

## Government by Judiciary,

**The Transforming of the 14<sup>th</sup> Amendment. Second Edition. Raoul Berger.**

Liberty Fund Inc; 8335 Allison Pointe Trail, Suite 300; Indianapolis, Indiana [4625–1678]; 317-842-0880

<http://www.libertyfund.org/details.asp?displayID=1656>

(From the Books “Forward”, Professor Forest McDonald, from the University of Alabama; & in referring to the author, “Raoul Berger”, Professor McDonald writes:)

**“Burger ... learned & reported ... that for the better part of a century the Supreme Court had been handing down decisions interpreting the Fourteenth Amendment improperly, willfully ignoring or willfully distorting the history of its enactment. More specifically, he found that the authors of the Amendment, far from contemplating a social & political revolution, as defenders of judicial activism maintained, intended only to protect the freedmen from the southern Black Codes that threatened to return them to slavery. More specifically yet, Berger found that the two key passages in the Fourteenth Amendment – privileges or immunities of citizens & due process of law – far from being vague & elastic, as activists maintained, were “terms of art” that had precise, well-understood, & narrow legal meanings. “Equal protection”, a new concept, was identified by the framers with the right to contract, to own property, & to have access to the courts.**

**The implication was that Brown v Board (1954, striking down segregation in the public schools) Barker v Carr & Reynolds v Simms (1962 & 1964 respectively, having to do with reapportionment of state legislatures), Roe v Wade (1973. Making abortion legal), & a vast array of other cases had been decided unconstitutionally, representing not law but the whims & values of the justices of the Supreme Court. No book on the Constitution, with the possible exception of Charles A. Beard’s Economic Interpretation of the Constitution 1913), has elicited such a storm of controversy. ...**

**So thoroughly did Burger rout his critics that, after a decade or so, they virtually stopped trying. Instead advocates of judicial activism began to assert that neither the words of the Constitution nor the intention of the framers are longer relevant. Justice William Brennan for example, declared in 1985 that “the genius of the Constitution rests not in any static meaning it might have had in a world that is dead & gone, but in the adaptability of its great principles to cope with current problems & current needs.” (In actuality, as one of Berger’s defenders, Wallace Mendelson, has pointed out, the only “great principles” to be found in the Constitution are “the consent of the governed, the diffusion of power, & the rule of law” – and the Supreme Court has undermined them all.) ...**

**I do not know what Raoul Berger thinks of the prospects fore a return by any means to constitutional government. I suspect he is hopeful though not optimistic, for he is a man of never-say-die temperament & hard nosed realism. In any event, if the great desideratum should come to pass, nobody would have done more to bring it about than Raoul Berger; for his writings, in their original form or in the form of the works of disciples & converts, have become the common coin of the realm. Forest McDonald / University of Alabama.**