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Book Review: Death Penalties: The Supreme Court's Obstacle Course. by Raoul Berger.

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Death Penalties: The Supreme Court's Obstacle Course. By Raoul Berger. Cambridge: Harvard University Press, 1982.

Raoul Berger's latest book, *Death Penalties: The Supreme Court's Obstacle Course,* is a new verse of the same old song. Like *Government by Judiciary,* the book attacks the Supreme Court for violating the original understanding of a provision of the Constitution (this time the eighth amendment). Like the earlier book, it also contains "the clearly articulated theme that the principal, indeed the only, criterion for constitutional interpretation is the 'intent' of the framers."[1] Both books ultimately fail to persuade the reader of the accuracy of their historical conclusions or the validity of their theory of constitutional interpretation.

Berger disclaims any intention to argue further his "interpretivist" or "originalist"[2] theories, instead resting on copious references to his earlier work.[3] He purports to confine *Death Penalties* to a demonstration of the "wide gap between what the Justices say the 'cruel and unusual punishments' clause 'requires' and the limited purpose the Framers meant it to serve."[4] In fact, several chapters are devoted to the underlying interpretivist premise, including one chapter generally attacking judicial review,[5] and one attempting to limit the language of the Constitution to its 1789 common law meaning.[6] Another chapter condemns the incorporation doctrine,[7] which seems rather superfluous in light of Ber-

1. Murphy, *Constitutional Interpretation: The Art of the Historian, Magician, or Stateman?,* 87 YALE L.J. 1752, 1752 (1978).

2. For origins and comparisons of the two terms, *see generally* Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U.L. REV. 204 (1980); J. ELY, DEMOCRACY AND DISTRUST (1980).

3. R. BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 9 n.29 (1982).

4. *Id.* at 9.

5. Ch. 5: The Role of the Court. This chapter is a rather shallow survey of carefully selected quotations from various eighteenth century politicians and jurists, designed to discredit judicial review by showing the framers' "profound distrust" of judicial discretion. Berger either fails to note, or quotes and ignores, any references to the judiciary as the *least* dangerous branch or contemporaneous statements *supporting* judicial review. *See id.* at 78-79, quoting from Hamilton in Federalist No. 78 on the weakness of the judiciary, without any follow-up and without referring to the statements in the same document which support the concept of judicial review. *See also* Bedau, *Berger's Defense of the Death Penalty: How Not to Read the Constitution,* 81 MICH. L. REV. 1152, 1155-56 & n.22 (1983).

6. Ch. 4: Common Law Terms in the Constitution.

7. Ch. 2: Incorporation of the Bill of Rights: En Bloc or Selective. Berger's criticism of incorporation of the Bill of Rights into the due process clause is tarnished by his

ger's main thesis that the eighth amendment itself does not bar capital punishment. The point of these chapters—and perhaps of the entire book—may be found in Berger's description of "the proper role of the Court":

> It is not wrapped in mystery. Fearful of the greedy expansiveness of power, the Founders sought to confine their delegates to the power conferred. To insure that their delegates would not 'overleap' those bounds, the courts were designed to *police* those boundaries . . . . [T]here is not the slightest intimation that the courts might supersede the legislature's exercise of power *within* its boundaries.[8]

Finally, Berger suggests two remedies for the Court's usurpation of legislative authority. The first is simply to foster a popular awareness that "the people . . . are wrongfully being deprived of the right to decide for themselves whether or not to enact death penalties. . . ."[9] His second suggested remedy borders on the irresponsible. He devotes an entire chapter to invoking and justifying a Congressional withdrawal of jurisdiction over capital cases from the federal courts, including the Supreme Court.[10] Such a withdrawal of jurisdiction would at least nominally make the most recent Supreme Court pronouncement[11] "the unchangeable law of the land . . . beyond the reach of the United States Supreme Court or state supreme courts to alter or overrule."[12] It is also a course "so fraught with constitutional doubt that although talked about from time to time, it has not been invoked for over one hundred years."[13]

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failure to deal adequately with the alternative argument that the privileges and immunities clause might easily be read to accomplish the same result. *Cf.* J. ELY, DEMOCRACY AND DISTRUST 28-30 & n.64 (1980); Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History,* 54 N.Y.U.L. REV. 651, 673-75 (1979). Berger attempts to refute this argument by resorting to his much-criticized contention that the entire fourteenth amendment, including the privileges and immunities clause, was intended solely to protect the rights enumerated in the 1866 Civil Rights Act. BERGER, *supra* note 3, at 98-99. For criticism of Berger's historical evidence for this conclusion, *see* Soifer, *supra*.

8. BERGER, *supra* note 3, at 86-87.

9. *Id.* at 9.

10. Ch. 7: Congressional Contraction of Judicial Jurisdiction.

11. At this writing, one of the most recent cases happens to be one in which the Court reversed imposition of the death penalty for failure to consider mitigating factors, Eddings v. Oklahoma, 455 U.S. 104 (1982), but as Berger notes, the Court has been neither consistent nor predictable in this area.

12. Resolution of Conference of Chief Justices, January 1982, *cited in* Apr. 1982 A.B.A.J. 386.

13. ELY, *supra* note 2, at 46 (footnotes omitted). *See also* Van Alstyne, *A Critical Guide to Ex parte McCardle,* 15 ARIZ. L. REV. 229, 264-66 (1973) (suggesting that Congress cannot withdraw jurisdiction solely because of its dissatisfaction with the likely substantive outcome).

I. BERGER'S HISTORICAL ANALYSIS

Berger's historical survey is detailed and comprehensive, although largely devoted to refuting Anthony Granucci's seminal article on the historical roots of the eighth amendment.[14] Berger begins with the Magna Carta, runs through the 1689 Bill of Rights, details crimes and punishments in England and the United States both before and after the adoption of the eighth amendment, and concludes that the term "cruel and unusual" is limited to punishments that are both "barbarous" and "no longer customary."[15] He stops just short[16] of committing himself to the position that to be prohibited by the clause a punishment must have been "no longer customary" by 1689. The strongest part of his argument focuses on the framers' specific intent to *exclude* capital punishment from the category of prohibited punishments.[17] Berger here marshalls impressive historical evidence on the intent to exclude, including the reference to deprivation of life in the fifth amendment. His argument overlooks, however, the significant distinction between using history to show that the framers intended to prohibit a certain practice and using the same history to create the negative inference that they did *not* intend to prohibit it.[18] His narrow definition of cruel and unusual as "no longer customary" also drains the clause of significance. It hardly seems necessary to safeguard the right to be free from punishments that are no longer authorized or imposed.[19]

Moreover, Berger's historical analysis is seriously flawed. He is highly selective and inconsistent in his use of sources. For ex-

14. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

15. BERGER, *supra* note 3, at 444.

16. *Id.* at 41-42.

17. *Id.* at 44-50.

18. *See, e.g.*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 397-98 (1974). Berger avoids the most direct violation of this principle: he attempts to establish not only that the framers did not intend to outlaw capital punishment but also that they specifically intended *not* to outlaw it. Berger's negative inference, however, is still subject to the basic criticism that the framers' intent cannot be determined with any certainty beyond the specific evils they were attempting to curb.

19. Berger nowhere defines "customary," but since he rejects the Court's analogy to being struck by lightning, and relies heavily on "popular support" for death penalty statutes, *see, e.g.* BERGER, *supra* note 3, at 66, 116 n.19, presumably the death penalty will be constitutional until it no longer commands sufficient support to allow its enactment or imposition. In this context, it would be interesting to know Berger's opinion of Enmund v. Florida, — U.S. —, 102 S. Ct. 3368 (1982) in which the Supreme Court vacated a death sentence imposed in a felony-murder case where the defendant "neither took life, attempted to take life, nor intended to take life." *Id.* at 3371. Justice White relied primarily on a statistical analysis demonstrating the rarity with which capital punishment is either authorized or imposed under such circumstances.

ample, when it suits his purpose, he emphasizes the significance of early judicial constructions as "more weighty" because closer in time to the Framers.[20] Later, in arguing that racially discriminatory imposition of the penalty is irrelevant, he relies heavily on the premise that the fourteenth amendment allows blacks to be excluded from juries.[21] He ignores an almost contemporaneous—and thus under Berger's view highly significant—Supreme Court decision invalidating a racially discriminatory jury selection system.[22]

Berger's interpretations of the historical record are also often questionable. For instance, he discusses two early versions of section 1 of the fourteenth amendment: Bingham's, which gave Congress the power to "make all laws necessary and proper to secure . . . equal protection," and Stevens's, which simply provided that "[a]ll laws . . . shall operate impartially and equally" without regard to race.[23] The distinction, as Berger rightly points out, is that Stevens's proposal, unlike Bingham's, would work by its own force.[24] Berger's distorted perception of history then leads him to conclude, despite the unequivocally self-executing language of the final version,[25] that "Bingham's proposal carried the day."[26] He cavalierly ignores both the obvious similarities between Stevens' proposal and the final version, and the historical evidence that section 1 was meant to be self-executing and section 5 was meant to confer additional power on Congress.[27]

Finally, of course, Berger's vision of the "framer's intent" is open to myriad queries and criticisms as to the identities of "the framers" (those at Philadelphia? the state legislatures and ratifying conventions?) and whether we can discover the single intent of so many long-dead individuals.[28] Berger argues that constitutional interpretation must be confined to the intent of the framers in order to reflect the consent of the people.[29] But those who "consented" to Berger's narrow eighteenth century interpretation

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20. BERGER, *supra* note 3, at 11.

21. *Id.* 56-57.

22. Strauder v. West Virginia, 100 U.S. 103 (1880).

23. BERGER, *supra* note 3, at 168.

24. *Id.* 168-69.

25. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV.

26. BERGER, *supra* note 3, at 169.

27. *See, e.g.*, H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 136-139 (1908).

28. *See generally* Brest, *supra* note 2, at 214-215; Murphy, *Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?*, 87 YALE L.J. 1752, 1755-56 (1978).

29. *See, e.g.*, BERGER, *supra* note 3, at 66:

Substitution by the Court of its own meaning for that of the Framers changes the

of the Constitution "have been dead for a century or two."[30] Moreover, in the context of the death penalty, those who suffer most from its imposition[31] were entirely excluded, as a race, not only from participation in the ratification process but from the rights of citizenship at all.[32]

Berger also rejects any argument based on the potential interaction between the eighth amendment and the equal protection clause of the fourteenth amendment.[33] He contends that the intent of the framers of the fourteenth amendment "militate[s] against tampering with" the sentencing process.[34] The counter-arguments, which emphasize the Court's role in protecting racial minorities,[35] are particularly strong in this context. First, blacks and other minorities are disproportionately affected by the criminal justice system in general and the death penalty in particular, as Berger himself admits.[36] Second, the Court's advances in protecting the rights of criminal defendants have often hinged, at least implicitly, on the fact that "the notorious facts of each case exemplified the national scandal of racist southern justice."[37] Finally, even Berger's narrow reading of the fourteenth amendment concedes that it was intended as a limited departure from the ordinary idea of state sovereignty, "for the purpose of thwarting efforts of the recalcitrant South" to re-enslave blacks.[38] Taking all of these factors together suggests that precluding the Court from supervising the circumstances under which the death penalty is

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scope of the people's consent, displaces the Framers' value choice, and violates the basic principle of government by consent of the governed.

30. ELY, *supra* note 2, at 11.

31. *See generally* Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience,* 95 HARV. L. REV. 456 (1981).

32. That this is true of most, if not all, "discrete and insular minorities", United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), is further support for the argument that the Court has a special role in interpreting the Constitution to protect such minorities. *See generally* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980): ELY, *supra* note 2. Berger rejects this theory implicitly in DEATH PENALTIES and explicitly elsewhere. *See* Berger, *Ely's "Theory of Judicial Review,"* 42 OHIO ST. L.J. 87 (1981).

33. BERGER, *supra* note 3, at 53-58.

34. *Id.* at 55. He also repeats his arguments, first outlined in GOVERNMENT BY JUDICIARY, about "anti-Negro sentiments" in the North, *id.* at 57-58. This theory has been attacked elsewhere. *See, e.g.,* Soifer, *supra* note 7.

35. *See* note 32 *supra* and accompanying text.

36. BERGER, *supra* note 3, at 4; *see also* Zeisel, *supra* note 31; Furman v. Georgia, 408 U.S. 238, 247-48 & n.10 (1972) (Douglas, J., concurring). The sentencing procedure is especially vulnerable to class-based discrimination: "[t]here is tremendous potential for the arbitrary or invidious infliction of 'unusually' severe punishments on persons of various classes other than 'our own.'" ELY, *supra* note 2, at 97.

37. Cover, *The Origins of Judicial Activism in the Protection of Minorities,* 91 YALE L.J. 1287, 1306 (1982).

38. Berger, *supra* note 3, at 91-92. *See also* Ely, *supra* note 2, at 33.

imposed would defeat one of the historic purposes of the fourteenth amendment.

Berger's historical analysis of the Supreme Court cases on capital punishment[39] is largely a reiteration of his earlier arguments on the true meaning of the clause and the limited role of the courts.[40] He does persuasively demonstrate the cases' utter inconsistency with one another. The Court itself has recently explained this inconsistency as a continuous attempt, sensitive to the need for modification in light of perceived inadequacies of each preceding approach, to "provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused."[41] The only novel argument in this chapter is Berger's contention that judicial supervision of the sentencing process undermines the traditional jury function of dispensing mercy.[42] In fact, since the Court's interference with jury verdicts has ultimately had the effect of requiring greater leniency and a greater consideration of individual mitigating factors,[43] the jury's ability to be merciful is left untouched. It is only only the jury's ability to be arbitrarily vengeful that is curtailed.

II. THE PROBLEM OF ORIGINAL INTENT

The underlying premise of the book is that by interpreting the eighth amendment as it has, the Court has violated "the right of the people to govern themselves":

> The Court's revision of the "cruel and unusual punishments" clause is but one more arrogation of power under the aegis of the Fourteenth Amendment, but another chapter in the tale of judicial make-believe.[44]

This underlying premise raises two important questions, one regarding the proper scope of constitutional interpretation and one touching broader issues in the philosophy of language. I do not propose to enter the interpretivist/non-interpretivist debate at this point, as the arguments have been well-rehearsed elsewhere,[45] and the dichotomy may not be as clear as the proponents of both posi-

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39. Ch. 6: The Cases. His discussion centers on Weems v. United States, 217 U.S. 349 (1910); McGautha v. California, 402 U.S. 183 (1971); Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976); Lockett v. Ohio, 438 U.S. 586 (1978).

40. *See* BERGER, *supra* note 3, at 112-13.

41. Eddings v. Oklahoma, 455 U.S. 104, 111 (1982).

42. BERGER, *supra* note 3, at 144-46.

43. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

44. BERGER, *supra* note 3, at 8.

45. *See, e.g.*, Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227 (1972); Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117 (1978);

tions once thought.[46]

Even assuming, however, that the intent of the framers is relevant—or dispositive—there remains the question of how to translate the subjective intent of numerous individuals, as transcribed into a set of phrases, into a broad rule governing the interpretation of those phrases. Berger's rather simplistic approach is to ask, in essence, what the phrase meant as a term of art at common law.[47] As Paul Brest has pointed out, however,

> [t]he mere fact that a phrase appears in a formal legal utterance . . . does not entail that it was used as a term of art. This is especially true of constitutional provisions. Although the ratifying conventions that adopted the Constitution and the legislatures that adopted the amendments included many lawyers, the vast majority of participants were laypersons, and it cannot simply be assumed that they used the phrase in its technical sense.[48]

Moreover, depending on the level of generality from which the framers' "intention" is derived, even terms of art can be understood to convey broader protection than that accorded by Berger. The common law referent of a term of art might be simply an illustrative example of a broader principle: a non-customary punishment is cruel and unusual, but it may not be the only type of punishment that is.[49] Another way to state this is to note that a principle is not limited to those applications envisioned by its author.[50]

Berger's probable response to this line of argument would be to rely on the framers' specific intent to *exclude* capital punishment from the prohibition of the clause. At this point, the analysis must take a more philosophical turn. The question becomes to what extent an author's subjective intent can limit the interpretations of the hearer or reader. It is by now almost a first principle of contemporary philosophy of language that a speaker cannot, by subjective intent alone, determine the meaning to be accorded his words.[51] Thus, if the *words* "cruel and unusual" are capable of

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Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases,* 71 N.W.U.L. REV. 417 (1976).

46. *See* ELY, *supra* note 2.

47. BERGER, *supra* note 3, at 61-65.

48. Brest, *supra* note 2, at 206 n.11.

49. For an elaboration of the difference between an example, or "conception", and a principle, or "concept", *see* R. DWORKIN, TAKING RIGHTS SERIOUSLY 134-37 (1979). *See also* Bedau, *supra* note 5, at 1161 & n.43.

50. *See* Schauer, *An Essay on Constitutional Language,* 29 U.C.L.A. L. REV. 797, 806 (1982); *see also* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 33e:

> Someone says to me: "Shew the children a game." I teach them gaming with dice, and the other says, "I didn't mean that sort of game." Must the exclusion of the game have come before his mind when he gave me the order?

51. *See, e.g.,* W.V.O. QUINE, WORD & OBJECT (1960); S. CAVELL, MUST WE MEAN

bearing the interpretation the Court has placed on them, the Framers' subjective intention to limit the words is irrelevant. As one scholar has noted, "[t]he text interposes itself between the intentions of the framers and the problems of the present, cutting off the range of permissible access and references to original intent . . . ."[52] As Justice Brennan has suggested, approval of the cruel and unusual punishments clause over the objection that "the Clause might someday prevent the legislature from inflicting . . . death" creates an inference that the majority was "prepared to run that risk."[53]

That the words of the clause can plausibly, as a matter of everyday meaning, be interpreted as a bar against capital punishment is the tacit assumption behind Berger's resort to the legislative history. Furthermore, the clause may not be intended to delineate specific prohibited punishments, but instead may be an invitation to future generations to interpret the clause.[54] This is a particularly satisfying interpretation from a philosophical standpoint, as it recognizes that an author is not always fully aware of his own "intentions."[55] This theory of constitutional interpretation was articulated by a member of the Supreme Court interpreting the fourteenth amendment shortly after its ratification:

> It is possible that those who framed [the amendment] were not themselves aware of the far reaching character of its terms. They may have had in mind but one particular phase of social and political wrong which they desired to redress. Yet, if the amendment, as framed and expressed, does in fact bear a broader meaning, and does extend its protecting shield over those who were never thought of when it was conceived and put in form, and does reach social evils which were never before prohibited by constitutional enactment, it is to be presumed that the American people, in giving it their imprimatur, understood what they were doing, and meant to decree what has in fact been decreed.[56]

WHAT WE SAY 38-39 (1969): "an individual's intentions or wishes can no more produce the general meaning for a word than they can produce horses for beggars"; Schauer, *supra* note 50, at 811: "the conventions of language use are superior, in the hierarchy of interpretive tools, to the intention of the speaker.

52. Schauer, *supra* note 50, at 809.

53. Furman v. Georgia, 408 U.S. 238, 263 (1972) (Brennan, J., concurring). *See also* Schauer, *supra* note 50, at 825. Berger responds at Brennan's argument by returning to the inclusion of references to capital punishment in the Fifth Amendment, BERGER, *supra* note 3, at 46-47, but he does not explain why of the two inconsistent clauses the Fifth Amendment takes precedence.

54. *See, e.g.,* ELY, *supra* note 2, at 13-14; Brest, *supra* note 2 at 216-17 (1980); *see also* Dworkin, *Law As Interpretation,* 60 TEX. L. REV. 527, 539-40 (1982) (an author's intentions can include "the intention to create something independent of his intentions").

55. *See* CAVELL, *supra* note 51 at 40; DWORKIN, *supra* note 54, at 538.

56. Live-stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649, 652 (No. 8,408) (C.C.D. La. 1870) (Bradley, J.). It is ironic that Berger cites Justice Bradley's opinion in this case in support of his contention that the Fourteenth Amendment was designed solely to protect rights encompassed by the

The most recent debate about theories of judicial review may have been sparked by *Roe v. Wade,*[57] as the last was by *Brown v. Board of Education*[58] (and the first this century by the invalidation of much New Deal legislation in the name of substantive due process.)[59] Berger does seem motivated, at least in part, by a desire to entice the Court away from its latest flirtation with Lochnerian[60] doctrines. He explicitly accuses Justice Brennan of pure Lochnerizing[61] and repeatedly states that judges should not pass on the wisdom of laws.[62] He may, however, be weakening his own case and doing the Court a disservice. As John Hart Ely has pointed out, the Eighth Amendment contains its own limits, in contrast to the open-endedness of substantive due process: "The subject is punishments, not the entire range of government action, and even in that limited area the delegation to the interpreter is not entirely unguided. . . ."[63] The constant invocation of *Lochner* to criticize cases in which the Court has at least attempted to tie its decision to specific constitutional language is likely to have the unintended effect of making the Court—and its critics—immune to such a charge when it really counts.[64] If Berger seriously desires to advocate principled decision-making, he must learn to distinguish unprincipled decisions from decisions with which he disagrees.

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1866 Civil Rights Act. BERGER, *supra* note 3, at 94-95 & n.81. Justice Bradley does reach this conclusion, as an afterthought, 15 F. Cas. at 655, but interprets both the Act and the Amendment to encompass much broader rights than those suggested by Berger. In fact, Justice Bradley gives the privileges and immunities clause the broadest possible construction, and only then concludes that "the first section of the [civil rights] bill covers the same ground as the fourteenth amendment. . . ." *Id.*

57. 410 U.S. 113 (1973).

58. 347 U.S. 483 (1954).

59. *See* Meeks, Foreword, *Symposium: Judicial Review versus Democracy,* 42 OHIO ST. L.J. 1, 2 (1981).

60. Lochner v. New York, 198 U.S. 45 (1905).

61. BERGER, *supra* note 3, at 120 n.32.

62. *See, e.g., id.* at 80-81.

63. Ely, *supra* note 2, at 14.

64. *See* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L.J. 920, 943-44 (1973). *See also* DWORKIN, *supra* note 54, at 527:

> [L]egal practice is an exercise in interpretation. . . . Law so conceived is deeply and thoroughly political. Lawyers and judges cannot avoid politics in the broad sense of political theory. But law is not a matter of personal or partisan politics, and a critique of law that does not understand this difference will provide poor understanding and even poorer guidance.

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