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## Review, Government by Judiciary

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## BOOK REVIEW

*Government by Judiciary*, by Raoul Berger: Harvard University Press, Cambridge, Massachusetts, 1977, 418 pages.

*Reviewed by Richard S. Kay\**

The storm of criticism over *Government by Judiciary* by Raoul Berger has already begun.<sup>1</sup> Well it might, for Berger draws into question virtually the entire case law of the fourteenth amendment. In particular he condemns as usurpations the Supreme Court's decisions declaring racial segregation unconstitutional<sup>2</sup> and those requiring the reapportionment of legislatures under the formula of one person-one vote.<sup>3</sup>

These doctrines have now become almost second nature to a generation of lawyers and scholars. Thus, it is hardly surprising that the casting of a fundamental doubt on such basic assumptions should produce shock, dismay, and sometimes anger.

Berger's argument, briefly stated, is that the fourteenth amendment<sup>4</sup> was intended by those who wrote and ratified it to accomplish rather limited objectives. The amendment was intended by the framers and understood by their contemporaries merely to "constitutionalize" the Civil Rights Act of 1866. The act had in express terms prohibited discrimination by the states on the basis of race with respect to a finite list of legal rights and powers: "[T]o make and enforce contracts, to sue, be parties, and give evidence, to inherit, pur-

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1. See Brest, Book Review, N.Y. Times, Dec. 11, 1977, § 7 (Book Review), at 10; Burleigh, Book Review, 49 PUB. INTEREST 151 (1977).

2. E.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

3. E.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

4. The critical section is the first:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

chase, 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, and [to be] subject to like punishment."<sup>5</sup>

Berger asserts that it was these rights and no others which were protected against state infringement by the fourteenth amendment. It assured *civil* equality—that is, equality in the legal relationships among people. This was in common understanding clearly distinguished from *political* equality in the relations between individuals and the state, which might have guaranteed the right to vote on a nondiscriminatory basis.<sup>6</sup> *Social* equality, which might have barred separate treatment in education and other public facilities, was similarly distinguishable.<sup>7</sup>

The triad of guarantees in section one of the amendment are, Berger contends, all understandable within this framework of limited concerns. The civil rights themselves are secured in the prohibition against abridging "the privileges and immunities of citizens of the United States" (this being a constitutional shorthand for the enumeration in the Civil Rights Act). State legislation discriminating with respect to the exercise of those rights (and those rights only) was prohibited by the Equal Protection Clause, and access to the courts on an impartial basis to vindicate those rights was provided by the Due Process Clause.<sup>8</sup>

To support this interpretation, Berger, in the great bulk of the book, puts forward a detailed examination of the deliberations of the 39th Congress which proposed the fourteenth amendment. The determination of legislative intention is always tricky<sup>9</sup> and in the case of constitutional amendments the difficulty is multiplied by the need to account for the ratification process as well. Nonetheless, one cannot help but be impressed by the volume and weight of Berger's evidence. I am not prepared or inclined to undertake the kind of historical verification necessary to decide whether his interpretation is cor-

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5. Civil Rights Act of 1866, § 1, 14 Stat. 27 (1866) (codified at 42 U.S.C. § 1981 (1970)), reprinted in R. BERGER, GOVERNMENT BY JUDICIARY at 24 (1977).

6. R. BERGER, *supra* note 5, at 24. The distinction between civil and political rights was at least recognized by the turn of the century. See H. BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW § 198 (3d ed. 1910); 11 C.J. *Civil Rights* § 1 (1917).

7. R. BERGER, *supra* note 5, at 27-29. It was this view—that the amendment did not touch the intangible degradation of state-imposed segregation—that underlay the Court's decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896). For a more expansive discussion of the same theme see *People ex rel. King v. Gallagher*, 93 N.Y. 438, 445-53 (1883).

8. R. BERGER, *supra* note 5, at 211-13.

9. See, e.g., Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

rect. While serious questions remain<sup>10</sup> it seems that the burden of proof has at least shifted to those who would impute a more expansive scope to the framers' intentions. The moral and political values advanced by the desegregation and one person-one vote decisions provide for me powerful reasons for hoping that the burden will be carried.<sup>11</sup> We may look forward, no doubt, to a spirited debate.

It seems clear, however, that even were Berger's thesis as to the original understanding accepted, the controversy over the conclusions he draws as to the impropriety of Supreme Court decisions would not be resolved. Lurking beneath the historical argument is a more serious difference over the weight which ought to be accorded the intention of the framers in constitutional adjudication. In the second part of his book Berger argues that judicial adherence to this original understanding is required for a number of reasons, including a contention that such adherence is vital to a government where power is delegated and limited by a constitution.<sup>12</sup> I believe that it is in forcing us to face this issue that Berger has made his most important contribution.

10. I find two matters particularly troubling. First, if the framers merely intended to put in constitutional form the specific rights secured in the Civil Rights Act of 1866, why did they cast aside the technique of enumeration for the grand and unspecific language of the amendment? Berger presents little direct testimony from the framers on this point and his explanation that there was an inclination to avoid detail and prolixity in a constitution is not entirely convincing. R. BERGER, *supra* note 5, at 38-39, 110-14.

Second, even if this were their subjective intention, are legislators able to limit broad language to intended narrow applications? Berger is certain, and cites authority for the proposition, that legislative intention controls even entirely inapposite expression. *Id.* at 7-8 & n.24. While this is, no doubt, a widely accepted idea, another traditional strain in interpretation requires the Court to look primarily to the expressed intent of the law-makers, that is, the language of the law itself. This view is summarized in the aphorism of Mr. Justice Holmes: "We do not inquire what the legislature meant; we ask only what the statute means." Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). This view has been adopted frequently by courts in the process of applying statutes. See *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 9-10 (1972); *United States v. Great N.R.R.*, 343 U.S. 562, 575 (1952); *People v. Knowles*, 35 Cal. 2d 175, 180-84, 217 P.2d 1, 4-6 (1950) (Traynor, J.). *But see* *Commissioner v. Acker*, 361 U.S. 87, 95 (1959) (Frankfurter, J., dissenting) ("Our problem is not what do ordinary English words mean but what did Congress mean them to mean.") Such an "objective" interpretation of a constitutional amendment would not, I think, be at odds with the stability and certainty requisite to constitutionalism. See notes 16-20 and accompanying text *infra*.

11. These are values which Berger shares. R. BERGER, *supra* note 5, at 4, 407. While he is certainly convinced of his argument, it is not hard to imagine that he may share the hope that his historical analysis be proven faulty.

12. "Respect for the limits on power are the essence of a democratic society; without it the entire democratic structure is undermined and the way is paved from Weimar to Hitler." *Id.* at 410.

It is not at all an easy question. The proposition that we ought to govern ourselves in the manner thought proper by the majority of a group of prosperous merchants, planters, and lawyers in 1787 or 1868 seems absurd on its face. Indeed, the fashion has grown in our generation of scoffing at the "filiopietistic" notion that we must be restrained by "the dead hand of the past."<sup>13</sup> As mentioned, Berger contests this position. He does so by accumulating a number of references and contentions based on history, political theory, and jurisprudence. I believe the same result can be reached in a more spare and logical argument.

The issue can be illustrated most clearly by a rather far-fetched example. Suppose Congress decides, as has often been suggested, that members of the House of Representatives ought to be elected for a four-year term and passes legislation to that effect. What is the duty of the Supreme Court when presented with a proper case challenging that legislation as inconsistent with Article I, Section 2? Even the defender of the most "modern" approach to constitutional construction would find this an easy case.<sup>14</sup> But would we not in this case be just as much ruled by the framers from their graves?<sup>15</sup> Just what is it about a result which so clearly ignores the constitutional text that we find disturbing? And, assuming that a conflict exists, is there any reason for distinguishing the easily understood passages from the more obscure ones?

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13. The literature to this effect is enormous. Berger cites and contends with much of it. The characterizations quoted in the text are respectively from Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 683 (1960) and JUDICIAL REVIEW AND THE SUPREME COURT 143 (L. Levy ed. 1967), quoted in R. BERGER, *supra* note 5, at 314. For a recent and particularly unabashed exposition of this view see Antieau, *The Jurisprudence of Interests As a Method of Constitutional Adjudication*, 27 CASE W. RES. L. REV. 823 (1977). One of the most thoughtful recent presentations is Grey, *Do We Have An Unwritten Constitution?* 27 STAN. L. REV. 703 (1975).

14. See Miller & Howell, *supra* note 13, at 683.

15. JUDICIAL REVIEW, *supra* note 13, at 143, quoted in R. BERGER, *supra* note 5, at 314. One explanation put forward by the late Professor Bickel distinguished between the broad clauses limiting government in regard to regulation of individual conduct—the "open texture" constitution—and the "mechanics of institutional arrangements and of the political process, of power allocation and the division of powers, and the historically defined hard core of procedural provisions found chiefly in the Bill of Rights" which comprise the "manifest constitution." With the latter there is an "absolute duty to obey" whereas under the former the Court is to explicate (albeit in a disciplined and rational process) principles nowhere written down. A. BICKEL, *THE MORALITY OF CONSENT* 25-30 (1975). The distinction seems to me unsatisfying not least of all because I find it impossible to divide constitutional provisions neatly into these two categories.

To answer the first question requires an elementary restatement of the reasons for a written constitution. Constitutionalism assumes the desirability of a limited government, that there are boundaries beyond which governmental acts are improper. This presupposes the articulation and preservation of knowable, stable, limiting rules.<sup>16</sup> Effective limits on government cannot be subject to unpredictable change. If I request you to behave according to rules 1, 2, and 3 but conceal the content of those rules until you transgress them, I cannot hope to influence your conduct to conform to the model I have in mind. Limited government requires that at a particular point in history the limits are decided upon and that they remain relatively fixed. At the least, change in the limits must be prospective. It was this idea which caused the founders of the government to insist with such emphasis on a *fixed* constitution as the surest security of liberty.<sup>17</sup>

Since even known rules are not always self-executing, however, the effectiveness of constitutional limits also depends on the existence of an authority which will announce when the limits are passed. Under our system the Supreme Court has been charged with the responsibility of "policing the boundaries"<sup>18</sup> of legitimate government activity by reference to the constitutional limits. To the extent the Court ignores those preexisting limits and judges the acts of government by other criteria, chosen ad hoc by the justices, the limits on government are as ineffective as the undisclosed rules numbered 1, 2, and 3. To implement real limits on government the judges must have reference to standards which are external to, and prior to, the matter to be decided.<sup>19</sup> This is necessarily historical investigation. The

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16. Therefore "natural law" in its various formats and formulae has never attained the precision and permanence to make it a meaningful governmental limit. A famous statement of this defect is the opinion of Justice Iredell in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398 (1798). See R. BERGER, *supra* note 5, at 251.

17. See R. BERGER, *supra* note 5, at 290, 363-66; F. HAYEK, *THE CONSTITUTION OF LIBERTY* 177-78 (1960). For any state, the promulgation of these limits on government may take place in a number of ways—by revelation, by charter from a superior authority, or by some form of broad political agreement. The United States Government, of course, is the product of the last. Stability is further assured by requiring that alterations in the limits may be effected only in the manner specified in advance in the constitutional rules—in our case by the difficult and consensus-assuring process of amendment. See *id.* at 180-83.

18. R. BERGER, *supra* note 5, at 362.

19. The starting point of an elucidation of constitutional clauses as norms for government, not only for judges, must be that it involves an exposition of the Constitution . . . [C]onstitutional rules are applications of prior political law-making. They reflect a series of decisions concerning the organization of gov-

content of those standards are set at their creation. Recourse to "the intention of the framers" in judicial review, therefore, can be understood as indispensable to realizing the idea of government limited by law.<sup>20</sup>

Now this may all be very well when the limits of government previously decided upon are more or less clear, as in the case of two-year terms for the members of the House of Representatives. What about the case where the framers did not express themselves with such precision? The classic case in point is the fourteenth amendment which prohibits the states from denying "the equal protection of the laws" or depriving people "of life, liberty or property without due process of law." Berger, it must be stressed, denies the existence of any vagueness in the intended meaning of these phrases when the historical record is examined.<sup>21</sup> This contrasts with the views of courts and scholars who have regarded these clauses as the "majestic generalities" of constitutional law.<sup>22</sup> Assuming Berger is mistaken and the historical meaning of such phrases is, in fact, obscure, are not the courts *then* entitled to give to them a meaning which is in keeping with their view of correct policy? This seems to me to involve a serious non sequitur. It may be that there is no obvious correct answer to a question of constitutional interpretation. But this does not provide a license for abandoning the task of interpretation altogether. Because a phrase may have no clear meaning does not indicate that it has no meaning at all.<sup>23</sup> The idea of constitutionally limited government which I have outlined seems to call for the Court to do the best it can in determining constitutional

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ernment, its powers and limitations that were made by particular men at particular moments in history.

Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 253-54 (1972). This is an outstanding discussion of the application of the idea of constitutional law as a limit on government to current fashions in constitutional adjudication and jurisprudence.

20. Adjudication without reference to prior constitutional limits not only fails in its essential role of guarding the boundaries created by the Constitution, but is itself a transgression of the limits defining the power of the judiciary. Hamilton was adamant in asserting that the judges "must declare the sense of the law" and denied that they would inevitably "exercise WILL instead of JUDGMENT." See THE FEDERALIST NO. 78 (A. Hamilton). The restricted nature of the judicial power created by the Constitution is examined by Berger. R. BERGER, *supra* note 5, at 290-93, 300-11.

21. See, e.g., R. BERGER, *supra* note 5, at 258.

22. Katzenbach v. Morgan, 384 U.S. 641, 649 (1966), quoted in *id.* at 166.

23. Moreover, if a constitutional provision were so vague as to seem to place no limit on government at all, I believe the natural conclusion would be that the legislature was free to formulate any policy it chose. It does not at all follow that the Court is given a veto by such clauses.

meaning, having reference to such historical evidence as exists and to the logic of the rest of the Constitution. Some answers will be more clearly correct or incorrect than others. If the Court does this, we may be free to criticize the Court's results, but we would be unjustified in questioning the legitimacy of its enterprise. To throw over the attempt altogether, however, subjects the Court to valid charges of infidelity to the scheme of constitutional government.

It will, no doubt, be noted that one possibility exists which would reconcile the application of shifting constitutional rules with the notion of limited constitutional government put forward here. This is the suggestion that the framers of the fourteenth amendment (and of other broad constitutional provisions) *intended* that these clauses have no fixed meaning but that they should be construed differently to meet the needs of different times. This view has been put forward by many writers, often citing the famous dictum of Chief Justice Marshall in *M'Culloch v. Maryland*<sup>24</sup> that "we must never forget that it is a *constitution* we are expounding," a constitution "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."<sup>25</sup> In this view certain constitutional phrases were in Justice Frankfurter's words "purposely left to gather meaning from experience."<sup>26</sup> In this way Court-imposed policy is blessed with the sanction of the framers.

There are two ways in which this notion can be understood. First, we may believe that the framers had specific objections to government behavior of a certain kind and that they intended this behavior to be forbidden in the instances they were aware of as well as those they could not foresee.<sup>27</sup> The fourth amendment prohibition against unreasonable search and seizure could be viewed in this sense to have been "intended" to apply to electronic surveillance of telephone conversations, not because this is similar in some way to an

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24. 17 U.S. (4 Wheat.) 316 (1819).

25. *Id.* at 407, 415. Berger contends that the expansive interpretations of these phrases are not representative of Marshall's philosophy of constitutional adjudication. See R. BERGER, *supra* note 5, at 373-79.

26. *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting), *quoted in id.* at 193. The extent to which the Constitution embodies this view was the subject of the debate between the majority opinion of Chief Justice Hughes and the dissent of Justice Sutherland in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

27. Thomas Grey has classified adherents of this manner of extrapolation as followers of "the pure interpretive model." See Grey, *supra* note 13, at 705-06 & n.9. The position is well articulated in Linde, *supra* note 19, at 254-55.

“unreasonable search and seizure,” but because it is an unreasonable search and seizure albeit one about which the framers could not have known.<sup>28</sup> So long as constitutional adjudication rests on this process of inference it cannot be objected to on the grounds of lack of adherence to original intent.

Second, we may view the nonspecific clauses of the Constitution as no more than identifications of broad moral values, respect for which is required of the government in a manner determined by the Supreme Court to be appropriate at any given time without reference to the specific views of the framers. We are provided with concepts such as privacy, equality, and contract and the Court is to explicate and enforce what it takes to be the proper specific applications of these concepts.<sup>29</sup>

It is important to see exactly what this position entails. To the extent the framers intended merely to identify broad values, they were leaving the power of the government largely undefined. This would be out of keeping with the idea of limitation by a fixed constitution, which I have argued animates the constitutional enterprise. To be sure, constitutionalism does not require that each and every governmental act be specified beforehand or that every prohibition be spelled out in detail. But the substitution of broad concepts for at least minimally defined proscriptions would justify a vast array of possibly inconsistent decisions. This is a giant step away from the idea of constitutional government I have outlined. It is difficult to attribute such an intention to framers committed to the rule of law.

In addition, it assumes that the high degree of flexibility which was purposely built into the Constitution was to be entrusted principally to the judiciary. There is no reason to think the courts would have been granted such a drastic revising power. Indeed, Berger pre-

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28. *Katz v. United States*, 389 U.S. 347, 353 (1967). The stirring dissent of Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 472-79 (1928), reaching the same conclusion, takes perhaps too broad a view of the impact of the fourth amendment and might be read as a prohibition against every possible governmental interference with “privacy.” Justice Black’s dissent in *Katz*, on the other hand, gives an unduly narrow construction to words perfectly capable of accommodating changing content. 389 U.S. at 364.

29. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-37 (1976). There is some indication that Dworkin’s position may be somewhat narrower and closer to the view discussed *supra* in the text accompanying notes 27-28. See *id.* at 136 n.1. My reading of Dworkin, however, leads me to believe he is more properly seen as a proponent of this more expansive model. See, e.g., Dworkin, *The Law of the Slave-Catchers*, 1975 *TIMES LIT. SUPP.* 1437.

sents evidence to the contrary, recounting the rejection by the Constitutional Convention of the Council of Revision, and documenting the framers' preference for a strictly limited judicial power.<sup>30</sup>

Faithfulness by a government (including its judiciary) to prior constitutional limits does not come without cost. It is inevitable that in some respects constitutional arrangements made at one time will become inadequate at a later time. To the extent constitutional amendment is difficult or impossible, the government will be disabled from doing what may urgently need to be done, or empowered to do what seems intolerable. If Berger's view of the meaning of the fourteenth amendment is correct, the cost of constitutional government would be dramatically and tragically illustrated in the perpetuation of racial segregation and discrimination in significant fields of government activity. But the acceptance of government limited by law is premised on the faith that in the long run the evil which is prevented is greater than the good which is denied or deferred.<sup>31</sup> Our distress at the possibility of losing decisions like those striking down racial discrimination and malapportionment should perhaps be balanced by the recollection of less attractive periods of judicial policymaking. Viewed in context, the activism of the Warren Court era appears to be only a brief interruption in an activism which may have far less appeal. Indeed the history of constitutional adjudication presents striking examples of the dangers of governmental power unlimited by law. Taken as a whole, it should give pause to those who would be content to leave the courts "discretion to roam in the trackless field of their own imaginations."<sup>32</sup>

Still it may be that the Constitution which exists at a certain time is so unsatisfactory, and the prospects for amendment so dim, that we may feel a judge is justified in substituting what seems to him or her some superior standard of governmental morality for that which may

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30. R. BERGER, *supra* note 5, at 300-11. I do not mean to suggest that vesting an undefined veto power in the judiciary does not serve to limit government action. Naturally as power is dispersed its exercise becomes more difficult. It does not, however, forward the special values of government limited by law which requires that limiting rules have some minimum level of stability and certainty. See text accompanying notes 16-20 *supra*.

31. See Kay, Book Review, 12 HARV. C.R.-C.L. L. REV. 219 (1977).

32. 1 J. KENT, COMMENTARIES ON AMERICAN LAW 373 (9th ed. 1858), quoted in R. BERGER, *supra* note 5, at 308. See *Lochner v. New York*, 198 U.S. 45 (1905). I cite *Lochner* only because it has come to symbolize judicial overreaching. I could, no doubt, list a long series of cases of different eras on different subject matters, three-quarters of which would be branded judicial usurpation by almost everyone although few might designate exactly the same three-quarters.

be fairly attributed to the Constitution. It may even be argued that we have reached such a point today.<sup>33</sup> That we may find such an action proper in a moral or political sense, however, ought not to blind us to the fact that it is in contradiction with and subversive of the design of constitutional government to which we purport to adhere.<sup>34</sup> We should be cognizant of the risks such a course of decision creates. This does not mean that those who would approve the exercise of this power in some cases are disqualified from ever criticizing its use in others. But the grounds for criticism must then be the policy bases of such decisions. It will not do to condemn the Court for overstepping its legitimate function of constitutional interpretation only when the results are somehow displeasing. That kind of criticism, as Raoul Berger has shown, is a two-edged sword.

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33. See, e.g., the "parade of horrors" which would ensue from fidelity to the constitutional text put forward in Grey, *supra* note 13, at 710-14.

34. The Supreme Court has always professed an allegiance to the commands of the constitutional text. See, R. BERGER, *supra* note 5, at 367-68. *But cf.* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966). ("Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do change.*")