

# Book Review

## Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?

*Government by Judiciary: The Transformation of the Fourteenth Amendment.* By Raoul Berger. Cambridge: Harvard University Press, 1977. Pp. ix, 483. \$15.00.

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Decisions of the Supreme Court under Earl Warren and to a lesser extent under Warren Burger have stirred not only opposition on the part of political activists whose interests and policies have suffered but also dispute among scholars about broader problems of constitutional interpretation and the roles of judges in a constitutional democracy.<sup>1</sup> Raoul Berger now joins this debate in *Government by Judiciary*.<sup>2</sup> His initial aim is to reconstruct the legislative history of the Fourteenth Amendment and to prove, in light of this history, that recent judicial decisions on race, reapportionment, and criminal justice have expanded and twisted the amendment's meaning. Running through the entire volume is the clearly articulated theme that the principal, indeed the only, criterion for constitutional interpretation is the "intent" of the framers. Original "intent" forever settles questions of public law and public policy.<sup>3</sup>

Part I of *Government by Judiciary* consists of a series of accounts of the adoption of the Civil Rights Act of 1866 and the proposal of its legitimator, the Fourteenth Amendment, by the 39th Congress. Berger concludes that it is clear beyond even a razor-thin doubt that the overwhelming majority of the amendment's supporters in Congress

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1. See G. ANASTAPLO, *THE CONSTITUTIONALIST* (1971); W. BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 229-32 (1976); W. ELLIOT, *THE RISE OF GUARDIAN DEMOCRACY* 237-74 (1974); S. GABIN, *JUDICIAL REVIEW AND THE "REASONABLE DOUBT" TEST* (forthcoming, 1979); L. LUSKY, *BY WHAT RIGHT?* (1975).

2. R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 191 (1977) [hereinafter cited by page number only].

3. P. 45.

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thought that section one proposed only modest changes in the political system. These changes would enable newly freed blacks to do little more than buy, own, sell, and contract for property in the same manner as whites and enjoy the same procedural protections as whites if they ran afoul of the criminal law.

The framers, Berger insists, intended neither the privileges and immunities nor the due process clause to nationalize the Bill of Rights, to confer suffrage on blacks or anyone else,<sup>4</sup> to outlaw racial segregation, or to require the states to provide any services for anyone. Rather, the privileges and immunities clause meant only that freedmen were to have the kind of rights Justice Bushrod Washington listed in *Corfield v. Coryell*.<sup>5</sup> Due process included only *procedures* that would allow a defendant in a criminal case to receive a fair hearing. "The words 'equal protection of the laws,'" Berger adds, "were meant to obviate discrimination by laws—that is, by *statutes*—so that with respect to a limited group of privileges [rights to buy, sell, own, and contract for property protected by the Civil Rights Act of 1866], the laws would treat a black no differently than a white."<sup>6</sup> Thus, he finds that Justice Bradley's opinion for the Court in the *Civil Rights Cases*<sup>7</sup> "does not betray, but rather corresponds to, the intention of the framers."<sup>8</sup> As the "key to an understanding of the Fourteenth Amendment," Berger explains that "the North was shot through with Negrophobia, that the Republicans, except for a minority of extremists, were swayed by the racism that gripped their constituents rather than by abolitionist ideology."<sup>9</sup>

Part II consists of a series of essays on issues that range from the intent of the framers of 1787, the meaning of the rule of law, and the legitimacy of juries of six and nine persons, to the validity of original intent as the overriding principle in constitutional interpretation. Each essay focuses on an intrinsically important question, but together they do not form a coherent presentation. Some follow up on problems raised in Part I; others seem to bear little relation to anything else in the book; a third category constitutes Berger's responses to anticipated criticism. Still, most of these essays describe

4. The penalty clause of § 2 provided the sole sanction for state denial of suffrage by requiring a reduction of congressional representation. P. 64.

5. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230).

6. P. 191.

7. 109 U.S. 3 (1883).

8. P. 190.

9. P. 10. Negrophobia was, no doubt, widespread in the North, but Berger probably overestimates the prevalence of that neurosis among leaders of the Republican Party. See M. BENEDICT, *A COMPROMISE OF PRINCIPLE* 22-25 (1974).

examples of, offenses against, or expansions on the basic thesis that constitutional interpretation falls within the jurisdiction of the historian.

In so doing, Berger is striking out boldly against much of constitutional law, especially as it has developed since 1937. He shows considerable courage for he also is opposing numerous constitutional historians and commentators.<sup>10</sup> Even though he stoically accepts the methodology of George Sutherland and his colleagues, Berger rejects their substantive views.<sup>11</sup> One is immediately reminded of William Winslow Crosskey's even more sweeping attack in 1953.<sup>12</sup> Like Crosskey, Berger has framed arguments that throw much of the burden of proof onto his intellectual adversaries, although, as will soon be evident, I believe that he fails to prove his own arguments. I shall concentrate on two problems: first, the methodology, style, and internal logic of his analysis, and next, more fundamental questions of constitutional interpretation.

## I. Method and Logic

Unlike Crosskey, whose research into unpublished correspondence and manuscripts was prodigious,<sup>13</sup> Berger confines his analyses of the "intent of the framers" to the public record. The *Congressional Globe*, he believes, is a full, accurate, and authoritative account, "a stenographic transcription"<sup>14</sup> not only of what Representatives and Senators said but also of what they meant. Berger also limits the concept of "framers" to the men at Philadelphia for the original Constitution and to the members of the 39th Congress for the Fourteenth Amendment.

Berger's almost total reliance on the *Globe* as the repository of the "intent" of the framers of the Fourteenth Amendment raises immediate

10. Among those whom he attacks are Alexander M. Bickel, Howard Jay Graham, Thomas C. Grey, Robert J. Harris, Harold M. Hyman, Alfred H. Kelly, Arthur S. Miller, Jacobus tenBroek, and William W. Van Alstyne.

11. P. 374 n.6. Berger does not mention that his own theory of constitutional interpretation was most explicitly stated by Chief Justice Taney in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1857). See note 47 *infra*.

12. I W. CROSSKEY, *POLITICS AND THE CONSTITUTION* 3-14 (1953). Berger's useful bibliography does not have an entry for Crosskey although his work is central to the argument in Part II.

13. To help explore the minds of the framers, Crosskey, in his two volume work, *POLITICS AND THE CONSTITUTION* (1953), tried to construct an elaborate dictionary of eighteenth century legal terms. Berger makes some effort in this direction when he examines the three clauses of the second sentence of § 1 of the Fourteenth Amendment (chs. 2-3, 10-11) but offers no real substance when he discusses the original Constitution.

14. P. 6.

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problems. First of all, it is not necessarily true that the *Globe* presents a "stenographic transcription"<sup>15</sup> of the debates. That stenographers recorded such a transcription does not mean that it was published as recorded. The *Congressional Record* of this century is frequently a tale of what legislators want the future to think they said rather than an account of what they actually said.<sup>16</sup> What the situation was then, I do not know; but the nearly perfect grammar of many of the speeches offers evidence, albeit thin and indirect, that somebody did some editing. Berger seems unaware of the problem. To convince readers of the reliability of his principal sources, he should have provided some evidence and a reasoned conclusion, not merely a bald declaration.

Furthermore, even a verbatim record need no more explain what a legislator intends by his vote than a judicial opinion need explain a judge's vote. Both often are justifications rather than explanations, and legislators tend to be more slippery about such matters than judges. Even when accurately reporting words spoken on the floor, a legislative record may provide only trappings for decisions and strategies that would be embarrassing if candidly explained.<sup>17</sup>

It is also questionable how much one can legitimately rely on the speeches of some members of a legislature as evidence of the "intent" of those who did not speak. People often vote for a measure in spite of rather than because of the speeches of others. And, to paraphrase Felix Frankfurter, in the end the members of the 39th Congress voted on the Fourteenth Amendment, not on the speeches.<sup>18</sup> Indeed it is

15. *Id.*

16. Under current practice, the editors of the *Record* send proof copies to each legislator who speaks, supposedly to allow correction of ungrammatical statements made in the heat of debate. In fact, many legislators use this opportunity to improve the style and substance of their speeches. Moreover, congressmen routinely "extend their remarks," that is, publish in the *Record* speeches that were never given. Even committee hearings and reports are not immune from this sort of distortion. Possibly the most horrendous example occurred in the fall of 1976 when the staff of a subcommittee of the Senate Appropriations Committee published an eight-volume record of hearings, complete with witty repartee, that were never held. *N.Y. Times*, Oct. 4, 1976, at 15, col. 3.

17. The debate in the Senate in 1958 on the bill to change the *Mallory* rule regarding admissibility of confessions offers an appropriate example. With the bill coming up for a vote on the last evening of a legislative session during an election year, neither the Majority Leader nor the proponents of the bill would have been able to muster a quorum had Senator Wayne Morse carried out his threat to kill the bill by filibustering. Both sides agreed to a dignified funeral for the bill. They would stage a mock debate and the Vice President would rule favorably on a motion that the bill violated the oft-ignored Senate Rule 27. Thus the foes of the Warren Court were allowed to lose—and leave—gracefully. See W. MURPHY, *CONGRESS AND THE COURT* 220-23 (1962).

18. See *Adamson v. California*, 332 U.S. 46, 64 (1947) (Frankfurter, J., concurring) ("Remarks of a particular proponent of the [Fourteenth] Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech.")

highly unlikely, and certainly difficult to prove, that a majority of the men of 1866 shared a single intent on the complex issues knotted into section 1. Certainly this cannot be proved by reliance on public speeches. In fact, Berger's evidence often indicates not only differences among the supporters of the amendment but also inconsistencies between remarks of particular individuals at different times.

Many of the amendment's supporters no doubt did share one intention—they wanted to win reelection in 1866. By then, the practice of sending franked copies of speeches to constituents was already established. One need not be a cynic to treat the rhetoric of an electoral campaign as weak evidence of anything more than an intent to gain or retain office;<sup>19</sup> indeed, as other research has shown,<sup>20</sup> the Republican supporters of the Fourteenth Amendment tended to be more liberal than their constituents about the rights of freedmen.

Recognition of these sorts of problems could have led to a fascinating and much more useful analysis of what was happening in the 39th Congress. But for Berger the *Globe* is not merely a verbatim record of the speeches of legislators who spoke with straight tongues and open hearts, it is also a "transcript of their minds,"<sup>21</sup> a truly amazing claim for any public document, even in a year when speech-makers are not running for reelection.

More generally, Berger's style of reasoning is often that of the clever college debater rather than that of the careful scholar. For instance, at one point he makes the argument, reasonable under many circumstances, that one should not accept the objections of opponents as evidence of what a bill means.<sup>22</sup> Yet, when an opponent's protests—such as those cited in Andrew Johnson's veto of the Civil Rights Act

19. Berger also accepts other bits of evidence at face value. He relies on Marshall's retreat in newspaper replies to critics of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and Justice Henry Baldwin's eulogy of the Chief Justice to support the claim that Marshall was a strict constructionist who adhered closely to the intent of the framers. See pp. 375-76, 379. Whatever else he was, John Marshall was not a strict constructionist. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187-89 (1824) (opposing strict construction). He was both an astute politician and a creative molder of the Constitution. Thomas Jefferson complained in 1810 that Marshall's "twistifications in the case of *Marbury*, in that of *Burr*, & the late *Yazoo* case shew how dexterously he can reconcile law to his personal biases . . ." Letter from Thomas Jefferson to James Madison (May 25, 1810), reprinted in 11 *THE WORKS OF THOMAS JEFFERSON* 141 (Ford ed. 1905). Jefferson added that in Marshall's hands, "the law is nothing more than an ambiguous text, to be explained by his sophistry into any meaning which may subserve his personal malice." Letter from Thomas Jefferson to John Tyler (May 26, 1810), reprinted in 12 *THE WRITINGS OF THOMAS JEFFERSON* 391 (Lipscomb ed. 1903). For other comments by Jefferson on Marshall's strategy of constitutional interpretation, see 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 401-03, 518, 620-21 (rev. ed. 1926).

20. See M. BENEDICT, *supra* note 9.

21. P. 372.

22. Pp. 97, 157-65.

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of 1866—support Berger’s thesis, those objections become reliable evidence.<sup>23</sup>

Similarly, Berger says that a bill’s managers speak with special authority; and frequently he quotes Jacob M. Howard, the Fourteenth Amendment’s manager in the Senate.<sup>24</sup> But when Howard declares that the Fourteenth Amendment will nationalize the Bill of Rights—a statement that Representative John A. Bingham also made when he introduced the amendment in the House<sup>25</sup>—Berger dismisses him as “‘one of the most . . . reckless of the radicals’” and one of the “‘extreme Negrophiles,’”<sup>26</sup> whose opinion “needs to be taken, in the words of the ‘immortal’ Samuel Goldwyn, with ‘a bushel of salts.’”<sup>27</sup>

Berger is similarly inconsistent in evaluating the use of governmental practice as evidence of constitutional meaning. When that practice runs counter to his thesis, he approvingly quotes Lord Chief Justice Denman: “‘The practice of a ruling power in the State is but a feeble proof of its legality.’”<sup>28</sup> When, on the other hand, practice supports Berger’s thesis, he cites Coke to the effect that “‘usage and ancient course maketh law.’”<sup>29</sup>

Nor are Berger’s evidence and reasoning convincing when he contends that the second sentence of section 1 of the Fourteenth Amendment<sup>30</sup> had a narrow and specific set of meanings. In according due process solely a procedural meaning, he has the least serious difficulties. Certainly such a claim is sound for the Fifth Amendment, and, while somewhat less robust, is still strong for the Fourteenth. *Wynehamer v. New York*,<sup>31</sup> which had tried to impart a substantive spirit into due process, he dismisses as “a sport.”<sup>32</sup> But similar ideas were in the wind, as evidenced by Taney’s opinion in *Dred Scott*,<sup>33</sup> and in some abolitionists’ arguments against slavery.<sup>34</sup> Instead of conceding this

23. Pp. 162-63, 170.

24. See pp. 30, 56, 60, 65, 103, 227.

25. CONG. GLOBE, 39th Cong., 1st Sess. 1089-90 (1866). Berger is more careful in dealing with Bingham, whom he calls, with some justification, “a confused thinker.” P. 95.

26. P. 147 (quoting Benjamin Kendrick).

27. *Id.*

28. P. 375.

29. P. 398.

30. “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.” U.S. CONST. amend. XIV, § 1.

31. 13 N.Y. 378 (1856).

32. P. 255.

33. 60 U.S. (19 How.) 393 (1857).

34. As early as 1837, Salmon Portland Chase was arguing that slavery violated the due process clause of the Fifth Amendment as well as “the whole spirit of the consti-

point, Berger relegates *Dred Scott* to a footnote,<sup>35</sup> saying that because that decision was anathema to abolitionists, they would not have used its reasoning. Without doubt, the ruling was anathema to abolitionists; but the notion that due process could protect certain basic, "natural rights" was an idea some abolitionists could and did accept.

Equal protection gives Berger more difficulty. His statement that common lawyers in the 1860s would have confined the concept of "laws" to statutes<sup>36</sup> is startling. That chance remarks in debates used the word "statutes" by no means implies that a generic term like "laws" would have had so limited a content. If its drafters had so narrow an intent and had been even barely competent lawyers, they would have worded the clause to require only "equal protection of statutes." The obvious conclusion is that they had something broader in mind.

Moreover, if, as Berger claims, the legislators of the 39th Congress "meant to outlaw discrimination only with respect to the rights enumerated" in the Civil Rights Act of 1866,<sup>37</sup> they chose the wrong words. If their intent was as he describes, they failed miserably in their duty by not listing the "enumerated privileges" as, in fact, they had done in the Civil Rights Act of 1866. Rather, as Justice Strong pointed out in *Strauder v. West Virginia*:<sup>38</sup> "The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible."<sup>39</sup> Berger's effort to restrict "privileges and immunities" is similarly flawed. He asserts that the words had the same meaning as those in Article IV, section 2, and quotes legislators as saying that the Fourteenth Amendment's clause was "drawn from" or had "roots in" Article IV. Brought to the amendment via Justice Washington's opinion

tion." Moreover, he found slavery "subversive of the fundamental principles on which all society rests." See SPEECH OF SALMON P. CHASE IN THE CASE OF THE COLORED WOMAN, MATILDA (Utica 1837); Chase's letter in LIBERTY OR SLAVERY: DANIEL O'CONNELL ON AMERICAN SLAVERY (Cincinnati 1863); and his speech in CONG. GLOBE, App., 33d Cong., 1st Sess. 133 (1854). Other abolitionists, notably Lysander Spooner and William Goodell, were also groping for a concept like substantive due process to connect their ideas about natural law and right with the Constitution's Preamble and specific guarantees of liberty such as habeas corpus. W. GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY 57-63 (2d ed. Utica 1845); L. SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 56-81 (Boston 1845). See also R. COVER, JUSTICE ACCUSED 154-58 (1975); Graham, *Procedure to Substance—Extrajudicial Rise of Due Process 1830-1860*, 40 CALIF. L. REV. 483 (1952); Miller, *The Forest of Due Process of Law*, in DUE PROCESS (NOMOS XVIII J. Pennock & J. Chapman eds. 1977).

35. P. 204 n.36.

36. Pp. 176, 191.

37. P. 176; see p. 167.

38. 100 U.S. 303 (1874).

39. *Id.* at 310.

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on circuit in *Corfield v. Coryell*<sup>40</sup> and the Civil Rights Act of 1866, these terms, Berger argues, had become “words of art.”<sup>41</sup> That some members of the 39th Congress so stated, he amply demonstrates. But there is a wide gap between “drawn from” or “rooted in” and “the same as.” And this gap is not bridged by Senator Howard’s declaration<sup>42</sup> that “we may gather *some intimation* of what *probably* will be the opinion of the judiciary by referring to . . . *Corfield v. Coryell*.”<sup>43</sup>

More importantly, if the framers of the Fourteenth Amendment thought that they were doing no more than repeating Article IV, section 2, one might ask why they bothered with such a repetition. At first the answer seems easy: they wanted to prevent states from discriminating against their own citizens, especially against freedmen. But if that is what the privileges and immunities clause means, it merely repeats the equal protection clause. Furthermore, the framers’ choice of language is passing strange if they only wanted to repeat Article IV, section 2. “Privileges and immunities of citizens of the *United States*” implies some substantive rights as United States citizens, rights that go beyond “privileges and immunities of citizens in the several states.” This logic is supported by the fact that the clause is preceded immediately by the definition of citizens of the United States. In that context, assertions by both the Senate and House managers that the Fourteenth Amendment would nationalize the Bill of Rights do not appear to be the peculiar aberrations that Berger claims they were. These pieces of evidence do not settle the

40. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). Berger stresses congressional reliance on *Corfield* as an indication of legislative intent behind the privileges and immunities clause. But this leaves Berger saddled with another element of that opinion: Justice Washington’s inclusion of the right to vote as among the “privileges and immunities” protected by Article IV. Thus, Berger has to assert that Washington was wrong on that point, yet he offers no evidence that the members of the 39th Congress intended to exclude voting from the rights imported from *Corfield* to Article IV.

41. P. 51.

42. Berger omits an important qualification that Howard made. In introducing the proposed amendment in the Senate, Howard said that a discussion of the full meaning of “privileges and immunities” would be “barren.” Then, after noting that the Supreme Court had never ruled on the problem, he quoted at length from Washington’s opinion in *Corfield*, without taking exception to the Justice’s inclusion of the right to vote, and concluded:

Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution . . .

CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). Rather than implying a limited and specific meaning for the phrase, Howard’s remarks suggest room for flexible interpretation.

43. P. 103 (emphasis added).



debate over incorporation,<sup>44</sup> but they do indicate that the record is far less clear than Berger would lead us to believe.

In sum, Berger's arguments would be more convincing were they more modest. Had he confessed his assumptions about his principal source, the possible incompleteness of the evidence, and the existence of significant differences among the amendment's supporters, he would have raised fewer doubts about the validity of his argument. That many, perhaps most, of the members of the 39th Congress had in mind less sweeping changes in social and political institutions than our generation is probably true.<sup>45</sup> It is also probably true that many latter-day historians, commentators, and judges have been moved by their zeal for reform to read their own preferences into the legislative record. But Berger's style leads one to believe he is not immune to the same sin.

## II. Intent and Constitutional Interpretation

*Government by Judiciary* is more than an effort to correct the historical record of the framing of the Fourteenth Amendment. More fundamentally, it is an attempt to influence judges and commentators by explaining and justifying a theory of interpretation of the Constitution and all its amendments. That theory is straightforward: constitutional interpretation is a matter merely of discovering, announcing, and applying the intent of the framers.<sup>46</sup> Although few others state that theory so sharply,<sup>47</sup> many scholars and judges share Berger's

44. A chief argument in the incorporation debate appears in Justice Black's dissenting opinion in *Adamson v. California*, 332 U.S. 46, 68 (1947). See generally H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908) (discussing adoption of Fourteenth Amendment and related legislation during Reconstruction); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *STAN. L. REV.* 5 (1949) (arguing that Fourteenth Amendment was intended only to incorporate some of Bill of Rights); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 *id.* 140 (arguing that Fourteenth Amendment did not incorporate Bill of Rights). Another commentator concluded in 1956 that the framers of the Fourteenth Amendment had had modest aims, yet in 1975 he indicated that he had come to believe that the framers intended to incorporate the Bill of Rights. Compare J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (1956) with James, *Is the Fourteenth Amendment Constitutional?* 50 *SOC. SCI.* 3, 9 n.2 (1975).

45. See, e.g., James, *supra* note 44. See generally M. BENEDICT, *supra* note 9 (describing divisions between radical and conservative Republicans).

46. Carried to its logical conclusion, Berger's reasoning that constitutional interpretation consists almost solely of historical research would argue for creation of a special federal court in the United States along the lines of the Constitutional Court of the Federal Republic of Germany. A special tribunal of this kind would be staffed by professional historians rather than lawyers and would have exclusive jurisdiction over questions—though not necessarily the final disposition of cases—involving the meaning of the Constitution.

47. *But see* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 405, 426 (1857) (Taney, C.J.): [The Constitution] speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was

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felt need to anchor their interpretations in the “intent” of the framers. The proper response must come at several levels. First, and this objection is specific to Berger, his justifications for reliance on intent disintegrate under close analysis. There is a second objection, not specific to Berger: the difficulties that confront any painstakingly thorough and intellectually scrupulous researcher who tries to establish legislative intent are typically insuperable. Ignoring these difficulties, as Berger does, does not remove them. Third, there is the argument, again not specific to Berger, that even if a researcher were to overcome the first two obstacles, the practical results of habitual reliance on original intent are likely to be disastrous and thus they can hardly have been intended by framers who were intelligent and patriotic.

### A. *Berger's Justifications*

Berger offers four sets of justifications for interpretation ruled by the intent of the framers. First, according to “traditional canons of interpretation, the intention of the framers being unmistakably expressed, that intention is as good as written into the text.”<sup>48</sup> In support of this assertion about judicial tradition, he cites a treatise on English law dealing with *statutes*.<sup>49</sup> Why English practice regarding statutes should control American practice regarding the Constitution, Berger never explains. Although he also cites three decisions of the Supreme Court that accord with the English view,<sup>50</sup> these opinions also deal with *statutory* interpretation. Moreover none of them utilizes legislative history as a means of discovering intent.

The distinction between statutory and constitutional interpretation is one that Berger does not grasp or, if he understands, does not care about. At other points, he quotes Justice Frankfurter as agreeing that the legislator’s intent controls but fails to acknowledge that Frankfurter was speaking of statutory, not constitutional interpretation.

voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.  
Cf. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 448 (1934) (Sutherland, J., dissenting) (framers’ intent controls interpretation).

48. P. 7.

49. M. BACON, *A NEW ABRIDGMENT OF THE LAW* (7th ed. London 1832).

50. *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903); *United States v. Babbit*, 66 U.S. (1 Black) 55, 61 (1861); *United States v. Freeman*, 44 U.S. (3 How.) 556, 565 (1845). Actually the statement regarding intent is dictum in *Babbit*, for, immediately after the passage Berger cites, the Court added: “But we do not place our decision upon this ground.” The point is pedantic and trivial, not worth mentioning except for the fact it is the sort of thing for which Berger criticizes others.

Berger criticizes Frankfurter as inconsistent because he sometimes reasoned that legislative intent did not control.<sup>51</sup> In the cases cited by Berger, however, Frankfurter *was* consistent. He applied the rule regarding the primacy of legislative intent to statutes but denied that the rule controlled cases involving constitutional interpretation.<sup>52</sup>

Nor do Berger's efforts to place Justice Story in his camp substantiate his claim that judicial tradition supports reliance on the framers' intent for constitutional interpretation. Berger intimates that Story, whom he describes as "perhaps the greatest scholar who sat on the Supreme Court,"<sup>53</sup> believed that "effectuating the draftsman's intention"<sup>54</sup> was the cardinal rule of constitutional interpretation. The Justice did believe that interpreters should seek "intent," but he meant not the intent of the draftsmen but rather the spirit of the document seen as a living thing. Intent, he wrote, was to be found primarily in the Constitution's "nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts."<sup>55</sup>

Indeed Story scornfully rejected the approach that Berger advocates:

Is the sense of the constitution to be ascertained, not by its own text, but by the "*probable meaning*" to be gathered by conjectures from scattered documents . . . ? Is the constitution of the United States to be the only instrument, which is not to be interpreted by what is written, but by probable guesses, aside from the text?<sup>56</sup>

As his second justification for reliance on the framers' intent, Berger argues that the framers had specific understandings of various clauses and that it was these understandings that they intended to bind the future.<sup>57</sup> Even if one could prove—and Berger has not—that the framers intended future generations to be bound by their specific understand-

51. Pp. 7, 136 n.12.

52. To prove his own consistency, Berger repeats his conceptual confusion in references to Justices Cardozo, Wilson and Holmes. Pp. 289 n.24, 366, 367, 369.

53. P. 365.

54. Pp. 365-66.

55. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 405, at 387 (1st ed. Boston 1833).

56. *Id.* at 390 n.1. Justice Story also observed:

In many cases, no printed debates give any account of any construction; and where any is given, different persons held different doctrines. Whose is to prevail? . . . Are Mr. Hamilton, and Mr. Madison, and Mr. Jay, the expounders in the Federalist to be followed[?] Or are others of a different opinion to guide us? Are we to be governed by the opinions of a few, now dead, who have left them on record? Or by those of a few now living, simply because they were actors in those days . . . [?]

*Id.*

57. Pp. 363-72.

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ings, that intention is hardly self-justifying. At best such an argument is circular, assuming what it has to prove—the binding character of the framers' intent. Furthermore, Berger glides silently from the premise that if the framers' intent is unmistakably expressed, it is as good as in the text,<sup>58</sup> to the conclusion that more ambiguous indications are also as good as text. This sort of reasoning is unpersuasive.<sup>59</sup>

Third, Berger argues that, almost by definition, a constitutional democracy is committed to the rule of law as a limitation on the discretion, and so on the power, of all public officials, including judges. He finds nourishment in John Adams' sage dictum: "A frequent recurrence to the fundamental principles of the constitution . . . [is] absolutely necessary to preserve the advantages of liberty and to maintain a free government . . . . The people . . . have a right to require of their law givers and magistrates an exact and constant observance of them."<sup>60</sup> But a need to return to fundamental principles implies no need to accept anything more than the fundamental principles themselves; it does not imply a need to accept, much less search for, what specific notions particular people may have had in mind. It is

58. P. 368.

59. Compounding Berger's error is the assumption that it has been "the Court's practice over the years to consult the intention of the Framers." P. 367. That statement has certainly been true for many Justices during this century, speaking both separately and for the Court. In the nineteenth century, judicial opinions made occasional reference to *The Federalist*, to Madison's notes on the Convention, and to interpretations of the First Congress, but it was decidedly not the practice of American and English judges during most of the nineteenth century to use the "legislative record" to justify statutory or constitutional interpretation. See notes 55-56 *supra*; cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (holding unconstitutional what Marshall claimed was constitutional interpretation by First Congress); C. ALLEN, *LAW IN THE MAKING* 476, 497-516 (1958) (British experience).

Not one of the opinions of the Court in early cases interpreting the Fourteenth Amendment cited a single line of debate in Congress or referred to a report of a legislative committee. See *Civil Rights Cases*, 109 U.S. 3 (1883); *Ex parte Virginia*, 100 U.S. 339 (1880); *Strauder v. West Virginia*, 100 U.S. 303 (1880); *United States v. Cruikshank*, 92 U.S. 542 (1876); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). The only reference to debates are two brief references in Justice Field's dissent in *Slaughter-House* to remarks of Senator Trumbull about the Civil Rights Act of 1866. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 92, 98 (1873). By the turn of the century, courts were frequently citing such material; as Justice Pitney noted in 1921, reports of House or Senate Committees may express legislative intent for an otherwise obscure statute, *Duplex Printing Co. v. Deering*, 254 U.S. 443, 474-75 (1921). Yet Pitney also observed that:

By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body.

*Id.* at 474. See generally tenBroek, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction* (pts. 1-4), 26 CALIF. L. REV. 287, 437, 655 (1938) & 27 CALIF. L. REV. 157 (1939) (means to establish framers' intent).

60. Quoted at p. 287. Adams's words were incorporated into the Massachusetts constitution of 1780 and were paraphrased in several other early state constitutions.

the fundamental principles in the Constitution that bind us, not the ways in which one or some of the framers would have interpreted those principles.

Indeed the internal logic of Berger's entire chapter on the rule of law provides a much stronger argument for a literal interpretation of the Constitution than for a search for what the framers may have had in mind. As any candid analysis of Justice Black's jurisprudence will indicate, literalism as a mode of constitutional interpretation has ample problems of its own.<sup>61</sup> Still, it has a great advantage over "intent" in that the materials on which it depends are readily available and thus provide much more tangible, though not necessarily more effective, means of curbing judicial discretion.

The starting point of Berger's fourth justification—that the Constitution embodies certain fundamental choices among values<sup>62</sup>—is, I think, absolutely correct. His subsequent argument, however, shares the same fallacy as his argument from the rule of law: acceptance of a belief about fundamental choices in no logical way implies that future generations are bound by what the framers may have had in mind when they drafted the Constitution. Nor does acceptance of the Constitution as a document containing a set of choices mean that its interpreters may not have to create new rights to protect those choices in a world of changing circumstances.

### B. *The Problems of Discovering the "Intent" of the Framers*

I have said enough about difficulties with the "record" of the 39th Congress as a window into the minds of its members. Even graver difficulties arise when one tries, as Berger does in Part II of his book, to explain the intent of the men of 1787. The hard truth is that we have no collection of documents that anyone can plausibly argue constitutes a full and accurate record of what the founders said at Philadelphia. Madison's notes provide the most comprehensive account available, but they are far from complete. And, in contrast to what many judges and commentators have implicitly assumed, Madison never even pretended that he had constructed a full record. He jotted down some notes while himself playing a leading role in de-

61. What does a literalist do when the literal commands of two constitutional provisions, such as the free press and fair trial requirements, come into conflict? One response is Justice Black's faith that the American people can and should protect both freedoms. See *Justice Black and the First Amendment's "Absolutes": A Public Interview*, in *ONE MAN'S STAND FOR FREEDOM: MR. JUSTICE BLACK AND THE BILL OF RIGHTS 474-76* (I. Dilliard ed. 1971). That response, however, is based on a cultural faith and a political value judgment, not on a literal reading of the Constitution.

62. P. 291.

bate; he wrote others during the evenings when he had more leisure; still others he composed after the Convention had adjourned.<sup>63</sup> These circumstances indicate that the notes were far from a verbatim transcript. Indeed, as would be expected, Madison's account disagrees at places with the even more fragmentary memoranda of other participants.<sup>64</sup> Moreover, some years later, when he had other sources against which to check his memory, Madison edited those notes.<sup>65</sup> One can reject Crosskey's claim that Madison lied to conceal the inconsistencies in his views over time<sup>66</sup> and still question the reliability of some of the "record" that he left. In fact Madison never published his own notes. They were published only after his death when his executors sold them to honor a bequest to his alma mater.

Thus even if we add to Madison's account what other framers like Robert Yates wrote down, we still have no "record" of the debates at the Constitutional Convention. There are only several sets of informal notes that vary in completeness and accuracy. Yet those who argue for intent as the lodestar of constitutional interpretation seldom confront or even admit to this problem.<sup>67</sup>

As do many other scholars and judges, Berger tries to fill the gaps in the evidence about the intention of the men at Philadelphia by utilizing *The Federalist* as an authoritative source. Without doubt, most of these newspaper articles are brilliant political polemics,<sup>68</sup> and some—Numbers 10, 39, 51, and 78, for example—are powerful expositions of hard-headed political philosophy. But Alpheus T. Mason has amply documented that the authors of *The Federalist* were not

63. See M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 60 (1913).

64. Divergent recollections appear in the materials collected in *DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES* (C. Tansill ed. 1927). Compare the notes of Robert Yates, *id.* at 746-843, Rufus King, *id.* at 844-78, William Patterson, *id.* at 879-912, William Pierce, *id.* at 87-95, Alexander Hamilton, *id.* at 913-22, and James McHenry, *id.* at 923-52, with the notes of James Madison, *id.* at 109-745. Although the most obvious differences involve remarks that are included and omitted, there are substantive differences as well. Madison helped blur those between his own version and that of Yates. When Yates's notes first became available, Madison labeled them a "very erroneous edition of the matter," but he soon added some of Yates's material to his own reports. I M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at xviii (1911).

65. *Id.* at xvi-xix.

66. 1 W. CROSSKEY, *supra* note 12, at 12-13; 2 *id.* at 1009-13.

67. An exception is Crosskey. See *id.* at vii, 12.

68. Jefferson said *The Federalist* was "the best commentary on the principles of government which ever was written." But, he also told Madison that: "In some parts it is discoverable that the author means only to say what may be best said in defence of opinions in which he did not concur." Letter from Thomas Jefferson to James Madison (November 18, 1788), *reprinted in* 5 *THE WRITINGS OF THOMAS JEFFERSON* 53 (Ford ed. 1895).

always consistent with each other nor each with himself.<sup>69</sup> As Madison explained some of the problems to Jefferson: "Though *carried on in concert, the writers are not mutually answerable for all the ideas of each other, there being seldom time for even a perusal of the pieces by any but the writer before they were wanted at the press, and sometimes hardly by the writer himself.*"<sup>70</sup> Furthermore, what the authors of *The Federalist* say does not always agree with what Madison says they argued for in the Convention.<sup>71</sup>

Berger's use of Alexander Hamilton and *Federalist* No. 78 deserves special comment. Like many other writers, Berger treats this tract as if it were a definitive expression of the views of the framers. In fact, he labels it "conclusive evidence" of what they had in mind.<sup>72</sup> *Federalist* No. 78 certainly offers an eloquent, sophisticated, and intellectually defensible jurisprudence. But there are difficulties in presenting Hamilton's view as evidence, much less "conclusive evidence," of a consensus among a majority of the framers.

First, from what Madison told Jefferson it is difficult to argue that No. 78 represented a consensus among Jay, Madison, and Hamilton, much less among others. Second, Hamilton is hardly an authority on what the men at Philadelphia finally concluded about judicial review. He had left the Convention when it was half over, long before most of the hard issues were ultimately resolved.<sup>73</sup> He returned once or twice for a few days but was not a regular participant in debate or deliberation. Third, given the paucity of debate about judicial review recorded in Madison's or any one else's notes, one cannot say, with any assurance whatsoever, that Hamilton's treatment of the topic in No. 78 accorded even with what was said *before* he left the Convention. In sum, one can accept or reject Hamilton's argument on its own very considerable merits. But one cannot, on the basis of sound logic or solid evidence, identify those views with the framers generally.

69. Mason, *The Federalist—A Split Personality*, 57 AM. HIST. REV. 625 (1952).

70. Letter from James Madison to Thomas Jefferson (August 10, 1788), reprinted in 5 THE WRITINGS OF JAMES MADISON 246 (G. Hunt ed. 1904).

71. Madison first supported the Virginia Plan, which would have provided for a much more centralized political system dominated by a unicameral Congress but later defended in *The Federalist* a looser form of federalism and a much more independent and powerful executive and judiciary. See THE FEDERALIST Nos. 10, 39-46 (J. Madison). Even more than Madison, Hamilton urged centralization—until he found it expedient to tout federalism. See THE FEDERALIST Nos. 15-17, 32-34, 82 (A. Hamilton); Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 804 (1961) ("*The Federalist* is probative evidence for only one proposition: that Hamilton and Madison were inspired propagandists with a genius for retrospective symmetry.")

72. P. 293.

73. M. FARRAND, *supra* note 63, at 197.

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There is yet another grave problem about “intent” that Berger, like most of its advocates, ignores. The Constitution and its amendments are not the products of a national convention or of Congress alone. They were ratified by other institutions—either state legislatures or conventions. What about the intentions of the more than 1600 ratifiers? If their views count, what were they? We have a good deal of information, though again incomplete, about what was said in the state conventions after the Constitution was proposed.<sup>74</sup> Yet what we now know of those debates hardly shows consensus on much more than a willingness to give the new Constitution a fair trial.<sup>75</sup>

On the ratification of the original Constitution, Berger offers scattered quotations and comments but not copious evidence or systematic analysis. On the ratifiers of the Fourteenth Amendment, Berger offers neither evidence nor comment. Given the amendment’s rough road to ratification,<sup>76</sup> his analysis would have been especially interesting. It would be useful to know how unusual were the views of men like the elder Justice Harlan, who thought that the amendment nationalized the Bill of Rights<sup>77</sup> and, together with the Thirteenth Amend-

74. See THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliot ed. Washington 1836) (relying heavily on newspaper accounts).

75. Merrill Jensen’s projected fifteen to twenty volumes of documents on ratification may present a different picture. See M. JENSEN, THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Volumes I, II, III published 1976; others forthcoming). Yet even that massive scholarship is unlikely to offer a complete view of the intent of these latter-day framers. See Robinson, *Jensen’s Monument: Documents on Constitutional Ratification*, 5 REVS. AM. HIST. 326 (1977).

76. Congress submitted the amendment to all thirty-seven states, but within a year each of the ex-Confederate states except Tennessee had rejected the amendment, as had Delaware and Kentucky. In two state legislatures, Oregon and New Jersey, ratification was by a slim and questionable margin. New Jersey, along with Ohio, later tried to rescind approval. Only after Congress required six states of the old Confederacy to ratify as a condition for readmission to the Union, and the Secretary of State rejected New Jersey and Ohio’s efforts to change their minds, was the requisite approval of three-quarters of the states obtained. Under these circumstances, the Secretary of State expressed doubts about the validity of the amendment, and Congress itself proclaimed ratification. See CONG. GLOBE, 40th Cong., 2d Sess. 4295-96 (1868); cf. Suthon, *The Dubious Origin of the Fourteenth Amendment*, 28 TUL. L. REV. 22 (1953) (amendment not legitimate part of Constitution). See generally, M. BENEDICT, *supra* note 9; J. JAMES, *supra* note 44; J. RANDALL, THE CIVIL WAR AND RECONSTRUCTION 740, 786-90 (1937); James, *supra* note 44; James, *Southern Reaction to the Proposal of the Fourteenth Amendment*, 22 J.S. HIST. 477 (1956).

77. See *Maxwell v. Dow*, 176 U.S. 581, 605 (1900) (Harlan, J., dissenting); *Hurtado v. California*, 110 U.S. 516, 538 (1884) (Harlan, J., dissenting). As a political activist before coming to the Court, Harlan had opposed ratification even of the Thirteenth Amendment. See L. Filler, *John M. Harlan*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 1281-82 (L. Friedman & F. Israel eds. 1969); Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637 (1957). Berger does devote attention to the younger John Marshall Harlan. See, e.g., pp. 152, 222.



ment, authorized Congress to outlaw segregation in such public facilities at inns, theaters, and coaches.<sup>78</sup> Similarly, it would be helpful to explore the extent to which ratifiers thought, as did Governor David Walker of Florida, that the amendment would allow Congress "to legislate in all cases touching the citizenship, life, liberty or property of every individual in the Union, of whatever race or color," and thus effectively to eliminate any need for state governments.<sup>79</sup> Even assuming once again that there was a single intent and not ten or fifty different intents, the task of discovering the intent of this echelon of framers is staggering. In fact, given the dearth of records of state legislative debates, the task may be impossible.<sup>80</sup>

Yet, if one claims that the intent of the framers is *the* critical element in constitutional construction, one cannot refuse to do the labor needed to uncover that intent. It is even less intellectually legitimate to pretend that the labor is unnecessary. If in the end one reluctantly concludes that the task is impossible, then at very least one must modify the prescription to read: "Because in the real world, we cannot discover the intent of the framers, other standard(s) must be used." If one refuses to make that modification, one is, in effect, relegating constitutional interpretation not to historians but to seers.<sup>81</sup>

### C. *Practical Effects*

If the United States had to undergo the delay and uncertainty of the amending process every time a problem arose that the framers had not foreseen or had foreseen in such a different context as to distort their vision of later problems, the practical effects would destroy the

78. See *Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting) (arguing that Thirteenth and Fourteenth Amendments allow Congress to outlaw segregation by private individuals who operate public facilities); cf. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (arguing that two amendments forbid states to require segregation in public facilities).

79. Statement of David Walker, reprinted in James, *supra* note 76, at 491.

80. See Anderson, *The Intention of the Framers: A Note on Constitutional Interpretation*, 49 AM. POL. SCI. REV. 340, 350 (1955) (beyond human capacity conclusively to connect fleeting, subjective intentions of framers to written words in text).

Justice Story concluded: "[T]here can be no certainty, either that the different state conventions in ratifying the constitution, gave the same uniform interpretation to its language, or that, even in a single state convention, the same reasoning prevailed with a majority, much less with the whole of the supporters of it." 1 J. STORY, *supra* note 55, at 388-89.

81. Responding to some of his critics, Berger refers to the "brute facts" brought out by his book and complains that most critics' real quarrel is with the framers—either of the original Constitution or of the Fourteenth Amendment. Berger, *Academe vs. the Founding Fathers*, 30 NAT'L REV. 468, 470 (1978). The message of this review is that Berger's argument relies far less on "brute facts" about whatever it was the framers intended and more on incomplete research and gossamery guesses about what they may have had in mind.

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country. A constitution "intended to endure for ages to come," as Marshall described it,<sup>82</sup> or to provide unity, justice, tranquillity, defense, welfare, and liberty for "ourselves and our posterity," as the men of 1787 wrote, could hardly perform its functions if it were a legal strait jacket. Berger's crabbed view of constitutional interpretation implies that the framers were either omniscient gods who foresaw all possible problems and provided ready solutions, or were arrogant fools who thought they were gods. Whether one thinks of the framers as saints or sinners, the plain fact is that the language they chose for the Constitution is often sweeping rather than precise, proclaiming general principles rather than mandating specific solutions.<sup>83</sup>

More persuasive than any argument offered in *Government by Judiciary* is the view that if the framers were men of intelligence, they would not have intended their specific interpretations of the sweeping language they used to bind future generations. They would have recognized that the future would bring problems that the framers had never encountered or foreseen.<sup>84</sup>

Madison himself conceded that the language of the original Constitution admitted of several quite different meanings. It was, he said,

82. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

83. Berger argues that the framers of 1787 were legal positivists, for only positivists would view a constitution or interpret it in such narrow terms. Pp. 386-91. A positivist, of course, need not be so rigid as Berger; even Hans Kelsen admitted the inevitability of a creative role for judges. H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 135 (1945). Berger fails to recognize that some of the framers—perhaps most—were decidedly not positivists but believers in natural law and natural right. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387-88 (1798) (Chase, J., asserting that reason and justice, judicially enforced, form constitutional restrictions on legislative action); R. FAULKNER, *THE JURISPRUDENCE OF JOHN MARSHALL* 9-20 (1968) (Marshall's adherence to natural law/natural rights); Murphy, *The Art of Constitutional Interpretation*, in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* (M. Harmon ed. 1978) (natural rights theory reflected in early case law).

Berger apparently relied on Robert Cover's excellent book, *JUSTICE ACCUSED* (1975), as an authority for denying the prevalence of natural law/natural rights during the early period. But Cover is concerned with problems that came to the courts largely after 1825. During the founding period, theories of natural law and natural rights retained wide influence. See, e.g., E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787* (1969); B. WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* (1931). Believers in natural law/natural rights would be apt to see a constitution (or even a statute) as containing general principles that need to be adapted to changing circumstances in order to secure justice and/or protect fundamental rights. That one disagrees with such a school of thought provides no intellectually respectable justification for pretending that it was not highly influential during the period in which the Constitution was framed and first expounded. Indeed, as Wright makes clear for the 1920s and as one can cogently argue for Earl Warren's chief justiceship, the influence of that school tends to sleep rather than die.

84. One must carefully distinguish between general principles such as limited government and the rule of law and specific notions of the meaning of these principles in concrete situations. See R. DWORIN, *TAKING RIGHTS SERIOUSLY* 131-49 (1977).

nothing to be ashamed of, for: "When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful, by the cloudy medium through which it is communicated."<sup>85</sup> As Cardozo once said, an interpreter of the Constitution has to discern "what today [the framers] would believe, if they were called upon to interpret . . . the constitution that they framed for the needs of an expanding future."<sup>86</sup>

It is, however, legitimate to demand that interpreters of the Constitution remain faithful to the underlying principles embodied in the structure and spirit of the document. Otherwise, judicial discretion may turn into judicial license. But in weighing the effectiveness of various limitations on judicial discretion, one should keep in mind that it was Taney in *Dred Scott*<sup>87</sup> who relied on the "intent of the framers," not Warren in *Brown*;<sup>88</sup> that it was Sutherland and his ideological brethren who used "intent" to keep laissez-faire ruling constitutional law, not Brandeis and Cardozo with their more candid social engineering. Search for intent restrains judicial discretion less than most approaches to constitutional interpretation because it is based on the usually self-deceptive myth that there is such a discoverable entity as a single intent on particular matters.

Instead, we should view a constitution as a charter for governance. It is a political credo: a set of authoritative statements about a society's basic goals. It is also a design for legitimate processes to achieve those goals, and for allocations of power to—as well as restrictions on the power of—officials who in society's name impose costs and benefits toward achievement of its general goals. Because of the broad and basic political character of a constitution, it is not amenable to the rules of interpretation that apply to private contracts or to statutes. Because of the complex nature of the interlocking arrangements contained in a constitution, an interpreter must look at it as a whole, examine its structure, as Charles Black would say.<sup>89</sup> Implicit in that structure is an ordering of values, a series of choices among substantive ends and procedures to achieve those ends. Those choices may have been made at different times, by different people,

85. THE FEDERALIST No. 37 (J. Madison) 236-37 (J. Cooke ed. 1961).

86. Draft of an unused concurring opinion by Justice Cardozo in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), reprinted in A. MASON & W. BEANEY, AMERICAN CONSTITUTIONAL LAW 393-94 (6th ed. 1978). After reading this opinion, Chief Justice Hughes modified his draft opinion for the Court to include the gist of Justice Cardozo's reasoning. See A. MASON, HARLAN FISKE STONE 360-65 (1956).

87. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-05 (1857).

88. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

89. See C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

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for different purposes; and one of an interpreter's most difficult tasks is to reconcile those differences.

Furthermore, a constitution has a spirit as well as a body, as both Marshall<sup>90</sup> and Story<sup>91</sup> noted. The notion of the rule of law—which Berger rightly emphasizes—is nowhere specifically endorsed in the American Constitution or in any of its amendments. But it is there. There also, at least since the Thirteenth and Fourteenth Amendments, is the notion of the equal worth and dignity of all human beings. To make a constitution more than a political artifact, an interpreter must discover these and other basic principles—in effect, the spirit—that inform the document and apply them to conditions its framers never knew.

To interpret a constitution requires more than ingenious guesses about what its draftsmen were thinking. Constitutional interpretation is an art, an art that must sometimes be both creative and political in the highest sense of that word, for it must apply imperfectly stated general principles to concrete and complex problems of human life and it must produce an authoritative solution. An interpreter who wishes to uphold, defend, maintain, or preserve the American Constitution cannot rationally treat it either as a detailed code or as a compact computer whose machine language is locked in the minds of men long dead. The root of the problem of constitutional interpretation lies in the stubborn refusal of the real world to stand still so that immutable general principles can have immutable applications to human behavior. The ongoing task for those who would interpret the Constitution is similarly to avoid the pretense that the world stands still and instead work to link the values of the past to the demands of the future.

90. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 383-84 (1821); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 645 (1819); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

91. 1 J. STORY, *supra* note 55, §§ 422, 427, 455; see *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 225 (1821).

