ValpoScholar Valparaiso University Law Review

Volume 12
Number 3 *Spring 1978*

*pp.*617-621

Spring 1978

Raoul Berger, Government by the Judiciary: The Transformation of the Fourteenth Amendment

Thomas H. Nelson

BOOK REVIEW

GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT.

By Raoul Berger. Cambridge: Harvard University Press, 1977. Pp. x, 483.

Once again, Raoul Berger has met his ambition of writing an "important" book. However, this is the most generous statement which can be made before beginning to criticize. Berger's previous works which obtained national attention, primarily *Impeachment*[1] and *Executive Privilege*,[2] were important not so much for their content as for their timing, being released just as the Watergate scandals were developing. The importance of *Government by Judiciary* likewise stems largely from the timing of its release, coming as it did on the eve of the *Bakke*[3] decision.

Nowhere in the text of the book, however, does Berger mention the *Bakke* case, nor, for that matter, does he address the issue of "affirmative action," "benign discrimination" or "reverse discrimination" (the term chosen automatically relegating the selector to a well-defined ideological camp). This is surprising, for the entire thesis of the book—that *Brown v. Board of Education*[4] cannot be justified under an historical analysis of the fourteenth amendment—is not aimed at correction of that 1954 judicial "error," but rather at prevention of future policy errors by the Court. Berger argues forcefully that the Court exceeds its constitutional role when it hands down decisions which are inconsistent with the intent of the framers of that document. Of course, if Berger's historical technique were applied to the issue of benign discrimination the result would be a judgment in favor of Mr. Bakke, for it is clear beyond peradventure that the framers of the fourteenth amendment did not intend to elevate minorities to a legal position superior to that of non-minorities.

---

1. R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973).
2. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974).
3. Regents of University of California v. Bakke, 98 S. Ct. 2733 (1978).
4. 347 U.S. 483 (1954) (declaring state "separate but equal" school systems unconstitutional).

Imputation to Berger of the motive to bolster Bakke's case is not meant to trivialize the fundamental nature of the questions raised by Berger's approach to constitutional adjudication. Berger is foremost a historian, which explains his basic postulate that the intent of the framers is to be the sole criterion in determining the content and scope of the various constitutional guarantees, particularly the fourteenth amendment. Using his historical approach, the book in great (indeed, even excessive) detail establishes the proposition that neither the congressional draftsmen of the fourteenth amendment nor the ratifying states intended that black schoolchildren should attend school with white schoolchildren. Thus established, it follows under Berger's method that *Brown v. Board* was an instance in which the Court clearly overstepped its bounds and unconstitutionally imposed its policy preferences upon the nation; according to Berger, the results of *Brown v. Board* could have been achieved legitimately only by resort to consitutional amendment through either submission to the states or by consitutional convention.

The criticisms which can be directed at the book run from matters of style to basic arguments of doctrine. The book is not easy reading even for a lawyer interested in American history. For example, nowhere in the book does Berger set out the text of the fourteenth amendment for the reader to consider independently, and thus the reader is forced to resort to other sources in order fully to comprehend the remarks addressed to various portions of the amendment. In addition, Berger often refers to relatively obscure nineteenth century personalities in making a point; as a consequence, the reader is often left to ponder the significance of a particular historical citation or source. Furthermore, the book progresses unevenly; the presentation of historical proofs is poorly organized and difficult to follow. Indeed, the book seems to be a compilation of a series of discrete essays. Notwithstanding these criticisms, however, the volume does effectively draw attention to a number of ideological shortcomings of the Warren court, *e.g.*, that the Court was singularly uninhibited by historical arguments and traditional judicial limitations, and that it was the first Court to use the Consitution consistently as an affirmative tool to achieve desired positive social ends. Berger's ultimate thesis, that judicial innovation can lead to judicial usurpation of political power, is effectively emphasized throughout.

The more interesting aspects of Berger's work arise when one rejects his approach to constitutional adjudication—that the historical record is to be the sole determinant of the contents of con-

stitutional guarantees—and asks instead the more fundamental question, "By what theory or process is the Constitution to be given meaning?" Although Berger does acknowledge that methods other than historical research and analysis have been used to breathe life into the Constitution, he nonetheless consistently attempts both to contradict and to refute those other approaches. The most basic criticism of the substance of the book is its refusal to admit the possible validity of other approaches to constitutional adjudication. Given Berger's stance, it is appropriate to survey some of those other approaches.

One approach starts with Berger's rigorous historical examination, but then allows the Court a bit more leeway. It might be termed "historical projection." One using this approach first ascertains the intended effect of a constitutional guarantee on conditions existing at the time of enactment or ratification, and then asks what (if any) intent the framers had concerning how the guarantee should be applied to future, necessarily changed, circumstances. Professor Bickel seems to be the chief proponent of this type of approach,[5] which will necessarily involve the historian in more speculation than is involved under a strict application of the Berger approach. This first alternative approach may, of course, be easily used to justify *Brown v. Board*, for it is not difficult to ascribe an intent to the framers that the amendment should be interpreted differently under changed circumstances.

A second alternative allows the Court still greater latitude by focusing not so much upon the historical basis of the guarantee but rather upon a philosophical notion that the Constitution in a democratic society is meant to protect the individual from the government, *i.e.*, the will of the majority. Thus under this approach the Constitution is perceived as essentially a counter-majoritarian instrument. The primary modern advocate of this approach was Chief Justice Stone, who in the famous note 4 in *United States v. Carolene Products Co.*[6] suggested that "discrete and insular minorities" might deserve special judicial attention and solicitude. *Brown v. Board* can easily be justified under this approach to constitutional decision making, since the opportunity to obtain an equal education was judicially extended to the then-isolated minority consisting of black children.

---

5. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, at 59 (1955).

6. 304 U.S. 144, 152 n.4 (1938).

A third, and still more liberal, attitude requires the Court neither to be bound by the historical record (however construed) nor to be concerned with individual rights in the face of tyranny by the majority. Under this third regime, the Court would look to the present Congress in order to formulate the present content of the constitutional guarantee. Mr. Justice Brennan seems to be the primary if not the only serious proponent of this approach. In *Frontiero v. Richardson*,[7] Brennan, writing for the plurality, suggested that sex should be a suspect classification under the equal protection clause, for, as Brennan stated, "[O]ver the past decade, Congress [has] concluded that classifications based upon sex are inherently invidious, *and this conclusion of a coequal branch of government is not without significance to the question presently under consideration.*"[8] Brennan's approach is strikingly antithetical to Stone's; indeed, Brennan seems to argue that legislation—majoritarian enactments—should be read into the Constitution. It is also interesting to note that the Brennan approach, if applied to the facts antedating *Brown v. Board*, would not have produced a decision in favor of black schoolchildren, for Congress was then singularly unresponsive to minorities' claims for equal treatment.

Various other approaches to constitutional interpretation remain, each allowing the Court greater flexibility than Berger's strict historical approach. They range from "substantive due process" and "shock the conscience" to what can only be described as judicial law created by whimsy. Each of these latter approaches is certainly much less analytically rigorous than those described above, allowing the Court to do pretty much as it pleases. Decisions such as *Griswold v. Connecticut*[9] and *Roe v. Wade*[10] can be placed in one, if not more, of these latter categories.

This range of possible approaches to constitutional adjudication, in addition to being descriptive of the actual processes employed by the Court, highlights what is perhaps a very significant conclusion that one reading the book might draw, *viz.*, that the Constitution has in fact been construed and manipulated by different forces and interests at different times in the nation's history. Berger argues that the legal historian, and *only* the legal historian, can cor-

7. 411 U.S. 677 (1973).

8. *Id.* at 687-88 (emphasis added).

9. 381 U.S. 479 (1965) (holding that an individual has a constitutional right to privacy).

10. 410 U.S. 113 (1973) (imposing constitutional restrictions upon state prohibition and regulation of abortions).

rectly interpret the Constitution. Generations of Supreme Court justices have, of course, implicitly disregarded Berger's fundamental truth. This reader, upon completing the volume, was left not so much with a feeling of specific concurrence with the Berger approach but rather with a growing concern that the process of making constitutional decisions has become much less analytically rigorous and principled in the recent past. The underlying message of *Government by Judiciary* comes through strongly, and for this reader, convincingly: As constitutional flexibility is achieved by the Court, democratic values suffer. The book derives its true importance from the emphasis Berger places upon this verity.

Thomas H. Nelson*

* Former Visiting Associate Professor of Law, Valparaiso University Law School.