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# EXPERT WITNESSES AND INTENT

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## ABSTRACT

How should a historian or a judicial scholar try to determine the intent of defendants in a racial or sex discrimination lawsuit, or the framers of a law or constitutional provision? What can we learn by examining paradigm cases from the employment and voting rights areas, and the classic case of the intentions of the framers of the Fourteenth Amendment?

Making use of models drawn from statistics and from rational choice theory, I examine the general contours of the *Sears* sex discrimination case, a voting rights suit from Selma, Alabama, and Raoul Berger's attempt to nullify Fourteenth Amendment jurisprudence in his *Government by Judiciary*. Sears' and Berger's methods and evidentiary conventions are shown to lead to biased results.

# EXPERT WITNESSES AND INTENT

J. Morgan Kousser

Although students of individual personality have been serving as expert witnesses since at least the 17th 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 began like duty with any regularity in the preparation of the school segregation cases in the 1940s and 1950s.[1] In *Brown* v. *School Board of Topeka*, 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 the impact of segregation was so deleterious to black people that it could be assumed that segregation ordinances were adopted with a racially discriminatory motive.[2]

In the 1960s and 70s, 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 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 Potter 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, but that it was necessary to demonstrate that the framers of the arrangement had adopted it with an *intent* to discriminate. For the next two years, the major point of discussion in debates over the renewal of the Voting Rights Act concerned whether an effect standard should be unmistakably written into the law to replace what Stewart believed was the existing intent standard.[5]

Likewise, the great brouhaha in the historical profession in 1986 over the testimony of Professors Rosalind Rosenberg and Alice Kessler-Harris in the *Sears* sex discrimination case centrally involved intent.[6] Rosenberg was brought into the litigation 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 Equal Employment Opportunities Commission employed Kessler-Harris to criticize Rosenberg's account of women's purposes, and 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.

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In the world of non-policy-oriented scholarship as well, some of the most important controversies of the last hundred years have been concerned with intent. Wilhelm Dilthey's concept of *versthehen* involved a projection of the historian into the thoughts and feelings of historical actors in order to understand what moved them.[7] Seeking to circumvent the problem of verifying whether economic actors engaged in maximizing their utility and were completely aware of their alternatives, Milton Friedman suggested that we examine only whether they behaved *as if* they were fully informed profit maximizers.[8] More informally, many if not most of the large questions that lie behind the workaday concerns of historians and other social scientists involve the assessment of intention: Can inanimate "fundamental forces," such as industrialization, immigration, or urbanization be said to "cause" certain events? To what degree are certain consequences of actions intended or unintended? Do voters generally act "rationally" or for "symbolic," non-instrumental reasons? How can we determine why groups of people behaved the way they did? Is it even possible to say that one interpretation of causation is better than another?

On all these questions and more, it seems to me, the experiences and reflections of expert witnesses, legal scholars, and other social scientists have a good deal to say to historians, and vice versa. In both the professional and legal arenas, scholars have shown too little self-awareness in their attributions of motives, and in their attempts to discern the meanings of human actions. Although I cannot claim to have solved any large problems, reflections on my experiences both in and out of the courtroom may at least bring some issues to consciousness and help to clarify their nature. To initiate the debate, I will examine three paradigmatic instances of the determination of intent in what seems to me increasing order of complexity: statistical cases about differential treatment, laws, and general constitutional provisions.

Even when white male Americans have openly admitted their desires to treat reds, browns, blacks, or females differently, they have usually disavowed any hostile purposes. When they excluded blacks from common or "white" schools in the 1840s, for instance, the Boston School Committee claimed that they were acting "in the best interests" of blacks, just as southern whites and men all over 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.[9] As a consequence, both legalists and historians have generally turned to circumstantial evidence of intent, which has always included evidence drawn from effects. Thus, even where 19th 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.[10] 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 about 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 structured employment or election procedures to promote sex or race discrimination. Not even the disfranchisers of the late 19th 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, adducing as reasons that they wanted educated, honest electors who had a "stake in society." They then let minor administrators carry out their actual and obvious purposes.[11] 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 localistically-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 of hires on gender, and it is no surprise that the effect of gender is reduced. Likewise, individual Latinos and southern 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.[12] 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 a separate male sphere. It's 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 pens on the Voting Rights Act. It's a dream world concocted in a computer or a witness's head for the transparent purpose of preventing those egalitarian fables from becoming realities, a set of tautological creations in which discrimination-free utopias are assumed in order to prove that no discrimination took place.

The determination of the intent of the proponents of a law is always uncertain because of the paucity of data, imperfections in the correlations between attitudes and behavior, and multiple purposes of the actors. Indeed, if it were easy to weigh the desires of large groups of people with certainty, most historiographical controversy would be eliminated, the need for review articles and books taking "fresh approaches" would be diminished, and the unemployment and underemployment rates for historians would rise even higher than they are today. It is therefore not entirely unfortunate that I have no general solution to the difficulties of unentangling motives. Nonetheless, I do have a few suggestions on how to go about the task more systematically.

Let us start, commonsensically, with a text. It may be that a law is so specific as to make at least some of the legislators' goals unmistakable, and this is particularly true in the

U.S., where laws are generally framed to allow less administrative discretion than in many European countries. 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."[13] 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 the 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 to honor a logrolling agreement involving a measure that they cared more about. Even an unambiguous statute may not provide unambiguous testimony on motives. And when a judge is trying to mete out punishment in cases brought under such laws, those deeper motives of the legislators may be important.

A law may provide clues to its purpose and genesis on its face, 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.[14] 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 16 years late for the march, but things hadn't changed much, anyway--no black person had served on that black belt county's commission for over a century.

I began my testimony there by noting that the at-large feature of that local law seemed patently to have been affixed to the end of the statute in a fashion that was barely grammatical and wholly illogical. 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, and it was silent on whether a plurality or a majority of the whole electorate was necessary for election and what would result if a commissioner carried the county, but lost his district. When I read this to Judge W. Brevard Hand, who has recently become nationally notorious for banning school textbooks that contain what he has termed "the religion of secular humanism," and who had in 1981 been considering the Dallas County voting case for five years, the judge 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's what we were there for. Why would someone stick on an at-large voting scheme?

The historical context helped. Dallas county had been over 80% 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," therefore, 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. By 1901, the Populists having been at least temporarily defeated and a constitutional convention to disfranchise blacks and poor whites having been authorized, but

not yet convened, Selma Democrats felt confident enough of their ability to control elections to draft a bill and have the county's representatives introduce it. 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, though there was no direct evidence in legislative journals or even hometown newspapers as to the reasons for the suspicious at-large section.[15]

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 sole disfranchising device. Then, 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 control half the seats, while in an at-large setting, it would take but a minor amount of skullduggery, 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. In case the convention only disfranchised illiterates or a widely-expected law suit forced equitable enforcement of voting laws, the at-large system provided insurance.[16] Judge Hand disagreed, suggesting during the trial that white Selmans couldn't 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, this Nixon Republican announced, was what he considered the fundamental human drive--greed. It was not so much that they opposed blacks, as that they wanted all the offices for themselves. The Court of Appeals somehow managed to produce a printable response to this masterful reasoning, curtly overturning Judge Hand.[17]

Because few state legislatures have kept formal records of debates, newspaper coverage of legislative proceedings is sketchy (although it was generally less so in the nineteenth than in the twentieth century) and committee hearings and reports have rarely been extensive until rather recently, the amount of data available for uncovering the motives of state legislators is usually less than for an Act of Congress. As in other instances, 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.

To see why, it's useful to introduce the concept of an issue space. 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 make 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 1 prefers point A, 2 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 on 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 obvious difficulties, several hidden assumptions in our analysis. Most importantly, we've assumed, in effect, that everyone votes and speaks "sincerely," that no strategic behavior or vote trading takes place.

[Insert Figure 1 Here]

Suppose that I'm one of 25% of the legislators who takes position C, while 30% are at about A, and 45% 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?

[Insert Figure 2 Here]

If I vote for the alternative nearest to my ideal point, I'll favor B over A', and B will win by 70-30. But on the next vote, B will beat 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 beat B, and then C' will beat 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. It should be evident that if everyone votes strategically, or if the agenda itself can be voted on, the situation immediately becomes vastly more complicated and the outcome is often theoretically indeterminate. Since legislators understood the importance of not being earnest long before the invention of game theory or spatial models, sets of roll calls will often reflect strategic maneuvering and speaking, and one who naively reads intent from the bare record may distort reality.

A second observation is that 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 A can convince B that A' is actually closer to B than C' is, then A' may win in a sequence of roll calls. A's behavior may not only trick B, but it 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 that it's nearer to position B. 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. It is usually difficult--because of incomplete information--to avoid making assumptions like this, if one wants to make any sense of intent, but the analyst ought at least to be aware of what she's doing. And 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 horribles" perhaps marching down a "slippery slope" as the inevitable direction if the bill is passed or the reasoning accepted.

In case these considerations seem merely theoretical, 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 section 2 was going to be altered to overrule the *Bolden* decision. To oversimplify, liberals believed that the best 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 5 person board in a 40% black area, for example, two of the officials should be expected to be black. Conservatives, led by political appointees in the Reagan Justice Department, believed in a strict intent standard, or even in a minimal participation criterion. In the first, unless it could be shown that the electoral system had been adopted for the specific purpose of racial or ethnic discrimination, that system was legal. In the second, as long as blacks or Latinos were allowed to register and vote freely, the purposes of the 1965 Voting Rights Act and the Fifteenth Amendment, in their view, had been attained, and the new law should go no further. 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've 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. In return, 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 and 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 2 had already passed the House without a specific disavowal of proportional representation, and the House bill had collected more than 60 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 not to require proportionality? Moreover, in an example of characteristic *chutzpah*, the Assistant Attorney-General for Civil Rights, William Bradford Reynolds, at least initially required his division to act as though Section 2 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.[18] 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 has further complicated matters. If Congresspersons 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. Winning not only means winning the roll calls, but also victory in the succeeding 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 that 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. 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 don't. 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 which was 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.[19]

Laws and most constitutional provisions are usually relatively specific. Recent U.S. constitutional amendments setting out the procedures for presidential succession, banning the poll tax, and allowing 18 year-olds to vote come to mind. But what of the broad clauses that give rise to so much constitutional controversy in the U.S., for instance the First, Fifth, Eighth, Ninth, and Fourteenth Amendments? What is freedom of speech, the press, religion? What constitutes due process of law? What sorts of punishment are cruel and unusual? What non-enumerated rights are reserved to the people? What actions deprive persons of equal protection of the laws?

In his *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 the right to an abortion.[20] Rather, the amendment was only a tightly constrained attempt to guarantee the 1866 Civil Rights Act, which he 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 then 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.[21] In a pair of 1985 speeches that attracted widespread attention, Attorney-General Edwin Meese and Supreme Court Justice William J. Brennan, Jr., popularized Berger and his allies and critics in a heated exchange that seems to portend an extended public debate.[22]

Berger's critics 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.[23] This view is particularly strong among those who would extend nondiscrimination and due process protections to groups or situations that fairly clearly were not envisaged by Reconstruction legislators, such as gays, women, and welfare recipients. The second, and less travelled, path is to question Berger's account of the framers' intentions.[24] While I have much sympathy with both of these strategies, it is the second that I wish to focus on today.

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.[25] 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. 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."[26] If they do not, if the implications of adhering to a particular rule of 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.

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. The first I will call the "floor of Congress" rule--only recorded debates in Congress are probative.[27] This, of course, conveniently limits the evidence that one has to examine, but it leaves out contemporary letters, newspaper stories, and speeches and debates over ratification 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.[28] Even if Berger had not read silence as acquiescence and quoted from speeches very selectively, the rule will 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, especially the more radical among them, said very little about Section One during the debates, it seems unlikely that the *Congressional Record* is representative in this instance.[29]

Berger's second rule is what I've 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'd lose.

Closely related is Berger's third assumption, sincere voting and speaking.[30] 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. 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 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.[31] Since 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 voter's position certainly cannot be ruled out.[32]

While he assumes that the proponents of the Amendment were simple-mindedly sincere, Berger considers the Democrats strategic liars whose claims that the measure would force the abrogation of school segregation and anti-miscegenation laws and would empower the central government to protect all the rights of persons against the states should be ignored as buncombe.[33] 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.[34] Scholars have often frustratedly remarked that most of the comments 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.[35] 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 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 potentially 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.?[36]

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 so feared taking liberal positions on racial matters that the Civil Rights Bill of 1866 and the Fourteenth Amendment had to have been "conservative" measures.[37] 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.[38] 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.[39] Furthermore, his 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.[40] "Liberty" meant only what Blackstone had denoted by it--freedom of locomotion--a hundred years earlier.[41] 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. 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.[42] By "privileges or immunities," they signaled only their adherence to Justice Bushrod Washington's 1823 musings on the Fourth Amendment's privileges or immunities clause in *Corfield* v. *Coryell*, even though in practically the sole mention of the point during the printed debates, the Fourteenth Amendment's Senate Manager, Jacob Howard, specifically disavowed an intention to limit the clause to the rights that Justice Washington had enumerated.[43] By "equal protection," they evinced a desire to protect only those particular rights that they had enumerated in the 1866 Civil Rights Law.[44] 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.[45] In such a hierarchical scale, anyone who disavowed black suffrage, say, 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 anti-miscegenation statutes, etc.

All three of these conditionals seem to me wrong. People may be much more willing to allow such private, voluntary, non-externality 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 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.

The determination of intent will never be either easy or uncontroversial, but historians will be stuck with the problem as long as we keep asking "why"? and judges and lawyers, as long as there are statutes and constitutions to be construed. So far as I know, there is no general algoithm for discovering purposes. Uninstructed "common sense" is, as usual,

frequently misleading. In this as in other instances, perhaps the least guidance is the most basic: don't assume that your subjects are simple or stupid; be conscious of your methods and biases; put your thesis at risk; and don't 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.

FOOTNOTES

1. The (Sir Thomas) Browne case is recounted in Herbert Garfinkel, "Social Science Evidence and The School Segregation Cases," *Journal of Politics*, 21 (1959), 46-47. 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 Kenneth B. Clark, "The Social Scientist as an Expert Witness in Civil Rights Litigation," *Social Problems*, 1 (1953), 5-11; Lawrence Rosen, "The Anthropologist as Expert Witness," *American Anthropologist*, 79 (1977), 555-78; Donald J. Bourgeois, "The Role of The Historian in The Litigation Process," *Canadian Historical Review*, 67 (1986), 195-205; Peyton McCrary and J. Gerald Hebert, "Keeping The Courts Honest: Expert Witnesses in Voting Rights and School Desegregation Cases," (unpub. paper delivered at Southern Historical Association Convention, 1986); and several of the essays in Betsy Levin and Willis D. Hawley, *The Courts, Social Science, and School Desegregation* (New Brunswick, N.J.: Transaction Books, 1977).

2. *Brown* v. *Board of Education*, 347 U.S. 483 (1954). See, e.g., Rosen, "Anthropologist as Expert Witness," 557-62, and references cited therein.

3. *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977); Larry G. Simon, "Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination," *San Diego Law Review* 15 (1978); Lawrence Tribe, *The Constitutional Protection of Individual Rights: Limits on Governmental Authority* (Mineola, N.Y.: The Foundation Press, Inc., 1978), 1028-32.

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., *Senate Report* No. 417, 97th Cong., 2d Sess. (1982); *Thornburg* v. *Gingles*, No. 83-1968 (U.S. Supreme Court, June 30, 1986).

6. Presently under appeal to the 7th Circuit, U.S. Court of Appeals, the case is styled *Equal Employment Opportunities Commission* v. *Sears, Roebuck and Co.*, Nos. 86-1519 and 86-1621. On the controversy in the historical profession, see, e.g., Karen J. Winkler, "2 Scholars' Conflict in Sears Sex-Bias Case Sets Off War in Women's History," *Chronicle of Higher*

*Education* (Feb. 5, 1986); Jon Wiener, "Women's History on Trial," *The Nation* (Sept. 7, 1985); Rosenberg, Thomas L. Haskell and Wiener, "Exchange," *The Nation* (Oct. 26, 1985); "Women's History and *EEOC* v. *Sears, Roebuck and Co.*," *New Perspectives* (Summer, 1986), 21-34; Jon Wiener, "Women Fall One Step Back in Sears Case," *In These Times* (July 9-22, 1986).

7. See Rudolf A. Makkreel, *Dilthey, Philosopher of The Human Studies* (Princeton, N.J.: Princeton Univ. Press, 1975).

8. Milton Friedman, *Essays in Positive Economics* (Chicago: Univ. of Chicago Press, 1953).

9. J. Morgan Kousser, "Dead End: The Development of Nineteenth-Century Litigation on Racial Discrimination in Schools (Oxford, Eng.: Clarendon Press, 1986); Kousser, "The Supremacy of Equal Rights," Caltech Social Science Working Paper No. 620 (March, 1987).

10. *Bertonneau* v. *Board of Education of New Orleans*, 3 Fed. Case No. 1361 (1878); *U.S.* v. *Buntin*, 10 Fed. 730 (1882).

11. Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (New Haven: Yale Univ. Press, 1974); Kousser, "Suffrage," in Jack P. Greene, ed., *Encyclopedia of American Political History* (N.Y.: Charles Scribners' Sons, 1984), III, 1236-58.

12. This strategy, pioneered in voting rights cases by Prof. 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 et al.* v. *City of Springfield, Ill., et al.*, decided Jan. 12, 1987, mimeo opinion at pp. 35-36.

13. *Motion Picture Co.* v. *Universal Film Co.*, 243 U.S. 502 (1917), quoted in Alexander M. Bickel and Benno C. Schmidt, Jr., *The Judiciary and Responsible Government, 1910-21* (New York: MacMillan Co., 1984), 713.

14. *Ala. Acts, 1900-1901*, No. 328, pp. 890-92.

15. 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.

16. 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. *Harris*, 189 U.S. 474 (1903), and *Giles* v. *Teasley*, 193 U.S. 146 (1904).

17. *U.S.* v. *Dallas County Commission*, 548 F. Supp. 875, 913-14 (1982). For fuller descriptions of Judge Hand's antics, see Lincoln Caplan, "A Good Ol' Boy Sitting on The Federal Bench," *Los Angeles Times*, March 29, 1987, V-3.

18. *New York Times*, May 12, 1984, A-9; July 27, 1985, A-29; Sept. 6, 1985, A-22.

19. Most details of this story appear in Walter F. Murphy, *Congress and the Court* (Chicago: Univ. of Chicago Press, 1962), 193-223. 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.

20. Berger, *Government by Judiciary: The Transformation of The Fourteenth Amendment* (Cambridge, Mass.: Harvard Univ. Press, 1977). Similarly, see Alfred Avins, "De Facto and De Jure Segregation: Some Reflected Light on The Fourteenth Amendment From The Civil Rights Act of 1875," *Mississippi Law Journal*, 38 (1967), 179-247 at 246-47.

21. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Baker* v. *Carr*, 369 U.S. 186 (1962); *Roe* v. *Wade*, 410 U.S. 113 (1973); *Los Angeles Times*, March 26, 1987, p. 1, for the *Joyce* decision.

22. Brennan, speech at Georgetown University, Oct. 12, 1985, mimeo., 4-5; Meese, speech before American Bar Association, July 9, 1985, mimeo., 13-17.

23. E.g., Gerald E. Lynch, "Book Review," *Cornell Law Review*, 63 (1978), 1091-1100; Dean Alfange, Jr., "On Judicial Policymaking and Constitutional Change: Another Look At The 'Original Intent' Theory of Constitutional Interpretation," *Hastings Constitutional Law Quarterly*, 5 (1978), 603-38; Randall Bridwell, "Book Review," *Duke Law Journal* (1978), 907-20; William Gangi, "Judicial Expansionism: An Evaluation of The Ongoing Debate," *Ohio Northern Law Review*, 8 (1981), 1-78; Michael J. Perry, "Interpretivism, Freedom of Expression, and Equal Protection," *Ohio State Law Journal* 42 (1981), 270, 285, 292-97; Mark V. Tushnet, "Following The Rules Laid Down: A Critique of Interpretivism and Neutral Principles," *Harvard Law Review*, 96 (1983), 789, 800-01.

24. See Walter F. Murphy, "Constitutional Interpretation: The Art of The Historian, Magician, or Statesman?," *Yale Law Journal*, 87 (1978), 1752-71; Stanley I. Kutler, "Raoul Berger's 14th Amendment: A History or Ahistorical?," *Hastings Constitutional Law Quarterly*, 6 (1979), 511-26; Aviam Soifer, "Protecting Civil Rights: A Critique of Raoul Berger's History," *New York University Law Review*, 54 (1979), 651-706; Michael Kent Curtis, "The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger," *Wake Forest Law Review*, 16 (1980), 45-102; Curtis, "The Fourteenth Amendment and The Bill of

Rights," *Connecticut Law Review*, 14 (1982), 237-306; Wallace Mendelson, "A Note on The Cause and Cure of The 14th Amendment," *Journal of Politics*, 43 (1981), 152-58.

25. Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard Univ. Press, 1985), 52-55, 165. See also Tushnet, "Following The Rules," 784-96.

26. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard Univ. Press, 1971), 136-42.

27. Berger, *Government by Judiciary*, 6-7.

28. Dworkin, *Matter of Principle*, 43-48; Murphy, "Historian, Magician, or Statesman?," 1755; Jacobus ten Broek, *Equal Under Law* (New York: Macmillan, 1965); Kousser, "Dead End"; Robert W. Bennett, "'Mere' Rationality in Constitutional Law: Judicial Review and Democratic Theory," *California Law Review*, 67 (1979), 1091.

29. Soifer, "Protecting Civil Rights," 182.

30. Berger, *Government by Judiciary*, 116, 241.

31. See, e.g., David Herbert Donald, *The Politics of Reconstruction, 1863-1867* (Baton Rouge, La.: Louisiana State Univ. Press, 1967).

32. Mendelson, "Cause and Cure," 154-56.

33. E.g., Representative Andrew Rogers (D, N.J.) charged that both the 1866 Civil Rights Bill and the 14th Amendment would outlaw segregated schools. Alfred H. Kelly, "The Fourteenth Amendment Reconsidered: The Segregation Question," *Michigan Law Review*, 54 (1956), 1066-67, 1074. For Berger's views on the untrustworthiness of Democratic statements, see *Government by Judiciary*, 157-65.

34. Dworkin, *Matter of Principle*, 48-57.

35. Kelly, "Segregation Question," 1077; Alexander M. Bickel, "The Original Understanding and The Segregation Decision," *Harvard Law Review*, 60 (1955), 56-59.

36. Kelly, "Segregation Question," 1071, 1084; Bickel, "Original Understanding," 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 14th Amendment by itself enfranchised blacks. See Thomas M. Cooley, ed., Joseph Story, *Commentaries on The Constitution*, 4th Ed. (Boston, Mass.: Little, Brown and Co., 1873), I, 686.

37. Berger, *Government by Judiciary*, 10-16, 56-57, 85, 161, 407.

38. Mendelson, "Cause and Cure," 158, n.34; Berger, *Government by Judiciary*, 91.

39. For evidence of the shift of the issue space see Robert J. Kaczorowski, "To Begin The Nation Anew: Congress, Citizenship, and Civil Rights After The Civil War," *American Historical Review*, 92 (1987), 49. For evidence of factional fluidity, see Allan G. Boque, *The Earnest Men: Republicans of The Civil War Senate* (Ithaca, N.J.: Cornell Univ. Press, 1981), 104-05.

40. Berger, *Government by Judiciary*, 134-56, 194-95, 200, 243. Cf. the statement of A. J. Rogers (D, N.J.): "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 words 'life, liberty, privileges, and immunities,' unless it should be the right of suffrage." Quoted in Bickel, "Original Understanding," 34-35.

41. Berger, *Government by Judiciary*, 20-21, 34-35, 243, 270.

42. Berger, *Government by Judiciary*, 139-40; 193-214; cf. *Dred Scott* v. *Sandford*, 60 U.S. 393 (1857); *Wynehamer* v. *The People*, 13 N.Y. 378 (1856); ten Broek, *Equality Before The Law.*

43. Mendelson, "Cause and Cure," 154-55.

44. Berger, *Government by Judiciary*, 171.

45. Berger, *Government by Judiciary*, 123, 174, 239, 243, n. 54, 412.

FIGURE 1

ONE ISSUE DIMENSION

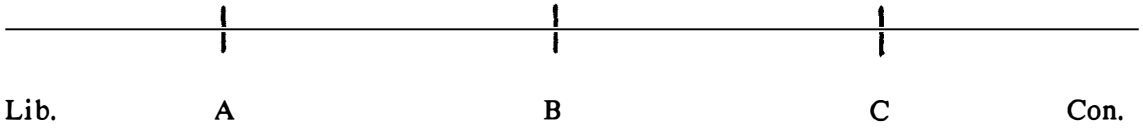



FIGURE 2

STRATEGIC VOTING IN ONE DIMENSION

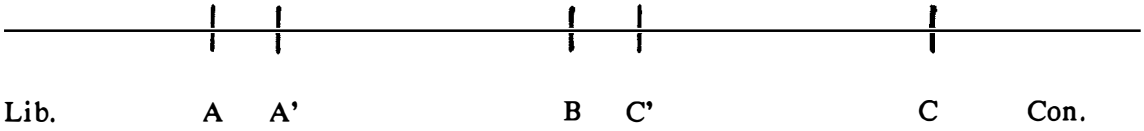


FIGURE 3

ROLLING LOGS

Panel A: A Preliminary Lineup with Logrolling Potential

| | | Provision R | |
|---|---|---|---|
| | | Yea | Nay |
| Provision S | Yea | 35 | 15 |
| | Nay | 10 | 40 |

Panel B: A Preliminary Lineup with Decisive Minorities Indifferent

| | | Provision R | | |
|---|---|---|---|---|
| | | Yea | Indiff. | Nay |
| Provision S | Yea | 35 | 22 | 05 |
| | Indiff. | 02 | 03 | 01 |
| | Nay | 05 | 05 | 40 |

Panel C: A Logroll Achieved

| | | Provision R | |
|---|---|---|---|
| | | Yea | Nay |
| Provision S | Yea | 51 | 05 |
| | Nay | 04 | 40 |

FIGURE 4

EXTREMISTS CAN BE SWING VOTERS

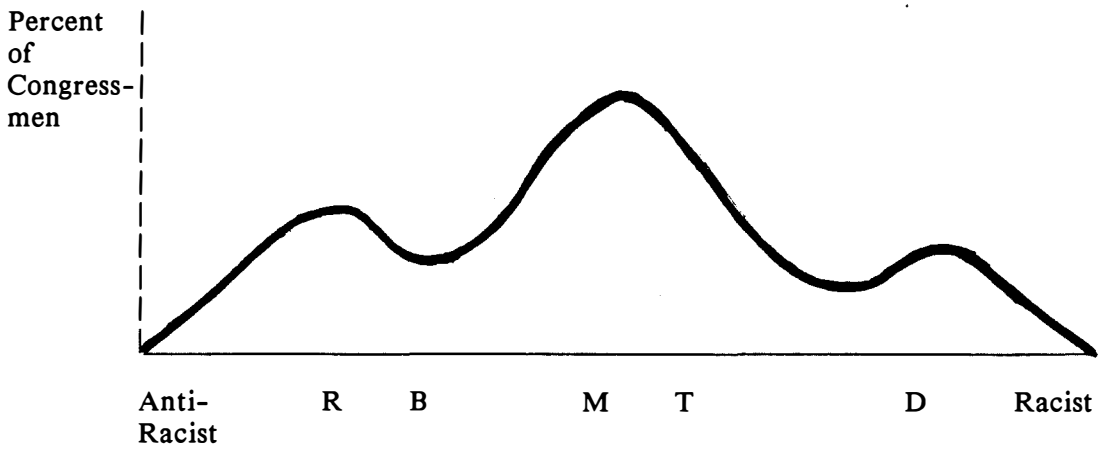
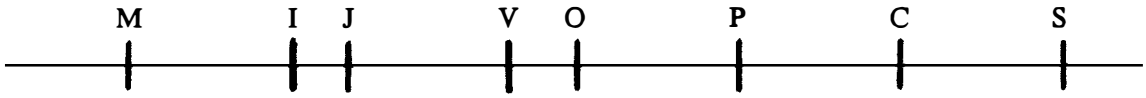



FIGURE 5

A HYPOTHETICAL GUTTMAN SCALE OF WHITE RACIAL ATTITUDES




Anti-Racist — Racist

M = Racial Intermarriage Legal
I = School Integration Mandatory
J = Non-Racial Juries
V = Black Suffrage
O = Right of Blacks to Hold Office
P = Protection Against Racial Violence
C = Black Codes
S = Racial Slavery Allowed