BOOK REVIEW

GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT. By Raoul Berger. Cambridge, Mass.: Harvard University Press, 1977. Pp. xxii, 483. $15.00.

*Reviewed by Randall Bridwell**

The limitation of judicial discretion has been one of the most controversial and perennial problems in the legal history of the United States. The problem is most often described in terms of a necessary accommodation of the need for certainty in the law and the need for justice. As Gordon Wood described the problem faced by post-revolutionary Americans: "The problem was: Could this emphasis on reason and equity in their law be maintained without judicial discretion."[1] The perceived need for judicial attention to unjust and obsolete rules has prompted arguments for, or at least acquiescence to, judicial discretion in "manipulating" apparently hard and fast statutory or constitutional rules. On the other hand, judicial "interpretation" has often been characterized as an impermissible perversion of expressly declared and properly approved law[2]—an intrusion into the legislative

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THE FOLLOWING CITATION WILL BE USED IN THIS BOOK REVIEW:

R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT [hereinafter cited as GOVERNMENT BY JUDICIARY].

1. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 299 (1969). *See also* W. MENDELSOHN, THE SUPREME COURT: LAW AND DISCRETION (1967).

2. For purposes of discussion here, a "pure" separation of powers case wherein the judiciary impermissibly distorts or ignores a properly enacted statute, and a case where the judiciary impermissibly implements a policy not authorized by the Constitution, will not be distinguished. Both cases involve similar though not identical considerations and thus raise similar questions about the scope of judicial authority. The judiciary is presumably no more nor less able to "initiate policy" in the face of a contrary statute than in the face of a contrary constitutional provision, although its authority to *implement* statutory policy may differ from the implementation (rather than contradiction) of constitutional principles. *Compare* Shapiro, *Of Institutions and Decisions*, 22 STAN. L. REV. 657 (1970) *with* 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 314-15 (4th ed. 1873) (arguing for an expansive reading of the constitutional text but only within the "plain import" of the language).

An important distinction should be made between things "unforeseen" by the Constitution's framers, and thus not expressly excluded by any constitutional provision, and things which are expressly excluded. The former is clearly more fortunately circumstanced than the latter

function.

Related to the pure separation of powers question is another principle often closely identified with our constitutional system: the primacy of consent as a prerequisite to the validity of governing rules.[3] Raoul Berger's new book, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, is a well researched and provoking attempt to deal with both of these important constitutional themes.

Perhaps the most striking thing about Berger's book is that he describes the United States Supreme Court's interpretation of the fourteenth amendment, especially in the areas of voting rights and desegregation, as an example of clearly impermissible and unconstitu-

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regarding arguable support for judicial interpretation designed to keep the Constitution "up to date." It is one thing to support judicial exegesis implicitly authorized by the Constitution as a necessary process of keeping the Constitution modern, but quite another to use the same rationale to justify something prohibited by the framers. *Compare* the examples in P. BREST, THE PROCESSES OF CONSTITUTIONAL DECISIONMAKING 157-58 (1975), *with* Berger's treatment of reapportionment and desegregation in GOVERNMENT BY JUDICIARY 52-98. *See also* Pfizer, Inc. v. Government of India, 98 S.Ct. 584 (1978), concerning the effect of congressional silence on a critical issue of statutory construction arising under section 4 of the Clayton Act, 15 U.S.C. § 15 (1970). The issue was whether foreign sovereigns were "persons" who were entitled to treble damages remedies for violations of the antitrust laws of the United States. The Court held, over three dissents, that they are, despite the fact that "in Congress the question was never considered at the time the Sherman and Clayton Acts were enacted." *Id.* at 587. The dissenters, Burger, Powell and Rehnquist, felt that congressional silence should not be construed as affirmative intent and that the matter should be left to Congress. The majority position is consistent with previous decisions broadly construing the remedial scope of congressional legislation. *See* Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448 (1957). *See also id.* at 464-65 (Frankfurter, J., dissenting). Such cases find their parallel in broad construction of the language of the Constitution on matters not specifically addressed or excluded by the framers, but must be distinguished from cases where the result is in fact incompatible with the framers' intention on a specific issue. Berger's book concerns the latter type of case.

3. The emphasis on consent in the literature of constitutional law and legal history varies in different contexts. Some writers focus upon the question of whether or not the great mass of judicial activity in the country has had the sanction of popular approval. James Willard Hurst in his recent book, LAW AND SOCIAL ORDER IN THE UNITED STATES (1977), reiterates the view that American law, including judicial action, has functioned within a broad popular consensus. *Id.* 65. Alexander Bickel has focused more on the desirability of the consensus than its existence as an historical fact. A. BICKEL, THE MORALITY OF CONSENT 16 (1975). On the contrary, Morton J. Horwitz has characterized our judicial tradition as a process of partisan policy-making in support of narrow "entrepreneurial" interests and as lacking the support of any real popular consensus. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 211 (1977).

The theory of consent that underlies Berger's approach has overtones of the notion of a "social contract." Berger presupposes that when the social contract was entered into, that is, when the Constitution was ratified, people relied on the intent of the framers to delineate the scope of their contractual rights and duties. Fundamentally this theory reveals more concern for an axiom of "good" constitutional law than for the historical fact of popular approval of judicial action. For Berger, "[t]he real issue, therefore, was not whether the Constitution must be 'congealed,' but rather who was to make the change—the people or the Justices." GOVERNMENT BY JUDICIARY 132. Berger does, however, regard the faithfulness to intentions as a requirement of constitutional interpretation which was implicitly included in the Constitution by its framers.

tional judicial action. For Berger, the Court's decisions in these areas unquestionably go far beyond the limits of judicial exegesis, construction or interpretation, and thus amount to a judicial overthrow of the "manifest constitution."[4] Critical to Berger's case is his reliance on the "original intention" of the framers of the fourteenth amendment: "On traditional canons of interpretation, the intention of the framers being unmistakably expressed, that intention is as good as written into the text."[5] For Berger, the intention of the framers concerning the scope of the fourteenth amendment is unmistakably clear and "must be permitted to speak for itself, unfiltered by a commentator's paraphrase."[6]

Roughly the first half of the book (Part 1) is an impressive mustering of evidence designed to illustrate the overwhelming consensus of the Thirty-Ninth Congress, the framers of the fourteenth amendment, on several critical issues which (if accepted as true) draws into question the legitimacy of some of this century's most important Supreme Court decisions[7] and perhaps even the good faith of several of the justices who decided them.[8] The core of Berger's argument is that a careful reading of the records of the Thirty-Ninth Congress reveals a link between the statutory and constitutional efforts on behalf of the freedmen,[9] and the privileges and immunities clause of the United States Constitution.[10] As interpreted by the seminal case of *Corfield v. Coryell*,[11] the privileges and immunities clause of article IV protects nonresidents of a state from discrimination under the state's statutory law with respect to certain "fundamental" rights.[12] Berger describes

4. Bickel makes the distinction between proper judicial interpretation, which is compatible with constitutional grants of authority, in providing "middle distance principles" between the letter of the Constitution and day to day life, A. BICKEL, *supra* note 3, at 25, and the "manifest constitution," which must not be ignored. *Id.* 30.

5. GOVERNMENT BY JUDICIARY 7. *See also id.* 45, 136-37, 363 n.3.

6. *Id.* 65.

7. Berger concentrates particularly upon the school desegregation decision, Brown v. Board of Education, 347 U.S. 483 (1954), and its progeny, and the principal cases dealing with reapportionment, Baker v. Carr, 369 U.S. 186 (1962), Reynolds v. Sims, 377 U.S. 533 (1964), and Oregon v. Mitchell, 400 U.S. 112 (1970). These cases appear to represent the most extreme distortions of the fourteenth amendment since they resulted in decisions that would have been deemed clearly impermissible by the framers. *See* GOVERNMENT BY JUDICIARY 52-98.

8. Berger accuses several of the justices of selectively following the known intent of the framers of the fourteenth amendment. Justice Frankfurter is singled out as being unusually inconsistent in that he followed the framers' design to exclude suffrage by dissenting in Baker v. Carr, 369 U.S. 186 (1962), the leading reapportionment case, and yet supported the *Brown* case dealing with desegregation. GOVERNMENT BY JUDICIARY 80, 81 n.38.

9. The principal statute is the Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866).

10. U.S. CONST. art. IV, § 2.

11. 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823).

12. *Id.* at 551-52.

these fundamental rights as consisting of no more than the hallowed trinity of life, liberty and property, or as he puts it: "(1) personal security; (2) freedom of locomotion; and (3) ownership and disposition of property."[13] Berger then goes on to explore the legislative history of the Civil Rights Act of 1866,[14] and, noting the frequent references in the legislative debates to *Corfield* and to article IV, section 2 itself,[15] he concludes that the 1866 Act was intended to outlaw discrimination as to the "fundamental" rights. He concludes that the objective of the fourteenth amendment was simply to "constitutionalize"[16] the Civil Rights Act of 1866 and not to establish any new substantive rights.[17] The privileges and immunities clause of the fourteenth amendment, he argues, was intended to protect the newly emancipated slaves and newly created state citizens from discrimination as to this same trinity of rights and thus to provide the resident citizen with the same guarantees which article IV had given to the immigrant citizen.[18]

In hammering out the fourteenth amendment, a coalition of moderate Republicans, the overwhelming majority in Congress, eschewed radical plans which might prompt a Democratic resurgence and backlash from northern conservatives and moderates thereby endangering Republican congressional leadership.[19] Dismissing the errant remarks of intransigent Democrats, whose opposition remarks are not to be taken seriously,[20] Berger argues that the broad and numerically overwhelming consensus among the framers of the fourteenth amendment was to accomplish only these limited objectives.

Significantly, the debates of the framers and their voting patterns on each clause of the amendment demonstrate an unequivocal exclu-

13. GOVERNMENT BY JUDICIARY 21. Berger links the narrow conception of "fundamental rights" embodied in article IV, § 2, the 1866 Civil Rights Act and section 1 of the fourteenth amendment, to the core of personal rights sanctioned by English law and enumerated by Blackstone, in 1 W. BLACKSTONE, COMMENTARIES 129-38.

14. Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866).

15. GOVERNMENT BY JUDICIARY 29-33.

16. *Id.* 23.

17. *Id.* 42 n.21. Justice Miller's majority opinion emasculated the effective protection potentially available under the privileges and immunities clause by emphasizing the amendment's limitation to "citizens of the United States," whose privileges and immunities differed from those afforded "citizens in the several States" who were protected by article IV. Berger rejects this distinction and adopts the construction of Justice Field, *id.* 43. See the discussion of Justice Bradley's opinion that the fourteenth amendment created new substantive rights, *id.* 49-50.

18. *Id.* 37-42. Berger further underscores that the term "person" employed in the equal protection clause signified no greater nor different substantive coverage than that accorded a citizen under the privileges and immunities clause of section 1 of the fourteenth amendment. *Id.* 215-20.

19. *Id.* 10-19, 93.

20. *Id.* 157 n.2.

sion of both suffrage[21] and segregation[22] from its coverage. With respect to this limited coverage and these exclusions, the privileges and immunities clause, the equal protection clause and the due process clause of the fourteenth amendment were identically situated. One revealed the scope and nature of the rights protected, the next established an equality of enjoyment as to these particular rights, and the latter guaranteed the judicial protection of these rights on an equal basis for all residents. Therefore these clauses offer no justification for the creation of additional substantive rights, nor for transposing the Bill of Rights into limitations on state authority. Thus, the opinions of the United States Supreme Court announced by Justice Brennan in *Baker v. Carr*,[23] by Justice Black in *Oregon v. Mitchell*,[24] and by Chief Justice Warren in *Reynolds v. Sims*,[25] carrying the Supreme Court into the area of state legislative reapportionment, were revolutionary and unauthorized by the Constitution. Likewise, Chief Justice Warren's opinion in *Brown v. Board of Education*[26] was constitutionally unsound.

According to Berger, this transformation came about due to the probably disingenuous pretense indulged in by the Court that the scope and content of the fourteenth amendment on these issues was "ambiguous,"[27] and because of the rise of a school of apologists for these decisions who sought to justify what the Court had done, often without regard to the intent of the framers. Beginning with an hypothesis first "cautiously advanced" by Alexander Bickel,[28] a theory of interpretation developed that the language of the fourteenth amendment was "open-ended,"[29] and thus provided a legitimate vehicle for change by the Court in later times (apparently without regard to its agreed upon

21. *Id.* 52, 75, 76, 77, 93.

22. *Id.* 119 nn.10, 12.

23. 369 U.S. 186 (1962).

24. 400 U.S. 112 (1970).

25. 377 U.S. 533 (1964).

26. 347 U.S. 483 (1954).

27. GOVERNMENT BY JUDICIARY 243-45. Some Justices, such as Justice Frankfurter, probably made decisions they knew to be wrong simply because of their personal prejudices, *see id.* 129, 264. This was so despite the fact that Frankfurter was a "sworn foe of subjective judgment," *id.* 129. Others, such as Justice Brennan, simply preferred using "ambiguous" statements by the framers, *id.* 98, and preferred "speculation," *id.* 92, over fact, *id.* 90-98. In any case, the Supreme Court, not the framers, has in Berger's view made the fourteenth amendment ambiguous. *Id.* 167-68, 258.

28. *Id.* 99. Bickel apparently advanced a rationale explaining the Warren Court treatment of the fourteenth amendment, despite the fact that he was fully aware that the framers had excluded the results achieved in the reapportionment and desegregation cases. *Id.* 100-01. Berger interprets Bickel's theory as indicating an intentional use of language which, though excluding certain results in 1868, might take on a new interpretation at a later time since the language chosen was so "elastic." *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 63 (1962).

29. GOVERNMENT BY JUDICIARY 99. "Bickel's theory, to speak plainly, is that the compro-

application in 1868). Later, other scholars such as William Van Alstyne[30] adopted this rationale, and scholars and justices[31] alike began to embellish upon the linguistic potential of the amendment. The "meaning" of the amendment thus became detached from the originally understood application to the facts of 1868.

Within the narrow limits of the reapportionment and desegregation cases, the simple beauty of Berger's case is quite compelling. However, one is troubled by his failure to develop fully a basic theory of constitutional interpretation which would support his general charges of judicial usurpation. Berger's approach to constitutional interpretation is founded upon the existence of some clear indication of

misers concealed the future objectives that they dared not avow lest the whole enterprise be imperiled. . . ." *Id.* 105.

30. *Id.* 112-13.

31. Beginning with Bickel's "elastic" or open-ended language theory, a variety of similar interpretations found favor with the Court and commentators. Despite Mr. Justice Harlan's statement of the scope of the fourteenth amendment in his dissent in Reynolds v. Sims, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting), which Berger describes as "irrefutable," the majority of the Court apparently chose to ignore the express exclusion of suffrage from the amendment. William Van Alstyne subsequently wrote a "rebuttal" to Justice Harlan that attempted in part to avoid the Court's dilemma by rationalizing the exclusion of "suffrage" as pertaining solely to the "exclusive state power over suffrage qualifications" and having no bearing on "the separate issue of malapportionment." Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 78-79 (1965). Berger justly counters this as illogical, since the right to deny a vote certainly must include the right to dilute it. GOVERNMENT BY JUDICIARY 76-77. Additionally Van Alstyne attempted to endorse the "open-ended" language theory as another justification for the Court's actions in the reapportionment cases, *id.* 112-13, and relying on a modern understanding of the language of the fourteenth amendment argued "[s]urely the right to vote is one essential protection that white men enjoyed, and surely equal protection would require that black men enjoy it to the same extent." Van Alstyne, *supra* at 56. *See* GOVERNMENT BY JUDICIARY 172 n.30. The approach became popular and was accepted by Justice Brennan writing for the majority of the Court in Oregon v. Mitchell, 400 U.S. 112 (1970), another reapportionment case. Other scholars, some involved officially in advocating such decisions, climbed aboard. Alfred Kelley, for example, developed the slightly different rationale that the radicals in the Thirty-Ninth Congress had the concealed purpose of including purposefully ambiguous language in the amendment which would include suffrage and segregation within the amendment's scope without making the result well known. *See* GOVERNMENT BY JUDICIARY 110-12, 121. All of the rationalizing is described by Berger as "a speculative fabric that collapses under the fact, made so clear by the framers, that they did not mean to confer Negro suffrage, present or *prospective*." *Id.* 115 (emphasis in original). Few others escape Berger's barbs. Jacobus ten Broeck's analysis of the equal protection clause is criticized as a syllogistic and a priori over-simplification without historical support, *id.* 177, 178 n.49. Fred Rodell is assailed for his "uncritical subjectivity," *id.* 287 n.16, and Charles Black is taken to task for sacrificing the standards of a scholar for the sake of a desired result, *id.* 349. There are numerous others who fare no better in Berger's opinion. Taken all together, they amount to a powerful school of apologists whose "muddied analysis" has been a reflection of a result-oriented approach to scholarship, an approach that is "not true to the historical facts.". *Id.* 36. *See* C. BLACK, THE PEOPLE AND THE COURT (1960); J. TEN BROECK, EQUAL UNDER LAW (1965); THE SUPREME COURT UNDER EARL WARREN (L. Levy ed. 1972); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965); Van Alstyne, *supra*.

the framers' intent as *the* measure of judicial authority. Certainly Berger convincingly argues that the fourteenth amendment was crystal clear with regard to suffrage and segregation in public schools. There may be disagreement about the techniques Berger uses in attributing this intent to those in the Thirty-Ninth Congress, but the strong suit of the book rests on this particular point.[32] But does this demonstration

32. Care must be taken to distinguish between general comments made during the discussion of a proposed amendment, followed by a vote to approve it, and attempts to include particular objectives within an amendment by express provision which were disapproved. For example, the situation where general comments were made in committee or on the floor about the understood exclusion of suffrage and segregation from the fourteenth amendment is different from an attempt to provide for these matters by adding explicit language to the amendment. It is more difficult to attribute the "meaning" conveyed by the general remarks to the finally approved amendment, and thus to conclude that suffrage and segregation were intentionally excluded from its scope, than to so conclude after the rejection of explicit language to that effect. It is thus arguable that the clarity of intent as to particular subjects varies with the type of legislative history relied upon. Although Berger's evidence of intent consists mainly of the general remark variety, *see, e.g.*, GOVERNMENT BY JUDICIARY 56, 59, 60-63, 65-67, 94, other types of evidence are also included. For example, Berger cites the failure of attempts to prohibit racial discrimination in voting rights. *Id.* 52, 92. Among these attempts were proposals to condition the readmission of the seceded states upon granting Negro suffrage, including one notable proposal by Senator Sumner shortly after the passage of the fourteenth amendment by the House which was aimed at the readmission of Tennessee. It was voted down by a vote of 34 to 4. *Id.* 59-60. Another was Boutwell's attempt to use the guarantee clause to condition Tennessee's readmission on the same terms *after* the fourteenth amendment was adopted by Congress. This was voted down in the House by a vote of 125 to 12. *Id.* 82, 93-95. Significantly these proposals were countered by John Bingham, a principal draftsman of the fourteenth amendment, on the express grounds that suffrage was a state matter. *Id.* Moreover, the Joint Committee on Reconstruction also rejected attempts to include language aimed at discrimination in voting. *Id.* 84 n.49.

Based on reasoning which has been favored by constitutional scholars for generations, it could be argued that the general comments cannot be rigidly affixed to the language which was finally adopted. For example, Joseph Story commented upon the variable intent of the drafters and the ratifying states, and briefly summarized what more recent scholars have labored to express: "Nothing but the text itself was adopted by the people." J. STORY, *supra* note 2, at 300. Moreover it could be argued that the rejection of express provisions for suffrage took place in legislative efforts collateral to the adoption of the fourteenth amendment, and in the work of the committee charged with formulating the language of the fourteenth amendment, as opposed to the whole House. Further, it could be argued that even if the whole Congress had voted to exclude language relating to suffrage from the amendment, its understanding did not carry over into the state ratification process, and in all cases exclusion could have been to eliminate redundancy, since the framers understood the general language to have the same import as that excluded.

However, even if the question of attribution of intent from general statement is in issue, the negative statements on suffrage and segregation were made so often, by so many, and most often by congressional leaders charged with explaining the amendment, GOVERNMENT BY JUDICIARY 67-68, and actions were taken so often that served to reveal a collective understanding of Congress that voting requirements were untouched by the fourteenth amendment, that a fair reading of the congressional understanding *on these two points alone* suggests that Berger is correct. Certainly the evidence often relied upon by the Court, *e.g.*, the construction of the statements of Boutwell and Bingham by Justice Brennan in Oregon v. Mitchell, 400 U.S. 112, 259-78 (1970), does not supply positive evidence that suffrage *was* included, or that the speakers chosen were themselves (regardless of general congressional intent) as "ambiguous" on the matter as Brennan claimed. GOVERNMENT BY JUDICIARY 96.

give us a better understanding of constitutional interpretation generally? Is the Constitution equally clear on everything else? Both scholars and judges have, for example, alluded to varying degrees of discretionary judicial authority inherent in different constitutional provisions.[33] Alexander Bickel referred to certain "middle distance principles" between the letter of the Constitution and day to day life,[34] as well as a "manifest constitution,"[35] which a court could not disobey or ignore. The implication is that the Constitution speaks with varying degrees of clarity, and relatedly that certain provisions were in fact intended to have an "open-ended" quality. Certain types of commerce which did not affect more than one state in 1789 might subsequently do so. Does this mean that the framers "intended" to freeze congressional regulatory power at the level of eighteenth century technology and commerce?[36]

Surely a distinction must be drawn between things that may be implicit in a particular constitutional provision—such as an evolving congressional regulatory power which includes authority over matters which, though absent in 1789, affect interstate commerce today—and things expressly excluded from a constitutional provision. Even the ordinary canons of statutory construction would distinguish between the *connotations* or meaning of a statute, and *denotations*, that is, instances of its application. Changes can occur in the latter without af-

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This suggests that the contribution of Berger's book is to make a damning case against a small number of particular decisions, rather than to demonstrate the utility of discoverable "intention of the framers" or to analyze the various methods by which that intent may be revealed and used in constitutional interpretation.

33. A good example of the Constitution's variable clarity is Justice Frankfurter's famous distinction between "technical," "explicit" or "specific" provisions and those containing "great concepts" which were "purposely left to gather meaning from experience." See the opinion of Mr. Justice Frankfurter, joined by Mr. Justice Reed, in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949).

34. A. BICKEL, *supra* note 3, at 25.

35. *Id.* 30.

36. In failing to distinguish between principles contained in the Constitution and examples of contemporary understanding as to the application of those principles as evidence of intention of the framers, Berger misses the opportunity to explore the limits of intent as a guide to judicial action. Even clear-cut proof of the framers' understanding of the correct application of a constitutional provision to contemporary facts does not exclude the application of the principle to other, different fact situations. Outside the narrow case of express exclusion attributable to the ratifiers of a provision, we are still adrift.

It is true that Berger attempts to distinguish his case concerning the fourteenth amendment from "interpretation of amorphous constitutional provisions such as 'commerce,' which . . . have no historical content." GOVERNMENT BY JUDICIARY 284 (footnote omitted). He is, however, only able to do this by assuming arguendo that "commerce" in fact had less meaning to the framers than "due process." Others have disagreed and Berger takes no account of them. *See* 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 50-114 (1953).

fecting the former. New instances may be brought within the original meaning of a statute with no offense to the drafters' intent. But to permit judicial enforcement of principles clearly excluded from the original *meaning* would transcend the judicial acknowledgment of supplementary specificity[37] necessary to make the statute useful and would amount to a judicial challenge to the legislative branch. In overgeneralizing the principles of interpretation he employs to attack the Warren Court's desegregation and reapportionment decisions, Berger invites a demonstration of their limited utility and a resultant weakening of his case. To urge simultaneously the force of the framers' intention as a general guide to constitutional decisionmaking and to attack particular Court decisions may cause the validity of the latter to be fought out in the debate about the former. Many will be satisfied that bringing forth the limitations of express intention has vindicated the particular cases which Berger seeks to discredit. Thus, a more complex and sophisticated treatment of the variety of problems inherent in constitutional interpretation might have lent more perspective to Berger's assault on the Warren Court revolution.

Indeed, too much of the debate on this subject moves between the extremes of outright rejection of historical data,[38] even where it is clear, so that the court is seen as a "continuous Constitutional convention,"[39] and the absolute submission to it according to some mechanical formula. Although some scholars have noted the incoherence of the

37. F. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 125-31 (1975).

> [B]ecause legislation is almost always pointed to the future, intended future results cannot be assured unless the historical event that an enactment immediately becomes is later honored by the courts. This means honoring the legislative past. To do otherwise would substitute the courts for the legislature in the lawmaking process. *Id.* 130.

The distinction between meaning and application appropriately symbolizes the difference between the "manifest" or the "explicit" Constitution alluded to by courts and commentators, or the "middle distance principle," those "left to gather meaning from experience." Moreover, it has not been unusual in our constitutional history to apply various principles of statutory construction or interpretation to the Constitution. For example, Justice Story in his famous Commentaries on the Constitution endorsed this approach in lieu of a search for intent. *See* 1 J. STORY, *supra* note 2, at 294. However, it has been rightly observed that "it was by no means self-evident in 1789 that judges should use the same techniques in the construction of constitutional provisions as in the interpretation of ordinary statutory and decisional sources." H. Jones, *The Common Law in the United States: English Themes and American Variations*, in POLITICAL SEPARATION AND LEGAL CONTINUITY 134 (1976). Doctrinal growth in a common law fashion has produced the evolution of constitutional principle with a flavor distinct from pure statutory construction.

38. *See* J. BECK, THE CONSTITUTION OF THE UNITED STATES (1922); Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950).

39. J. BECK, *supra* note 38, at 195.

> In short, the rules of interpretation have often been shifted to suit the emergency; and the passions and prejudices of the day . . . have not infrequently furnished a mode of argument which would, on the one hand leave the Constitution crippled and inanimate, or, on the other hand, give it all rational boundaries. 1 J. STORY, *supra* note 2, at 295.

debates on judicial authority, they have contented themselves with pointing out the "bad" results which would occur if adherence to the framers' intent was emphasized more than contemporary values.[40] Surely utter indifference to the constitutional text or its history makes the Constitution relatively meaningless, but those who oppose this approach have failed to develop the details of the uses of history very well. Important considerations include the problems of proving the relevant "intent,"[41] such as the significance of changes in the meaning of words or phrases and the principles applicable to "implicit intent," the resolution of the tension between statements of drafters or framers at variance with the contemporary meaning of language employed,[42] the degree of acquiescence presumed by the silence of non-speaking members in a ratifying body or the degree to which the language of an amendment is to be taken in light of random statements supporting its adoption,[43] matters extraneous to the debates,[44] and changes in underlying facts to which the debated concepts apply.[45] Berger's book adds little to the quest for solutions to these delicate problems.

It is perhaps unfair to dull Mr. Berger's accomplishments by pointing out what he did not do. However, there is an even more serious problem with the book. This concerns his reliance upon interpretations of American constitutional and legal history that are actually inconsistent with his basic thesis. For example, Berger asserts that "the

40. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975). The author espouses the view that "[b]road textual provisions are seen as sources of legitimacy for judicial development and explication of basic shared national values." *Id.* 709. However, his justification for discussions reflecting these "shared national values" consists of enumerating the "bad" results that would occur if the literal interpretive model were followed, and he contents himself that he has in this result-oriented fashion made out "at least a prima facie practical case against the model." *Id.* 711-13. Surely such analysis makes no sense at all. If the "values" expounded by the judiciary were "national" and, more importantly, "shared," why would all these horrible things occur if the Court stayed its hand? Perhaps the "unfair" results more clearly represent shared national values than the Court's decision. One may remark that the Constitution commits us to some principle which restrains even majoritarian values. But then Grey's nose count for and against the results of particular cases is actually *inconsistent* with any implicit principle in his argument to the effect that judicial enforcement of these values is legitimate *notwithstanding* majoritarian sentiment. This is, to say the very least, poor constitutional analysis.

41. *Compare* 1 W. CROSSKEY, *supra* note 36, at 363 *with* Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964). See note 31 *supra*.

42. *See* F. DICKERSON, *supra* note 37, at 125-31; P. BREST, *supra* note 2, at 139-45, 157.

43. *See* Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930). "The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small." *Id.*

44. An example is the frequent use of the *Federalist Papers* as a guide to constitutional meaning. GOVERNMENT BY JUDICIARY 85, 316.

45. P. BREST, *supra* note 2, at 157-58. This is naturally related to the change in word "meaning," so long as the distinction between concepts and the application is preserved.

Framers excluded the judiciary from policy-making,"[46] and he devotes a short chapter to proving it.[47] Yet he uncritically accepts a theory popularized by Morton Horwitz that both state and federal judges in the early nineteenth century employed an "instrumental" style of decisionmaking pursuant to which they consciously formulated policy.[48] Berger thus points to Story's opinion in *Swift v. Tyson*[49] as an example of impermissible judicial lawmaking which the Court finally corrected in 1938.[50] Yet Story is also identified as "perhaps the greatest scholar who sat on the Supreme Court,"[51] and as a reliable source of the "interpretive presuppositions that assured the Framers their design would be effectuated."[52] This may suggest a profound distinction between the public and private law areas which would make Story's behavior in *Swift* (a private law commercial case originally brought under the diversity of citizenship jurisdiction) compatible with Berger's image of the scrupulous public constitutional law judge which Story exemplified. But Berger's repeated approval of the final correction of the *Swift* usurpation clearly suggests that Story was acting incorrectly. If this is what Berger means, then we must question his charges that the Warren Court was really acting in a novel or revolutionary manner by "initiating policy." If he means that Story's behavior was correct, then we must question whether initiating policy was something totally alien to the framers' concept of judicial power. Justices Story, Warren and Brennan all seem either equally blameless or equally culpable. The magnitude of the alleged "instrumental" private law activity in the early national period, which Berger accepts, would in any case cause us to question the degree to which a strict, non-policy oriented theory of judicial action prevailed after the framing of the Constitution. Or was it possible for the judiciary to "make policy" under a supposedly highly limited jurisdictional grant—the diversity of citizenship jurisdiction—and yet be unable to do so under other more general constitutional directives—for example, resolving constitutional problems on appeals from the highest courts of the various states? The statutory directive contained in section 34 of the original Judiciary Act,[53] which required that rules of decision be taken from state laws "in cases where

46. GOVERNMENT BY JUDICIARY 300.

47. *Id.* 300-11.

48. M. HORWITZ, *supra* note 3, at 2; GOVERNMENT BY JUDICIARY 308.

49. 42 U.S. (16 Pet.) 1 (1842).

50. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); GOVERNMENT BY JUDICIARY 297 n.56, 410 n.11.

51. GOVERNMENT BY JUDICIARY 365.

52. *Id.* 366.

53. Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73, 92.

they apply," coupled with the diversity jurisdiction would indicate a *narrower* range of policy-making authority in such cases than in those involving general constitutional issues, such as the contract clause or the commerce clause.

Obviously, a "non-instrumental" explanation of the private law activity in the federal courts would strengthen Berger's case for limitations on judicial power, as well as for a stricter view of separation of powers in the early national period. This would also illuminate the variety of interpretive functions which the Court performs beyond the monolithic reaction to discoverable intent suggested by Berger as an exclusive standard for judicial action, and would strengthen his characterization of unrestrained judicial policy-making as historically atypical. Such an explanation can be made, but it requires a more complex explanation for the history of judicial discretion than Berger employed.[54] Berger has thus made out a case against particular decisions of the Warren Court, but he has failed to demonstrate that the process employed by that Court deviated from earlier conceptions of judicial authority.

These problems indicate that Berger has made manifest the chronic problems of constitutional interpretation without assisting much in their resolution. Yet there is much to be said for Berger's effort. Certainly the objective for scholarship which Berger envisions and the sharp distinction between scholarship and advocacy is something with which few would quarrel.[55] Certainly the rationalizing word games and essentially ahistorical methodology of many of the apologists for modern judicial action resemble nothing so much as an interesting and esoteric leg-pull, and really should not be so frequently confused with scholarship.[56] Nor should courts' dualistic invocation of constitutional principles simultaneously with unjustified and unauthorized result-oriented jurisprudence be silently accepted by those who know better.

In this respect, Berger's failure to illuminate the area of constitutional interpretation is certainly no greater than those he criticizes, and his attempt to link judicial action to at least some limiting constitutional principle is more satisfying than the appeal to self-evident principles of "justice" and "equality" or the total result-orientation of some

54. For an explanation of the private law area in the federal courts and the principles of decisionmaking employed by the federal courts in the early nineteenth century, *see* R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM (1977).

55. Professor Tribe is one notable exception. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW iv (1978).

56. See note 41 *supra*.

who simply wish to avoid the whole issue.[57] Thus, Berger calls our attention to the specter of relatively limitless judicial action which has come in large measure to replace "reasoned elaboration" by the Court.[58] He has directed us to a number of critical, if not indispensable, questions which we are bound to face eventually: What are the useful or efficient principles of constitutional interpretation which could take account of varying degrees of clarity or ambiguity in the framers' intent among different constitutional provisions? Are such principles desirable or justified whether or not they were "presupposed" or "intended" by the framers? What is the role of precedent and stare decisis in areas where judicial exegesis proceeds from an ambiguously stated "intent"—that is, what separation of powers implications are there in the fact that the clarity of intent varies from provision to provision in the Constitution? If the members of the judiciary have by accepted standards exceeded their authority, and continue to do so, should they be impeached?[59] If we accept the fact of judicial action, should we also accept some constitutional justification for that fact, such as the recognition of the Supreme Court's role in somehow enforcing popular values which may come to differ from the preference of the framers over the course of time?

The position which endorses the power to ignore clearly expressed intent on a particular issue seems to be harder to justify than all other claims for judicial authority. Those who subscribe to such a view will have a difficult time dealing with the practical objections to it. For example, if we rationalize such a power under the theory that the judiciary is functionally better able to give expression to public morality or society's ideals on a continuous basis than the formal amendment process, we would be forced to abandon all checks on judicial power. Even an unpopular decision could presumably not be checked by a constitutional amendment which would itself be ignored despite its clarity since societal ideals and public values may be declared contrary to it. If such judicial power is justified *because* the amendment process could ultimately check any abuse, the justification itself would seem to be inconsistent with judicial power which is free from the restraints of the intention of the framers to some unspecified extent. Does some lapse of time make the deviation from intent more credible, since it would lend color to the claim that the principle embodied in the Constitution

57. *See, e.g.*, Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583, 595-97 (1973).

58. Gunther, *Too Much a Battle With Straw Men?*, Wall St. J., Nov. 25, 1977, at 4, col. 6.

59. GOVERNMENT BY JUDICIARY 414.

is "outmoded"? But if so, what principle determines how long we must wait for judicial amendment? Additionally, we have the very real possibility that the admission of such an extensive judicial power would in fact permit judicial decisions which were not in any real sense reflective of public values so much so as personal predilections or political considerations.[60]

Mr. Berger has raised anew the possibility that certain forms of judicial action may signal truly normative constitutional changes despite the highly general theories which have been adduced to support. For renewing our interest in this significant question, Mr. Berger should be thanked.

60. 1 J. STORY, *supra* note 2, at 314. Though Story preferred to treat constitutional law as a function of applying interpretive rules to the text, rather than as a search for elusive framers' intention on all subjects, *id.* 294-337, he believed that his method of constitutional interpretation was a limited one and one which did not include judicial acknowledgement of public policy changes. "Arguments drawn from impolicy or unconvenience ought here to be of no weight." *Id.* 315. The fact that "the policy of one age may ill suit the wishes or policy of another" was for Story an argument *against* judicial authority rather than for it. Indeed, the difficulty of the amendment process would also seem to mitigate against any extensive policymaking function since abuses which did not conform to public morality would be hard to rectify. Additionally, if the claim for such a judicial power rests upon the desirability of allowing the court to express some majoritarian conviction or principle, then permitting the imposition of a judicially fashioned rule for which majoritarian support is doubtful for one which commanded such support at the time of its adoption seems questionable, absent some feasible method of insuring that the judicial perceptions are reliable indicators of majoritarian, fundamental values. This is especially true if the Court's actions are valid only where they have de facto majoritarian support, since the Court cannot choose "fundamental values" for the society. R. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971). Compare the opinion of Justice Black disclaiming such a judicial power of revision, discussed in GOVERNMENT BY JUDICIARY 258, with that of Justice Frankfurter, purporting to base at least some interpretative power on the judicial perception of "the consensus of society's opinion," Francis v. Resweber, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring); *see* GOVERNMENT BY JUDICIARY 260-62.

Perhaps those who would make both statutes and the Constitution merely advisory in the face of judicial perceptions of the public good might examine the Constitution of England in the age when this power was enjoyed by the judges. Interestingly, it expresses a pre-modern notion of separation of powers, a medieval conception of judicial authority derived from a feudal society—in short, a monarchical constitution founded on the proprietary rules of feudal law, rather than democracy. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 327-31 (4th ed. 1948); A DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES 3-100 (S. Thorne ed. 1942).