

EXPERT WITNESSES, RATIONAL CHOICE AND THE SEARCH FOR INTENT*

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Students of the individual personality have been serving as expert witnesses since at least the seventeenth century, when Sir Thomas Browne assured an English jury that witches existed and that, in his opinion, the defendants in the instant case were, indeed, witches. Historians, psychologists, anthropologists, and sociologists only took on a like duty in the 1940s and 1950s with the preparation of the school segregation cases.¹ In *Brown v. Board of Education*, the Supreme Court and the litigants were concerned with the question of intent in two very different ways: they asked historians whether the framers of the fourteenth amendment had meant to ban racial segregation in schools or not; and they asked other social scientists, in effect, whether segregation was so harmful to black people that a discriminatory motive could be inferred.²

In the 1970s and 1980s, the discussion of what became known as *de facto* and *de jure* school segregation turned on the question of motivation, as did those of the legality of various housing laws and employment practices.³ This stream of decisions perhaps reached

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1. The (Sir Thomas) Browne case is recounted in Garfinkel, *Social Science Evidence and the School Segregation Cases*, 21 J. POL. 37, 46-47 (1959). The literature on the use of social scientists and historians as expert witnesses is wider than it is deep, but for convenient introductions and references, see B. LEVIN & W. HAWLEY, *THE COURTS, SOCIAL SCIENCE, AND SCHOOL DESEGREGATION* (1977); Bourgeois, *The Role of the Historian in the Litigation Process*, 67 CANADIAN HIST. REV. 195 (1986); Clark, *The Social Scientist as an Expert Witness in Civil Rights Litigation*, 1 SOC. PROBS. 5 (1953); Rosen, *The Anthropologist as Expert Witness*, 79 AM. ANTHROPOLOGIST 555 (1977); P. McCrary & J. Hebert, *Keeping the Courts Honest: Expert Witnesses in Voting Rights and School Desegregation Cases* (1986) (unpublished paper delivered at Southern Historical Association Convention).

2. *Brown v. Board of Education*, 347 U.S. 483 (1954). See, e.g., Rosen, *supra* note 1, at 557-62, and references cited therein.

3. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); L. TRIBE, *THE CONSTITUTIONAL PROTECTION OF INDIVIDUAL RIGHTS: LIMITS ON GOVERNMENTAL AUTHORITY* 1028-32 (1978); Binion, "Intent" and Equal Protection: A Reconsideration, 1983 SUP. CT. REV. 397, 398-403; Sellers, *The Impact of Intent on Equal Protection Jurisprudence*, 84 DICKINSON L.

its high water mark in the 1980 voting rights case of *Mobile v. Bolden*, which brought historical expert witness testimony to the fore again.⁴ In his plurality opinion in *Bolden*, Justice Stewart ruled that it was not enough to show that the at-large election feature of the Mobile City Commission had the *effect* of discriminating against blacks. Instead, it was necessary to demonstrate that the creators of the arrangement had adopted it with an *intent* to discriminate. For the next two years, debates over the renewal of the Voting Rights Act centered on whether an effect standard should replace what Stewart believed was the existing intent standard.⁵

Likewise, issues of intent were also central to the great brouhaha among historians in 1986 over the testimony of Professors Rosalind Rosenberg and Alice Kessler-Harris in the *Sears* sex discrimination case.⁶ Rosenberg was asked to testify on the question of whether the apparent pattern of sex discrimination shown by employment statistics proved that Sears intended to discriminate against women in commission sales hires or whether women's allegedly different motives in seeking employment could explain the statistical results away. The EEOC employed Kessler-Harris to criticize Rosenberg's account of women's purposes. In the ensuing extra-judicial controversy, each of the combatants attacked the other's motives in testifying as she did. Moreover, the emerging strategy of the defendants in both voting rights and affirmative action litigation has concentrated on the use of statistics to prove or disprove intent.⁷

Determining the intent of Congress or other policymaking bod-

REV. 363 (1980); Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978).

4. *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In *Brown*, historians had not actually testified, but had served as consultants to the NAACP, being asked to supply evidence to support that organization's contention that the fourteenth amendment was meant to ban school segregation. The responsibilities of private advisers and those who testify under oath are quite different.

5. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986); S. REP. NO. 417, 97th Cong., 2d Sess. 2 (1982).

6. The U.S. Court of Appeals for the Seventh Circuit has decided the case, upholding the decision of the district court. In a 2-1 vote, Judges Wood and Eschbach made up the majority while Judge Cudahy filed a vigorous dissent. The court denied rehearing *en banc* on March 15, 1988. *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988). On the controversy in the historical profession, see Wiener, *Women Fall One Step Back in Sears Case*, IN THESE TIMES, July 9-22, 1986; Wiener, *Women's History on Trial*, 241 THE NATION 61 (Sept. 7, 1985); Winkler, *2 Scholars' Conflict in Sears Sex-Bias Case Sets Off War in Women's History*, CHRONICLE OF HIGHER EDUC., Feb. 5, 1986; *Women's History and EEOC v. Sears, Roebuck and Co.*, NEW PERSPECTIVES, Summer 1986, at 21.

7. For introductions to the issues involved in using statistics in employment discrimination cases, see Boardman & Vining, *The Role of Probative Statistics in Employment Discrimination Cases*, 46 LAW & CONTEMP. PROBS. 189 (1983); Shoben, *The Use of Statistics to Prove Intentional Employment Discrimination*, 46 LAW & CONTEMP. PROBS. 219 (1983).

ies continues to be crucial in courts as well as in other forums. *Weber*, the affirmative action case, turned on the legislative history of Title VII of the 1964 Civil Rights Acts. Whether the framers of the 1866 and 1870 Civil Rights Acts meant to protect whites of various non-British ethnic and nationality groups was crucial in two 1987 Supreme Court cases.⁸ Two major confrontations between Congress and the Reagan administration have involved intent: Did the 1972 SALT I Treaty prohibit tests of beam weapons or other technologically advanced ballistic missile defense system components outside the laboratory?⁹ Did the Boland Amendment prohibit the president and employees of the National Security Council from helping to provide military assistance to those seeking to overthrow the Nicaraguan government during 1985? Finally, in a series of nineteenth and early twentieth-century commerce clause cases, and perhaps most memorably in the 1952 *Steel Seizure Case*, court decisions depended on judges' interpretations of the reasons why Congress *failed* to pass laws. However difficult it may be to discern the motives for inaction, the problem underlines the importance of discovering intent in statutory and constitutional law.¹⁰

Although they continually attribute motives to their subjects, historians have published very little on the concept of intention. Legal scholars have expressed themselves more systematically, distinguishing three varieties of motives: the subjective intentions of individuals, which are evidenced by what people say they meant to do and why they meant to do it; foreseeability, or the consequences

8. *St. Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987); *Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019 (1987); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

9. See R. GARTHOFF, *POLICY VERSUS THE LAW: THE REINTERPRETATION OF THE ABM TREATY* (1987) (pamphlet published by the Brookings Institution); Chayes & Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956 (1986); Sofaer, *The ABM Treaty and The Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986).

10. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Laurence H. Tribe argues persuasively that courts must interpret legislative and constitutional silence in *L. TRIBE, CONSTITUTIONAL CHOICES* 29-44 (1985). For a contrary argument, see R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 181-82 (1975). One might begin systematic thinking about how to interpret silence by distinguishing between active and inactive silence. The former is more probative, because the legislature is known to have been aware of a possible action and refused to take it—e.g., refused to prohibit local governments from regulating ship pilots. The passivity of a legislature that is not known to have considered a particular provision obviously provides courts with less guidance. Even in the first case, however, the intentions of the body may be subject to differing interpretations. For example, in 1875, the House turned down amendments to that year's Civil Rights Act that would have allowed school segregation and that would have required at least equal, even if separate schools. Supporters of integration apparently preferred not to enshrine segregation, even if it meant failing to mandate equal racial expenditures, equal school buildings, equal term lengths, etc.

that "objective" observers think could reasonably have been expected to follow from a particular behavior; and institutional intention, or the effect of a sum of a series of decisions by different officials.¹¹

In this article, I shall argue that historians, political scientists, and judges unconsciously do employ all three notions of intent, and that none of the three should be discarded. To rely wholly on direct expressions of people's thoughts is to undermine a proper skepticism about misrepresentations, and, in the many instances in which there are few or no statements at all, to risk abandoning the search for intent altogether. To concentrate exclusively on foreseeability is to invite nonterminating disputes between observers who differ on what various actors should have expected, as well as to disregard more straightforward evidence of motives. Finally, institutions do not act, in the simple way that vectors do in physics. Institutional intent is often a useful conceit, but it may, like other figures of speech, embellish rather than clarify. The inevitable intermixture of all three notions of intent and the difficulties and advantages of each will be illustrated through an examination of these paradigmatic instances: statistical cases about differential treatment, laws, and a general constitutional provision, the fourteenth amendment.

I

Even when white male Americans have openly admitted their desires to treat others differently, they have usually disavowed any hostile purposes. When they excluded blacks from common or "white" schools in the 1840s, for instance, the members of the Boston School Committee claimed that they were acting "in the best interests" of blacks. Similarly, southern whites and men everywhere purported to be protecting Afro-Americans and women by denying them the vote. It has never been easy to find sworn, public expressions of ethnic or gender discrimination that would satisfy an antipathetic judge.¹² As a consequence, both jurists and historians have generally turned to circumstantial evidence of intent, which has always included evidence drawn from effects.

It is misleading to mark too bright a line between "intent" and "effect," or "differential treatment" and "adverse impact." Evi-

11. Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317 (1976) [hereinafter Note, *Segregative Intent*].

12. J. KOUSSER, DEAD END: THE DEVELOPMENT OF NINETEENTH-CENTURY LITIGATION ON RACIAL DISCRIMINATION IN SCHOOLS (1986) [hereinafter J. KOUSSER, DEAD END]; Kousser, "The Supremacy of Equal Rights": *The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment* NW. U.L. REV. (forthcoming).

dence that the goals of certain policies were impermissible has almost always been a matter of inference, rather than of direct statement.¹³ Thus, even where nineteenth-century judges ruled school segregation constitutional, they still gauged the motives of school boards by requiring that the education offered blacks had to be "substantially equal" to that given whites.¹⁴ Those effects were often judged by evidence which was at least in principle quantifiable, such as per capita appropriations, teachers' credentials, the quality of school buildings, the distance children had to walk to school, and so on. There is nothing new in using statistics about effects to judge whether discrimination has taken place.

No reasonable person would expect Sears executives or southern legislators or city fathers to admit on the record that they intended to promote sex or race discrimination. Not even the disfranchisers of the late nineteenth century wrote race explicitly into their qualifications. Instead, they skillfully found correlates of race—literacy, property, conviction for such crimes as petty theft or miscegenation—and debarred people with those traits, maintaining that they wanted educated, honest electors who had a "stake in society." They then left it to minor administrators to carry out their actual and obvious purposes.¹⁵ Similarly, present-day employers claim that they want only an aggressive, experienced, unreservedly dedicated work force, and framers of at-large election schemes desire cosmopolitan, rather than locally oriented commissioners, councilmen, or school board members.

The correlation gambit is also used when their practices are challenged in court. The strategy is to find correlates of race or gender and then to use them as explanatory variables, or if they cannot be measured, as explanations in principle. Past discrimination thus becomes an excuse for present and future discrimination. If Sears and other employers rarely hired women to sell consumer durables before 1973, it is not difficult to see why they had such trouble finding experienced women for such lines after that date. Throw in "experience" on the right-hand side of a regression equation, and the likelihood of finding a statistically significant effect for gender is reduced.¹⁶ Likewise, individual Latinos and southern

13. Boardman & Vining, *supra* note 7, at 191-93; Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 139-46 (1972) [hereinafter Note, *Legislative Purposes*].

14. *Bertonneau v. Board of Directors of New Orleans City Schools*, 3 F. Cas. 294 (C.C.D. La. 1878) (No. 1,361); *U.S. v. Buntin*, 10 F. 730 (C.C.S.D. Oh. 1882).

15. J. KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974); Kousser, *Suffrage*, in 3 *ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY* 1236 (J. Greene ed. 1984).

16. Essentially, the variance of the estimate of the coefficient for gender will be in-

blacks have only recently attained much political visibility, they usually have difficulty raising as much money as white candidates do, and nearly all are Democrats, whereas most southern whites are now at least occasional presidential Republicans. Add such independent variables, and the effect of race on electoral success or polarization tends to wash out.¹⁷ Likewise, in dismissing the most extensive statistical study of the death penalty ever made, the federal district court in the 1987 case of *McCleskey v. Kemp* emphasized possible excluded variables and the reduction in the effects of race when *twenty* additional independent variables were added to the regression equation.¹⁸ But what do such equations really tell us about causation? What picture of the world do they represent?

The portrait is an unreal, idealized one, in which men and women have exactly the same employment histories, express a determination to sell in precisely the same fashion, have equal knowledge of what has heretofore been considered by employers to be a separate male sphere. It is a universe where blacks are just as educated and wealthy as whites, in which partisanship and race are unrelated, and in which the effects of past discrimination all disappeared at the stroke of Lyndon Johnson's pen on the Voting Rights Act. It is a state in which race has no judicially cognizable effect on prosecutors or juries, even though the chances of receiving the death penalty just happen to be seven times as high for blacks who kill whites as for whites who kill blacks.¹⁹ It is a dream world concocted in a computer or a witness's or judge's head for the transparent purpose of preventing those egalitarian fables from becoming realities, a set

creased if variables such as experience are entered into the regression equation, if gender and experience are correlated. And as the variance of the estimate rises, an analyst's confidence that the coefficient is not zero will fall. This confidence is what the concept of statistical significance usually refers to in such cases. This will hold for any two (or more) variables. For the mathematics of the statement, see E. HANUSHEK & J. JACKSON, *STATISTICAL METHODS FOR SOCIAL SCIENTISTS* 87 (1977). For unstated reasons, Judge Nordberg accepted the unusually stringent standard of a "t" value of above 3.0 for statistical significance in the *Sears* case. If there were no difference in hires or salaries by sex, one would find one in a sample, using this criterion, only 0.27% of the time. The combination of including variables correlated with sex and making it so difficult to find a statistically significant effect for sex reduces almost to zero the chance of concluding that Sears was guilty of discrimination. For a good commonsensical discussion of the issues involved, see Note, *Title VII, Multiple Linear Regression Models, and the Courts: An Analysis*, 46 *LAW & CONTEMP. PROBS.*, 283, 286-88 (1983).

17. This strategy, pioneered in voting rights cases by Professor Charles Bullock of the University of Georgia, has been rejected by the U.S. Supreme Court in *Gingles*, and by Judge Harold A. Baker of the Central Illinois U.S. District Court in *Frank McNeil v. City of Springfield, Ill.*, 658 F. Supp. 1015 (C.D. Ill. 1987).

18. *McCleskey v. Kemp*, 107 S. Ct. 1756, 1764 n.6 (1987).

19. *Id.* at 1770 n.20.

of tautological creations in which discrimination-free utopias are assumed in order to prove that no discrimination took place.

II

The determination of the intent of the proponents of a law is always uncertain because of the indefiniteness of language, sloppy drafting, the complexity of the legislative process, the paucity of data on legislators' motives, imperfections in the correlations between attitudes and behavior, and multiple purposes of the actors. Sometimes, as Supreme Court Justice John H. Clarke once noted about the language of a particular statute, "it is so plain that to argue it would obscure it."²⁰ Yet even here, the difficulty of answering a question about motivation depends crucially on how broadly the question is phrased. If the law says that the speed limit shall not exceed 55 miles per hour, or that persons who use a gun during the commission of a felony must serve at least some time in prison, or that performing or conspiring to arrange an abortion is illegal, it is easy to identify criminal acts, but not so simple to discover why the legislators voted for the laws. Some may have desired to conserve energy, others, to prevent auto accidents; some, to inhibit violent crimes, others, to punish those who committed them; some, to protect the lives of fetuses, others, merely to avoid electoral challenges from the anti-abortionists or as part of a logrolling agreement.²¹ Even an unambiguous statute may not provide unambiguous testimony on motives. The deeper motives of the legislators may be important when a judge is trying to mete out punishment or assign rights in cases brought under such laws, or when a plainly stated law fails to cover unforeseen contingencies. Judges in such instances often rest their interpretations on the lawmakers' broad purposes or on well-known legal principles with which they assume the legislators were familiar. Thus, in construing the law of wills in 1889, New York Appeals Court Judge Robert Earl stated that "a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers."²²

Inquiry into purpose may or may not be necessary to clarify a

20. *Motion Picture Co. v. Universal Film Co.*, 243 U.S. 502 (1917), *quoted in* A. BICKEL & B. SCHMIDT, JR., *THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-21*, at 713 (1984).

21. Long recognized by scholars, these difficulties have aroused considerable skepticism about the possibility of determining legislative intent at all. *See Note, Legislative Purposes*, *supra* note 13, at 142.

22. *Riggs v. Palmer*, 22 N.E. 188, 189 (1889), *quoted in* R. DWORKIN, *LAW'S EMPIRE*

statute's meaning. But when a legislative or administrative body adopts a regulation which has the effect of treating groups of people differently, and the reasonableness of the distinction or disadvantage is called into question, courts usually have no alternative but to search for motives. Those who would confine judges entirely to the examination of a statute's language and effects not only needlessly ignore relevant information but they also launch judges on even less clearly demarcated, less certain seas of inquiry.²³ Unless their robes confer mystic powers, judges must look beyond statutory language and to complimentary documents produced by members or employees of the relevant official body, to extrinsic materials bearing on the context in which the action took place, and to appropriate case law to determine why the officials behaved as they did.²⁴ How can this be done systematically?

A law may provide clues to its purpose and genesis on the face of its text, and a knowledge of other related events and of the legislature's standard operating procedures may yield interpretive hints. In 1901, for instance, the Alabama legislature passed a law changing the Dallas County Commission from an appointive to an elective body.²⁵ Each commissioner had to reside in one of four electoral districts, but all the voters in the county could cast ballots for every commissioner. As of 1981, when I testified in the Justice Department's challenge to this law in Selma—I was sixteen years late for the march, but things had not changed much, anyway—no black person had served on that black belt county's commission for over a century.

I began my testimony by noting that the at-large feature of that local law was added to the end of the statute in a fashion that was barely grammatical and wholly illogical.²⁶ In the penultimate clause of section 6 of the law, the winner was required to receive a plurality in the district, but the last clause provided that every voter in the county could vote for each commissioner, while remaining silent on what proportion of the whole electorate was necessary for

18 (1986). See Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 526 (1964).

23. Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 974-75 (1978).

24. Thus, much of the legal scholarship on statutory interpretation, which concentrates on ascertaining meaning, is irrelevant to discovering purposes that may go beyond or even controvert apparent statutory intent. In particular, Dickerson's witty diatribe against the systematic use of most legislative documents, in R. DICKERSON, *supra* note 10, at 137-97, is here beside the point.

25. Act of Feb. 8, 1901, No. 328, 1900-1901 Ala. Acts 890.

26. That such a potent inconsistency contradicts the usual presumptions about reading statutes (R. DICKERSON, *supra* note 10, at 223-25) is one of many instances that underline the differences in inquiries directed at meaning and those focusing on purpose.

election and what would happen if a commissioner carried the county but lost his district. When I read this to Judge W. Brevard Hand, who had in 1981 been considering the Dallas County voting case for five years, he remarked that the law was so unclear that someone ought to bring a legal challenge to it. The lawyer for Justice deadpanned that he thought that was what we were there for. Why would someone stick on an at-large voting scheme?

The historical context helped. Dallas County had been over eighty percent black since the early antebellum period, and its elected officials during Reconstruction had been either black or white radical Republicans. In the late 1870s, after Alabama had been "redeemed," the state legislature simply abolished local elections in this and several other similar counties, obviating the need for violence or ballot-box stuffing to maintain white Democratic supremacy locally. In 1901, the Populists had been at least temporarily defeated and a constitutional convention to disfranchise blacks and poor whites had been authorized, but not yet convened. Selma Democrats felt confident enough of their ability to control elections to have a bill on the subject introduced. Since Alabama legislators customarily deferred to their colleagues on local legislation (unless, of course, those colleagues happened to be Republicans or Populists), the bill sailed through without reported discussion, amendment, or any adverse votes. Whatever it was these locals wanted, they got. The legislative journals and even hometown newspapers were silent as to the reasons for the suspicious at-large section.²⁷

Could the local notables in Selma have had anything to fear from blacks at the time? I concluded that they could have. Suppose that the constitutional convention were to adopt a literacy test as the whole disfranchising device. Despite egregious educational discrimination, the black density in the county was so overwhelming that a small majority of the literate voters, as measured by the 1900 census, would still be nonwhite. By mapping the electoral districts into census districts and sampling from the manuscript census returns, I was able to show that two of the four county commission districts would have had substantial black majorities in 1900, and a third would have had a bare black majority, if the electorate were confined to literate voters. In a district system, then, with anything like a fairly administered literacy qualification, blacks would con-

27. Reports in the *Selma Journal*, a local newspaper, indicate that the at-large section was in the text of the bill as it was first introduced into the legislature, so the provision was added by the bill's initiators, and not to conform to some statewide standard imposed by other legislators.

trol half the seats. In an at-large setting, however, it would take only minor skulduggery, compared to what Dallas County voting officials had perpetrated for the last generation in state elections, to segregate the courthouse completely.

It therefore seemed to me that the most plausible reason for the adoption of the 1901 at-large system was a racist one.²⁸ The at-large system provided insurance in case the convention only disfranchised illiterates or a widely expected lawsuit forced equitable enforcement of voting laws.²⁹ That is to say, lacking plausible direct evidence, I was forced to try to reconstruct what the crucial actors could have foreseen, and, by adding evidence of their purposes in taking other actions, to determine their motives in this instance. Judge Hand disagreed with me, suggesting during the trial that white Selmans could not have had a racist motive in passing the law, because they could always have stuffed the ballot box or killed their opponents. What motivated them, announced the judge—who has more recently attracted widespread attention by banning school textbooks that propagate what he terms “the religion of secular humanism”—was what he considered the fundamental human drive—greed. It was not so much that they opposed blacks, as that these whites wanted all the offices for themselves. The court of appeals somehow managed to produce a printable response to this reasoning, curtly overturning Judge Hand.³⁰

Reflection on this example suggests two preliminary general rules for investigating legislative intent. First, knowing how the body operated in a particular instance—who wrote the bill, how was it changed in committee or on the floor, whether there was a partisan or sectional division on it, etc.—and how the body conventionally proceeded on analogous bills may indicate the importance of various actors in its framing. In this case, since the bill was passed without dissent as written by Selmans, and since the Alabama legislature in this period usually deferred on purely local bills unless they posed some danger to white Democratic supremacy, the intentions that counted most were those of the Dallas county dele-

28. For an analysis of recent equal protection doctrine that focuses how central impermissible purposes were to an action, see Meyers, *Impermissible Purposes and the Equal Protection Clause*, 86 COLUM. L. REV. 1184, 1208 (1986).

29. No one knew precisely what plan the convention would adopt at the time that the bill was proposed. Two lawsuits growing out of the convention's malpractices reached the U.S. Supreme Court in 1903-04. *Giles v. Teasley*, 193 U.S. 146 (1904); *Giles v. Harris*, 189 U.S. 475 (1903).

30. *U.S. v. Dallas County Commissioner*, 548 F. Supp. 875, 913-14 (S.D. Ala. 1982), *rev'd in part and remanded*, 739 F.2d 1529 (11th Cir. 1984). For fuller descriptions of Judge Hand's antics, see Caplan, *A Good Ol' Boy Sitting on The Federal Bench*, L.A. Times, March 29, 1987, at V-3.

gation. Although in some circumstances, the weighting will be obvious and uncontroversial, in others, it will not be, and there, it must be justified openly and self-consciously.³¹ Second, even if more evidence had been available, it would still have been obviously fallacious to ignore the social and political context of the times and any available evidence about the philosophies and motives of the key participants.

Few state legislatures have kept formal records of debates, newspaper coverage of legislative proceedings is sketchy (although generally less so in the nineteenth than in the twentieth century) and committee hearings and reports have rarely been extensive until rather recently. Thus, the amount of data available for uncovering the motives of state legislators is usually less than for an Act of Congress. Having less information makes it easier to come to a conclusion, but harder to be sure of it. On major controversial bills, if the historian is lucky, there will be a few partially reported speeches, some frustratingly vague newspaper stories and editorials, a roll call vote or two on amendments, and perhaps the text of the bill reported out by the relevant committee. If the object of attention is a bill in Congress, one will almost surely have this information, plus hearings and reports and maybe a few mentions in private paper collections. For obscure or local bills, like the Dallas County local government act, the information will usually be much less plentiful. Even in the best cases, however, inference may not be straightforward.³²

To see why, it is useful to introduce the concept of an issue space.³³ To start simply, suppose that we can scale an issue from the most liberal to the most conservative position, or from spending nothing to spending, say, \$1 million, or some other dimension that

31. Compare the unfortunately offhanded justification of weights in the case of the fourteenth amendment in Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMM. 43, 49-50 (1987).

32. It is easy to sympathize with Dickerson's remarks on "... the frustrations, interminable prolixities, blind alleys, and dismal uncertainties of the prevailing patterns of legislative history." R. DICKERSON, *supra* note 10, at 168. For the historian or judge concerned with intent, however, it is impossible to take Dickerson's advice about legislative history: ignore it.

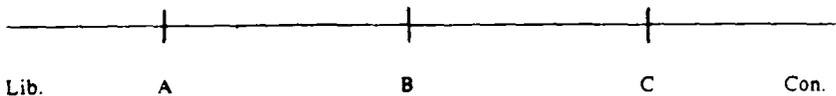
33. A convenient introduction to the literature of "rational choice" is R. ABRAMS, *FOUNDATIONS OF POLITICAL ANALYSIS* (1980). I have drawn freely and without attribution on the standard literature on spatial models and other aspects of rational choice below.

It might be contended that to attempt to determine the intent of a multi-member body is to conduct such an elementary fallacy of composition that it should simply be dismissed as ridiculous. If this were not enough, Kenneth Arrow's famous impossibility theorem about aggregating preferences provides a more formal proof of the absurdity of the effort. Nonetheless, lawyers and judges, must construe legislative intent to do their jobs. If we are not to view their effort as merely an elaborate hoax to cloak their own policy choices, then it is worth trying to understand how they muddle through in a non-ideal world.

makes sense in a particular instance. Suppose that every legislator has an "ideal point" or "bliss point" that represents the bill or provision that she would like to see adopted. Legislator one prefers point A, two prefers B, and so on. Then if there are enough legislators and enough roll calls, we may be able to determine statistically not only who ends up on the winning side of each, but where each legislator ranks on the continuum. By relating speeches to votes, we may be able to nail down these positions pretty precisely. Yet there are several difficulties and several hidden assumptions in our analysis. Most importantly, we have assumed, in effect, that everyone votes and speaks "sincerely," that no strategic behavior or vote trading takes place.

FIGURE 1

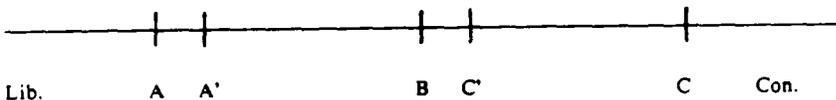
ONE ISSUE DIMENSION



Suppose that I am one of the twenty-five percent of the legislators who takes position C, while thirty percent are at about A, and forty-five percent are close to B. Suppose I expect a sequence of votes in which B is the committee position reported out, and it is matched first against A and then against C. How should I vote on A versus B?

FIGURE 2

STRATEGIC VOTING IN ONE DIMENSION



If I vote for the alternative nearest to my ideal point, I will favor B over A, and B will win by 70-30. But on the next vote, B will defeat C, which I prefer, by 75-25, so I end up with my second choice. If I vote strategically on the first ballot, A will defeat B, and then C will defeat A, because the people at B are closer to it than they are to A. So, if I vote strategically and no one else does, I will get an outcome (in this example) more to my liking than if I vote my true preferences. If everyone votes strategically, and if the agenda itself can be voted on, the situation immediately becomes

vastly more complicated and the outcome may be theoretically indeterminate. Since legislators understood the importance of not being earnest long before the invention of game theory or spatial models, the bare record will often reflect strategic maneuvering and speaking rather than "real" intent.³⁴

Legislators may have incentives not only to vote against their own preferences, but also to distort what they think is the content of each proposal. If Group A can convince Group B that *A* is actually closer to B than *C* is, then *A* may win in a sequence of roll calls. Group A may fool not only Group B, but may also confuse later judges or historians. While the bill on its face may appear to be close to position A, the debate may imply the contrary. What should one conclude in this circumstance?

Two simplifying assumptions are often implicitly employed to solve this difficulty. One is that the majority's intent is concentrated at the position of the swing voter. We may refer to this as the "swing voter assumption." If *C* is the position finally adopted, then, according to this assumption, that is what the whole majority favored, even though we may have reason to believe that most of the members of the majority preferred, say, B to *C*. The majority of the majority may have been inept, or the rules may have been stacked against it, or its members may have been so risk-averse or so desirous of a consensus solution that they voted for their second choice. Another simplifying assumption is that the members of the assembly said what they believed and acted as they spoke. This I will term the "sincere voting and speaking postulate." Legislators did not contend that the bill's position was at *C* and at the same time secretly hope that a future judge would construe the bill to have been at position C.

In some important cases, we know not only that the swing voter and sincerity assumptions were incorrect, but also the direction or directions of the biases. It is often remarked, for instance, that opponents of a bill or argument may posit a "parade of imaginary horrors" perhaps marching down a "slippery slope" as the inevitable direction if the bill is passed or the reasoning accepted.

Let me give an example from the recent history of voting rights legislation. The key question in the renewal of the Voting Rights Act in the early 1980s was whether to alter section two to overrule the *Bolden* decision. To oversimplify, liberals believed that the best

34. For game theoretic discussions of sincere and sophisticated or strategic voting, see Enelow, *Saving Amendments, Killer Amendments, and an Expected Utility Theory of Sophisticated Voting*, 43 J. POL. 1062 (1981); Enelow & Koehler, *The Amendment in Legislative Strategy: Sophisticated Voting in the U.S. Congress*, 42 J. POL. 396 (1980).

indicator of whether blacks and Latinos were disadvantaged by an electoral arrangement was whether the candidates of their choice—usually but not always black or Latino—were elected in proportion to the minority population. On a five person board in a forty percent black area, for example, two of the officials should be expected to be black. Conservatives, led by political appointees in the Reagan Justice Department, would have required proof of discriminatory intent or else would have limited the Act to a guarantee that black or Latinos could register and vote freely. Moderates wanted blacks and Latinos to have a chance to be elected, but feared that a proportionality test would become too mechanical and absolute, and would discourage the sorts of coalitions that elected people like themselves to office. Everyone wanted credit for the passage of an act which by 1980 had gained almost universal rhetorical support. No one to the left of Jesse Helms wanted to be labeled a racist.

The compromise that was worked out was both ingenious and illustrative of the points that I have been stressing. Senator Robert Dole offered an amendment proclaiming an effect standard, but disavowing the necessity of proportional representation, and the Democrats, particularly the ranking minority member on the Judiciary Committee, Edward Kennedy, allowed Dole to claim the credit for breaking the potential deadlock and pushing the bill toward passage. Since the compromise provision language was ambiguous, ancillary congressional materials assumed a heightened importance. In return for the credit, Dole allowed Kennedy to write the Senate Report on the bill, a task which he delegated to two of the chief civil rights lobbyists on the Act. These men not only wrote a strong effect standard into the report but edged towards proportionality. They also made sure that examples were drawn from all the legal cases that were either known to be pending or expected to be filed shortly. When a judge asked subsequently whether Congress meant the law to apply to a case such as that in Hopewell, Virginia, therefore, civil rights lawyers could simply refer him to the Senate Report, which used exactly that example. Moderates got the credit, liberals, the gloss, but what was *the* single intent of Congress?

The problem is further complicated by two other facts. Before the Kennedy-Dole compromise was proposed, section two had already passed the House without a specific disavowal of proportional representation, and the House bill had collected more than sixty Senate sponsors—enough to shut off a possible filibuster and nearly enough to override a presidential veto. Since substantial majorities of both houses, then, were willing to support the substitution of an effect for an intent criterion and to stop there, was it Congress's real

desire to avoid a proportionality requirement? Moreover, in a characteristic display of chutzpah, the Assistant Attorney General for Civil Rights, William Bradford Reynolds, at least initially required his division to act as though section two had not been amended at all, and not to file cases unless the intent of the shapers of an electoral system could be clearly shown to have been discriminatory.³⁵ Strategize the agenda, strategize the votes, strategize the glosses, and let some poor judge or historian puzzle out what you wanted done!

To simplify their interpretive tasks, courts have often adopted rules of thumb, but as the 1982 Voting Rights Act example shows, an announcement of such rules can further complicated matters. If legislators know that courts will take statements in debate by major sponsors or the wording of congressional reports as authoritative, then the political game will be extended to include those documents, and "institutional intent" will seem to be more and more an artificial construct. Winning not only means winning the roll calls, but also victory in successive judicial struggles over the interpretation of the act. It is a complicated two-stage game with incentives for misrepresentation in both periods. Interpretation is at the very least a sensitive task, and no announced interpretive scheme is strategy-proof.

These difficulties are further compounded if we model the legislative situation more realistically by relaxing the assumption that there is only one bill, and that the bill's provisions are extremely simple. Suppose that in a 100-person legislature a bill has two provisions, neither of which is supported by a majority of the members. But each section has rather different coalitions for and against each, as in Figure 3, panel A, where majorities actually oppose each provision, or panel B, where a large minority opposes, but decisive minorities are indifferent. It is possible that in each case, skilled political entrepreneurs may be able to put together enough vote swaps, even without amending either section of the bill, to pass both provisions, as in Panel C of Figure 3.

35. N.Y. Times, May 12, 1984, at A-9; N.Y. Times, July 27, 1985, at A-29; N.Y. Times, Sept. 6, 1985, at A-22; Voting Rights Review, Jan. 1987, at 2-3; Editorial, Boston Globe, April 13, 1987.

FIGURE 3
ROLLING LOGS

Panel A: A Preliminary Lineup with Logrolling Potential

		<u>Provision R</u>	
		<u>Yea</u>	<u>Nay</u>
Provision S	Yea	35	15
	Nay	10	40

Panel B: A Preliminary Lineup with Decisive Minorities Indifferent

		<u>Provision R</u>		
		<u>Yea</u>	<u>Indiff.</u>	<u>Nay</u>
Provision S	Yea	35	22	05
	Indiff.	02	03	01
	Nay	05	05	40

Panel C: A Logroll Achieved

		<u>Provision R</u>	
		<u>Yea</u>	<u>Nay</u>
Provision S	Yea	51	05
	Nay	04	40

The entrepreneurs' task will be facilitated if, for example, those who are unfavorable or indifferent or negative toward one proposal care more about the proposal that they favor than the one that they dislike. In this case, the swing voter assumption would be generally false, for on both provisions (or on two or more bills, in an obvious extension of the example) many of the swing voters were actually opposed or indifferent. In the presence of logrolling, then, the lawmakers' goals are fundamentally indeterminant.

Naturally, there are negative as well as positive logrolls, and one of the most famous examples is of the negative variety. In 1957-58, the Warren Court came under harsh attack by an uneasy coalition of segregationists and fervent anticommunists. The House passed a bill called H.R. 3, removing the Supreme Court's jurisdiction in a relatively minor class of cases, but seen by both sides as an entering wedge for much more substantial attacks. In a story that then-majority leader Lyndon B. Johnson often repeated in his effort to court liberals in the contest for the 1960 presidential nomination, the Senate vote on H.R. 3 stood at 40-40, when latecomer Robert Kerr of Oklahoma, who was expected to support it, stepped into the chamber. Johnson grabbed Kerr by the lapels and backed him into the Senate cloakroom, reminded him not only of past debts to LBJ, but also of some pending public works measures affecting Oklahoma that Kerr strongly favored. The great arm-twister thus changed Kerr's mind, thereby, as Johnson put it with his typical humility, singlehandedly saving the Supreme Court.³⁶

III

Laws and most constitutional provisions tend to be relatively specific. Recent constitutional amendments setting out the procedures for presidential succession, banning the poll tax, and allowing eighteen year-olds to vote come to mind. But what of the broad clauses that give rise to so much constitutional controversy? What is freedom of speech, the press, and religion? What constitutes due process of law? What sorts of punishment are cruel and unusual? What nonenumerated rights are reserved to the people? What actions deprive persons of equal protection of the laws?

In *Government by Judiciary*, a book which provoked bitter controversy in law journals, but which has been largely ignored by historians, Raoul Berger attempted to show that the framers of the fourteenth amendment did not intend to outlaw segregated schools or malapportioned legislatures or, by implication, gender-based discrimination or interference in the decision to terminate a pregnancy.³⁷ Rather, the amendment was a carefully constrained

36. Most details of this story appear in W. MURPHY, *CONGRESS AND THE COURT* 193-223 (1962). As the example implies, logrolling may not involve simple vote trading, but also trade-offs with more general goals, such as friendship or indebtedness to a leader or party loyalty. In a parliamentary system, backbenchers or even cabinet ministers may support statutes that they actually oppose out of loyalty or a disinclination to force a dissolution of the government. In such cases, the "true" intent behind the law cannot really be determined.

37. R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977). See Avins, *De Facto and De Jure Segregation: Some Reflected Light on the Fourteenth Amendment From the Civil Rights Act of 1875*, 38 *MISS. L.J.* 179, 246-47 (1967).

attempt to guarantee the 1866 Civil Rights Act (which he also reads very narrowly) against constitutional challenge or partisan reversal. If Berger is right on the facts, and if constitutional provisions today should be interpreted to mean no more and no less than their framers intended, then the foundations of the major decisions of the Warren and Burger and even Rehnquist Courts are undermined. *Brown*, *Baker v. Carr*, *Roe v. Wade*, *Johnson v. Santa Clara*, and many more decisions represent not good law, but mere judicial overreaching.³⁸ In a pair of 1985 speeches that attracted widespread attention, Attorney General Edwin Meese, III and Supreme Court Justice William J. Brennan, Jr. engaged in a heated exchange that seems to portend an extended public debate on the issues raised by Berger, his allies, and their critics.³⁹ President Reagan's unsuccessful nomination to the Supreme Court of Robert H. Bork further underlined the crucial nature of the controversy.

Berger's detractors have taken two basic tacks. The first accepts or sidesteps his reading of the intent of the framers, but dismisses his interpretive premise that the meaning of broad constitutional sections should be cabined by the views of men of one or two centuries ago.⁴⁰ This view is particularly strong among those who would extend constitutional protections to groups that clearly were not envisaged by Reconstruction legislators, such as gays, women, and welfare recipients.⁴¹ The second, and less travelled, path is to question Berger's account of the framers' intentions.⁴² By closely analyzing Berger's account, however, I shall

38. *Johnson v. Santa Clara*, 107 S. Ct. 1442 (1987); *Roe v. Wade*, 410 U.S. 113 (1973); *Baker v. Carr*, 369 U.S. 186 (1962); *Brown v. Board of Education*, 347 U.S. 483 (1954).

39. W. Brennan, Speech at Georgetown University 4-5 (Oct. 12, 1985) (mimeo); E. Meese, Speech before American Bar Association, 13-17 (July 9, 1985) (mimeo).

40. E.g., R. DWORKIN, *supra* note 22, at 360-63; Alfange, *On Judicial Policymaking and Constitutional Change: Another Look at the "Original Intent" Theory of Constitutional Interpretation*, 5 HAST. CONST. L.Q. 603 (1978); Bridwell, Book Review, 1978 DUKE L.J. 907; Gangi, *Judicial Expansionism: An Evaluation of the Ongoing Debate*, 8 OHIO N.U.L. REV. 1 (1981); Lynch, Book Review, 63 CORNELL L. REV. 1091 (1978); Munzer & Nickel, *Does The Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1032 (1977); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, OHIO ST. L.J. 261, 270, 285, 292-97 (1981); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482 (1985); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 800-01 (1983). The clearest and most persuasive statement is Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

41. Whether these critics seek other criteria because they find Berger's arguments convincing, or accept Berger too casually (in my view) because they want to argue for using other modes of interpretation is unclear, at least to me. Whatever the critics' intentions, I think they have failed to realize the weaknesses of Berger's specific arguments about the original understanding of the fourteenth amendment.

42. See Curtis, *The Fourteenth Amendment and the Bill of Rights*, 14 CONN. L. REV. 237 (1982); Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor*

attempt to show that the two strategies do not differ as much as might be imagined.

Berger adopts at least eight rules or empirical generalizations to simplify his interpretive task, none of which is uncontroversial and all of which bias his conclusions. Every interpretation, as Ronald Dworkin points out, rests on value-laden principles. The Constitution nowhere states that judges, executives, or legislators must discover and abide by the applications of broad principles to specific situations that the framers may (or may not) have had in mind a century or two ago.⁴³

The first of Berger's principles I will call the "floor of Congress" rule—only recorded debates in Congress are probative.⁴⁴ This, of course, conveniently limits the evidence that one has to examine, but it leaves out contemporary letters, newspaper stories, speeches, and ratification debates in state legislatures, as well as previous documents of all kinds that may illuminate doctrinal developments that led to the amendment, and actions or statements after 1866 that cast reflected light on the motives and meanings of the sponsors.⁴⁵ Even if Berger had not read silence as acquiescence and quoted from speeches very selectively, the rule would bias conclusions unless floor comments are a representative sample of all opinions, whether those opinions are officially expressed or not. Since large numbers of congressmen, state legislators, and campaigners,

Berger, 16 WAKE FOREST L. REV. 45 (1980); Kutler, *Raoul Berger's 14th Amendment: A History or Ahistorical?*, 6 HASTINGS CONST. L.Q. 511 (1979); Mendelson, *A Note on the Cause and Cure of the 14th Amendment*, 43 J. POL. 152 (1981); Murphy, *Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?*, 87 YALE L.J. 1752 (1978); Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979).

43. R. DWORKIN, *A MATTER OF PRINCIPLE* 52-55, 165 (1985). See also Tushnet, *supra* note 40, at 784-96. Legal commentators such as Berger who urge the adoption of certain maxims of constitutional exegesis and conventions for determining intent do not eliminate normative behavior by judges or historians, as they claim to do. Lyons, *Constitutional Interpretation and Original Meaning*, 4 SOC. PHIL. & POL'Y 75 (1986). Those theorists merely believe that choices should be made at the level of interpretive principles, rather than on matters of substantive policy, and they implicitly assert that those standards are neutral, and that they are chosen independently of substantive outcomes, as though they took place behind a Rawlsian "veil of ignorance." J. RAWLS, *A THEORY OF JUSTICE* 136-42 (1971).

If they do not, if the implications or adhering to a particular rule or interpretive formula can be largely if perhaps imperfectly foreseen, then any rigid distinction between choosing rules and choosing policies dissolves. In the instance before us, it is hard to imagine that Berger's muddled, often self-contradictory, law-office history was cooked up without a consideration of its present-day consequences, and utterly ludicrous to maintain that endorsements of his position by such persons as Attorney General Edwin Meese were.

44. R. BERGER, *supra* note 37, at 6-7.

45. J. KOUSSER, *DEAD END*, *supra* note 12; R. DWORKIN, *supra* note 43, at 43-48; J. TEN BROEK, *EQUAL UNDER LAW* (1965); Bennett, "Mere" Rationality in Constitutional Law: *Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1091 (1979); Murphy, *supra* note 42, at 1755.

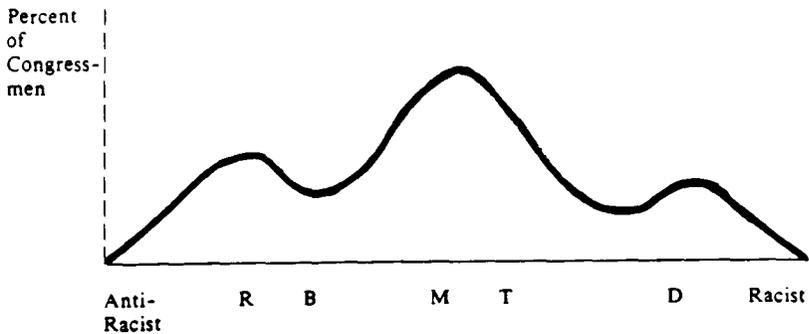
especially the more radical among them, said very little about section one during the debates, it seems unlikely that the *Congressional Record* is representative.⁴⁶

Berger's second rule is what I have called above the "swing voter assumption"—Congress is taken to have enacted the bliss point of that legislator who is just on the margin between voting for or against the proposal. All members whose ideal points are to his right, say, vote "nay," while others would prefer more leftist proposals, but capitulate because without the swing person or group they would lose.

Closely related is Berger's third assumption, sincere behavior.⁴⁷ If some legislators vote or abstain strategically, then no single person or group is pivotal, and therefore no position in an issue space is. Suppose that there is a minimal majority rule in effect, for instance, a provision that a constitutional amendment must obtain two-thirds of the votes in both houses of Congress, and that opinion is distributed as in figure 4.

FIGURE 4

EXTREMISTS CAN BE SWING VOTERS



In this graph, the vertical axis measures the number of people taking a certain position, and the three clumps of people have modes at "R" (for Radical Republicans), M (for Moderate Republicans), and D (for Democrats). There are more moderates than anything else, and Berger assumes, therefore, that the final position adopted will be at about M or even to the right, at T (for two-thirds). But suppose that the R's indicate in public or private that they will either vote against M and T or abstain. Then they may be

46. Soifer, *supra* note 42, at 682.

47. R. BERGER, *supra* note 37, at 116, 241.

able to convince the other Republicans to favor B (for John A. Bingham, who is usually considered the most important framer), as against D, which amounts to no change at all. Since abstention and strategic voting were rife in the 39th Congress, any political entrepreneur would anticipate the possibility and frame his proposals to minimize strategic defections.⁴⁸ Since most of the drafting of section one necessarily went on mostly in private, and since much of the floor strategy was thrashed out in private Republican caucuses, the possibility that the meaning of the amendment did not coincide with the moderate swing voters' position certainly cannot be ruled out.⁴⁹

While he assumes that the proponents of the amendment were simplimindedly sincere, Berger considers the Democrats strategic liars. He views as buncombe their claims that the measure would force the abrogation of school segregation and antimiscegenation laws and would empower the central government to protect all the rights of persons against the states.⁵⁰ Not only are Berger's remarks about each side's craftiness incongruous, but his characterization also implies a breadth and vagueness in the amendment that was necessary for the Democratic charges to have any credibility whatsoever. Yet such breadth would go counter to a fifth Berger predisposition—to consider the fourteenth amendment a point estimate, or, to put it in Dworkin's terms, an effort to legislate a "concrete," rather than a less specific "abstract" intent.⁵¹ Scholars have often frustratedly remarked that most of the debate by advocates of section one was conducted in sonorous references to Magna Carta, the Declaration of Independence, and the protection of freedmen and southern white loyalists.⁵² But *should* a debate about the most expansively phrased constitutional provision after 1791 have been focused on details of the moment, as if Congress were discussing petty

48. As Earl M. Maltz points out, radicals joined Democrats to defeat an early version of the reduction-of-representation section of the fourteenth amendment. Thus, uncompromising supporters and uncompromising opponents of black suffrage refused to accept a middle way. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933, 942 (1984). For further examples of such behavior, see D. DONALD, *THE POLITICS OF RECONSTRUCTION, 1863-1867* (1965).

49. Mendelson, *supra* note 42, at 154-56; Farber & Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMM. 235, 273-74 (1984).

50. For a discussion of Representative Andrew Rogers's (D, N.J.) statement charging that both the 1866 Civil Rights Bill and the fourteenth amendment would outlaw segregated schools, see Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1066-67, 1074 (1956). For Berger's views on the untrustworthiness of Democratic statements, see R. BERGER, *supra* note 37, at 157-65.

51. R. DWORKIN, *supra* note 43, at 48-57.

52. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56-59 (1955); Farber & Muench, *supra* note 49, at 269; Kelly, *supra* note 50, at 1077.

and easily altered regulations, such as a tariff list, a rivers and harbors appropriation bill, or retiring greenbacks? Additionally, in a more practical sense, one of the chief tactics employed to hold any coalition together is ambiguity. If the amendment and the discussion on it were deliberately kept broad and vague in order to hold the Republicans together against a defecting president and a still possibly potent, unreconstructedly racist Democratic opposition, does it make sense to treat the amendment as a shorthand for a specific laundry list of positions on schools, suffrage, etc.?⁵³

Berger also assumes attitude stability in three senses: First, the white northern public was, in his eyes, ineradicably and deeply racist and opposed to the centralization of power in the national government. This allows him to use statements from the antebellum era as evidence about feelings in 1866, to shove the abolitionists and their heirs offstage as a tiny minority, and to contend that all Republican politicians must have been terrified of taking liberal positions on racial matters, so that the Civil Rights Bill of 1866 and the fourteenth amendment must have been "conservative" measures.⁵⁴ Second, because he presumes that individuals never change, statements at any time in their careers evidence their views in 1866, and none of the events of that "critical year" moved them.⁵⁵ Third, he assumes that a "moderate" or a "conservative" position is constant in relation to some timeless scale. If the scale itself is in motion—if, for instance, black suffrage was a "radical" measure for Republicans in 1866, but a "mainstream" one by 1869, or if people shifted from faction to faction—then Berger's general argument, which identifies issue positions by their factional sponsorship, is undermined.⁵⁶ The argument is also both vague and circular. His strategy is to identify people with factions by informally and unsystematically lining them upon crucial issues, and then to denominate any proposal made by a member of one of these "factions" with that position in some eternal issue space. Thus, a "moderate" is someone who votes with other "moderates," and anything that he proposes or votes for is, by definition, "moder-

53. Kelly, *supra* note 50, at 1071, 1084; Bickel, *supra* note 52, at 61-63. Charles Sumner, the protege of Supreme Court Justice Joseph Story who succeeded Story as Professor at Harvard Law, and George F. Edmunds, for twenty years head of the Senate Judiciary Committee, stated in 1869 that the fourteenth amendment by itself enfranchised blacks. See 1 J. STORY, COMMENTARIES ON THE CONSTITUTION 686 (T. Cooley 4th ed. 1873).

54. R. BERGER, *supra* note 37, at 10-16, 56-57, 85, 161, 407.

55. Mendelson, *supra* note 42, 158 n.34; R. BERGER, *supra* note 37, at 91.

56. For evidence of the shift of the issue space see Kaczorowski, *To Begin The Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45, 49 (1987). For evidence of factional fluidity, see A. BOQUE, THE EARNEST MEN: REPUBLICANS OF THE CIVIL WAR SENATE 104-05 (1981).

ate."⁵⁷ Furthermore, Berger's assumption of individual and societal stasis, if ever an appropriate simplification, is surely inapplicable to the years of the growth of antislavery sentiment, the Civil War, emancipation, and the brutal ideological and social conflicts of the Reconstruction period.

A seventh postulate is that key words and phrases had temporally constant, knife-edge sharp, universally recognized definitions.⁵⁸ "Liberty" meant only what Blackstone had said it was—freedom of locomotion—a hundred years earlier.⁵⁹ All the patriotic and campaign oratory and all the antislavery campaign's books, pamphlets, and newspaper articles did not, in Berger's view, encrust the word with any additional significance.⁶⁰ By "due process," the fourteenth amendment's sponsors referred only to procedure, not substance, according to Berger, as though there were a "bright line" between the two and as though no antebellum natural rights-substantive due process tradition existed.⁶¹ By "privileges or immunities," they signaled only their adherence to Justice Bushrod Washington's 1823 musings on the article IV privileges or immunities clause, even though in almost the only mention of the point during the printed debates, the fourteenth amendment's Senate manager, Jacob Howard, specifically disavowed any intention to limit the clause to Justice Washington's enumeration.⁶² By "equal protection," they evinced a desire to protect only those particular rights that they had enumerated in the 1866 Civil Rights Act, an act

57. Maltz, who also argues for a relatively conservative reading of the fourteenth amendment, provides a particularly succinct example of such reasoning: "The voting pattern on the Bingham substitute clearly reflects the Moderate origin of the current language of section one [of the 14th Amendment]. The more Moderate and Conservative elements of the [joint] Committee [on Reconstruction] were virtually unanimous in their support of the proposal. Among this group only Grimes dissented. One would hardly expect such near unanimity unless the proposal softened the language of section one." Maltz, *supra* note 48, at 963. The capitalization of factional labels presumably heightens the reader's sense of their reality.

58. R. BERGER, *supra* note 37, at 134-56, 194-95, 200, 243. Cf. Bickel, *supra* note 52, at 34-35 ("Sir, I defy any man upon the other side of the House to name to me any right of the citizen which is not included in the worlds 'life, liberty, privileges, and immunities,' unless it should be the right of suffrage." (quoting the statement of A.J. Rogers (D. N.J.))).

59. R. BERGER, *supra* note 37, at 20-21, 34-35, 243, 270.

60. In an 1844 pamphlet, for instance, the abolitionist William Godell had defined the "liberty" of the fifth amendment due process clause as "the power of acting as one thinks fit, without restraint or control except from the laws of nature." Quoted in J. TEN BROEK, *supra* note 45, at 75. For a summary of the use of the term "liberty" in the debates over the thirteenth amendment, see *id.* at 167-68.

61. R. BERGER, *supra* note 34, at 139-40, 193-214. Cf. *Dred Scott v. Sanford*, 60 U.S. 393 (1856); *Wynehamer v. The People*, 13 N.Y. 378 (1856); J. TEN BROEK, *supra* note 45. For an excellent critique of the substance/process distinction, see L. TRIBE, *supra* note 10, at 9-20.

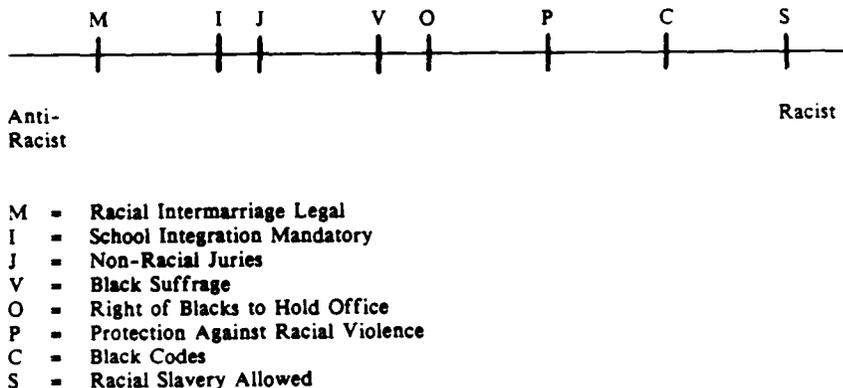
62. Mendelson, *supra* note 42, at 154-55; Farber & Muench, *supra* note 49, at 274.

that Berger, unlike the Supreme Court and other scholars, reads very narrowly.⁶³ All of these presumptions serve Berger's evident purpose—to eliminate national protection of the rights of the disadvantaged—and there is little or no evidence for any of them.

Finally, Berger believes that white racial attitudes form a temporally stable Guttman-type scale, from allowing racial intermarriage on one end through school and jury integration, black suffrage, the right to hold office, and protection against racially-motivated violence, all the way to the "Black codes" and slavery on the other end.⁶⁴ In such a hierarchical scale, anyone who disavowed black suffrage, for example, must, to be consistent, also have opposed any policy to its left—for instance, school integration, as in Figure 5. If attitudes did form such a scale, if he has properly ordered it, and if no other factors affected people's votes on these issues, then Berger is justified in using evidence that Republicans did not force the suffrage issue in 1866 as support for his view that they did not intend to mandate school integration, outlaw antimiscegenation statutes, etc.

FIGURE 5

A HYPOTHETICAL GUTTMAN SCALE OF WHITE RACIAL ATTITUDES



All three of these conditionals seem to me wrong. People may be much more willing to allow such private, voluntary, nonexternality producing acts as the choice of a marriage partner to be free of restrictions than they are to favor obligatory racial contacts that might directly involve everyone in schools or stores. Democrats

63. R. BERGER, *supra* note 37, at 171. For a much broader, and, I think, more convincing reading, see J. TEN BROEK, *supra* note 45, at 179-81.

64. R. BERGER, *supra* note 37, at 123, 174, 239, 243 n.54, 412.

with few expectations of capturing black votes might more vehemently oppose impartial suffrage than school segregation. Since other attitudes and interests affect white positions on racial matters, and everyone may not order the scales similarly, this last Berger assumption is just as dubious as its predecessors.⁶⁵

The determination of intent will never be either easy or uncontroversial, but historians will be stuck with the problem so long as we keep asking "why?" and judges and lawyers, so long as there are statutes and constitutions to be construed. So far as I know, there is no general algorithm for discovering purposes, but the quest need not be an "unfocused hunting expedition."⁶⁶ Uninstructed "common sense" is frequently misleading. In this as in other instances, perhaps the best guidance is the most basic: do not assume that your subjects are simple or stupid; be conscious of your methods and biases; put your thesis at risk; and do not unwittingly adopt theoretical or evidentiary rules that decide the case for you. However obvious, these rules are too seldom strictly adhered to, and it never hurts to remind oneself and others of them—so that we may all live up to our good intentions.

65. Maltz, *supra* note 48, at 947, 950 n.75, 961, contends that Reconstruction Republican congressmen's votes did not always reflect their true preferences because of "political expediency," "the pressures" of "events," or "the need to preserve this newly found unity."

66. Note, *Segregative Intent*, *supra* note 11, at 325.