

Notes on the 14th Amendment from Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* [1977]

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We are apt to overlook Chief Justice Marshall's caution that:

"The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional."

And

"has been emphatically termed a government of laws and not of men."

And

"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."

Concept of Judicial Review:

<http://legal-dictionary.thefreedictionary.com/Judicial+Review>

<http://legal-dictionary.thefreedictionary.com/Warren+Court>

The Constitution is to be construed, in Jefferson's words, in accordance with the "meaning contemplated by the plain understanding of the people at the time of its adoption—a meaning to be found in the explanation of those who advocated it."

The decade preceding adoption of the Constitution was one of great intellectual ferment in which, **Gordon Wood** has shown, a revolution in political thinking was taking place.⁴⁸ The postulate, for example, that sovereignty was in the people, that rights need not flow from the Crown, was far more revolutionary than judicial review.⁴⁹

It needs to be borne in mind that the Constitution contains no specific provision for judicial review. What legitimacy it has largely rests on the legislative history, which contemplates no more than policing constitutional boundaries,⁵⁴ limits which Chief Justice Marshall declared were not to be "transcended."

Respect for the limits on power are the essence of a democratic society; without it the entire democratic structure is undermined and the way is paved from Weimar to Hitler.
Raoul Berger

Oliver Wendell Holmes (1902-1943) in *Baldwin v. Missouri*, he stated:

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or *moral beliefs* in its prohibitions . . . Of course the words “due process of law,” if taken in their literal meaning, have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court’s own discretion, the validity of whatever laws the States may pass.⁴¹

1. Basis for most SCOTUS decisions is based on the 14th Amendment, Raoul Berger 'Basis of amending power' bookmark.

2. What does it mean 'What did it mean when they wrote it' Scalia's determination on intent and meaning.

3. 'Democrat Racists'

Of Nevada to the “nearly insurmountable” prejudice, James F. Wilson of Iowa to the “iron-cased prejudice” against blacks. These were Republicans, sympathetic to emancipation and the protection of civil rights.⁴⁰ Then there were the Democratic racists who unashamedly proclaimed that the Union should remain a “white man’s” government.⁴¹ In the words of Senator Garrett Davis of Kentucky, “The white race . . . will be proprietors of the land, and the blacks its cultivators; such is their destiny.”⁴²

4. Reality hits home for GOP politicians 'GOP intrigue freedmen are full citizens 3/5th's no more' the reality that the South would drive the House to be reapportioned due to full citizenship for Negroes.

5. Democrats and GOP wanted to limit the power that would be conveyed to Negroes by the 14th amendment as they believed them to be inferior and our society was essentially racist against them whether North or South as it would have consequences to politicians due to reapportionment of Congress for House seats.

6. 'No encroachment to State Sovereignty:'

No trace of an intention by the Fourteenth Amendment to encroach on State control—for example, of suffrage and segregation—is to be found in the records of the 39th Congress. A mass of evidence is to the contrary, and, as will appear, the attachment of the framers to State sovereignty played a major role in restricting the scope of the Amendment.

7. 'Three Clauses:'

Meaning of the three clauses of §1 were three facets of one and the same concern: to insure that there would be no discrimination against the freedmen in respect of

“fundamental rights,” which had clearly understood and narrow compass. Roughly speaking, the substantive rights were identified by the privileges or immunities clause; the equal protection clause was to bar legislative discrimination with respect to those rights; and the judicial machinery to secure them was to be supplied by nondiscriminatory due process of the several States.

NOTE:

Therefore the scope of the amendment was only to apply over fundamental rights of citizenship and operative through State Legislatures and Courts with remedies against seats in Congress only for federal intervention...

8. 'Only federal consequence'

Consider the “one man-one vote” doctrine. Section 2 of the Fourteenth Amendment provides that if suffrage is denied on account of race, the State’s representation in the House of Representatives shall be proportionally reduced. This constitutes the sole provision for federal intervention. Senator William Fessenden, chairman of the Joint Committee on Reconstruction, explained that the Amendment “leaves the power where it is, but it tells [the States] most distinctly, if you exercise that power wrongfully, such and such consequences will follow.”

9. 'Purpose of the Amendment:'

The “privileges or immunities” clause was the central provision of the Amendment’s §1, and the key to its meaning is furnished by the immediately preceding Civil Rights Act of 1866, 1 which, all are agreed, it was the purpose of the Amendment to embody and protect. The objectives of the Act were quite limited. The framers intended to confer on the freedmen the auxiliary rights that would protect their “life, liberty, and property” — no more. For the framers those words did not have the sprawling connotations later given them by the Court but, instead, restricted aims that were expressed in the Act. The legislative history of the Amendment frequently refers to “fundamental rights,” “life, liberty, and property,” and a few historical comments will show the ties between the two.

10. 'Embody & Incorporate Civil Rights Act of 1866:'

An ardent advocate of an abolitionist reading of the Amendment, Howard Jay Graham, stated that “virtually every speaker in the debates on the Fourteenth Amendment—Republican and Democrat alike—said or agreed that the Amendment was designed to embody or incorporate the Civil Rights Act.”

11. 'Corfield rebutted:'

But we cannot accede to the proposition . . . that the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state.

12. 'Privileges & Immunities:'

clinging to the traditional trinity: “life, liberty, and property.” suffrage excluded and left to States to fashion.

13. 'No suffrage onto the States:'

The decision was made, however, not to propose a limited, single purpose amendment; not to advertise the particular issue of Negro suffrage and to dispose of it through a provision instantly validating the laws of all states where equal suffrage regardless of race was denied.

NOTE:

It was understood in 1866 that this power belonged to the States and that Congress could not force onto the States suffrage for Negroes, though in 2015 SCOTUS has used the 14th Amendment to usurp a States power over marriage which had been an Article IV and 10th amendment issue since our founding...

14. 'States Rights by Lincoln:'

On the eve of the Civil War, Lincoln stated in his First Inaugural Address, "The right of each State to order and control its own domestic institutions according to its own judgment exclusively is essential to the balance of powers on which the perfection and endurance of our political fabric depends."

15. 'Long standing right of States Rights:'

Howard is confirmed by the Report of the Joint Committee, which drafted the Amendment: "It was doubtful . . . whether the States would surrender a power they had always exercised, and to which they were attached."

16. '15th amendment GOP ascendancy:'

A secondary objective, he found, "was to protect the southern Negro against future disfranchisement," 17 for it had become apparent that military occupation must come to an end and continued control must rest on Negro voters, who would help perpetuate Republican ascendancy. Thaddeus Stevens, leader of the Radicals, therefore began drafting the Amendment "to save the Republican party from defeat.

17. 'Hegemony for GOP:'

The dominant purpose of the 39th Congress was to maintain Republican hegemony by reducing Southern representation; and only secondarily did they think to secure the "person and property" of the Negro from oppression.³ There were repeated disclaimers of any intention to interfere with State sovereignty beyond those objectives.

NOTE:

The Oh Shit factor now that the 3/5ths compromise is ended and Southern legislatures could end up dominating Congress due to swollen populations of freemen...

18. 'Incontrovertible:'

Unless some special magic was deemed to inhere in the words "equal protection" —a supposition hereinafter examined—the evidence, to my mind, that suffrage was excluded from the Amendment is all but incontrovertible.

19. 'Political reality:'

Unless Northern voters preferred Democratic resurgence to Negro suffrage, the interests of Republican voters and members of Congress were one and the same. In fact the framers shared the prejudices of their Northern constituency, to recall only George W. Julian's statement in the House: "**The real trouble is we hate the Negro.**"

20. 'No blank check:'

Studied ambiguity also collides with Senator Fessenden's suggestion of a change because "there is a little obscurity or, at any rate, the expression in section 4 might be construed to go further than was intended." 29 A "**blank check to posterity**" is likewise refuted by Chairman Wilson's statement: "I fear that comprehensive statesmanship which cares for posterity as well as for itself will not leave its impress upon the measure we are now considering."

and

Shortly after congressional approval of the Amendment, and during the warm-up for the elections of 1866, a leading Radical, Congressman Robert C. Schenck of Ohio, averred the Democrats "are afraid that it may have some concealed purpose of elevating negroes . . . [to] make them voters. It goes to no such length."

21. 'Senator Howard plainly states:'

(States rights were upheld for the granting of franchise) Senator Howard, who has been regarded as "one of the most reckless of the radicals," one who "served consistently in the vanguard of the extreme negrophiles," 36 explained to the Senate that he would have preferred to secure suffrage to the colored race to some extent at least . . . But sir, it is not a question what you, or I, or half a dozen other members of the Senate may prefer in respect to colored suffrage . . . the question really is, what will the Legislatures of the various States . . . do in the premises; what is likely to meet the general approbation of the people. The Committee were of the opinion that the States are not yet prepared to sanction so fundamental a change.

22. 'Senator Wilson:'

Thirteenth Amendment for constitutional authority to enact the Civil Rights Act. But there was vigorous opposition. Conkling declared that "Emancipation vitalizes only natural rights, not political rights." 55 And most Republicans held that natural rights did not include the right to vote. Senator Henry Wilson, a Massachusetts Radical, stated that the Thirteenth Amendment "was never understood by any man in the Senate or House to confer upon Congress the right to prescribe or regulate the suffrage in any State . . . If it had been supposed that it gave that power the amendment would never have passed the Congress, never have received the sanction of the States."

23. 'Established rule:'

The established rule is that if a thing is within the intention of the framers, it is as good as written in the text.

24. 'No concealed purpose:'

During the ratification process, in the summer election campaign of 1866, the Republicans repeatedly assured the people that, in the words of Senator John Sherman of Ohio, the Amendment “was an embodiment of the Civil Rights Bill,” itemizing several of its provisions. A similar assurance was given by Senator Lane of Indiana.⁶⁴ Congressman Schenck of Ohio repudiated “a concealed purpose” to confer Negro suffrage; his Ohio colleague Columbus Delano stressed that the Amendment was designed to make citizens “safe in the South.”⁶⁵ Logan of Illinois said it was meant to permit the citizen “to sue and be sued, to own property, to have process of court,” a reminder of the limited objectives of the Civil Rights Act, accompanied by a specific disclaimer that §1 “gives the negro the right of suffrage.”⁶⁶ These and still other representations collected by Charles Fairman militate against a concealed purpose to go beyond the confines of the Act.

25. 'Ratification Premise:'

The doctrine of ratification premises that the principal knows what he is ratifying; without full disclosure there can be no ratification.⁶⁷ And there is the larger issue of political morality.

26. 'Lee voice of reason:'

As Lee stated in the Virginia Ratification Convention, “When a question arises with respect to the legality of any power, exercised or assumed,” the question will be, “*Is it enumerated in the Constitution?* . . . It is otherwise arbitrary and unconstitutional.”

27. 'New law for a new Day:'

He told the Conference that he would “file a separate concurring opinion” if the “Court feigned that the Justices were doing anything other than declaring new law for a new day.”⁵⁵ This, Kluger comments, was asking the majority to admit that “there was no judicial basis for its decision,” that “it was acting in a frankly unjudicial way.”⁵⁶ Kluger considers it “a scarcely reasonable request to make of the brethren.”⁵⁷ Why not? What kind of “consensus of society” (which the Court purportedly effectuates) is it that cannot withstand the truth—that effectuation required “new law for a new day”? An adult jurisprudence for an age of “realism” surely called for an end to the pretense that it was the Constitution, not the Justices, who spoke.⁵⁸ Concealment suggests there may in fact have been no consensus.⁵⁹ Perhaps Jackson’s insistence impelled Chief Justice Warren—after labeling the history “inconclusive”⁶⁰—to state that “we cannot turn back the clock to 1868,”⁶¹ a veiled declaration that the intention of the framers was irrelevant and that the Court was revising the Constitution to meet present-day needs

NOTE:

Verify Frankfurter’s comment “new law for a new day.”

28. 'No Federal Oversight of State Courts:'

The states did not adopt the Amendment with knowledge of its sweeping meaning under its present construction. No section of the Amendment gave notice to the people that, if adopted, it would subject every state law . . . affecting [judicial processes] . . . to

ensorship of the United States courts. No word in all this Amendment gave any hint that its adoption would deprive the states of their long recognized power to regulate [judicial processes].

29. 'Excluded political rights:'

The Civil Rights Act, it will be recalled, secured to blacks the *same* right to contract, to hold property, and to sue, as whites enjoyed, and the “*equal benefit of all laws for security of person and property.*” “Political rights” were excluded.

30. 'Chief Justice Marshall:'

For Chief Justice Marshall, on the other hand, the words of the Constitution were not to be “extended to objects not . . . contemplated by the framers” 94 —let alone unmistakably excluded.

31. 'Purpose of due process:' (**Bergers opinion**)

The extraordinary transformation of due process by the Court⁵⁵ has turned the Fourteenth Amendment topsy-turvy. The original design was to make the “privileges or immunities” clause the pivotal provision in order to shield the “fundamental rights” enumerated in the Civil Rights Act from the Black Codes. Intertwined with that enumeration was repeated emphasis on the enjoyment of the “same rights,” and “equal benefit of all laws and proceedings for the security of person and property.”

32. 'Harris Defines:' (**Read in conjunction as a trinity**)

Harris comments, “was the mutual interdependence of the privileges and immunities, due process, and equal protection clauses.” 65 And in answer to the question “equal protection of what?” he replies: “when the three clauses are read together as they ought to be, it is equal protection by equal laws pertaining to the rights of life, liberty and property, and the privileges and immunities of citizenship.

33. 'No new criteria of Justice:' (**Howard and Steven reiterate followed by Trumbull**)

As in the case of the “**equal protection**” clause, the framers were content to bar discrimination, to assure blacks that they would have judicial protection on the same State terms as whites, no more, no less. It should be apparent from the foregoing that the due process clause was not meant to create a new, federal criterion of justice. Like State *laws* at which “equal protection” was aimed, State *justice* had to be nondiscriminatory. It was “equal justice to all men and equal protection under the shield of law” of which Howard spoke.⁶⁹ [E]quality in the protection of these fundamental rights . . . was the common refrain throughout,” as is exemplified by Stevens’ “Whatever means of redress *is afforded* to one shall be afforded to all,”

34. 'Wilson quotes Blackstone:' (No **new rights** were fashioned, equality and due process)

Wilson had quoted Blackstone’s pairing of “due process of law” and by the “laws of the land” in commenting on the Civil Rights Bill, exhibiting awareness that Blackstone regarded them as the sole means of curtailing the specified rights. He emphasized that the Bill “does not go one step beyond” protection from discrimination with respect to

designated “immunities,” that “it is not the object of this bill to establish new rights,” but to declare “the equality of all citizens in the enjoyment of civil rights and immunities.”

35. ‘Bork’s Conclusion:’ (The Court, in short, **was not empowered** to substitute its policy choices for those of the framers.)

The words are general but surely that would not permit us to escape the framers’ intent if it were clear. If the legislative history revealed a consensus about segregation in schools and all the other relations in life, I do not see how the Court could escape the choices revealed and **substitute its own**, even though the words are general and conditions have changed. It is the fact that history does not reveal detailed choices concerning such matters that permits, indeed requires, resort to other modes of interpretation.⁸⁰

36. ‘Robert S. Hale:’ (Protect the **Freedmen** was the intent of the Amendment)

Robert S. Hale said, “It is claimed that this constitutional amendment is aimed simply and purely toward the protection of ‘American citizens of African descent’ . . . I understand that to be the whole intended practical effect of the amendment.” Bingham replied, “It is due to the committee that I should say that it is proposed as well to protect the thousands . . . of loyal white citizens . . . whose property . . . has been wrested from them.”⁹¹ He recurred, however, to a broader statement: “all persons, whether citizens or strangers . . . shall have equal protection . . . in the rights of life, liberty, and property.”

37. ‘Samuel L. Warner:’ (Mistrust of **SCOTUS**)

Not long after congressional approval of the Amendment, Samuel L. Warner, a Connecticut Republican, said he had “learned to place but little reliance upon the dogmas of [the] Court upon any question touching the rights of humanity.”⁹

38. ‘Congress was the remedy, not the Courts:’ (Under sec. 5 **Congress** was to remedy)

It was “necessary,” said Senator Poland, that Congress “enforce the provision . . . and *compel* its observance.”²⁶ Stevens explained that the Amendment “allows Congress to correct the unjust legislation of the States”; and Charles Fairman observed that “Stevens’ thought ran to political rather than judicial action.”²⁷ Other framers also looked to Congress to undertake “corrective” action.

Furthermore:

The overtones of such expressions were amplified by Senator Howard: section 5 constitutes a direct affirmative delegation of power to Congress *to carry out* all the principles of these guarantees, a power *not found in the Constitution* . . . It casts upon Congress the *responsibility* of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of person and property . . . I look upon this clause as indispensable for the reason that it thus *imposes upon Congress* this power and *this duty*. It enables *Congress*, in case the States shall enact laws in conflict with the principles of the amendment, *to correct* that legislation by a formal congressional amendment.²⁹

39. 'Berger's well reasoned question:' (**Courts have usurped Congressional Powers**)

A reasoned argument for a judicial power of enforcement of the Fourteenth Amendment—apart from that derived from the grant in the Civil Rights Act of 1866, which Congress is free to withdraw—has yet to be made. Section 5, I would insist, raises questions which go to the heart of judicial enforcement of the Amendment, questions which the Court has never attempted to answer, which have been neglected by scholars, and to which they might well devote further study.

40. 'Problem in Politics:' (Reality bites, the real issue their **reelection and House Seats**)

Bingham's change of heart illustrates Russell Nye's pithy summation: after 1865 the "Negro was no longer a problem in morality, but a problem in politics."

41. 'Warren upended Law:' (Chief Justice Warren ignored the **legislative record and the rights of the States** to push a federal and his agenda)

Stated baldly, what the framers meant by the words they employed is not binding on the Court; the Court lays claim to power to revise the Constitution to meet present needs. A celebrant of the Warren Court, Paul Murphy, commented that *Brown* disclosed Chief Justice Warren's "unabashed and primary commitment to justice and his willingness to shape the law to achieve it." 61 He did not merely "shape" the law, **he upended it**; he revised the Fourteenth Amendment to mean exactly the opposite of what its framers designed it to mean, namely, to leave suffrage and segregation beyond federal control, to leave it with the States, where control over internal, domestic matters resided from the beginning.

NOTE:

Tenth Amendment controls this issue as it had since 1789 when Constitution was ratified, the legislative record is clear segregation in the schools and suffrage were State matters per the 10th amendment, more importantly the Courts had no remedy as Congress alone had retained that power, making their decision a usurpation of the 14th amendment.

42. 'Distortion of Due Process:'

Whatever the scope of procedural due process, the "deposit of history" incontrovertibly shows that it did not comprehend a judicial veto of legislation on policy grounds.

Frankfurter acknowledged that the "vagueness" of due process "readily lends itself to make of the Court a third chamber with drastic veto power."

NOTE:

This time period 1926 was firmly in the grasp of the progressive era where Laissez-Faire economic systems were being shed for more stringent socialist forms. With the classical definition of due process being jettisoned allowed new avenues to implement change on society... through the courts.

43. 'Marshall's admonition:'

Once limits are prescribed, Chief Justice Marshall stated, they may not "be passed at pleasure." It was because constitutions were bulwarks against oppression that, in his words, "written constitutions have been regarded with so much reverence." 32 The

Constitution represents fundamental choices that have been made by the people, and the task of the Courts is to effectuate them, “not [to] construct new rights.

Explained by Berger:

When the judiciary substitutes its own value choices for those of the people it subverts the Constitution by usurpation of power. No dispensation was given to the Court to step outside its powers; it is no less bound by constitutional limits than are the other branches, as the historical evidence makes plain. First, it was clearly excluded from participation in the making of policy, the function of the legislature.

44. “Judiciary’s Purpose:’

Third, conclusive evidence that the judiciary was designed only to police constitutional boundaries, not to exercise supraconstitutional policymaking functions, was furnished by Hamilton. In Federalist No. 78 he stressed that the courts were to serve as “bulwarks of a limited Constitution against legislative encroachments” —a note repeatedly sounded in the subsequent Ratification Conventions.

Marshall speaks to this issue:

Chief Justice Marshall rephrased this in unmistakable terms: the **Court** was only to give “effect to the **will of the legislature.**”

45. ‘No more heinous offense:’

Finally, well aware that there existed considerable distrust of the proposal for judicial review, Hamilton sought to allay it in Federalist No. 81 by calling attention to the important constitutional check which the power of instituting impeachments . . . would give to that body [Congress] upon the members of the judicial department. This is alone a complete security. There can never be danger that the judges, by a series of deliberate **usurpations** on the authority of the legislature, would hazard the united resentment of the body intrusted with it.⁵⁰

These were no idle words, for both the English and the Founders regarded “usurpation” or subversion of the Constitution as the most heinous of impeachable offenses.⁵¹

46. “Robert H. Jackson:’ (Justice Jackson)

Justice, Robert H. Jackson, perceived, as Chief Justice Warren did not, that “the rule of law is in unsafe hands when courts cease to function as courts and become organs for control of policy.”

NOTE:

Nowhere is this admonition been more fulfilled than with the Warren and now Roberts Courts that have made a sham of the Court as they abandoned the legislative record for natural law to an unknown principle by being the policy arm of the Obama regime in the ObamaCare and Gay marriage cases...

47. ‘Washington’s parting statement:’ (Contained in his farewell address)

If in the opinion of the People, the distribution or modification of the Constitutional

powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.⁶¹

48. ‘Wary of Legislative Powers at the Convention:’ (Looked for ways to curtail Legislature)

Edmund Randolph proposed in the Convention that the President, “and a convenient number of the National Judiciary, ought to compose a council of revision” to examine every act of Congress and by its dissent to constitute a veto.⁴ When his fellow Virginian George Mason argued for judicial participation in the presidential veto, he recognized that judges already could declare an unconstitutional law void. But with regard to every law *however unjust oppressive* or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He wished further use to be made of the Judges, of giving aid in *preventing every improper law*.⁵

49. ‘James Wilson had similar views on Powers of the Legislature:’

Laws may be *unjust, may be unwise, may be dangerous*, may be destructive; and yet be *not so unconstitutional* as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power [in order to “counteract”] the improper views of the Legislature.

50. ‘Justice Douglas Speaks:’

Justice Douglas therefore stood on solid ground in stating that “when the Court used substantive due process to determine the wisdom or reasonableness of legislation, it was indeed transforming itself into the **Council of Revision** which was rejected by the Constitutional Convention.”

51. ‘Gay Marriage and ObamaCare Response:’

To thrust aside the dead hand of the Framers is to thrust aside the Constitution. The argument that new meanings may be given to words employed by the Framers¹⁰ aborts their design; it reduces the Constitution to an empty shell into which each shifting judicial majority pours its own preferences.

52. ‘Whirligig of Justice:’

Such are the fruits of a value-oriented system which makes of “constitutional [case] law” a veritable whirligig. No rhetoric can disguise that this is but the kadi administering justice under a tree.