

to assume that judicial review is available to rectify the alleged deprivation begs the question because that is the very point at issue.

If chapter III is viewed merely as a prediction that the Supreme Court will hold judgments of impeachment reviewable, it may be correct. But to the extent it purports to base that prediction on a reasoned extrapolation from authoritative sources, it is dubious. And to the extent it attempts to justify judicial review, it is totally unconvincing. Too much contrary authority is ignored, and too many hard questions are bypassed to make it cogent.

#### CONCLUSION

I probably have made Berger appear more dogmatic than he is. For the most part, Berger is tentative and self-effacing: "The conclusion that 'high crimes and misdemeanors' was adopted as a 'technical' limiting phrase leaves perplexing problems; and it is to be hoped that my reflections will stimulate further study and investigation."<sup>63</sup> Certainly the result of his labor is a timely, interesting, and valuable contribution to a previously ignored subject. Perhaps no higher praise can be given than to observe that all future debate about impeachment will use Berger's book as a starting point.

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THE CASE FOR BLACK REPARATIONS. By Boris I. Bittker.<sup>1</sup> New York: Vintage Books, 1973. Pp. 191. \$1.95 (paper).

One leaves the reading of this short, scholarly work with revived hunger for a society capable of acting upon Boris Bittker's generous legal and moral perceptions of why and how we should provide contemporary black American citizens with reparations for the evils they have suffered at the hands of the white majority. But one senses that this hunger will go unrequited, much like, in Lincoln's phrase, "the

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bondsman's two hundred and fifty years of unrequited toil."<sup>2</sup> Bittker disavows any purpose beyond opening the legal discussion of the reparations issue, but he is plainly committed to the notion that reparations in some form are proper. Is that notion widely shared, politically or morally? I doubt it. We are looking at an idea whose time is, at best, yet to come, an idea profoundly antithetical to the inarticulate instinct of too many Americans who elect too many legislators and whose views influence the approaches of too many of the judges whose courtrooms might provide an alternative way to redress for black grievances. I should like to be wrong in this, soon, but I take my view of the possible from Carl Sandburg:

If you can imagine love letters written back and forth between Mary Magdalene and Judas Iscariot, if you can see Napoleon dying and saying he was only a sawdust emperor and an imitation of the real thing, if you can see judges step down from the bench and take death sentences from murderers in black robes, if you can see big thieves protected by law acknowledging to petty thieves handcuffed and convicted that they are both enemies of society, if you can vision an opposite for every reality, then you can shake hands with yourself and murmur, "Pardon my glove, what were we saying when interrupted?"<sup>3</sup>

And yet, my gloom to one side, what Bittker essays in *The Case for Black Reparations* is not short of wonderful, an exceptional lesson in the capacity of a humane legal scholar to come to grips dispassionately, rationally, and persuasively with a subject vulnerable to destructively emotional treatment in the hands of others, whether of the left or the right. Should a day arrive which witnesses a Presidency resurrected, a Congress reinvested, and a creative public confidence restored, what Bittker has had to say today, in tumultuous and discordant times, will greatly contribute to the intellectual framework within which we may proceed toward a sensible revision of racial wrongdoing.

Bittker's fundamental contribution in this regard is to shift the focus of reparations discussions from the idea of paying for the slave labor that terminated one hundred years ago to the less traumatic notion of compensation for the wrongs committed in the name of white supremacy since emancipation. It has been estimated that the value

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2. Second Inaugural Address of Abraham Lincoln, Mar. 4, 1865, *reprinted in THE INAUGURAL ADDRESSES OF THE PRESIDENTS* 253, 256 (R. Bowers ed. 1929).

3. C. SANDBURG, *THE PEOPLE, YES* 68 (1936).

of unpaid black equity in slave labor totals somewhere between \$448 billion and \$995 billion;<sup>4</sup> at the sound of these numbers practical men wince, and this is of course to leave aside the theoretical difficulties in visiting the costs of Greek Helots on present day Athenians, or the damages due nineteenth century Massachusetts lint-lung victims, the child millworkers, on the current administrations in Springfield, Boston, or Washington, D.C. Shifting analysis away from the bedeviling thought of compensation today for wrongs of ancient vintage is thus an important first step in developing a rational approach capable of gathering wider popular support than could otherwise be generated. Bittker correctly observes that the various black initiatives regarding reparations, notably the *Black Manifesto* (1969) adopted by the National Black Economic Development Conference and Dr. Martin Luther King's *Bill of Rights for the Disadvantaged* (1964), have been widely misread as calling for compensation for slavery, and thus have not received the kind of thoughtful review they deserve. To the contrary, says Bittker, the essential first point to be made about proposals for black reparations "is that they seek to redress injuries caused by a system of legally imposed segregation that was eventually held in *Brown v. Board of Education* to violate the equal-protection clause of the Fourteenth Amendment."<sup>5</sup> That perception significantly clears the air, for we are now no longer talking about old injuries whose consequences would be difficult to trace down the years to contemporary beneficiaries; instead we are looking at the living young adult denied an adequate education in a pre-*Brown* segregated school, the consumer of systematically deficient municipal services such as sanitation and the paving and lighting of streets, the black housewife humiliated by banishment to the back of the bus, and all the other examples of persons who within recent memory have been harmed in one way or another by the persuasive grip of officially sanctioned or tolerated separation of the races.

This revolution in perspective achieved, Bittker turns to method. Here, whether the legislature or the judiciary is to serve as the vehicle for reparations, the problems are legion. It is clear to me that Bittker favors a legislative program although he devotes a great deal of analysis to what he terms the "alternative scenario," redress through suits

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4. J. MARKEITI, *BLACK EQUITY IN THE SLAVE INDUSTRY* 15 (1969).

5. B. BITTKER, *THE CASE FOR BLACK REPARATIONS* 19 (1973).

under 42 U.S.C. § 1983.<sup>6</sup> His analysis of section 1983 is superb: all the critical questions are asked, if not always resolved. Are there precedents elsewhere in the law for the award of damages to victims of practices analogous to the harmful details of segregation? Is it conceivable that section 1983 liability was intended to attach to state officials who enforced segregation when segregation was the legal way of life? If political subdivisions, for whom these officials acted, are not liable under *Monroe v. Pape*,<sup>7</sup> is the state itself liable? In the post-*Brown* era, what kinds of official footdragging will be understood as occasioning liability? Assuming liability for either pre- or post-*Brown* actions, what is the measure of damages? Professor Bittker's analysis of options in this latter regard is particularly illuminating. Yet, when all the questions are asked, and all the scholarship submitted, one is left with the sense that the true answer to a problem of the magnitude of reparations is not finally for the courts. To fulfill the dream of social justice which Professor Bittker plainly harbors, one will have to find a solution other than several million lawsuits. He does not assert this outright, but the effectiveness of his own legal arguments regarding the problems to be faced in a reparations effort in the judicial forum leaves this conclusion all but unavoidable.

What, then, of a legislative effort? Bittker clearly thinks that, constitutional considerations aside for the moment, Congress is free to make amends for wrongs done under a system of law that authorized those wrongs at the time they were committed. The example cited is that of the creation by Congress<sup>8</sup> of the Indian Claims Commission in 1946 "to redress some of the wrongs committed while America was pursuing her manifest destiny by pushing back the Indians . . . ."<sup>9</sup> Bittker also recommends the potential usefulness of one of the Claims Commission's standards for relief, "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity,"<sup>10</sup> should Congress decide to move on the black reparations issue. But he finds chilling problems arising after these easy preliminaries. Should a program of reparations be individual or group oriented? If individuals are to be granted compensation directly, will

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6. *Id.* at 30-35.

7. 365 U.S. 167 (1961).

8. Ch. 959, 60 Stat. 1049 (1946), *as amended*, 25 U.S.C. §§ 70 to 70v-2 (1970, Supp. II, 1972).

9. B. BITTKER, *supra* note 5, at 22.

10. 25 U.S.C. § 70a (1970), *quoted in id.*

this require the development of a racial code, that is, a classification system whereby one measure of "blackness" is established, with all the ominous implications of sharper polarization of the races that would conceivably follow? If the reparations program is to distribute wealth through groups, what kind of wealth, which groups, and with what objectives? How will grants to some groups be legitimized when others purporting to represent differing constituencies get nothing? The questions proliferate, and the author carefully delineates the difficulties inherent in each response. Here Bittker's interrogative intent, as distinct from a wish to reach definite conclusions, emerges most incisively. The reader must reflect; here nothing is pre-digested.

In a concluding chapter, the author assesses the constitutionality of a federal program of reparations devoted exclusively to the benefit of black citizens. When a program's objective is redressive rather than repressive, or benign rather than malignant, does its use of race as the qualifying factor collide with the first Justice Harlan's "color blind"<sup>11</sup> Constitution? Bittker, guardedly, thinks not. Examining the Supreme Court's tolerance of the use of racial percentages in the *Swann* case<sup>12</sup> as a "starting point in shaping a remedy to come of past constitutional violations,"<sup>13</sup> the Court's further recognition that school boards cannot be denied discretionary use of racial percentages in dismantling dual school systems,<sup>14</sup> the host of yet-to-be-rejected programs to end discrimination in employment, union membership, and college admissions, and finally the Court's treatment in *Katzenbach v. Morgan*<sup>15</sup> of congressional power to intrude, in a fashion favorable to Puerto Ricans, into the domain of state power to fix voter literacy requirements, Bittker finds adequate basis for sustaining a remedial program which uses race as a classification. As I write, the resolution of this momentous question, at least at the state level,<sup>16</sup> may be approaching as the Court deliberates *DeFunis v. Odegaard*,<sup>17</sup> in which

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11. *Plessy v. Ferguson*, 163 U.S. 537, 554 (1896).

12. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

13. *Id.* at 12, quoted in B. BITTKER, *supra* note 5, at 118.

14. *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45-46 (1971).

15. 384 U.S. 641 (1966).

16. A decision against the state in *DeFunis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169, *cert. granted*, 94 S. Ct. 538 (1973), would not necessarily mean that Congress could not act on a reparations program under § 5 of the fourteenth amendment.

17. 82 Wash. 2d 11, 507 P.2d 1169, *cert. granted*, 94 S. Ct. 538 (1973). It is conceivable that *DeFunis* will be dismissed as moot once *DeFunis* graduates in June 1974.

the preferential admission of blacks to the University of Washington Law School is at issue. I hope the Court finds room in the Constitution for the classification the University of Washington has used. If it does not, one will take solace in remembering that the Constitution grows and accommodates, guided by the learning and vision of scholars like Professor Bittker, whose splendid effort here will survive for a different era.

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FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION, 1835-1877. By Bernard Schwartz. Baltimore: The Johns Hopkins University Press, 1973. Pp. xi, 243. \$10.00.

*From Confederation to Nation* is a constitutional history of the United States in the nineteenth century. To be more exact, it is an examination of the operation of the Federal Constitution from 1835 (the year of John Marshall's death) to 1877 (the end of Reconstruction). Although the book is rather short (only 243 pages, including index), it is packed with information and analysis. None of the important American constitutional developments of the period is excluded from discussion. The thesis of the book is that between 1835 and 1877 the United States was transformed from a loose confederation with a weak central government into a nation whose central government possessed both the military strength to restrain rebellious states from leaving the Union and the political authority to protect individual rights from abridgment under color of state authority. In overview, the book is a successful effort to support this thesis by tracing constitutional developments between 1835 and 1877. According to Professor Schwartz, these developments were so significant, and the transformation of government so momentous, that "[t]he four decades after Marshall's death can be considered as a virtual continuing constitutional convention. . . ."<sup>1</sup>

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1. B. SCHWARTZ, FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION, 1835-1877, at x (1973) [hereinafter cited as SCHWARTZ].