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## Government by Judiciary: The Transformation of the Fourteenth Amendment

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## BOOK REVIEW

GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT by Raoul Berger. Cambridge: Harvard University Press. Biblio. index. 1977. Pp. x + 483. \$15.00 cloth.

*Robert A. Ertman\**

There is nothing novel in Professor Berger's charge that the Supreme Court has twisted and ignored the intent of the framers of the Constitution by exercising an "amending power" under the "guise of interpretation."<sup>1</sup> Berger, however, has thoroughly examined primary historical sources and effectively marshalled the evidence in favor of the theory that the framers of the Fourteenth Amendment intended it to have a very narrow effect. His style is readable and avoids legalistic jargon. Further, Berger is known for his consistent rejection of an expansive interpretation of the Constitution even when he would approve of the result.<sup>2</sup> These qualities give the book a general air of objectivity which cannot be ignored.<sup>3</sup>

Professor Berger correctly distinguishes between the historical question of what was the framers' intent and the issue of whether the original intention of the framers is binding on the present generation.<sup>4</sup> The majority of the book is devoted to historical expositions of the intent of the original framers of the Constitution and the framers of the Fourteenth Amendment. This book review will examine the validity of Berger's crucial argument that, according to traditional canons of interpretation, the clear intent of the framers of the Constitution is "as good as written into the text" and that any interpretation contrary to their intent is not valid.<sup>5</sup>

Berger argues that interpretation according to the framers' intent is a "long-standing rule of interpretation in the construction of all documents—wills, contracts, statutes—and although today such rules are downgraded as 'mechanical' aids, they played a vastly more important role for the Founders."<sup>6</sup> He attacks the misuse of Marshall's famous dictum that "[w]e must

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1. R. BERGER, *GOVERNMENT BY JUDICIARY* 1 (1977) [hereinafter cited as BERGER].

2. See Berger, *Constructive Contempt: A Post-Mortem*, 9 U. CHI. L. REV. 602, 642 (1942).

3. This book is not tainted by racial prejudice. Professor Berger says in his introduction that "[m]y study may be absolved of that imputation: I regard segregation as a blot on our society . . ." His attempt at self-defense is understandable, but his citation for this statement reads in full: "One reads with horror of the Negro lynchings and torture that found their way into the courts as late as 1938. P. MURPHY, *THE CONSTITUTION IN CRISIS TIMES, 1918-1969*, at 95, 123 (1972)." The citation proves nothing; it is an example of Berger's use of citations *per se* to support his text. BERGER, *supra* note 1, at 4 n.12.

4. BERGER, *supra* note 1, at 8.

5. *Id.* at 7.

6. *Id.* at 365.

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>7</sup> Even if Berger is correct, it does not excuse his failure to discuss the validity of Marshall's distinction. Also there are obvious fundamental differences between wills, deeds, contracts, and statutes, on the one hand, and the constitution of a nation-state on the other. Further, the traditional canons for written document interpretation were established before the existence of written constitutions; therefore, the application of these canons to the United States Constitution is by analogy rather than by contemporaneous authority. Berger does not acknowledge that the application is by analogy; thus, at no point is the appropriateness of the analogy examined.

A more important issue is whether Berger is correct in asserting that the traditional canons of written document interpretation consist essentially of a search for the intention of the framer. Although this is the orthodox modern view,<sup>8</sup> it does not follow that this view was predominant when the Constitution and the Fourteenth Amendment were adopted. Berger cannot prove this assertion by citing post-Constitution cases to the effect that "[t]he intention of the lawmaker is the law,"<sup>9</sup> nor by citing the eighteenth century English rule to the same effect.<sup>10</sup>

The rule that the lawmaker's intent is the law must be read in light of the prevailing legal fiction that words possess fixed and unalterable meanings.<sup>11</sup> This concept was a carry-over from the medieval belief that the inherent potency of words was "no mere fairy tale, but a reality of life."<sup>12</sup> With the intellectual development of the Renaissance and Enlightenment the view lost general currency, but it remained as a legal fiction for reasons peculiar to the English judicial system.<sup>13</sup>

In the early nineteenth century the fixed meaning rule gave way not to the modern search for subjective intent but to the rule that plain meaning

7. In brief, Berger argues that this portion of *McCulloch* was merely dicta, that it did not concern an extension of powers but rather the proper means of carrying out expressly granted powers. In addition, Marshall, writing under a pseudonym, denied that the opinion claimed any right to change the Constitution. BERGER, *supra* note 1, at 375-77, quoting *McCulloch v. Maryland*, 17 U.S. 316, 416 (1819).

8. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950).

9. BERGER, *supra* note 1, at 7-8 n.24.

10. *Id.* at 7-8 n.24, 366.

11. 9 J. WIGMORE, EVIDENCE § 2461 (3d ed. 1940).

12. *Id.*

13. *Id.* For example, there was a prejudice in favor of the legal heirs. This prejudice is not surprising since land was not devisable until 1540. By refusing to acknowledge the testator's intention the older system of land inheritance would be promoted. If an heir was not mentioned in a will, no parol evidence, however convincing and reliable, would be admitted to show that the omission was intentional. Therefore the heir would receive his share as if there had been no will. 9 J. WIGMORE, EVIDENCE § 2461 (3d ed. 1940).

There was also a prejudice against allowing juries to interpret written documents, especially deeds. The legal fiction that written words had only one meaning protected documents from an uncertain fate at the hands of juries. *Id.*

cannot be disturbed. The meaning of words was still fixed by rules of law unless a contradictory meaning was clear from the face of the document.<sup>14</sup>

Interpretation of statutes was more complex, since the courts could not dismiss the will of Parliament. Blackstone stated the rule as follows:

The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequences, or the spirit and reason of the law.<sup>15</sup>

In other words the will of the lawmaker is to be found in signs or outward manifestations of intent. This is an explicit rejection of the interpretation of statutes according to the true, subjective intent of the framers.

Berger states that the legislative history of a statute, including committee reports, is "commonly regarded as the best evidence of legislative 'intention.'" <sup>16</sup> The merits of this approach are debatable, but it is the prevailing American practice. Justice Frankfurter once remarked that "only when the legislative history is doubtful do you go to the statute."<sup>17</sup> The traditional English rule is just the opposite. Not only is legislative history inadmissible as evidence, but neither court nor counsel can refer to it.<sup>18</sup>

Even if the rule that "the will of the lawmaker is the law" is taken at face value, it does not follow that the intent of the framers is "as good as written into the Constitution." Members of the Constitutional Convention were not the lawmakers since they did not accept and ratify the Constitution. This is equally true for members of the Thirty-ninth Congress who did not accept and ratify the Fourteenth Amendment. Berger, in addressing the importance of "original intention," <sup>19</sup> twice quotes Madison as saying that if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers."<sup>20</sup>

14. *Id.*

15. I W. BLACKSTONE, COMMENTARIES 59 (8th ed. 1778).

16. BERGER, *supra* note 1, at 7. Professor Berger cites H. HART & A. SACKS, THE LEGAL PROCESS 1266 (1958), but ignores the contrary conclusion regarding the traditional rule outlined on page 1264. See note 22 *infra*.

17. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947).

18. H. HART & A. SACKS, THE LEGAL PROCESS 1264 (1958).

19. BERGER, *supra* note 1, at 364.

20. *Id.* at 3, 364. Berger is quoting from Madison's letter to Henry Lee dated June 25, 1824, on the subject of combatting party spirit, especially that of the ascendant party.

Although Professor Berger does not discuss Madison's argument that the Constitution should be interpreted according to the intent of the ratifying states, it should be mentioned here. According to Madison's argument, the States have ultimate authority to interpret the Constitution and to set aside any act which they think violates it. Madison subsequently took this position in the Virginia Resolution. J. MILLER, THE FEDERALIST ERA 239 (1960). This is also the position taken by the Southern States before the Civil War. See, e.g., VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT, WE THE STATES 275 (1964) (the Fort Hill Address of John

Berger appears oblivious to any distinction between the intent of the framers and the intent of those who ratified the Constitution, and uses Madison's quotation as support for his proposition that "[e]ffectuation of the draftsman's intention is a long-standing rule of interpretation in the construction of all documents—wills, contracts, statutes . . . ." <sup>21</sup> Perhaps his failure to distinguish between the nature of various types of documents is responsible for this error.

The modern reader has access to ample legislative history of the Constitutional Convention, mainly in Madison's copious and generally accurate notes.<sup>22</sup> However, this material was not available at the time the Constitution was ratified. For example, the official journal was not published until 1819,<sup>23</sup> and Madison's notes were published posthumously in 1840.<sup>24</sup> This unavailability was not inadvertent; it resulted from the secrecy rules adopted by the Convention.<sup>25</sup> Despite precautions, it was inevitable that the record

C. Calhoun on July 26, 1831). Despite the merit of the position prior to the Civil War, currently it is not a viable theory of interpretation of the Fourteenth Amendment.

21. BERGER, *supra* note 1, at 365.

22. See J. JACOBSTEIN & R. MERSKY, *FUNDAMENTALS OF LEGAL RESEARCH* 133-35 (4th ed. 1973).

23. C. VAN DOREN, *THE GREAT REHEARSAL* 38 (1948).

24. *Id.* at 39.

25. The following rules were adopted on May 29, 1787:

That no copy be taken of any entry on the journal during the sitting of the House without the leave of the House.

That members only be permitted to inspect the journal.

That nothing spoken in the House be printed, or otherwise published, or communicated without leave.

M. FARRAND, *1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 15 (rev. ed. 1937).

In explaining the reasons for these rules, Hamilton, in a letter dated September 11, 1792, under the pseudonym "Amicus," stated:

Had the deliberations been open while going on, the clamors of faction would have prevented any satisfactory result; had they been afterwards disclosed, much food would have been afforded to inflammatory declamation. Propositions made without due reflection, and perhaps abandoned by the proposers themselves on more mature reflection, would have been handles for a profusion of ill-natured accusation. Every infallible declaimer, taking his own ideas as the perfect standard, would have railed without measure or mercy at every member of the Convention who had gone a single line beyond his standard.

C. WARREN, *THE MAKING OF THE CONSTITUTION* 136-37 (1937).

It is worth noting that these secrecy rules were respected until well after the ratification of the Constitution, even by Convention delegates who opposed adoption and later led the fight against ratification. C. ROSSITER, *1787: THE GRAND CONVENTION* 283 (1966). The purpose and effect of the rules was clarified in a letter written by Edmund Carrington, a member of Congress from Virginia, to Madison, dated June 13, 1787, stating: "Having matured your opinions and given them a collective form, they will be fairly presented to the public and stand their own advocates . . ." C. WARREN, *THE MAKING OF THE CONSTITUTION* 137 (1937).

This objective was not the author's afterthought because it clearly appears in the record at the very beginning of the Convention:

Mr. King objected to one of the rules in the Report authorising any member to call for the yeas & nays and have them entered on the minutes. He urged that as the acts of the Convention were not to bind the Constituents it was unnecessary to

would be used by some convention delegates to support their interpretations of the Constitution. Such use of the record was made in connection with the ratification of Jay's Treaty in 1796.<sup>26</sup> The secrecy and the reaction to its breach convince this author that the interpretation of the Constitution according to the intent of the framers is contrary to the intent of the framers.

This is the legal process: the interpretation of the Constitution in the context of a particular case and controversy. It is this reasoned decision-making which gives meaning to all law, including the words "life," "liberty," "property," and "due process of law," found in the Fifth and Fourteenth Amendments. Berger argues that these were well developed concepts and "words of received meaning."<sup>27</sup> This is correct, but only in the sense that it is not permissible to define them innovatively, without regard for their developed meanings. While the original source of the words is the Magna Carta,<sup>28</sup> it is

exhibit this evidence of the votes; and improper as changes of opinion would be frequent in the course of the business & would fill the minutes with contradictions.

Col. Mason seconded the objection; adding that such a record of the opinions of members would be an obstacle to a change of them on conviction; and in case of its being hereafter promulgated must furnish handles to the adversaries of the Result of the Meeting.

The proposed rule was rejected *nem. contradicente*.

M. FARRAND, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 10 (rev. ed. 1937) (Madison's notes of May 28, 1787).

26. The House of Representatives demanded to see the State Department papers relating to the treaty. President Washington refused to deliver them on the ground that no part of the treaty-making power was vested in the House. His message to the House on March 30, 1796, relied not only on the "plain letter of the Constitution itself," but also on his personal understanding as a member of the Convention together with the official journal. M. FARRAND, 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 371 (rev. ed. 1937).

On April 6, 1796, in the House of Representatives, Madison rose to protest:

But, after all, whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.

*Id.* at 374. Madison used harsher language in a letter sent to Jefferson two days before addressing the House:

According to my memory & that of others, the Journal of the Convention was, by a vote deposited with the P., to be kept sacred until called for by some competent authority. How can this be reconciled with the use he has made of it?

*Id.* at 372.

27. BERGER, *supra* note 1, at 35.

28. CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1137 (1973). The Magna Carta was originally imposed upon an unwilling King by his rebellious barons who were protecting their own narrow interests. In later centuries, the meaning of the Magna Carta grew far beyond the intent of the King or barons. *Id.* at 1138.

obvious that the connotation of these words has been greatly expanded since the framing of the Fifth and Fourteenth Amendments. Berger incorrectly asserts that "[t]hey had been crystallized by Blackstone . . . ." <sup>29</sup> The legal process did not grind to a halt with the publication of Blackstone's *Commentaries*. This growth of the concept of liberty was well known to the framers. <sup>30</sup> They used words which they knew had grown in meaning, and which are capable of further growth. This growth occurs in the continuing process of reasoned decisionmaking by the application of the Constitution to particular cases and controversies; it is not a "blank check to posterity." <sup>31</sup>

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29. *Id.* at 35 n.55.

30. Blackstone wrote that "[t]here is no transaction in the ancient part of our English history more interesting and important, than the rise and progress, the gradual mutation, and final establishment of the charters of liberties, emphatically stiled THE GREAT CHARTER and CHARTER OF THE FOREST . . . ." W. BLACKSTONE, TRACTS 283 (3d ed. 1771).

31. BERGER, *supra* note 1, at 99, *citing* WARD ELLIOTT, THE RISE OF GUARDIAN DEMOCRACY viii (1974).