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Government by Judiciary: The Transformation of the Fourteenth Amendment

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BOOK REVIEW

Government by Judiciary: The Transformation of the Fourteenth Amendment. RAOUL BERGER. Cambridge: Harvard University Press. 1977. Pp. xii, 483. $15.00 cloth.

As its title suggests, Raoul Berger's *Government by Judiciary* states an extreme version of a familiar thesis: The Supreme Court has abandoned its proper role as interpreter of the Constitution and has usurped the power to act as a third legislative chamber. Like kadis under a tree, the Court creates law from mere personal predilections.[1] The main instrument of this judicial coup has been the fourteenth amendment. *Government by Judiciary* is an historian's book, strongest when using the historian's tools to illuminate the past. Underlying this research, however, is a remarkably simplistic theory of constitutional interpretation, a theory that forms the basis for Professor Berger's dire conclusions about the role of the Supreme Court in American government.

I

The conventional view of the fourteenth amendment is that it expresses broad principles of equality and fairness in somewhat cloudy language. In Part I of *Government by Judiciary*, Professor Berger analyzes the legislative history of the amendment and concludes that its framers saw their language as neither broad nor vague.

> Study of what the terms meant to the framers indicates that there was no mystery. 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.[2]

The "fundamental rights" protected by the fourteenth amendment were essentially those enumerated in the Civil Rights Act of 1866—rights to make and enforce contracts, to sue, to own property, and to enjoy the benefits of the law.[3] Professor Berger re-

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[1] The clichés are Professor Berger's. *See, e.g.*, pp. 265-66, 289, 409-10.

[2] P. 18.

[3] Section 1 of the Act provided:

> That all persons born in the United States . . . of every race and color . . .

buts arguments that the amendment embodied the aspirations of *ante bellum* Abolitionists, was a compromise between radical and moderate Republican factions, or was deliberately cast in ambiguous terms to allow for future development. Rather, the authors of the amendment generally shared their constituents' strong racial prejudices. Political realities permitted only a minimal amount of protection for the freedman; the framers' own limited sense of justice demanded no more. More specifically, says Berger, the legislative history clearly demonstrates that the amendment was intended to have no effect whatever on segregated schools[4] (which were common in the North) or on the states' power to limit the franchise on racial or other grounds[5] (which, though a cherished target of some radical Republican strategists, was accepted by the public at large and the majority of members of Congress).

This portion of the book is generally persuasive and interesting. Unfortunately, Professor Berger's polemic tone often causes lapses of style and substance. Even the typography is affected. Spattered with italics and rhetorical questions, the book at times looks like a *Cosmopolitan* ad. The awkward structure of the argument contributes to the feeling of overstatement. Rather than present a single chronological account of the legislative debates, Professor Berger treats each clause of the amendment separately and devotes separate rebuttals to each opposing interpretation. The resulting overlap leads him to cite the same remarks in several different contexts, thus exaggerating the apparent weight of the evidence. Moreover, Professor Berger's dully literal readings of some Congressmen's statements call into question his sensitivity to nuances of language. For example, he cites Representative George W. Julian's statement that "[t]he real trouble is *we hate the Negro*" for the proposition that "the framers *shared* the prejudices of their Northern constituency."[6] Taken in context, however, Julian's re-

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shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties . . . .

Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27. The descendants of this statute, 42 U.S.C. §§ 1981, 1982 (1970), were given a broad interpretation by the Supreme Court in Runyon v. McCrary, 427 U.S. 160 (1976) and Jones v. Alfred H. Mayer Corp., 392 U.S. 409 (1968).

[4] Pp. 117-28.

[5] Pp. 52-98.

[6] P. 91 (emphasis in original) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 257 (1866)).

mark emerges as a product of liberal guilt, not of racist passion.[7] One may also question Professor Berger's assessment of the depth of the electorate's opposition to Negro suffrage. If it would have been political madness for the Republicans to include such a requirement in the fourteenth amendment, how can we account for the passage and ratification shortly thereafter of the fifteenth amendment?[8]

Even more extraordinary is Professor Berger's reading of section 5 of the fourteenth amendment.[9] He suggests that the section grants Congress the *exclusive* power to enforce the amendment, and that the courts therefore lack such power.[10] But given the general power of judicial review, which Professor Berger accepts,[11] it seems evident that the courts have the power to enforce a flat constitutional prohibition of certain state actions, at least in the sense of following the command of the supremacy clause to disregard such actions in determining private litigation.

These reservations, however, are on the whole peripheral. They do not seriously detract from the persuasiveness of Professor Berger's argument that the framers of the fourteenth amendment intended only a limited and specific guarantee of nondiscrimination as to what were then perceived as basic human rights, rather than a general principle of equality and fairness.

II

In Part II Professor Berger turns to the consequences of these historical findings, and it is here that the book is most disappoint-

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[7] Representative Julian, in a speech advocating black suffrage, argued that his opponents were moved not by the blacks' lack of education, but by pervasive racism. CONG. GLOBE, 39th Cong., 1st Sess. 255-59 (1866). Similar self-accusatory statements about the pervasiveness of white racism have been a staple of modern liberals. Such rhetoric obviously provides little evidence of the House's motives in passing an amendment protective of blacks.

[8] Of course, the passage of the fifteenth amendment, if anything, supports Professor Berger's reading of the fourteenth amendment as not addressing problems of suffrage. That reading is further buttressed by strong arguments from the text of the amendment itself, in particular § 2, and from the legislative history, both familiar from Justice Harlan's scholarly dissent in Reynolds v. Sims, 377 U.S. 533, 589 (1964). But the quick success of the fifteenth amendment suggests that Representative Julian's opponents were not as intransigent as Professor Berger would have us believe.

[9] *See* pp. 221-30.

[10] Although he does not unequivocally endorse the argument, asking only for "further study," Professor Berger does conclude that at least "[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." P. 229.

[11] P. 355.

ing. Professor Berger holds that the only legitimate source for deducing the meaning of a constitutional text is the specific intentions of its framers.[12] Therefore, the fourteenth amendment comprises only the limited goals of its authors; the broader implications drawn by the Supreme Court are illegitimate interpolations.

The consequences of insisting "that the 'original understanding' be honored across the board"[13] have been catalogued elsewhere,[14] but some bear repeating in the context of the fourteenth amendment. The framers understood "due process" to mean a right to notice and hearing before punishment for crime. Hence, the states need not recognize any of the procedural protections afforded in criminal trials by the Bill of Rights, nor even meet a general standard of fundamental fairness. The amendment would not demand any procedural protections in civil or administrative actions. Nor would it protect rights that have been enforced under the rubric of substantive due process, including first amendment freedoms and the right to privacy. As for the equal protection clause, the framers understood it to provide only the most limited protection to blacks (not including the invalidation of de jure school segregation, miscegenation laws, and exclusion from juries), and none whatever to such groups as women, illegitimates, and the poor. In this light Professor Berger's stylistic excesses become understandable—if one rejects virtually all of the Supreme Court's fourteenth amendment jurisprudence, dating back to 1879, escalated rhetoric is a fitting response.

But why should the "original understanding" be the only legitimate meaning of the Constitution? Professor Berger seems to assume that his is the accepted theory of interpretation. He ascribes the primacy of the "original understanding" to "centuries-old canon[s] of interpretation."[15] Certainly the Justices themselves tend to dress their interpretations in the legislative intent whenever possible (and sometimes even when not). But Professor Berger's claim that such rigid constructionism represents the accepted theory of constitutional interpretation is hardly consistent with his insistence that the Supreme Court has been acting quite otherwise for nearly a century. Since the heyday of legal realism, with its cynical view of judicial lawmaking, sophisticated legal thinkers have struggled to arrive at theories of constitutional decisionmaking that adequately

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[12] Pp. 363-72.

[13] P. 411.

[14] Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710-14 (1975).

[15] P. 368.

account for the actual behavior of judges.[16] As for the general public, while many would no doubt embrace Professor Berger's thesis baldly stated, most would assuredly recoil when informed of its consequences.[17]

A second argument for rigid construction is Professor Berger's elaborate restatement of the evidence that the framers did not expect the judiciary to exercise as much power as it currently does. This argument simply begs the question. Unless we conclude that the Constitution allows for no institutional growth beyond the original understanding—the very point to be proved—the belief of the framers in a weak judiciary is only as persuasive as the arguments supporting that belief. One might assert that along with the Constitution the people ratified the governmental philosophies of its authors, but such a view is no more realistic than the claim, scorned by Professor Berger,[18] that the people have implicitly ratified the role the Supreme Court has assumed over the last century.

A third argument rests on a philosophical assertion about the concept of meaning. If we are to understand the meaning of a phrase in a particular document, we must begin with the meaning of the words as used at the time the document was written. Thus, we are not "free to read Hamlet's statement that he 'can tell a hawk from a handsaw,' then meaning a heron, as if he referred to our pointed-tooth cutting tool because the meaning of 'handsaw' has changed . . . . Even Humpty-Dumpty did not . . . insist that when Alice 'used' a word *he* could dictate what *she* meant."[19] This argument begs the question more subtly. Of course when the framers used a word we may not insist that *they* meant what we would mean had we used it; but we have no reason to do so unless the intended meaning of the framers is always to guide our reading of the text. Nor is the view that the Constitution's meaning can change as incomprehensible as Professor Berger seems to think. In order to understand the past, the historian seeks the meaning of a document in the utterances of its creators and their contemporaries. To

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[16] For particularly helpful examples, see P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 145-46, 161-64, 170-71 (1975), and Dworkin, *The Jurisprudence of Richard Nixon*, 18 N.Y. REV. BOOKS, May 4, 1972, at 27, col. 1, *reprinted in* R. DWORKIN, TAKING RIGHTS SERIOUSLY 131 (1977).

[17] The popularity of the Burger Court demonstrates that the appeal of "strict constructionism" as a slogan in Richard Nixon's campaign in 1968 translates readily into a preference for particular results, especially in the field of criminal procedure, rather than for a particular method of constitutional interpretation.

[18] Pp. 354-55.

[19] Pp. 370-71 (emphasis in original).

those trained in literary criticism, however, the idea that a work's meaning is to be sought anew in the relation between its text and each new reader or generation of readers, rather than in the meaning intended by its author, as deduced from external sources, is hardly startling.[20] The analogy to literary interpretation seems appropriate, for legal texts are consulted for their relevance not to a past age, but to current problems.[21]

Professor Berger's strongest argument, to which he devotes less attention, questions the desirability, and not necessarily the legality, of constitutional interpretation that departs from the original understanding.[22] If judges are not limited by some historically ascertainable legislative intent, they will have nothing to guide them but their own preferences. This result is inconsistent with democratic values and frequently leads, as during the *Lochner*[23] era, to substantively undesirable decisions.

A book review, of course, is not the place for a full discussion of the issues raised by this familiar contention, but some of its weaknesses can be sketched. It is not entirely true, in the first place, that freedom from fidelity to the original intention sets judges loose on a sea of personal whim. To win acceptance, judicial decisions must observe traditions of what does and what does not count as a plausible legal argument. Thus, any acceptable interpretation of the Constitution must bear a reasonable relation to the text. This is no trivial restriction. Some texts are not particularly malleable.[24]

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[20] Contemporary critics like Harold Bloom and Edward W. Said have given this old idea a more radical emphasis, insisting on the creative potential even of "misreading" or "violat[ing] the text's putative original state." *See* H. BLOOM, A MAP OF MISREADING (1975); E. SAID, BEGINNINGS 210 (1975).

[21] The Shakespearean footnotes of the Louisiana illegitimacy cases illustrate the difference between historical and literary perspectives. In Levy v. Louisiana, 391 U.S. 68, 72 n.6 (1968), Justice Douglas cited Edmund's speech in *King Lear* for the proposition that bastardy is an invidious classification. Justice Harlan replied that the reliance on the speech is misplaced; Shakespeare's views on the laws of illegitimacy are revealed by Edmund's character rather than by the words he utters in his own defense. Glona v. American Guarantee Co., 391 U.S. 73, 77 n.3 (1968). But surely, what counts is not Shakespeare's opinion of the status of illegitimates, but the eloquent, and to us unanswerable, appeal of Edmund's words. If, with Justice Harlan, we seek the views of the author of the text, we must, with Professor Berger, accord controlling weight to such sources as the author's private correspondence. But to a director of *Lear*, the plausibility of playing Edmund as a victim of prejudice turns on how *we* respond to the *text*, and not on external evidence of Shakespeare's feelings about illegitimates.

[22] *See* pp. 413-18.

[23] Lochner v. New York, 198 U.S. 45 (1905).

[24] For example, the President "shall hold his Office during the Term of four Years . . . ." U.S. CONST. art. II, § 1.

For such texts any interpretation but the apparent one, even if it rested on a change in the common usage of the words, would not be plausible.[25] The same could not be said, however, of language like "equal protection of the laws." The word "equal" has not changed in dictionary meaning or moral appeal. In Ronald Dworkin's terms,[26] the "concept" it represents is the same to us as to Representative Bingham. Yet our "conception" of equality is vastly different from that Professor Berger attributes to the framers of the fourteenth amendment. Today we would barely comprehend a command of "equal protection" that meant only a limited or partial equality of black and white citizens. To give effect to our conception of equality is hardly the same thing as disregarding the text entirely.

Adherence to long-standing constitutional doctrines, even where those doctrines appear to depart from the text as well as from the original understanding,[27] is another source of interpretation short of judicial whim. Professor Berger derides this notion—a past "usurpation" cannot justify further usurpation in the pres-

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[25] Thus, Professor Berger cites Paul Brest's discussion of the effect of changes in the meaning of the word "biweekly" in a hypothetical constitutional provision for the exclusive importance of the original understanding. Pp. 370-71 n.38 (citing P. BREST, *supra* note 16, at 146 n.38). To Brest, however, the "biweekly" provision is an extreme case, not the norm. Not all language requires such rigid adherence to the original understanding. Alternative formulations of a provision can vary widely in their specificity. When the drafter of a document selects a vague formulation, he delegates greater discretion to those who will interpret the language in years to come. *See* P. BREST, *supra* note 16, at 10-14, 23-33, 146 n.38.

[26] *See* Dworkin, *supra* note 16, at 28, *reprinted in* R. DWORKIN, *supra* note 16, at 135:

> When I appeal to the concept of fairness I appeal to what fairness means, and I give my views on that issue no special standing. When I lay down a conception of fairness, I lay down what I mean by fairness, and my view is therefore the heart of the matter. When I appeal to fairness I pose a moral issue; when I lay down my conception of fairness I try to answer it.

Dworkin's distinction helps to rehabilitate Alexander Bickel's view that the fourteenth amendment's phraseology is "open-ended." *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). Professor Berger argues that the framers of the amendment in fact had a particular, narrow conception of what it meant, and did not specifically intend to use language that would grow over time. But the evidence is not inconsistent with the theory that they were appealing to a concept of equality which, as they understood it, extended only so far, but which we understand differently. The nature of the task confronting a constitutional draftsman would lead us to expect that this interpretation should presumptively be applied to broadly-worded constitutional provisions.

At any rate, Dworkin's distinction attempts to reconcile fidelity to the original intention with a changing Constitution. Even this has been criticized as affording insufficient flexibility for courts to reinterpret the Constitution. *See, e.g.*, Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977).

[27] The enduring doctrine of substantive due process provides one example.

ent.[28] Clearly, the courts must retain the freedom to return to the text and start the quest for plausible interpretation from scratch when the received tradition is unsatisfying. But the continued dialectic between a canonical text and its traditional glosses, as the example of Talmudic law demonstrates, is hardly inconsistent with the rule of law. It is the principle by which legal systems remain vital.

Professor Berger seems to admit this in his conclusion. There he confesses that he would not urge the Court to renounce all of its misinterpretations of the fourteenth amendment. *Brown v. Board of Education*,[29] in particular, should not be undone, because it would be

> utterly unrealistic and probably impossible to undo the past in the face of the expectations that the segregation decisions . . . have aroused in our black citizenry—expectations confirmed by every decent instinct. That is more than the courts should undertake and more, I believe, than the American people would desire.[30]

Professor Berger insists this is not an admission, but merely a recognition that "eggs cannot be unscrambled."[31] I think there is more to it than that. We cannot preserve the holding of *Brown* and its progeny and, at the same time, deny their gravitational force in deciding current disputes about equality. To accept the package, however, is to allow judicial misinterpretation to change the meaning of the equal protection clause, apparently with Professor Berger's reluctant acquiescence.

Such evolution, as a practical matter, is perfectly consistent with democratic principles. Professor Berger is not alone in ratifying *Brown*; the people have accepted *Brown* as a fundamental principle of our law far more consciously than they ever ratified the comments of obscure legislators about the meaning of a constitutional amendment. We should be wary too of describing the policy choices of judges as "whim" or "predilection." Judicial lawmaking is neither so arbitrary nor so unchecked by majoritarian institutions as such words imply. Supreme Court Justices, after all, are made, not born. Their education and their heritage heavily influence their moral and political beliefs. Further, the nature of judicial

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[28] P. 352.

[29] 347 U.S. 483 (1954).

[30] Pp. 412-13.

[31] Letter to the Editor, THE NEW REPUBLIC, February 11, 1978, at 7.

appointment and confirmation requires that the Justices pass muster with a political majority, at least at the time of appointment. If the dominant faction on the Court is often somewhat out of phase with the popular majority of the moment, that offers assurance that radical change, whether originating in Congress or the Court, will occur only when it is accepted by a majority that can endure long enough to exercise its impact on judicial appointments and still retain control of Congress. If that is the significance of judicial resistance to the New Deal, perhaps that resistance was not quite the constitutional breakdown liberals of the time took it for.

Which brings us to the last point. In the end will judicial decisions that depart from the original understanding of the Constitution necessarily produce calamitous results? Well, no one is going to be pleased with all Supreme Court decisions all the time. But that is also true of decisions of the President or Congress. If the Justices have not always been of the highest caliber, that, sadly, is also true of our elected officials. And in the case of the Court, we at least have the comfort that the judiciary governs in a relatively narrow sphere. The Court's freedom to respond to its understanding of our society's basic values may have produced *Lochner*, but Professor Berger's theory would deny us *Brown*.[32]

III

Professor Berger concludes his book with a call to arms: If people can be persuaded to see things his way, the Supreme Court can be forced to change its ways. No doubt the Court could be compelled to yield, for the Court, as I have pointed out, is by no means unresponsive to democratic pressures. But the change would likely be temporary. The cycle is familiar. In some periods activist courts bend the meaning of constitutional provisions to reflect their perceptions of the basic principles of our society in light of contemporary values and social needs. In other periods courts purport to construe the text strictly in accord with traditional legal techniques. In either case judges adopt the model of constitutional interpretation that they feel better suits the needs of their times.

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[32] I suspect that to most lawyers of my generation, *Brown* is a touchstone for constitutional theory fully as powerful as *Lochner* was for a previous generation. If the strictures on the holding of *Brown* of as great a scholar as Herbert Wechsler sound dated and academic to us today (*see* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33-34 (1959)), Professor Berger's contention tbat the Court should have held that "equal" in the fourteenth amendment did not really mean "equal" because the purportedly racist views of its framers are "as good as written into the text" (p. 368) can only be characterized as preposterous.

The problem is not, in the end, one of legitimacy, but of policy. If, by rejecting the principle that the only legitimate source of the meaning of a constitutional text is the narrow intention of its authors, the Supreme Court exercises greater power than the framers anticipated, it does so not by coup d'état, but by the organic development of institutions and traditions of law in a democracy. One can argue, as a matter of political philosophy, that this development has been undesirable. One can seek to change its direction. Or one can stick to the humbler but still demanding task of the lawyer and seek to understand the norms of the complex constitutional system we have evolved. Professor Berger does neither. He pretends that our constitutional order is not what it is, but something much simpler that does not allow those practices he disapproves. For this reason most students of the Constitution will find *Government by Judiciary* sadly beside the point.

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