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

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Raoul Berger's last two books, on impeachment[1] and executive privilege,[2] were published just as those subjects were becoming matters of great concern in the latter months of the Nixon administration. In *Impeachment*, he persuasively argued that the constitutional process was designed to be political, not judicial, and that impeachable offenses are not limited to indictable crimes. That work was well addressed to the current debate, but when Berger turned his hand to executive privilege, he labeled it "a constitutional myth"[3] and put his argument beyond the pale of the contemporary controversy. Now in *Government by Judiciary*,[4] Berger uses questionable premises to conclude that the United States Supreme Court is subverting our system of law and posing a dire threat to our democratic system.

Subtitling his book, "The Transformation of the Fourteenth Amendment," Berger claims that through careful scrutiny of the committee reports and debates in the Thirty-Ninth Congress[5] the meaning of privileges and immunities, due process, and equal protection can be precisely fixed. The amendment's first section,[6] he says, was exclusively an attempt to translate the terms of the Civil Rights Act of 1866[7]

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1. R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973).

2. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974).

3. *Id.*

4. R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 6 (1977).

5. *See generally* CONG. GLOBE, 39th Cong., 1st Sess. (1865-1866).

6. U.S. CONST. amend. XIV, § 1 provides:

> 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.

7. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

into suitable constitutional language.[8] Rejecting the Supreme Court's decision in the *Slaughter-House Cases* of 1873,[9] Berger argues that the privileges and immunities clause[10] was intended to embrace the fundamental rights of personal security, the liberty to move and travel, and the right to own and transfer property.[11] The equal protection guarantee,[12] he continues, was added solely to assure that laws touching these fundamental rights would be nondiscriminatory,[13] and the due process clause[14] was added to assure access to the state courts.[15] Having thus confined the language of the amendment's first section, the author concludes that the Supreme Court is obligated in a government of laws and under our theory of the separation of powers to honor this original understanding.[16]

What such a reading means in practical terms is that virtually all of the Court's work under the fourteenth amendment, including the striking down of segregation,[17] the ordering of legislative reapportionment,[18] and the selective incorporation of the Bill of Rights into the due process clause,[19] can be described as usurpations of power by a tribunal that has transformed a government of the people into a government by the judiciary. The passivity of the public in light of this shocking transformation is, according to Berger, the result of a subterfuge perpetrated by a Court that has alternately falsified the historical record and improperly rejected it as hopelessly ambiguous. Through such legal legerdemain, he concludes, the Justices have illegally written their views of a good society into the law.

Assuming for the moment that if broad words in the Constitution can be given precision in terms of the process that gave them birth then that meaning should control future adjudication, the question is, has

8. R. BERGER, *supra* note 4, at 22-36.
9. 83 U.S. (16 Wall.) 36 (1873).
10. U.S. CONST. amend. XIV, § 1, *quoted in* note 6 *supra.*
11. R. BERGER, *supra* note 4, at 36.
12. U.S. CONST. amend. XIV, § 1, *quoted in* note 6 *supra.*
13. R. BERGER, *supra* note 4, at 191.
14. U.S. CONST. amend. XIV, § 1, *quoted in* note 6 *supra.*
15. R. BERGER, *supra* note 4, at 212.
16. *Id.* at 407-10.
17. Brown v. Board of Educ., 347 U.S. 483 (1954).
18. Reynolds v. Sims, 377 U.S. 533 (1964); *see* Baker v. Carr, 369 U.S. 186 (1962).
19. *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy guarantee); Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment—jury trial); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of opposing witnesses); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment—right to counsel); *In re* Oliver, 333 U.S. 257 (1948) (public trial).

Berger conclusively determined the meaning of the key phrases in the fourteenth amendment? The answer clearly is that he has not. The author's first mistake stems from his assumption that determining the meaning of a constitutional amendment involves the same methodology as determining the meaning of a statute. Resort is made to legislative history to clarify ambiguous words in a statute because it is quite proper to interpret the statute in accordance with congressional intent. Should the Supreme Court affront that understanding, Congress need only amend the statute to overcome the prospective effect of the Court's mistake. With a constitutional amendment, however, the process is much more complex. Congress can only recommend a change in the fundamental law to the effective agents of ratification—the state legislatures.[20] In submitting a proposal to the states, Congress transmits no lexigraphical guide. If, then, we are to seek the original understanding of the amendment, must we not investigate the debates in the state legislatures? Berger is oblivious to this problem.

In addition, the author's claim for a limited reading of the first section is further weakened by the fact that the amendment was rejected not only by all but one of the former states of the Confederacy but also by a number of other states as well.[21] It was this recalcitrance of states that had remained loyal to the Union that necessitated the use of force in the South to ensure the necessary votes for ratification. The northern state legislatures could hardly have taken exception to the other sections of the amendment; it was the first section with its potential for altering the dimensions of the pre-war federal system that provoked resistance, including the attempts to rescind ratification in Ohio and New Jersey.[22]

If Berger has not established that the terms of the first section had precision in the eyes of both the proposers and the ratifiers of the amendment, has he at least established that the congressional record supports his limited reading? Once again, the answer is no. Plunging into the legislative history as an advocate, the author does not hesitate to avoid or downplay certain material, or worry when a consistent interpretation must be sacrificed to advance his argument.

First, Berger generally excludes the comments of Democrats, assuming that their objections to the wording were all born of a desire to exaggerate the expansive potentiality of the amendment and thereby

20. U.S. CONST. art. V.

21. J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 192 (1956).

22. *Id.* at 192-93.

secure its defeat. Though there is plausibility in this assumption, is it not strange that many Democratic protests against the general language so clearly anticipated later interpretations of the amendment by both Court and Congress? And did not such comments give the Republican majority sufficient notice that such phrases as due process and equal protection could be expanded in the future beyond whatever consensus then existed? Certainly the men in Congress were not ignorant of the fact that our history had already demonstrated that the interpreters, and not the framers, of constitutional language determine its meaning.

Second, Berger alternates between praise and scorn in his treatment of the comments of Congressman John A. Bingham of Ohio and Senator Jacob M. Howard of Michigan, two of the most important Republican spokesmen on the amendment's first section. When the words of these legislative leaders do not support the author's views, he pronounces their comments confused, idiosyncratic, or out of step with the Republican majority.[23]

Third, Berger interprets the absence of comment after a speech inconsistently. In some instances, silence means profound agreement; in others, it is interpreted as a total rejection of the speaker's views. Further instances of such shaping of the material can be identified, but it should be clear that conclusions drawn from such a survey of the legislative history are intimately related to what the investigator is seeking.

In defending his view that the amendment's first section simply wrote the Civil Rights Act of 1866 into the fundamental law, Berger responds to an obvious question: If this was the intent, why did Congress avoid the statutory language? The author's answer is revealing. He says that in a constitution, prolixity should be avoided in favor of "utmost compression."[24] In insisting that the translation was precise and clear, Berger reveals his unsophisticated understanding of semantics. When specific protections are translated into general terms, which then become the sole constitutional standard, such terms acquire a life of their own. In other words, the cost of the translation comes at a considerable sacrifice of precision and concreteness. Such words are malleable; they resist narrow and constricted boundaries. As Oliver Wendell Holmes recognized so well, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the

23. *See, e.g.*, R. BERGER, *supra* note 4, at 145.

24. *Id.* at 39.

time in which it is used."[25] That the terms of the amendment's first section had a precise meaning at the time of their addition to the Constitution remains debatable, but even if they did, there was no way to ensure the preservation of that meaning. Nevertheless, Berger perversely clings to the view that the meaning of "due process" and "equal protection" was implacably fixed in 1866.

From the current debate over the implications of the proposed Equal Rights Amendment back to the framing of the Constitution, there has been a clear recognition that the meaning and applications of general wording cannot be determined fully and that future generations must be trusted to exercise their interpretive wisdom. In the convention in Philadelphia in 1787 a delegate asked for some clarification of the meaning of the term "direct tax"; he received no response.[26] And when those delegates submitted their work to the people, they sent along no annotations or explanations. The Framers were willing to trust the future with the language that they had penned. Early interpreters in the legislative and judicial branches had to chart their own way. This early experience set the pattern for the development of our constitutional history and gradually the Supreme Court emerged as the definitive interpreter of the Constitution.

Much of Berger's attack miscarries because he ignores the practical realities of our legal-governmental system. By measuring the Court's work against abstractions rather than within the context of the inconsistencies of democratic practice, he has spun a theory of high conspiracy. So obsessed is the author with the spectre he creates that he argues that the Supreme Court was not intended to play any role at all in interpreting the fourteenth amendment. He reaches this conclusion by reading the fifth section of the amendment as conferring upon Congress the exclusive power to enforce its provisions.[27] Such a strange interpretation can only be born of a fundamental misconception of how constitutional provisions enter into a course of litigation that demands judicial resolution.

Despite the highly subjective nature of Berger's investigation, most students of the legislative record of the thirty-ninth Congress would accept the view that the Republican majority in Congress had a narrower conception of the range of the first section's three clauses than

25. Towne v. Eisner, 245 U.S. 418, 425 (1918).

26. 2 THE RECORDS OF THE FEDERAL CONVENTION 350 (M. Farrand ed. 1911).

27. R. BERGER, *supra* note 4, at 229. U.S. CONST. amend. XIV, § 5 provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

that taken by the Supreme Court in the middle third of the twentieth century. But such a conclusion is hardly surprising, for the survival of our eighteenth century constitution is as much a tribute to subsequent generations as it is to the Framers. The key to the document's survival has been interpretation, a process of renewal that assumes that the words of the Constitution can still provide guidance in an ever changing society. Charged with interpreting the Constitution in response to rival claims based upon its wording, the Justices must evaluate arguments in relation to the general guidelines of the fundamental law. Through this process, the Court makes new law. We should not flinch from this realization, for the interpreters of law are as much law makers as those who drafted its terms. Though such a conclusion does not square with the theory of a separation of powers, it is a fact of our governmental life.

Often Justices have felt uncomfortable with their task of reinterpreting the Constitution and have desperately sought a rationale, no matter how tenuous, that could be partially anchored in the past. Berger's criticism of the Justices for these contrived rationales hits the mark, for the Court, though engaged in no conspiracy, has been wary of directly confronting its lawmaking function. We ask the Supreme Court to make these decisions, however, because we have been and still are unwilling to entrust legislative branches with the full power to rule. The Court has a policymaking role not because its collective membership is engaged in a conspiracy against the American people but rather because very early in our history as a nation, as the perceptive French observer, Alexis de Tocqueville, observed, we began to frame our policy conflicts in legal terms and sought their resolution within the judicial branch.[28] Despite diatribes directed against its power and recurrent comment about the incompatibility of its power with democratic ideology, the Supreme Court survives as an important policymaker in our society because we have chosen to endow it with such authority. Contrary to many of the institution's critics, however, the Court does not operate in a vacuum; constitutional history demonstrates that both internal and external constraints establish certain boundaries upon its policymaking role.

When Berger accuses the High Bench of subverting the rule of law, he says that such action carries the "hallmark of Hitlerism and Stalinism."[29] Such distortion, misunderstanding and overstatement

28. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 92-97 (3d Am. ed. 1839) (n.p. n.d.).
29. R. BERGER, *supra* note 4, at 412.

are characteristic of the book, which, despite the author's protestations, is a polemic written from a theoretical stance out of touch with the practical realities of our constitutional system. Except for the passion of his argument, there is little new in *Government by Judiciary*; even the title is borrowed from a 1932 publication by Louis B. Boudin.[30] Moreover, the book is neither well organized nor smoothly written, characteristics that are accentuated by Berger's running arguments with some of the writers who have investigated the legislative history of the fourteenth amendment.

The Supreme Court is not divorced from the society it serves. It is not a sacrosanct body isolated from substantial professional and lay criticism. But neither the Court nor the public is well served by books, such as *Government by Judiciary*, that generate heat with no accompanying light.

30. L. BOUDIN, GOVERNMENT BY JUDICIARY (1932).