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Federalism: The Founders' Design

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BOOK REVIEW

FEDERALISM: THE FOUNDERS' DESIGN. Written by Raoul Berger, University of Oklahoma Press, 1987. Pp. 223, $16.95 (hardback).

REVIEWED BY JEREMY M. MILLER

This is not just one more condemnatory book review of the eminent Raoul Berger's latest book. Liberals have supplied enough of those.[1] Instead, the following review is by one of ostensibly the same political leaning, a conservative. Moreover, whatever one's philosophy, he must be impressed by Berger's historical research and lucidity of style.

Professor Berger is, if not the founder, then still the leading force behind the jurisprudential philosophy known as "strict constructionism" or "original intention." Strict constructionism commands judges to strictly or literally interpret/construe the written law. Original intent binds judges to the supreme law, the Constitution. In interpreting it, they should rely not upon personal feelings, concepts of fairness, sociology, etc. but rather upon only the original intention of the framers of that great document.

Berger traces the historical roots of original intention to the recesses of English legal history.[2] The search for original intent, he writes, is the *only* acceptable function of judges. Otherwise, they have "uncurbed power,"[3] *i.e.*, they have "usurped"[4] another's role.

Chapter Eight examines just such a usurpation by the Supreme Court of the United States. Mr. Berger argues that municipal mass transit is in no way interstate commerce,[5] and it should therefore not be subjected to the "federal minimum wages and hours stand-

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[1] *See, e.g.*, Tushnet, Book Review, 73 A.B.A. J. 93 (1987).

[2] R. BERGER, FEDERALISM: THE FOUNDERS' DESIGN 194 (1987).

[3] *Id.* at 186.

[4] *Id.*

[5] *See* U.S. CONST. art. I, § 8: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."

ards."[6] The Supreme Court, concludes Berger, took the wrong course.[7]

The plethora of that Court's usurpations have denigrated the Constitution to mean "only what a changing body of Justices chooses at any given moment to have it mean," and hence "a flimsy bulwark of our liberties."[8] The only way to preserve our freedoms is by correct and responsible adjudication on the part of all judges, particularly those on the Supreme Court. Berger concludes, "the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument."[9]

In essence, strict constructionism and original intention are but the latest expression of Austinian jurisprudence, or positivism. John Austin defined law as (only) the command of a sovereign enforced by sanction.[10] That command, for our present purposes, is the Constitution.

Austin's positivism took analytic jurisprudential form in the philosophy of Goodhart. Goodhart postulated that case law could be made applicable to future cases by a simple process of paring the case down to its essence, its ratio decidendi or *precedent*.[11]

However, both Austin's historical positivism and Goodhart's analytic positivism have glaring flaws. Austin's positivism lacks expression of the notion that, when push comes to shove, the people may have more power than the sovereign.[12] Further, people choose to obey law even without actual sanction. Kelsen believed such obedience results from the "threat" of sanction rather than the actual sanction itself.[13]

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[6] Berger, *supra* note 2, at 164.

[7] *Id.* at 120; *see also* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

[8] Berger, *supra* note 2, at 188.

[9] *Id.* at 201.

[10] *See generally* J. AUSTIN, *Lectures on Jurisprudence* (5th ed. 1885).

[11] *See generally* Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L.J. 161 (1930).

[12] Thus reasoned H.L.A. Hart when formulating his "rule of recognition." *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961).

[13] *See generally* H. KELSEN, GENERAL THEORY OF LAW AND STATE (1945).

The Framers, whom Raoul Berger proffers to parrot, also rejected this view of law. Instead, they thought that law must be value-based. Foremost of these values is liberty. Thus, they formulated a limited government designed to protect the liberty value of the citizenry. The Framers perceived unbridled government as a threat to individual liberty. The religious, intellectual, and economic persecutions of their forefathers provided the Framers' motivating force. Therefore, our government was trifurcated, the presidency and all offices were limited, and a Bill of Rights was soon incorporated.[14]

The error in Austinian philosophy has been illustrated repeatedly: in Nazi Germany, in Cambodia, in Stalin's Russia, and in our own internment of Japanese-Americans during World War II. Authority must be limited by liberty and equity. The Framers, recognizing such necessity, limited governmental authority. Amendment I protects liberty, amendment IV protects the dignity of the home, and amendment V and VI protect citizens' equality before the law. Each clause, as well as the entire structure of the Constitution, protects these human values.

The Framers called their philosophy "natural law."[15] Natural law has been a long-lived legal philosophy whose proponents have included: Jefferson,[16] Madison,[17] Montesquieu,[18] Locke,[19] Rousseau,[20] Thomas Aquinas,[21] and Aristotle.[22] Can an intangible concept such as a philosophy or a *value* be subject to strict construction? Certainly our government cannot destroy liberty. That is an original intent. But were all the permutations, combinations, and compromises in liberty laid out by the founders? Of course not.

Liberty unbridled begets anarchy. Liberty almost unbridled destroys another great legal value, equality.[23] Balancing liberty against

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[14] Rusin, *To Form a More Perfect Union*, 89 HARV. MAG. 30, 38-39 (May-June 1987).
[15] *See generally* T. JEFFERSON, THE PORTABLE THOMAS JEFFERSON (1975).
[16] *Id.* at 21, 251-53, 292, 320, 425, 564-65.
[17] *See generally* THE FEDERALIST No. 43, at 279 (J. Madison) (C. Rossiter ed. 1961).
[18] *See generally* B. MONTESQUIEU, THE SPIRIT OF LAWS (1878).
[19] *See generally* J. LOCKE, ON CIVIL GOVERNMENT, TWO TREATISES (1965).
[20] *See generally* J. ROUSSEAU, THE SOCIAL CONTRACT (1978).
[21] *See generally* T. AQUINAS, SUMMA THEOLOGICA (1960).
[22] *See generally* ARISTOTLE, THE POLITICS (1975).
[23] *See generally*, I A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 279 (1945).

equality and authority is no simple task. Fundamentally, it requires deep feelings of fairness and careful attention to the twin needs of neither destroying the individual's autonomy nor destroying that which preserves individual autonomy, the government's authority.

I, too, am a strict constructionist. I, too, believe in original intent. But such is not a set of written rules to be discovered in the private libraries of the Framers, nor in the archaic yellowed script of a document the average American can read only with great difficulty. Rather that original intent is a balancing process involving different values, never forgetting the greatest of all legal values, liberty.

An analogy may help to illustrate the terrible fallacy of Berger's view. The ancient medical practices of the Greeks included many things we now know to be damaging. The great medical oath, that of Hippocrates, at that time commanded that doctors follow the best practices in Greek medicine. Were we to strictly construe that oath, modern doctors would be required to do bloodletting and ignore penicillin.

Berger's strict construction is superficial. Hippocrates' intent was to heal. That intent is and will continue to be fundamental to medicine. Additionally, doctors are to serve their patients and honor (not abuse) their trust. Hippocrates' oath has been remembered because of its universality. Hippocrates, were he alive, would be aghast to have his teachings taken literally. Such was not his original intention. Similarly, the United States Constitution has survived because of its universality in expressing not the idiosyncracies of Eighteenth Century America, but instead in its expressing perennial legal *values*.

Although at times Berger's language might have us hope he is more than a literalist, the pessimistic conclusion seems more appropriate. He does talk of liberty,[24] but he is far more pre-occupied with states' rights.[25] Berger rightly argues that our system was to be

[24] *See generally* Berger, *supra* note 2, at 56.

[25] *Id.* at 20, 24, 32.

one of dual sovereignty,[26] *i.e.*, one in which the states have sovereignty over some things and the national government over others, but he misses the mark by going no deeper. The purpose of states' rights was to protect the individual by limiting central power.

In an era in which most states and many corporations are more powerful then the original United States, how can Berger argue that limitations must not be placed on the states or businesses themselves? Further, did not the Fourteenth and other Civil War amendments change the game entirely, as they are *expressly* applicable to the states?[27] The due process requirement was, even then, a catch-all. The evolution of selective incorporation (of the Bill of Rights to the states) is neither radical . . . nor new.[28] Berger seems somehow to disagree.[29]

It seems the hope of the erudite Berger is that the high court stop its usurpation and that all future changes be thrown open to the populace.[30] He writes, "if the Constitution stands in need of revision, let the people amend it in accordance with Article V."[31] Although I will not disagree with that sentiment, Berger's notion of original intent trivializes a Constitution designed to protect liberty into an Eighteenth-Century strait-jacket.

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[26] *Id.* at 48, 54.

[27] In pertinent part, the Fourteenth Amendment reads:

> . . . No *State* shall make or enforce any law which shall abridge the privileges and 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 . . . [emphasis added]

[28] *See, e.g.*, Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897) (defining the Fourteenth Amendment's due process clause as including the Fifth Amendment's just compensation clause); Gitlow v. New York, 268 U.S. 652 (1925) (incorporating the First Amendment free speech clause into Fourteenth Amendment due process); Benton v. Maryland, 395 U.S. 784 (1969) (incorporating Fifth Amendment double jeopardy). The above gives a sampling of the so-called "selective incorporation" cases. The fact that such process began in the late 1800's clearly refutes Berger's implicit argument that judicial usurpation is a new creature. More fundamentally, it lends credence to the notion that he has missed the point altogether. That is, the Fourteenth Amendment unarguably diminished states' rights at least in the area of individual liberties. When Berger calls for a formal constitutional amendment process, *infra* note 31, he has likely missed the mark badly as that has already occurred over a century ago!

[29] Berger, *supra* note 2, at 158-63.

[30] *Id.* at 179-81.

[31] *Id.* at 189.