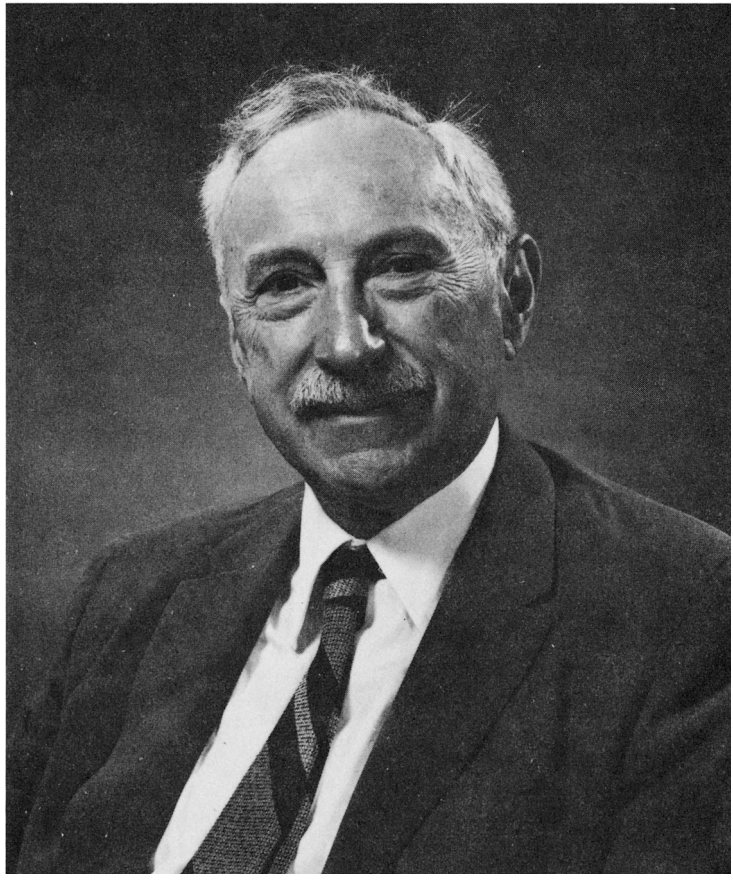
GOVERNMENT BY JUDICIARY



Raoul Berger

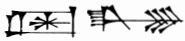
GOVERNMENT BY JUDICIARY

The Transformation of the Fourteenth Amendment

Raoul Berger

with a Foreword by Forrest McDonald

SECOND EDITION



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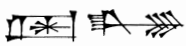

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—Fourteenth Amendment, §1

Nullius in Verbo

—Motto of the Royal Society, London

Take nobody's word for it; see for yourself

Contents

Foreword

Raoul Berger's original intention, if I may use that phrase in a different way than he does, was not to become a great constitutional historian. Indeed, his work as a scholar is actually the fourth (or fifth, depending on how you count) of the careers he has held during a long and illustrious lifetime.

His first love was and continues to be music. As a youth he studied the violin in New York and Berlin and then went on to make a number of highly praised concert tours, appear as a soloist with the Cleveland Symphony, and serve as second concertmaster with the Cincinnati Symphony Orchestra and first violinist of the Cincinnati String Quartet. But it was difficult in the 1920s, as it is today, to earn a living as a soloist in America, and the drudgery of life in an orchestra began to be numbing to his soul. Accordingly, at the age of twenty-seven, he decided to enroll in college and have a go at making his way in the real world. At thirty-one he entered Northwestern University Law School, and at thirty-four he was ready to hang up his shingle as a practicing attorney.

In 1938, having spent two years in private practice and another taking an advanced degree at Harvard, Berger began his succession of professions in earnest. The first was public service, including stints with the Securities and Exchange Commission and service as general counsel to the Alien Property Custodian and as special assistant to the attorney general. In 1946 he retired from government, and for the next sixteen years he was engaged in private practice in Washington, D.C. Then came yet another calling as a law professor at the University of California, Berkeley, and then at Harvard Law School as Charles Warren Senior Fellow in American Legal History until his retirement in 1976.

In each of these activities Berger achieved considerable distinction, but it was not until he embarked upon his journey as a constitutional scholar that he began rising to greatness. His first book, published in

1969, was *Congress v. The Supreme Court*. In it, he concluded after an exhaustive study of the documentary record that the framers of the Constitution intended that the federal courts have the power to review legislative acts and pass on their constitutionality, though there is no mention of judicial review to be seen in the text of the Constitution—a conclusion that has recently been buttressed by the discovery of some previously unknown documents.[1]

That finding was scarcely revolutionary, for it coincided with the consensus among students of the founding; but the book was marked by several qualities that characterize all of Berger's later works. The quantity of his research is massive but is combined with pinpoint accuracy in dealing with details.[2] His prose is lucid. He brings to his undertakings a zestful enthusiasm, an indication that he is impelled by a sheer love of scholarship—the traditional scholarly ideal that the genuine scholar seeks to know the truth for its own sake—and not by the ideological predilections that distort so much historical research. And, in *Congress v. The Supreme Court* Berger announced his commitment to the ages-old but vitally alive proposition that, when construing a constitution, it is permissible and often necessary to go beyond the text of the document to ascertain, if possible, the intentions of its authors but decidedly not permissible to read into it ideas derived from "natural rights" dogmas or other external values.

Berger's next two books, as Philip Kurland has described them, were "blockbusters," and they won him enthusiastic praise, especially among readers of a liberal persuasion. *Impeachment* coincidentally appeared in 1973, at just the time when President Nixon was headed on a collision course with Congress, though it was a subject on which Berger had been working for several years. The book focuses mainly on the question of the removal of federal judges, but it is a tour de force of English and

1. The documents are the notes of attorneys Edmund Randolph and St. George Tucker in the 1782 case known variously as *Case of the Prisoners* and *Commonwealth v. Caton*. See William Michael Treanor, "The *Case of the Prisoners* and the Origins of Judicial Review," 143 U. Pa. L. Rev. 491–570 (1994).

2. Philip B. Kurland has pointed out that Berger, in the rare instances when he misinterprets his evidence, courageously and candidly acknowledges his error. See Kurland's foreword to Raoul Berger, *Selected Writings on the Constitution* ii (1987).

American constitutional history. *Executive Privilege*, which appeared in 1974, is a devastating rebuttal of the argument that the president can constitutionally withhold from Congress or the courts information relevant to the performance of their duties. (Presidents had been withholding such information for some time, but Berger insists that repeated violations of the Constitution do not make them constitutional but merely compound the evil.)

Berger's niche in the liberal pantheon came tumbling down in 1977 upon the publication of the book you are about to read, *Government by Judiciary*, and suddenly he became a hero to conservatives. His private political beliefs are irrelevant to his work, because he rigorously casts them aside in his research and writing, going wherever the evidence takes him; but it may help the reader if I point out that by and large Berger's predilections have been on the liberal side. He was, after all, a member of the administrations of Franklin Roosevelt and Harry Truman. As he states in the addenda to Chapter 16 of the present edition, his principles are the "standard political principles of the moderate left of the Democratic party," but he makes "no pretense of identifying them with constitutional mandates."

Berger's personal politics had no more influence on the reception of *Government by Judiciary* than they had on his writing of the book. What he learned and reported was that for the better part of a century the Supreme Court had been handing down decisions interpreting the Fourteenth Amendment improperly, willfully ignoring or willfully distorting the history of its enactment. More specifically, he found that the authors of the Amendment, far from contemplating a social and political revolution, as defenders of judicial activism maintained, intended only to protect the freedmen from southern Black Codes that threatened to return them to slavery. More specifically yet, Berger found that the two key passages in the Fourteenth Amendment—privileges or immunities of citizens and due process of law—far from being vague and elastic, as activists maintained, were "terms of art" that had precise, well-understood, and narrow legal meanings. "Equal protection," a new concept, was identified by the framers with the right to contract, to own property, and to have access to the courts.

The implication was that *Brown v. Board* (1954, striking down segregation in the public schools), *Baker v. Carr* and *Reynolds v. Sims* (1962 and 1964, respectively, having to do with reapportionment of state legislatures), *Roe v. Wade* (1973, making abortion legal), and a vast array of other cases had been decided unconstitutionally, representing not law but the whims and values of the justices of the Supreme Court. No book on the Constitution, with the possible exception of Charles A. Beard's *Economic Interpretation of the Constitution* (1913), has elicited such a storm of controversy.

From the outset, the law reviews teemed with attacks on *Government by Judiciary*, some of them cautious and considered, many slipshod and semihysterical. Berger decided immediately to take each attack seriously, to rethink and reexamine his evidence, and to publish a rebuttal. He quotes John Locke as stating that rebuttal is necessary lest victory be "adjudged not to him who had the truth on his side, but by the last word in the dispute." In time, Berger wrote approximately forty article-length rebuttals and one of book length. My own judgment, as I wrote in a review of the book-length rebuttal (Berger's *The Fourteenth Amendment and the Bill of Rights*, 1989), is that Berger defeated his critics "at every turn." This controversy and the now sizable body of rebuttal literature gave rise to the publication of the present edition of *Government by Judiciary*, containing the original version liberally sprinkled with fresh addenda.

So thoroughly did Berger rout his critics that, after a decade or so, they virtually stopped trying. Instead, advocates of judicial activism began to assert that neither the words of the Constitution nor the intentions of the framers are any longer relevant. Justice William Brennan, for example, declared in 1985 that "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."[3] (In actuality, as one of Berger's defenders, Wallace Mendelson, has pointed out, the only "great principles" to be found in the Constitution are "the consent of the governed, the diffusion of power, and the rule of law"—and the Supreme Court has un-

3. Brennan speech of October 12, 1985, as reported in most major newspapers.

dermined them all.)[4] Brennan's disciple Justice Thurgood Marshall went even further in this direction. In 1987, amidst the celebrations of the bicentennial of the Constitution, Marshall said, "I do not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start." He noted further that "several amendments, a civil war, and momentous social transformation" were necessary before the United States achieved a genuinely "constitutional government."[5]

In the face of such attitudes, one may justifiably question whether the Supreme Court is capable of restoring the constitutional compact to anything resembling its pristine form. But it is true, as the adage has it, that the Supreme Court follows the election returns, and voters have increasingly expressed their frustration with "government by judiciary." It is also true that Congress has the constitutional authority to rein in the Supreme Court through its control over the Court's jurisdiction, its power of the purse, and sundry other means.

I do not know what Raoul Berger thinks of the prospects for a return by any means to constitutional government. I suspect he is hopeful though not optimistic, for he is a man of never-say-die temperament and hard-nosed realism. In any event, if the great desideratum should come to pass, nobody would have done more to bring it about than Raoul Berger, for his writings, in their original form or in the works of disciples and converts, have become common coin of the realm.

Forrest McDonald
University of Alabama

4. Wallace Mendelson, "Raoul Berger on the Fourteenth Amendment Cornucopia," 3 Benchmark 211 (1987).

5. Marshall speech of May 6, 1987, as reported in most major newspapers.