formation that are constitutionally delegated to other branches, particularly the legislature. To voice that charge is tantamount to the acceptance of what is, or should be, *the* primary salient fact of American constitutionalism: that lawmaking is emphatically the province of the legislative branch, the

28. Forrester, *Are We Ready for Truth in Judging?* 63 A.B.A.J. 1212, 1215 (1977).
29. *See* H. ABRAHAM, *supra* note 18, at 377-80.

branch that by constitutional provision and philosophical design is the keystone of the arch of representative democracy. The American Constitution thus provides neither for a "pure" or "direct" democracy, nor for an "aristocratic" or "elitist" regime.

For better or for worse, and it may well on occasion be the latter, laws are designed to be made by the people's duly elected representatives, assembled in Congress and the fifty state legislatures. Whatever one may think of the merits of their performance—and they rarely receive a high mark from the sovereign people who sent them there—elected representatives are replaceable via the electoral process, a process vastly ameliorated and universalized in not inconsiderable measure by the courts. And in extreme situations, the legislature's role, even the legislative branch itself, is subject to change by constitutional amendment, albeit not without some genuine toil and trouble. In other words, while the Constitution requires adherence to its explicit and implicit terms, it neither requires nor guarantees legislative wisdom—all it mandates is that legislative (and executive) actions be performed in accordance with constitutional authority. As Justice Holmes once observed: "We fully understand . . . the very powerful argument that can be made against the wisdom of the legislation, but on that point we have nothing to say, as it is not our concern."[30] In typically colorful fashion he once expressed this constitutional and judicial philosophy to the then sixty-one year old Justice Stone: "Young man, about 75 years ago I learned that I was not God. And so, when the people . . . want to do something I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, 'Goddamit, let 'em do it.' "[31]

Felix Frankfurter, Holmes' disciple who would inherit the master's chair and become one of the most ardent modern exponents of judicial restraint[32]—notwithstanding his lifelong personal commitment to civil libertarianism—well articulated the heart of the matter long before he ascended to the bench: "Even the most rampant worshipper of judicial supremacy admits that wisdom and justice are not the tests of constitu-

30. Noble State Bank v. Haskell, 219 U.S. 575, 580 (1911).

31. C. CURTIS, LIONS UNDER THE THRONE 281 (1947) (quoting Justice Holmes). Or as Holmes said to the famed constitutional lawyer John W. Davis on another occasion: "Of course I know, and every other sensible man knows, that the Sherman [Antitrust Act of 1890] is damned nonsense, but if my country wants to go to hell, I am here to help it." F. BIDDLE, JUSTICE HOLMES, NATURAL LAW AND THE SUPREME COURT 9 (1961).

32. *See, e.g.*, W. MENDELSON, FELIX FRANKFURTER: THE JUDGE (1964).

tionality."[33] Once on the Court, he time and again lectured his colleagues and countrymen in the same vein, as when he dissented vigorously from the Court's decision in *Trop v. Dulles*,[34] which declared unconstitutional a section of the Immigration and Nationality Act of 1940:

> It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do.[35]

And in what is probably Justice Frankfurter's most famous exhortation of judicial abstemiousness, he all but cried out in dissent in *West Virginia State Board of Education v. Barnette*,[36] the celebrated flag salute case:

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion [by Mr. Justice Jackson], representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. *As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard* . . . . Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.[37]

Yet as Raoul Berger's indictment makes clear, even such opponents of "government by judiciary" as Justices Holmes and Frankfurter

33. Frankfurter, *Can the Supreme Court Guarantee Toleration?*, 43 *New Repub.* 85, 86 (1925).

34. 356 U.S. 86 (1958).

35. *Id.* at 120 (Frankfurter, J., dissenting).

36. 319 U.S. 624 (1943).

37. *Id.* at 646-47 (Frankfurter, J., dissenting) (emphasis added).

and their latter-day followers, such as Justices John Marshall Harlan and Lewis Powell, are not absolved from the task of drawing the elusive line between "appropriate" and "inappropriate" judicial action.[38] Thus, even avowed champions of judicial self-restraint have been willing to embrace a judicial approach that unquestionably manifests a "double standard" between judicial review of legislation touching upon "economic-proprietarian questions" and that of legislative or executive action affecting fundamental civil rights and liberties.[39] That "double standard," however, is also susceptible to judicial rationalizations or fiat that have resulted in "double standards" within "double standards."[40] Hence, as early as 1937, so confirmed an exponent of judicial restraint as Justice Cardozo created and spelled out in *Palko v. Connecticut*[41] an "Honor Roll of Superior Rights"[42] that in effect laid the groundwork for both the theory and practice of a double standard in the interpretation of constitutionally recognized human rights. In so doing, Cardozo specified in tabular form those rights that *did* and those that *did not* require close judicial scrutiny.[43] The fundamental issue in *Palko* was the "incorporation" of the Bill of Rights into the Fourteenth Amendment; but the basis of the decision was the concept of "preferred freedoms," a concept which would within a year be judicially recognized and articulated by Justice Stone in his historic footnote to the otherwise insignificant *Carolene Products* case.[44]

38. *See* notes 18-27 and accompanying text *supra*.

39. *See* H. ABRAHAM, *supra* note 5, at 9-32 (tracing the formulation and justification of the double standard).

40. *Id.* at 16-17.

41. 302 U.S. 319 (1937).

42. *See* H. ABRAHAM, *supra* note 5, at 66-69. The importance of this "Honor Roll" is threefold: (1) it established guidelines by which to measure the incorporation problem; (2) it provided judicial recognition of the claim that, at least in certain conditions, the states are subject to the Bill of Rights via the Fourteenth Amendment; and (3) it laid the groundwork for support of the double standard theory and its subsequent application.

43. *Id.* at 70. For example, the First Amendment's separation of church and state was deemed not incorporated by the Fourteenth Amendment, and thus not requiring close judicial scrutiny.

44. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). The footnote reads in part: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends

The Stone formulation proved, not surprisingly, to be a veritable Pandora's box. Avowed judicial activists such as Justices Douglas, Murphy and Rutledge,[45] and Justice Black (who, however, rejected the "judicial activist" label) quickly utilized it to justify judicial interpretations of constitutional phraseology that would undoubtedly have amazed the framers. Yet had not Holmes himself, almost six decades prior to *Palko* and *Carolene Products*, spoken of "[t]he felt necessities of the time"?[46] Had he not specifically suggested that jurists "should not be too rigidly bound to the tenets of judicial self-restraint in cases involving civil liberties"?[47] Indeed, is it not wholly feasible to justify this "double standard" on the grounds of (1) the crucial nature of basic freedoms, (2) the explicit language of the Bill of Rights, (3) the expertise of the judiciary in matters involving the maintenance of fundamental liberties, and (4) the discrepancy in access to the political process between the "haves" and the "have nots"?[48] Obviously, a host of Justices have been comfortable in accepting and propounding these justifications and have ruled accordingly.[49]

Since 1937, the "double standard" has expanded in favor of judicial interpretative powers that would, I suggest, have troubled both Holmes and Cardozo as well as other early proponents of that standard. Although it began with the latter Warren Court years,[50] this expansion was, ironically, articulated most frequently by the "conservative" Burger Court beginning in the late 1960's and continuing into the 1970's.[51] It has taken the form of what is unquestionably a "double standard" within a "double standard"—a patent manifestation of "government by judiciary," whatever one may think of its merits. Ever since 1937, civil rights and liberties issues have been accorded closer judicial examination than those in the economic-proprietarian realm. Upon a demonstration that a statutory classification affects

seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." (citations omitted).

45. These Justices reached the Court within three years after *Carolene Products* was decided.

46. *See* note 22 and accompanying text *supra*.

47. *See* H. ABRAHAM, *supra* note 5, at 30 & n.88.

48. *Id.* at 24-32.

49. *Id.*

50. *Id.* at 16-17. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Bd. of Elections, 383 U.S. 663 (1966); Griswold v. Connecticut, 381 U.S. 479 (1965).

51. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976); Roe v. Wade, 410 U.S. 113 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

"fundamental interests"[52] or utilizes a "suspect category,"[53] or where the classification is not considered "suspect" but is nonetheless subject to more than the minimal level of review,[54] the Court will now examine the statute with closer judicial scrutiny. Once an issue has thus been deemed to require an enhanced level of "scrutiny," the Court in effect shifts the burden of proof of constitutionality *to the legislature and/or the executive* and requires a showing of a compelling or important interest in support of the classification, thereby rejecting the traditional equal protection (and due process) test of whether the legislature had a "reasonable" or "rational" basis for the classification.[55] Judicial procedural and substantive policymaking of this sort is both an open invitation for further judicial activism and grist for the mill of Berger's indictment. It is tailor-made for the blurring of epistemological distinctions between constitutionally permissible and impermissible actions by the political branches of the government. It puts a premium on wisdom and fairness, neither of which, no matter how desirable and logical, is *required* by the terms of the Constitution of the United States.

II. Activism and Restraint: The Problem of Drawing a Viable Line

Infinitely more difficult than stipulating the foregoing facts of gov-

52. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting rights).

53. In San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court identified a "suspect class" implicating strict judicial scrutiny as one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28. *Compare* note 44 *supra*.

Strict scrutiny applies to classifications based on race, *see, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967); Bolling v. Sharpe, 347 U.S. 497, 499 (1954), as well as national origin or alienage, *see, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971). More problematic has been the Court's treatment of illegitimacy. *See, e.g.*, Weber v. Aetna Cas. & Ins. Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971); Levy v. Louisiana, 391 U.S. 68 (1968). Illegitimacy was apparently eliminated as a suspect class by the Court's decisions in Norton v. Mathews, 427 U.S. 524, 531 (1976) and Mathews v. Lucas, 427 U.S. 495, 506 (1976). For the Court's current difficulties in reviewing classifications based on legitimacy, *compare* Trimble v. Gordon, 430 U.S. 762 (1977) *with* Lalli v. Lalli 99 S. Ct. 518 (1978). For a detailed discussion of *Trimble* and the search for the appropriate standard of review, see *Constitutional Review: Supreme Court, 1976-77 Term*, 5 HASTINGS CONST. L.Q. 61, 114-21 (1978).

54. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); and Reed v. Reed, 404 U.S. 71 (1971) (all dealing with sex discrimination). *But cf.* Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974) (gender-based classifications designed to ameliorate the effects of past discrimination against women upheld).

55. H. ABRAHAM, *supra* note 5, at 16-17.

ernmental and constitutional life regarding the nature of the judicial process and the judicial role is the quest for a viable line between judicial activism and judicial restraint. I am not persuaded that Raoul Berger has succeeded in doing so in *Government by Judiciary*—and it may conceivably be impossible. In effect, Berger's solution amounts to the entirely commendable exhortation that judges stay within the limits of their constitutionally assigned judicial function and base their judgments solely upon that which is constitutionally permitted by the authority inherent in the basic charter ratified in 1789.

It would be difficult to quarrel with that exhortation, and even most extreme judicial activists, both on and off the bench, would very likely be willing to say "Amen!" to it. The problem with this solution is the twofold one of interpretation of constitutional language and the tailoring of the judicial function to the limits of that language. The day is gone where there would still be serious challenges to the existence of the ultimate judicial power, that of judicial review,[56] for judicial review is clearly a fact of governmental life that has been settled by the sweep of history.[57] While challenges to its justification continue, they are academic; the presence and continuation of judicial review in our system of separation of powers and checks and balances is assured. Berger does not challenge it;[58] what he does understandably and justifiably challenge is the application of judicial review to the perception of the judicial role in general, and to specific cases and controversies—such as that of the transformation of the Fourteenth Amendment—in particular. His is a cry of "Halt!" and, while recognizing the futility of undoing what has already been done, Berger wants the judicial branch to return to principles of self-restraint, of abstemiousness, and of what Justice Frankfurter was fond of calling "judicial humilitarianism."

It is one thing to second and applaud Berger's clarion call as a general beacon to guide judicial conduct, but it is quite another to rest adherence to it on the unbending keystone of the original intention of the drafters of the Constitution—even if that intent were clearly ascertainable in every instance, which demonstrably it is not.[59] What is needed is a line that would permit the invocation of the spirit as well as the letter of a constitutional provision without engaging in the kind of judicial prescriptive policy making that, during the past two genera-

56. The penultimate judicial power, that of statutory construction, has never been seriously challenged except in its application to specific cases.

57. *See* H. ABRAHAM, *supra* note 18, at 279-314. The analysis found at 304-14 is especially applicable.

58. GOVERNMENT BY JUDICIARY 355.

59. *See* notes 7-8 and accompanying text *supra*.

tions, has emanated from the Court's "right" wing (*e.g.*, the four anti-New Deal "Horsemen"), the Court's "left" wing (*e.g.*, the contemporary civil libertarian activism of Justices Douglas, Brennan and Marshall), and even from its "center" (*e.g.*, the actions of Justices Blackmun, Stewart and Powell in such policy making opinions as the 1973 Abortion Cases,[60] the 1976 Private School Admissions Case,[61] and the 1978-9 Reverse Discrimination Cases).[62] The sought after yet elusive line must above all underscore a resolute commitment to an abjuring both of decision making based upon personal philosophical commitments and value judgments and of the understandable instinct to reach out and settle issues that may well require determination but which have not been resolved by the people's elected representatives.

Searching for and evaluating the inherent spirit as well as the patent letter of a constitutional provision need not result in an impermissible enlargement of the judicial role—no matter how tempting that enlargement may be as a means to expedite needed political or economic reform. Thus, although the need for a hallmark decision such as that articulating the Sixth Amendment's guarantee of the right to counsel in all criminal cases[63] is beyond rational argument, the Court, "the Nation's ultimate judicial tribunal," should not in consequence be viewed, as Justice Frankfurter put it, as "a super-legal aid bureau."[64] Some, albeit certainly not all, aspects of *Miranda v. Arizona*[65] would seem to mandate such an approach, for in *Miranda* the Court wrote at least a partial code of police conduct into the Constitution.[66] Similarly, it is defensible for the Court to rule unconstitutional crass gender discrimination, such as that found in *Reed v. Reed*,[67] for the statute at issue there, which favored the appointment of male administrators for decedents' estates, constituted an example of a clear-cut, irrational and sexually discriminatory classification. But the Court should not view itself as a "social reform agency"—a position seemingly propounded when it wrote what, in effect, constitutes a Federal Abortion Code in its

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

61. Runyon v. McCrary, 427 U.S. 160 (1976).

62. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Steelworkers v. Weber, 47 U.S.L.W. 4851 (1979).

63. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); *see also* Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to *pro se* representation).

64. Uveges v. Pennsylvania, 335 U.S. 437, 449-50 (1948).

65. 384 U.S. 436 (1966).

66. *Id.* at 467-73. The Court in *Miranda* set forth the well known "Miranda instructions," requiring that persons in custody be informed of specific rights prior to police interrogation.

67. 404 U.S. 71 (1971).

controversial *Roe*[68] and *Doe*[69] decisions. No matter how much one may applaud the results reached in *Roe* and *Doe*, it was the task of *legislatures* to overhaul then existing abortion laws; the fact that it was a difficult, delicate, and politically hazardous issue neither mandates nor excuses judicial intervention.

The distinction between reliance on intent and spirit can be illustrated by reference to the Fourteenth Amendment itself. Whereas Professor Berger's historically accurate reading of the intention of the framers of the Fourteenth Amendment would, if followed to the letter, have perpetuated injustice, reliance on the basis and spirit for its enactment rendered constitutionally permissible the Court's biting of the proverbial bullet of endemic, governmentally mandated racial segregation, culminating in the historic decisions in *Brown v. Board of Education*[70] and *Brown II*.[71] But the Court had no constitutional mandate to turn itself and the lower rungs of the judiciary into a combination of national school board,[72] transportation expert,[73] disciplinarian,[74] employment manager,[75] and admissions director.[76] It was similarly constitutionally spirited and comprehensible for the Court, as it did in *Baker v. Carr*,[77] to rule justiciable the question of apportionment and redistricting based upon the letter and spirit of the post-Civil War suffrage amendments. But it is hardly clear that the letter and spirit of these amendments justify the kind of historical reasoning reflected in *Wesberry v. Sanders*[78] two years after *Baker*, and they certainly do not justify the sort of "judicial election supervisory board" rationalizations that have prompted federal courts to thrown out entire units of local government based on arguable allegations of practices of invidious discrimination.[79]

68. Roe v. Wade, 410 U.S. 113 (1973).
69. Doe v. Bolton, 410 U.S. 179 (1973).
70. Brown v. Board of Educ., 347 U.S. 483 (1954).
71. Brown v. Board of Educ., 349 U.S. 294 (1955).
72. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).
73. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
74. Goss v. Lopez, 419 U.S. 565 (1975).
75. Franks v. Bowman, 424 U.S. 747 (1976).
76. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
77. 369 U.S. 186 (1962).
78. 376 U.S. 1 (1964). The Court in *Wesberry* struck down a Georgia apportionment statute which it found debased the voting rights of residents in one district of the state due to greater population density than was found elsewhere in the state.
79. *See, e.g.*, Hadley v. Junior College Dist., 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 474 (1968); Bolden v. City of Mobile, 423 F. Supp. 384 (S.D. Ala. 1976).

Conclusion

What, then, of a viable line? Unfortunately there is none, nor can there be one. I submit, however, that one can endeavor to delineate the Court's proper role based on the two-pronged principle of identifying institutional role commitments and meritorious court personnel. Neither lends itself to facile articulation, yet neither is beyond ascertainable outline. With respect to the former, the members of the judicial branch must ever be aware that the basic role of "the least dangerous branch"[80] of the government is that of saying "yes" or, more dramatically, "no" to the other branches, be they on the federal or state level. The courts must resolutely shun prescriptive policymaking.

Ours, to be sure—and fortunately—is not a "pure" democracy; equally fortunately, ours is not characterized by Blackstonian legislative supremacy. Our system of separation of powers and checks and balances is through design a sound one, notwithstanding recurrent strains and even excesses. But our constitutional democracy, based upon majoritarian rule with due regard for minority rights, does not shroud the judicial branch with the mantle of Platonic guardians.[81] Our judicial branch, with the Supreme Court at its apex, is the greatest institutional and constitutional safeguard we possess; only those committed to libertarian suicide would sanction a transfer of the judicial guardianship of our basic civil rights and liberties to either the legislature or the executive or both! That does not mean, however, that the judiciary is or should be empowered to govern. It can and does serve as an arbiter, a check, a guardian, even a teacher "in a vital [constitutional] seminar,"[82] but it must do so by embracing those parameters of constitutional obligations that inhere in its role. Raoul Berger's excessive literalism is no answer, but his exhortations to hew to the text, if coupled with something Berger rejects, namely the text's spirit, may bring us close to one.

The quest for limits will be successful only if the judiciary is prepared to abide by the commendable maxims of judicial restraint, so well articulated by Justice Brandeis in his concurring opinion in *Ashwander*[83] more than four decades ago,[84] and if the Court views its func-

80. A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

81. *See* W. ELLIOTT, THE RISE OF GUARDIAN DEMOCRACY (1974).

82. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

83. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

84. *See* H. ABRAHAM, *supra* note 18, at 354-76. This section of the book sets forth the "Sixteen Great Maxims of Judicial Self-Restraint."

tion as an abstemious, passive one characterized by what Professor Louis Lusky calls the application of "tentative" judicial power.[85] Recognizing these limits assuredly would not prevent the Court from wielding its necessary constitutional club, as it did amidst all but universal cheers in dispatching Richard Nixon into resignation as a result of its seminal holding in *United States v. Nixon*,[86] and as it did in such landmark rulings as *Youngstown Sheet & Tube Co. v. Sawyer*,[87] *Brown v. Board of Education*,[88] *Baker v. Carr*[89] and *Gideon v. Wainwright*.[90]

It is thus both obvious and appropriate that, in accordance with the authority implicit in Article III, the judiciary periodically revises, even revolutionizes, the Constitution. But it may and must do so only in the presence of appropriate letter and spirit constitutional authority; natural law-like commitments to personalized notions of "justice," without more, are barred. *Ad hoc* conceptualizations and implementations of what may very well be desirable national or state policy goals are no warrant for stepping outside the proper institutional role and function. In none of its components or levels is the judiciary empowered to act as a superlegislature,[91] no matter how inviting such a course may be. Self-restraint by the courts in lawmaking is their seminal contribution to democratic society. The temptations to stray are manifold and human, yet they must be eschewed—lest the guardian of the Constitution find itself emasculated by hostile action.

Of course, the jurists who render the decisions are human beings as to whom, in Justice Benjamin Cardozo's poignant words, "[t]he great tides and currents which engulf the rest of men do not turn aside in their course, and pass . . . by."[92] Still, as the sage Alexis de Tocqueville observed in his prescient *Democracy in America*:

> Federal judges . . . must not only be good citizens and men of education and integrity, qualities necessary for all magistrates, but [they] must also be statesmen; they must know how to understand the spirit of the age, to confront those obstacles that can be overcome . . . [but they must also be able] to steer out of the current when the tide threatens to carry them away, and with

85. L. LUSKY, BY WHAT RIGHT? 47-50, 361-66 (1975).

86. 418 U.S. 683 (1974) (President does not possess absolute, unqualified privilege of immunity from judicial process).

87. 343 U.S. 579 (1952) (striking down executive action seizing steel mills to avert a nationwide strike which was deemed harmful to national defense interests).

88. 347 U.S. 483 (1954).

89. 369 U.S. 186 (1962).

90. 372 U.S. 335 (1963).

91. *See* note 28 and accompanying text *supra*.

92. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

them the sovereignty of the union and obedience to its laws.[93]

To achieve James Madison's call for a "bench happily filled,"[94] the men and women who staff the judiciary in general, and the Supreme Court in particular, must above all be public servants that are endowed with incontestible *merit*. For professional merit constitutes the essential qualification for judicial office—all others ought to be of lesser or no importance to the appointing executive and the confirming house of the legislature. As I have endeavored to demonstrate in a book-length political history of appointments to the Supreme Court[95]—and, by implication, to the lower federal bench—the following five criteria proved to be the most apparent and most significant in the selection processes that underlay the 101 appointments to the highest court in the land through 1975, the date of the last appointment: (1) objective merit; (2) personal friendship; (3) balancing group and constituency "representation" on the Court—e.g., geography, religion, race and sex; (4) political and ideological compatability; and (5) judicial experience.[96]

There is no need to belabor each of these here. Suffice it to plead, however, that whatever the political and sociological realities of the day may be, the central consideration in the eyes of those charged with the selection and confirmation process ought to be that first category—that of indisputable professional and personal merit and integrity. If we cannot expect such qualities in those selected to serve on the bench, where can we? If this assumption *cum* exhortation be regarded as unrealistic, perhaps naive, it is nonetheless an irreducible goal that ought not to be compromised if our aim is *really* to achieve a meaningful commitment to and expression of a judicial role designed to attain equal justice under law. To be sure, other considerations necessarily underlie the decisive characteristics and qualifications of a putative appointee besides those three advanced by Justice Frankfurter, namely that the future justice be a "philosopher, historian, and prophet."[97] Yet Frankfurter was essentially correct when he argued that neither judicial experience, political affiliation, nor geographic, racial, gender or religious considerations ought to play a significant role.

There have been some recent developments that would appear to point toward a more formally committed embrace of merit considera-

93. A. DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 150 (J. Mayer ed. 1966).

94. J. MADISON, IV LETTERS AND OTHER WRITINGS 349-50 (1884).

95. H. ABRAHAM, JUSTICES AND PRESIDENTS (1974).

96. *Id.* at 3-63.

97. Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781 (1957). To this list could be added the requirement that a future Justice be "a person of inordinate patience." (Justice Brennan's statement to author, May 19, 1964).

tions in the selection of jurists. Thus, in some twenty states United States Senators have established advisory appointment panels for members of the federal district bench. And very early in his administration, President Carter established by executive order the "United States Circuit Judge Nomination Commission."[98] Composed of thirteen panels, one for each of the federal circuits but with two each for the large Fifth and Ninth Circuits, the Commission was charged with nominating to the President "as circuit judges persons whose character, experience, ability and commitment to equal justice under law, fully qualify them to serve in the Federal judiciary."[99] In line with this commendable aim, and armed with guidelines on their face based indisputably upon merit, the thirteen eleven-member panels were created and went to work. Yet proverbial eyebrow raising by students of the appointment process took place immediately in the face of the specified membership requirement that "[each] panel include members of both sexes, members of minority groups, and approximately equal numbers of lawyers and nonlawyers."[100] Whatever the merits of these contemporarily prevalent considerations may be—and they are arguably meritorious requirements of the first magnitude—the not entirely astonishing results have been to focus upon, and emphasize, those "representative" requirements, often at the expense of the arguably more significant one of basic professional merit, with some of the panels engaging in heated arguments involving charges of "quotas" and "reverse discrimination."[101]

At this writing, it is too early to essay a judgment, and it would be unscholarly to endeavor predictions. But it is hardly comforting to observe that the results of almost two years of experience with the panels indicate that much, in some cases most, of the questioning of the candidates by panel members has related to political, social and economic ideologies; that personal views on substantive questions have constituted the gravamen of the inquiries. One of the critics of the Fourth Circuit nominating panel, Edwin M. Yoder, Jr., Associate Editor of the *Washington Star*, recounted the "baffling" experience of "an old and valued personal friend," whom he characterized as "the brightest young state jurist to emerge in North Carolina since [the now Con-

98. Exec. Order No. 11,972, 3 C.F.R. 96-99 (1977), *reprinted in* 28 U.S.C.A. § 44 app., at 69-70 (Supp. 1978), *as amended by* Exec. Order No. 12,059, 43 Fed. Reg. 20,949 (1978).

99. 43 Fed. Reg. 20,949, § 1.

100. *Id.* § 2(c).

101. Slotnick, *What Panelists are Saying About the Circuit Judge Nominating Commission*, 62 JUD. 320 (1978).

gressman] Richardson L. Preyer."[102] The panel, Mr. Yoder wrote, "asked no questions about his attitudes toward the judicial process, or tending to reveal judicial temperament. He was, however, asked for personal views on substantive questions: abortion, women's rights, 'state sovereignty,' and the *Bakke* case."[103]

It is a sober thought that the proposed Omnibus Judgeship Act of 1978[104] has afforded President Carter the unprecedented opportunity to effect at one fell swoop a one-third increase in the federal judiciary by filling the thirty-five new circuit court of appeals and 117 district court judgeships the bill establishes. It is an opportunity fraught with responsibility—an opportunity to raise genuine professional merit to an unprecedented level or to enshrine a different kind of "politicization" into the judicial branch, one that would largely substitute notions of currently fashionable "representativeness" for the latter-day practice of chiefly rewarding political fealty. By August 1, 1979, the Carter appointments comprised one-third non-white and female; their political affiliation was 97.3% Democratic. This is not to say that the presence of either or both factors vitiates the possibility of the emergence of overriding professional competence, as the history of judicial appointments has frequently manifested—thanks in no small measure to that commendable judicial independence that comes with the constitutionally enshrined safeguards on tenure and related appurtenances.[105]

However one may evaluate Raoul Berger's trenchant indictment of the contemporary nature of the judicial process and role, whatever one may think of the viability of his prescriptions for redress, there can be no doubt that judges must consider themselves bound by the "maxims of judicial restraint," by an abiding dedication to the attainment of "equal justice under law" rather than that of "justice at any cost," and the knowledge that judges, in fine, "are appointed to 'defend the Constitution,' not to revise it."[106] Those called upon to perform the judicial role thus must, above all, be clothed with demonstrable professional merit, ever alive to the sage admonition of Justice John Marshall Harlan in his memorable dissenting opinion in *Reynolds v. Sims*,[107] that the "Constitution is not a panacea for every blot upon the public

102. Fish, *Questioning Judicial Candidates: What Can Merit Selection Ask?*, 62 JUD. 8, 11 (1978).

103. Yoder, Jr., *Screening Judicial Candidates: New Politics in 'Merit Selection'*, The News & Observer, Dec. 8, 1977, at 5.

104. Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629 (1978).

105. *See* H. ABRAHAM, *supra* note 95.

106. Berger, *Academe vs. the Founding Fathers*, 30 NAT'L REV. 15, 471 (Apr. 14, 1978).

107. 377 U.S. 533 (1964).

welfare; nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements."[108]

108. *Id.* at 624-25 (Harlan, J., dissenting).