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## Paul Dimond Fails to "Meet Raoul Berger on Interpretivist Grounds"

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At the outset (1977) activists dismissed my *Government by Judiciary*<sup>1</sup> out of hand.<sup>2</sup> Now, five years later, Paul Dimond informs us that his *Meeting Raoul Berger on Interpretivist Grounds* was financed by the Ford Foundation, the Carnegie Foundation, and Michigan and American University Law Schools,<sup>3</sup> suggesting that my views have become a burr under the activist saddle.<sup>4</sup>

In the main Dimond rehashes the stale generalities<sup>5</sup> of prior activist critics without taking account of my painstaking, point by point refutation of those worthies.<sup>6</sup> Those who do not study a writer's replies to his critics, to borrow from Santayana, are doomed to repeat their mistakes. An activist more candid than most, Michael Perry, recently listed examples of the "commentary generally accepting Berger's history" and some "generally effective rebuttals by Berger to criticisms of his history."<sup>7</sup> Like the prior critics, Dimond prefers

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1. R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

2. Brest, *Berger v. Brown et al.*, N.Y. Times, Dec. 11, 1977, § 7 (Book Review), at 10; Cover, *NEW REPUBLIC*, Jan. 14, 1978, (Book Review), at 26. Henry Monaghan wrote, "Berger's uncomfortable and unfashionable analysis is an important one. It will not do, as some have already done, to brush it aside in peremptory manner." Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 124 (1978).

3. Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462 (1982).

4. Commenting on the ongoing attacks on Stanley Elkins' *Slavery* (1959), Eric Foner wrote: "In the writing of history, refutation, not imitation, is often the sincerest form of flattery. Mr. Elkins' thesis, for example, remains important precisely because a generation of scholars has directed its energies to overturning it." Foner, *The Slaveholder as Factory Owner*, N.Y. Times, May 23, 1982, § 11 (Book Review), at 11, 27.

5. Referring to the "now-familiar litany of activists," such as claims that constitutional "phrases are 'vague' and 'malleable' and must be 'creatively discerned afresh,'" John Burleigh observed, "Such rhetoric is, of course, sand in the eyes . . ." Burleigh, *The Supreme Court vs. The Constitution*, THE PUBLIC INTEREST 151, 152 (Winter Supp. 1978).

6. Dimond, *supra* note 3, at 463 n.7, cites Curtis, Kutler, Soifer, and Murphy. For my replies, not cited by Dimond, see Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 OHIO ST. L.J. 435 (1981) (to Curtis); Berger, *The Scope of Judicial Review* (pt. 5; "Comment on Stanley I. Kutler's Essay") 6 HASTINGS CONST. L.Q. 527, 590 (1979); Berger, *Soifer to the Rescue of History*, 32 S.C.L. REV. 427 (1981); Berger, *The Scope of Judicial Review and Walter Murphy*, 1979 WIS. L. REV. 341.

7. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 285 n.100 (1981). Another candid activist, Larry Alexander, wrote,

Berger has forced all serious constitutional theorists to deal with questions regarding proper principles of constitutional interpretation and the proper role of the courts, questions that many theorists, basking in the warm glow of Warren Court decisions on individual rights, felt content to ignore. Berger has quite convincingly demonstrated that the bulk of modern judicial decisions under the fourteenth

generalities to telling specifics. Thus he refers to Alexander Bickel's statement that "the legislative record concerning the broad constitutional phrases cannot produce 'specific answers to specific present problems, . . . the answer that must emerge in the vast majority of cases is no answer.'" <sup>8</sup> Yet in at least two specific and crucial instances the answer is unmistakable. That suffrage was excluded from the fourteenth amendment, said Justice Harlan, is "irrefutable," <sup>9</sup> and more and more activists, including Dimond, are agreed. <sup>10</sup> So too, activists increasingly acknowledge that what Dimond describes as "one intractable aspect of racial discrimination—segregation in the schools" <sup>11</sup> likewise was excluded. <sup>12</sup> On my two central issues, therefore, "the scholarly controversy over the 'original understanding'" <sup>13</sup> largely has been resolved, a fact that a subsidized refutation was duty bound to notice and rebut, but did not "meet."

### I. DIMOND'S RECITALS ARE UNTRUSTWORTHY

One who undertakes to tear down the scholarship of another is under a duty of unimpeachable accuracy. Dimond adds to frequent inaccuracy persistent misrepresentations of my position, indicating that he either does not understand what he reads or is so ridden by his ideological prepossessions as to be oblivious to discrepant facts. In either case his credibility is seriously damaged. A scholar is required to take account of discrepant facts. <sup>14</sup>

(1) "Berger views Bingham as a Negrophobe" <sup>15</sup> who "favored most racial discrimination," <sup>16</sup> notwithstanding I noted that John Bingham "had been a leading congressional antislavery constitutional theorist," <sup>17</sup> a role that

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amendment cannot be justified by reference to what the drafters of that amendment believed the amendment would accomplish. Moreover, Berger has argued with great force that judicial decisions that cannot be justified by what the constitutional Framers specifically intended are illegitimate in a democracy.

Alexander, *Modern Equal Protection Theories: A Meta-theoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 4 (1981).

8. Dimond, *supra* note 3, at 464.

9. *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965).

10. Dimond, *supra* note 3, at 472 n.46; Abraham, Book Review, 6 HASTINGS CONST. L.Q. 467, 467-68 (1979); Alfange, Book Review, 5 HASTINGS CONST. L.Q. 603, 622 (1978); Lusky, Book Review, 6 HASTINGS CONST. L.Q. 403, 406 (1970); Mendelson, Book Review, 6 HASTINGS CONST. L.Q. 437, 453 (1979); Nathanson, Book Review, 56 TEX. L. REV. 579, 580-81 (1978). Gerald Gunther wrote that "most constitutional lawyers agree" that "the one person-one vote" doctrine "lacks all historical justification." Gunther, *Too Much a Battle With Straw Men?*, Wall St. J., Nov. 25, 1977, at 4, col. 5.

11. Dimond, *supra* note 3, at 465.

12. Nathanson wrote about the argument that the fourteenth amendment "would not require school desegregation or negro suffrage. These are not surprising historical conclusions. The first was quite conclusively demonstrated by Alexander Bickel . . . the second was also quite convincingly demonstrated by Mr. Justice Harlan. . . . Berger's independent research and analysis confirms and adds weight to those conclusions." Nathanson, Book Review, 56 TEX. L. REV. 579, 581 (1978). See also Abraham, Book Review, 6 HASTINGS CONST. L.Q. 467, 467-68 (1979); Alfange, Book Review, 5 HASTINGS CONST. L.Q. 603, 622 (1978); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 292 (1981).

13. Dimond, *supra* note 3, at 463.

14. "Historical reconstruction," wrote the eminent historiographer, Sir Herbert Butterfield, "must at least account for the evidence that is discrepant." H. BUTTERFIELD, *GEORGE III AND THE HISTORIANS* 225 (1959).

15. Dimond, *supra* note 3, at 481.

16. *Id.* at 489. See also *id.* at 490 n.145 and accompanying text.

17. R. BERGER, *supra* note 1, at 207 n.49.

is utterly incompatible with negrophobia. In the passage Dimond cited<sup>18</sup> I merely pointed out that Bingham opposed the inclusion in the Civil Rights Act of 1866 of the phrase "there shall be no discrimination in civil rights or immunities" on the ground that it would "embrace every" right including "political rights," and therefore must be "stricken out or the constitutions of the States are to be abolished by your act."<sup>19</sup> This I characterized as "a States' Rights manifesto,"<sup>20</sup> unaccompanied by the remotest reference to racism. To convert this to a charge of "negrophobia" is grotesquely to misrepresent my views.

(2) Dimond attributes to me the view that "the requirements of equal protection are satisfied by separate but equal facilities,"<sup>21</sup> and asserts that "Berger's materials on the separate but equal question imply that *Plessy* was . . . correctly decided . . ."<sup>22</sup> My sole reference to *Plessy v. Ferguson*<sup>23</sup> was to Justice Frankfurter's listing of Chief Justice Vinson and Justices Clark, Reed, and Jackson as "'probable dissenters if the Court voted to overturn *Plessy* in the Spring of 1953.'"<sup>24</sup> Indeed, Dimond observes that "Berger's book . . . never addresses the propriety of the Supreme Court's 1896 decision in *Plessy v. Ferguson*";<sup>25</sup> apart from identifying it in a footnote to the Frankfurter list as the "separate but equal decision," it was never mentioned again.

(3) Dimond has it that Berger "argues against any 'judicial enforcement of the [Fourteenth] Amendment,'" citing to my comments on section 5: "Congress shall have power to enforce" the provisions of the amendment.<sup>26</sup> Very early the Court declared that section 5 conferred power on Congress, not the Court;<sup>27</sup> and the framers contemplated that judicial enforcement would require a delegation from Congress. At the cited point I stated, "A reasoned argument for a judicial power of enforcement of the Fourteenth Amendment—apart from that derived from the grant in the Civil Rights Act of 1866, which Congress is free to withdraw—has yet to be made."<sup>28</sup> This is not an argument "against any judicial enforcement" but a statement that it depends upon a delegation by Congress.<sup>29</sup>

(4) "Berger reads the privileges or immunities clause of the second sen-

18. *Id.* at 120.

19. *Id.*

20. *Id.* "In calling for the deletion, Bingham, the former abolition theorist, had openly acknowledged that the bill as drafted would have prohibited statutes such as school segregation." R. KLUGER, *SIMPLE JUSTICE* 640-41 (1976). Justice Black considered that Bingham objected to the Civil Rights Bill because it "would actually strip the states of power to govern." *Adamson v. California*, 332 U.S. 46, 100 (1947) (dissenting opinion).

21. Dimond, *supra* note 3, at 507.

22. *Id.* at 507-08.

23. 163 U.S. 537 (1896).

24. R. BERGER, *supra* note 1, at 128 (quoting R. KLUGER, *SIMPLE JUSTICE* 612, 614 (1976)).

25. Dimond, *supra* note 3, at 507.

26. *Id.* at 471 n.44.

27. *Ex parte Virginia*, 100 U.S. 339, 345 (1879).

28. R. BERGER, *supra* note 1, at 229. For citations see Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 311, 350-52 (1979).

29. It is orthodox learning that federal jurisdiction depends upon a grant from Congress. *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *The "Francis Wright"*, 105 U.S. 381, 386 (1881); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845); *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810).

tence to *limit* the meaning of citizenship provided in the first."<sup>30</sup> Now, the three clauses of the second sentence had been framed long before it was discovered that a conflict over whether or not Negroes were "citizens" remained to be resolved. For though the thirteenth amendment had emancipated the Negro, the *Dred Scott* decision<sup>31</sup> threw a cloud over his citizenship. The sole purpose of the first sentence, as said by Senator Lyman Trumbull, was "to end that very controversy, whether the negro is a citizen or not,"<sup>32</sup> a view likewise expressed by Senator Jacob Howard.<sup>33</sup> In Dimond's own words, the Senate "added a provision to section 1 to clarify what 'persons' are citizens and to bury the contrary conclusion of *Dred Scott* forever."<sup>34</sup> There was not the slightest intimation that it was also intended to alter the content of the three clauses of the second sentence. In an 1866 decision Circuit Justice Swayne declared, "The fact that one is a subject or citizen determines nothing as to his rights as such. . . . Citizenship has no necessary connection with the franchise of voting . . . or indeed any other rights, civil or political."<sup>35</sup> It follows that the addition of citizenship in the first sentence did not enlarge the rights conferred by the second.

(5) Dimond attributes to Senator Luke Poland of Vermont the view that "the proposed privileges or immunities clause merely incorporated the words from section 2 of article IV *with all their ambiguity*."<sup>36</sup> Poland did not remotely suggest that the words were ambiguous. As former chief justice of his state, he was presumably aware that, among others, Trumbull in the Senate and William Lawrence of Ohio in the House had alluded to judicial constructions of the terms,<sup>37</sup> which a judge would know removed "their ambiguity." Next, there is Poland's remark about the equal protection clause: "Congress has already shown its desire and intention to uproot and destroy *all* such partial State legislation in the passage of what is called the civil rights bill."<sup>38</sup> Dimond comments, "Poland either thought that the 1866 Civil Rights Act applied to *all* racially partial legislation, or recognized that the equal protection clause did not merely prohibit the Black Codes."<sup>39</sup> Dimond overlooked one crucial word—"such." It was not "*all* racially partial State legislation" to which Poland adverted, but "*all such* partial State legislation" as was banned in "the civil rights bill." That bill, as will appear, was limited in terms and that limitation was repeatedly emphasized in the debates, points of which a chief justice would not be unaware.

30. Dimond, *supra* note 3, at 469 (emphasis in original).

31. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

32. CONG. GLOBE, 39th Cong., 1st. Sess. 1285 (1866) [hereinafter cited as GLOBE].

33. *Id.* at 2890, 2896. For additional citations see R. BERGER, *supra* note 1, at 44-45.

34. Dimond, *supra* note 3, at 499.

35. *United States v. Rhodes*, 27 F. Cas. 785, 790 (C.C.D. Ky. 1866) (No. 16,151). The Civil Rights Bill first conferred citizenship and then went on to grant certain privileges. See GLOBE, *supra* note 32, at 474. Senator Trumbull stated, "[A] man may be a citizen in this country without a right to vote" or other rights. *Id.* at 1757.

36. Dimond, *supra* note 3, at 500 (emphasis added).

37. See *infra* text accompanying note 181.

38. GLOBE, *supra* note 32, at 2961 (emphasis added).

39. Dimond, *supra* note 3, at 500 (emphasis in original).

Such inaccuracies and misrepresentations—there are others<sup>40</sup>—suggest either that Dimond framed the indictment before he studied the record or that he is a careless reader whose judgment is not to be trusted. Although it is frustrating once more to retrace the ground covered by my replies to the activist critics Dimond cites, the subsidy of Dimond's study by several foundations and law schools constrains me to undertake the ungrateful task.

Let me begin with his misconceptions, which start with his title, *Strict Construction and Judicial Review of Racial Discrimination . . .*, apparently categorizing me as a "strict constructionist."<sup>41</sup> But my thesis is that the Court has flouted the unmistakable intention of the fourteenth's framers, displacing their choices by its own.<sup>42</sup> That is not "strict construction." Dimond blandly views this as the Court's "institutional mission . . . its role in articulating the contemporary meaning of sweeping phrases like equal protection,"<sup>43</sup> as if the exclusion of suffrage and desegregation could mean one thing in 1866 and has come to mean the exact opposite today.<sup>44</sup> Invocation of that view indicates that Dimond cannot really rely on history for the claimed power.

His headlong commitment to activist theology blinds him to threshold obstacles. So he states, given the "common understanding of the vagueness of much of the constitutional text, Berger bears the burden of proving that the equal protection clause was intended to enumerate [?] specific, narrow protections against racial discrimination."<sup>45</sup> Rights reserved to the states by the tenth amendment cannot be curtailed under cover of "vague" terms,<sup>46</sup> particularly because the framers were acutely conscious that every antidiscrimination proposal involved a corresponding diminution of states' rights.<sup>47</sup> An in-

40. See also *infra* text accompanying note 133; and text accompanying notes 192-96. Others will appear in the course of the following pages.

41. Dimond, *supra* note 3, at 462.

42. Judge J. Skelly Wright, an apologist for activism, wrote, "[T]he most important value choices have already been made by the framers . . ." Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 784 (1971). Judicial "value choices are to be made only within the parameters of the most important value choice embedded in the constitutional language." *Id.* at 785.

43. Dimond, *supra* note 3, at 463 (emphasis added).

44. Chief Justice Taney declared, "If in this court we are at liberty to give old words new meanings . . . there is no power which may not, by this mode of construction, be conferred on the general government and denied to the States." Passenger Cases, 48 U.S. (7 How.) 283, 478 (1849). In this he echoed Madison: "[I]f the sense in which the Constitution was accepted and ratified . . . be not the guide in expounding it, there can be no security . . . for a faithful exercise of its powers." 9 J. MADISON, WRITINGS 191 (G. Hunt ed. 1900-1910).

In 1872 a unanimous Senate Judiciary Committee Report, signed by Senators who had voted for the fourteenth amendment, stated, "A construction which should give the phrase . . . a meaning differing from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution . . ." S. REP. NO. 21, 42d Cong., 2d Sess. 2 (1872), reprinted in A. AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES 571-72 (1967).

45. Dimond, *supra* note 3, at 464 (footnote omitted) (emphasis added).

46. The great object of the Bill of Rights, said Madison, "is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode." 1 ANNALS OF CONGRESS 437 (Gale & Seaton ed. 1836) (print bearing running title "History of Congress").

47. Roscoe Conkling, a member of the Joint Committee on Reconstruction, said, "[t]he proposition to prohibit States from denying civil or political rights to any class of persons, encounters a great objection on the threshold. It trenches upon the principle of existing local sovereignty. . . . It takes away a right which has been always supposed to inhere in the States . . ." GLOBE, *supra* note 32, at 358; see also statements of Columbus Delano, *id.* at App. 158; and statements of Charles A. Eldridge, *id.* at 1154. Dimond, however, rejoices in the "open-endedness and generality" of § 1, Dimond, *supra* note 3, at 472, which "leaves open the nature and reach

tention to curtail them, Chief Justice Marshall declared in 1833 and Justice Miller reiterated in 1872, requires clear, not vague, statements.<sup>48</sup> Activists therefore carry the burden of proving an intention by "vague" words to diminish the province of the states. Then, too, a "vague" term may be illuminated by the "original understanding," and if that is clear, it overrides the text.<sup>49</sup> That centuries-old canon is not noticed by Dimond, although it was reaffirmed by a Reconstruction Congress.<sup>50</sup>

## II. SUFFRAGE AND SEGREGATION

The vast bulk of my historical discussion was devoted to suffrage, which a considerable body of activists agrees was excluded from the fourteenth amendment. Dimond himself concedes that that exclusion "does have support in the text and structure of the fourteenth amendment"; but he cannot bring himself to admit that the reapportionment decision therefore represents a reversal of the framers' exclusion, saying that that case "is beyond the scope of this Article."<sup>51</sup> In Sumner's eyes suffrage was the quintessential right: "if the [fourteenth] is inadequate to protect [them] in their . . . right to vote, it is inadequate to protect them in anything . . ."<sup>52</sup> Hence, Richard Kluger, an admirer of *Brown v. Board of Education*,<sup>53</sup> asked, "Could it be reasonably claimed that segregation had been outlawed by the Fourteenth when the yet more basic emblem of citizenship—the ballot—had been withheld from the Negro under the amendment?"<sup>54</sup> Dimond, however, summons "the way that the Reconstruction Congress dealt with one intractable aspect of racial discrimination—segregation in the schools"<sup>55</sup> as disclosing the fourteenth amendment's "actual role as a general protection against official caste

of the states' antidiscrimination duties." *Id.* at 471. He considers that the framers did not fail "to express their intent in plain English." *Id.* at 468. It may be "plain English" but nonetheless, by his own testimony, "vague." On the other hand, J. H. Ely, another activist, finds that "open-ended generality" "frightening," "scary." *See infra* note 260 and accompanying text.

48. Chief Justice Marshall held that a purpose to invade the province of the states by the Bill of Rights "would have [been] declared . . . in plain and intelligible language." *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833). Justice Miller rejected a broad interpretation of the "privileges or immunities" clause that would subject the states to "the control of Congress . . . in the absence of language which expresses such a purpose too clearly to admit of doubt." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78, (1872). *See also id.* at 82; *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967).

49. *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903).

50. *See supra* note 44.

51. Dimond, *supra* note 3, at 472 n.46. Robert Bork stated, "The principle of one man, one vote . . . runs counter to the text of the fourteenth amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula." Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 18 (1971). So too, Gerald Gunther wrote,

The ultimate justification for the *Reynolds* ruling is hard, if not impossible, to set forth in constitutionally legitimate terms. It rests, rather, on the view that courts are authorized to step in when injustices exist and other institutions fail to act. That is a dangerous—and I think illegitimate—prescription for judicial action.

Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 *WASH. U.L.Q.* 817, 825.

52. *CONG. GLOBE*, 40th Cong., 3d Sess. 1008 (1869).

53. 347 U.S. 483 (1954).

54. R. KLUGER, *SIMPLE JUSTICE* 635 (1976).

55. Dimond, *supra* note 3, at 465.

discrimination.”<sup>56</sup> In short, “[t]he evidence suggests that *Brown’s* result was within the scope that the framers envisioned for the fourteenth amendment.”<sup>57</sup> This is an astonishing misreading of the history which records that one Reconstruction Congress after another rejected proposals to ban mixed schools.<sup>58</sup>

The temper of the times is disclosed by remarks Senator James Harlan of Iowa made when desegregation of the District of Columbia schools was under discussion in April 1860:

I know that there is an objection to the association of colored children with white children in the same schools. This prejudice exists in my own State. It would be impossible to carry a proposition in Iowa to educate the few colored children that now live in that State in the same school houses with white children. It would be impossible, I think, in any one of the States in the Northwest.<sup>59</sup>

Howard Jay Graham, a foe of discrimination, wrote that “Negroes were barred from public schools in the North . . . ,”<sup>60</sup> a fact likewise noted by Dimond.<sup>61</sup> Dimond observes that “many free states, of course, also imposed caste distinctions to exclude blacks altogether or to keep blacks in a second-class condition.”<sup>62</sup> The unceasing efforts of Senator Charles Sumner to abolish segregated schools in the District of Columbia were unavailing<sup>63</sup>—the very galleries of both Houses were segregated.<sup>64</sup> Consequently, a veteran judge, E. Barrett Prettyman, held that congressional support for segregated schools in the District of Columbia contemporaneous with the adoption of the amendment (and the Civil Rights Act of 1866) was conclusive evidence that Congress had not intended section 1 of the amendment to invalidate school segregation laws.<sup>65</sup> It is unrealistic to presume that a Congress that had plenary jurisdiction over the District and yet refused to bar segregation there

56. *Id.* at 464.

57. *Id.* at 465. For general activist concurrence that segregation was excluded, see *supra* note 12. H. S. Commager advised the NAACP that “[t]he framers of the amendment did not, so far as we know, intend that it should be used to end segregation in schools.” R. KLUGER, *SIMPLE JUSTICE* 620 (1976). M.L. Benedict labelled *Brown v. Board of Education* “the greatest intrusion into policymaking since its [the Courts’s] obstruction of New Deal legislation in the early 1930s.” Benedict, *To Secure These Rights: Rights, Democracy, and Judicial Review in the Anglo-American Constitutional Heritage*, 42 OHIO ST. L.J. 69, 69 (1981). “Certainly Berger convincingly argues that the fourteenth amendment was crystal clear with regard to suffrage and segregation . . . .” Bridwell, Book Review, 1978 DUKE L.J. 907, 913. Philip Kurland wrote that “in *Brown* the Court abandoned the search for the framers’ intent . . . and chose instead to write a Constitution for our times.” Kurland, *Brown v. Board of Education Was the Beginning*, 1979 WASH. U.L.Q. 309, 315.

58. Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 311, 326–31 (1979). Dimond notes “The lack of popular support for mixed schools generally frustrated Sumner’s eight-year campaign in Congress to legislate specifically against separate schools.” Dimond, *supra* note 3, at 503. He naively ascribes this to “political expediency.” *Id.* at 504; “passage was politically impossible,” *id.* at 503, as if the framing of an amendment were not responsive to “political expediency.”

59. CONG. GLOBE, 36th Cong., 1st Sess. 1680 (1860).

60. H. GRAHAM, *EVERYMAN’S CONSTITUTION* 290 n.70 (1968).

61. Dimond, *supra* note 3, at 503.

62. *Id.* at 473 n.54.

63. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1085 (1956).

64. Dimond, *supra* note 3, at 503.

65. *Carr v. Corning*, 182 F.2d 14, 17 (D.C. Cir. 1950).

would turn around to invade state sovereignty, which the framers were zealous to preserve,<sup>66</sup> in order to impose desegregation upon the states.

When *Brown* was first argued before the Supreme Court, Alexander Bickel, whom Dimond is fond of citing—and misciting—to me, was law clerk to Justice Frankfurter, who assigned to him compilation of the legislative history of the amendment. Upon delivery of his memorandum he stated in a covering letter, “It was preposterous to worry about unsegregated schools, for example, when hardly a beginning had been made at educating Negroes at all and when obviously special efforts, suitable only for the Negroes, would have to be made.”<sup>67</sup>

To have upended segregated schools, Charles Fairman observed, “would have exposed the bill to active opposition in the North.”<sup>68</sup> Cognizant of such sentiments, James Wilson of Iowa, chairman of the House Judiciary Committee and manager of the Civil Rights Bill of 1866, assured the House that the words “civil rights” do not “mean that all citizens shall sit on the juries, or that their children shall attend the same schools.”<sup>69</sup> A prelude of the 39th Congress’ program was the Carl Schurz report, *Education of the Freedmen*; throughout, it spoke of “‘colored schools,’ ‘school houses in which colored children were taught.’ . . . There were no references to unsegregated schools, even as an ultimate objective . . . .”<sup>70</sup> Instead there was a pervasive assumption that segregation would remain. Referring to the burning of black schools in Maryland, Josiah B. Grinnell of Iowa said, give them schoolhouses and “invite schoolmasters from all over the world to come and instruct them.”<sup>71</sup> Senator Daniel Clark of New Hampshire stated, “[Y]ou may establish for him

66. For the framers’ attachment to state sovereignty, see R. BERGER, *supra* note 1, at 60–64; and *supra* note 47.

67. R. KLUGER, *SIMPLE JUSTICE* 654 (1976).

68. 6 C. FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 1179 (1971).

69. GLOBE, *supra* note 32, at 1117. See also *id.* at 1294. Compare Wilson’s assurance with Dimond’s reference to “the proponents’ similarly silent reaction to Rogers’ [an extremist Democratic opponent] charge that H.R. 63 authorized Congress to prohibit racially dual schooling.” Dimond, *supra* note 3, at 497 n.189. Having made their point by a leading spokesman, the framers were not obliged to rise to every exaggerated charge by an opponent seeking to scuttle the bill. See Trumbull’s statement, *infra* note 238.

A campaign for political and social equality, Senator James Doolittle of Wisconsin confessed, was “frightening” to the Republicans who “represented states containing large numbers of the despised and feared free Negroes.” D. DONALD, *CHARLES SUMNER AND THE RIGHTS OF MAN* 158 (1970). Derrick Bell, a black academician, points out that “few abolitionists were interested in offering blacks the equality they touted so highly. Indeed, the anguish most abolitionists experienced as to whether slaves should be granted social equality . . . is well documented.” Quoted in R. BERGER, *supra* note 1, at 167. See also *infra* text accompanying note 238.

William Windom of Minnesota said the Bill does not confer “social privileges. It merely provides safeguards to shield [blacks] from wrong and outrage and to protect them in the enjoyment of . . . the right to exist.” GLOBE, *supra* note 32, at 1159. See also statements of James W. Patterson and Senator Lyman Trumbull, quoted in R. BERGER, *supra* note 1, at 29; statements of William Lawrence of Ohio, GLOBE, *supra* note 32, at 1836. In the Civil Rights Cases, 109 U.S. 3 (1883), Justice Bradley declared, “Congress did not assume” by the Civil Rights Bill to “adjust what may be called the social rights of men . . . but only to declare and vindicate those fundamental rights,” i.e., “the same right to make and enforce contracts” and so forth. *Id.* at 22.

70. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 10 n.29 (1955).

71. R. BERGER, *supra* note 1, at 125.



schools.”<sup>72</sup> Ignatius Donnelly of Minnesota said, “Educate him and he will himself see to it that the common schools shall forever continue among his people.”<sup>73</sup> Senator William P. Fessenden said of the “representation” proposal that was to become section 2 of the fourteenth amendment: It “should serve as an inducement to the southern States to build school houses . . . and educate their colored children until they are fit to vote.”<sup>74</sup> In vetoing the antecedent Freedmen’s Bureau Bill, President Andrew Johnson noted that it provided for the “erection for their benefit of suitable buildings for asylums and schools,” and objected that Congress “has never founded schools for any class of our own people.”<sup>75</sup> The leading radical, Thaddeus Stevens, “did not publicly object to the separation of the races in the schools although he was against segregation in theory. . . . But he never pressed for legal enforcement of this kind of equality, as Charles Sumner did, believing it achievement enough that the South would have free schools at all.”<sup>76</sup>

Apart from opponents’ remarks designed to defeat the framers’ proposals, no one asserted that either the Civil Rights Act of 1866 or the fourteenth amendment outlawed school segregation, the absence of which keyed into Northern aversion to mixed schools. “[R]acism,” remarks David Donald, Sumner’s biographer, “ran deep in the North,”<sup>77</sup> and the suggestion that “Negroes should be treated as equal to white men woke some of the deepest and ugliest fears in the American mind.”<sup>78</sup> In 1869 Senator Henry Wilson, the Massachusetts radical, stated, “There is not to-day a square mile in the United States where the advocacy of the equal rights and privileges of those colored men has not been in the past and is not now unpopular.”<sup>79</sup> That was glaringly evident with respect to mixed schools. Despite Sumner’s unceasing efforts to obtain legislation mandating unsegregated schools,<sup>80</sup> he failed to have them included in the Civil Rights Act of 1875, which provided for equal accommodations in inns and public conveyances.

Dimond does not dispute these facts; instead he relies upon the “generality” of the amendment and upon statutes subsequent to the amendment to exhibit the framers’ “understanding that it covered a broad range of state behavior.”<sup>81</sup> With the exception of the 1875 Act, the acts he lists were directed at violence and intimidation.<sup>82</sup> Mixed schools, our litmus test, had been

72. *Id.*73. *Id.*74. *Id.* at 126.75. *Id.*76. *Id.*

77. D. DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 202 (1970).

78. *Id.* at 157. “[E]ven abolitionists were anxious to disclaim any intention of forcing social contacts between the races . . . .” W. BROCK, AN AMERICAN CRISIS 286 (1963).

79. CONG. GLOBE, 40th Cong., 3d Sess. 672 (1869).

80. Dimond, *supra* note 3, at 503; see also *infra* text accompanying note 88.81. Dimond, *supra* note 3, at 481.82. *Id.* at 478–80. For example, the Ku Klux Klan Act of 1871 was aimed at “the states’ failure to protect . . . freedmen from rule by Klan terror,” *id.* at 479, “against violence,” *id.* (quoting CONG. GLOBE, 41st Cong., 3d Sess. 1276 (1871)), thereby denying them “the equal protection of the laws.” *Id.* (quoting CONG. GLOBE, 42d Cong., 1st Sess., app. 78, 80 (1871)). As will appear, “equal protection” was constantly associated with specifically enumerated rights.

deleted from the 1875 proposals;<sup>83</sup> before long the entire 1875 Act was invalidated by the *Civil Rights Cases*.<sup>84</sup> Moreover, the Court has said that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."<sup>85</sup> More relevant is the explanation of Senator Aaron A. Sargent of California in 1875 that the common schools proposal would reinforce "what may perhaps be an unreasonable prejudice, but a prejudice . . . powerful, permeating every part of the country, and existing more or less in every man's mind."<sup>86</sup> In the House William Phelps of New Jersey stated, "[Y]ou are trying to legislate against human prejudice and you cannot do it. No enactment will root out prejudice."<sup>87</sup>

Dimond acknowledges that "[t]he lack of popular support for mixed schools generally frustrated Sumner's eight-year campaign in Congress to legislate specifically against separate schools."<sup>88</sup> But he extenuates, "Congress also has repeatedly refused to declare that it would be unconstitutional to pass such legislation."<sup>89</sup> It suffices that Congress, responding to popular sentiment, rejected such legislation. Moreover, "[N]onaction," the Supreme Court held, "affords the most dubious foundation for drawing positive inferences."<sup>90</sup> Segregation proposals, Dimond asserts, were rejected not "because Congress considered segregation . . . to be beyond the scope of the fourteenth amendment, but because passage was politically impossible at that time."<sup>91</sup> What was "politically impossible" in 1875 was even less possible in 1866.<sup>92</sup> Not surprisingly, Sumner "placed little stress upon the Fourteenth Amendment's guarantee of equal protection of the laws; too many of his colleagues who had helped draft that ambiguous document would reply that they had never intended to outlaw segregation."<sup>93</sup> He had relied rather on "the Sermon on the Mount and . . . the Declaration of Independence."<sup>94</sup> As William Gillette said of suffrage, less unpalatable to the electorate than mixed

83. Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 NW. U.L. REV. 311, 329, 331 (1979).

84. 109 U.S. 3 (1883). Dimond facilely disposes of these cases on the ground that the Act imposed duties on private individuals rather than public officials. Although the Court found no occasion to pass on whether there was a right to equal accommodations in inns and public conveyances, *id.* at 19, it was at pains to say that the Civil Rights Act of 1866 dealt with "fundamental rights," e.g., "the same right to make and enforce contracts, to sue . . . and to inherit, purchase . . . property, as is enjoyed by white citizens." *Id.* at 22. "Congress did not assume . . . to adjust what may be called the social rights of men . . ." *Id.* There is no indication in the parallel history of the amendment that it undertook to do so by the amendment.

85. *United States v. Price*, 361 U.S. 304, 313 (1960). It is one thing to cite framers in a subsequent Congress to confirm views expressed in the 1866 Congress, and something else again when the framers attempt to change their testimony upon which the 39th Congress relied.

86. 3 CONG. REC., 43d Cong., 1st Sess. 4172 (1874).

87. *Id.* at 1002.

88. Dimond, *supra* note 3, at 503.

89. *Id.*

90. *United States v. Price*, 361 U.S. 304, 310-11 (1960).

91. Dimond, *supra* note 3, at 502-03.

92. Russell Nye observed that the Reconstruction made no "basic changes in the prevailing attitudes toward race . . . attitudes clearly reflected in the congressional politics of Reconstruction." Nye, *Comment on C. V. Woodward's Paper*, in NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION 156 (H. Hyman ed. 1966).

93. D. DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 532 (1970).

94. *Id.*

schools, "Most congressmen apparently did not intend to risk drowning by swimming against the treacherous current of racial prejudice and opposition to Negro suffrage."<sup>95</sup> The notion that the framers, who shared the racism of their constituents,<sup>96</sup> would secrete in the "general terms" of the amendment authorization for future encroachments on state control of segregation is sheer fantasy.

### III. THE OBJECT OF RECONSTRUCTION REDRESS

For light on "the purpose of Reconstruction law generally and of the equal protection clause in particular,"<sup>97</sup> Dimond commendably looks to the "sorts of evils against which the provision was directed."<sup>98</sup> He quotes Senator Henry Wilson's explanation that adoption of the fourteenth amendment would "obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes."<sup>99</sup> The Black Codes, Dimond explains, sought "to maintain blacks as a servile class,"<sup>100</sup> to "relegate blacks to virtual peonage."<sup>101</sup> He notices that they "excluded blacks from voting, owning land, making contracts, securing access to the courts, working without a license, traveling without a pass, or engaging in certain trades."<sup>102</sup> With the exception of voting these were the very "sorts of evils" that the Civil Rights Act was intended to remedy and did so almost in those very terms: section one of the Civil Rights Bill provided

[t]hat there shall be no discrimination in civil rights or immunities . . . on account of race . . . but . . . [all] shall have the same right to make and enforce contracts, to sue . . . to inherit, purchase . . . and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property . . . .<sup>103</sup>

The chairman of the House Judiciary Committee, James Wilson of Iowa, asked whether those terms

mean that in all things civil, social, political, all citizens, without distinction of race or color, shall be equal? By no means can they be so construed. . . . I understand civil rights to be simply . . . "[t]he right of personal security, the right of personal liberty, and the right to acquire and enjoy property."<sup>104</sup>

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95. W. GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* 25 (1965).

96. In the Senate John Sherman of Ohio said, "[W]e do not like Negroes. We do not conceal our dislike." C. V. Woodward, *Seeds of Failure in Radical Race Policy*, in *NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION* (H. Hyman ed. 1966); see also M. KELLER, *AFFAIRS OF STATE* 67 (1977).

97. Dimond, *supra* note 3, at 472.

98. *Id.* (quoting J. ELY, *DEMOCRACY AND DISTRUST* 13 (1980)).

99. Dimond, *supra* note 3, at 473 n.56.

100. *Id.* at 474.

101. *Id.* at 475.

102. *Id.* at 474.

103. GLOBE, *supra* note 32, at 474.

104. *Id.* at 1117; this was a quotation from Kent. Wilson later reemphasized the exclusion of school and jury laws, *id.* at 1294.

Bickel comments, "Wilson thus presented the Civil Rights Bill to the House as a measure of limited and definite objectives. In this he followed the lead of the majority in the Senate. . . . And the line he laid down was followed by others who spoke for the bill in the House."<sup>105</sup> For example, Martin Thayer of Pennsylvania observed, "[W]hen those civil rights which are first referred to in general terms . . . are subsequently enumerated, that enumeration precludes any possibility that the general words which have been used can be extended beyond the particulars which have been enumerated."<sup>106</sup> "The sole purpose of the bill," he emphasized, was "to secure" those "fundamental rights."<sup>107</sup> Senator William M. Stewart explained that the Bill was designed "simply to remove the disabilities existing by laws tending to reduce the negro to a system of peonage. It strikes at that; *nothing else*. . . . That is the whole scope of the law."<sup>108</sup>

Nevertheless, Dimond asserts that "the 1866 Act responded to evils extending beyond such express discrimination,"<sup>109</sup> that Berger "fails to recognize the *sweep* of the evil that the 1866 Act addressed."<sup>110</sup> Apparently he rests on the charge that Berger "ignor[ed] the significance of the Codes' facially neutral provisions."<sup>111</sup> By "facially neutral" Dimond means that the Codes "applied on their face to blacks and whites alike";<sup>112</sup> hence, he argues that the Act's "goals" were not as "limited" as Berger claims, but "responded to evils extending beyond such express discrimination[s]" enumerated in the Act.<sup>113</sup> He mentions no "evils" other than those of the Black Codes and the periodic violence during the Reconstruction, and fails to distinguish between the *persons* to whom the Codes applied and the specific "evils," the "acts of racial discrimination" made possible by the Codes. Inclusion of the whites in the Codes was merely window dressing to disguise discrimination in the application; it did not enlarge the "sweep" of the remedy that the Act strikingly patterned on the very "evils" Dimond found. Against his speculations there is the statement of James W. Patterson of New Hampshire, who was "opposed to any law discriminating against [blacks] in the security and

105. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 17 (1955). Alfred Kelly wrote that Wilson "declared for a narrow interpretation of the measure in unequivocal terms . . . ." Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1066 (1956).

106. GLOBE, *supra* note 32, at 1151. Immediately prior thereto, he had explained "fundamental rights" in terms of "the right to make and enforce contracts" and so forth. *Id.* at 1151.

107. *Id.* at 1152.

108. *Id.* at 1785 (emphasis added).

109. Dimond, *supra* note 3, at 477.

110. *Id.* at 475 (emphasis in original).

111. *Id.*

112. *Id.* at 474. From the inclusion of whites Dimond leaps to the conclusion that the banned "discrimination included facially neutral laws that failed to redress *private combinations*." *Id.* at 476 (emphasis added). His citations to Ely and Soifer have no bearing on "private combinations." The Civil Rights Bill reached "any person who under cover of law" deprived another of rights secured by the Act. GLOBE, *supra* note 32, at S.211. When Wilson was asked why the coverage was not extended to the "whole community," he replied, "We are not making a general criminal code for the States." *Id.* at 1120.

113. Dimond, *supra* note 3, at 477. See also *id.* at 476.

protection of life, liberty, person [and] property," but said, "Beyond this I am not prepared to go . . . ." <sup>114</sup> So, too, William Windom of Minnesota declared that the Civil Rights Bill conferred an "equal right, nothing more . . . to make . . . contracts" and the like. <sup>115</sup>

Next Dimond argues that the Civil Rights Act of 1866 "dealt with the specific wrongs that Congress thought should be outlawed at that time. . . . Decades or centuries later, however, the manifestations of such discrimination might be quite different. . . . Thus, even an amendment incorporating 'only' the thrust of the 1866 Act could authorize *different applications* than those enumerated in the Act." <sup>116</sup> This confounds application of a principle to new facts with the Court's replacement of the framers' principle by its own. It is widely agreed that the framers excluded suffrage and segregation from the scope of the amendment. To argue that segregation may now be barred because conditions have changed is to obliterate the exclusory "principle," not to apply it to new facts. Moreover, since the Act addressed "specific wrongs"—namely, violence and oppression—its provisions may not be warped to embrace education, which undeniably was left untouched. Chief Justice Marshall declared that the words of the Constitution are not to be "extended to objects not . . . contemplated by its framers," <sup>117</sup> let alone objects consciously excluded.

#### IV. THE TEXT OF THE FOURTEENTH AMENDMENT: "CODE WORDS"

With respect to the three clauses of the fourteenth amendment—privileges or immunities, equal protection, and due process—Dimond goes to great lengths to show that Bingham, draftsman of the amendment, "is not a plausible candidate for framing a constitutional amendment using *code words* with the narrow, precise meanings suggested by Berger," <sup>118</sup> adducing among other things that Bingham "argued in broad, sometimes rambling terms" <sup>119</sup> respecting "the rights of the people." <sup>120</sup> Yet Bingham flatly stated that "[e]very word of the proposed amendment is to-day in the Constitution," <sup>121</sup> "exactly in the language of the Constitution," <sup>122</sup> referring to "the language of the second section of the fourth article, and a portion of the fifth amendment," which he quoted. <sup>123</sup> Since two of the clauses employed "words of art," as will

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114. GLOBE, *supra* note 32, at 2699.

115. *Id.* at 1159.

116. Dimond, *supra* note 3, at 476 (emphasis added).

117. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827) (dissenting opinion).

118. Dimond, *supra* note 3, at 485 (emphasis added).

119. *Id.* at 494.

120. *Id.* (quoting CONG. GLOBE, 42d Cong., 1st Sess., app. 85 (1871)). Because Berger allegedly "views Bingham as a Negrophobe" whereas "Fairman calls Bingham an incurably muddle-headed thinker," Dimond concludes, "Such wide-ranging views of Bingham" rebut "any claim that Bingham framed the fourteenth amendment as a code to be interpreted as a term of art," Dimond at 481-82 (emphasis in original), a manifest *non sequitur*.

121. GLOBE, *supra* note 32, at 1034.

122. *Id.* at 1095.

123. *Id.* at 1034.

appear, it matters little what *he* conceived them to mean, whether he “framed the fourteenth amendment as a code to be interpreted as a term of art,”<sup>124</sup> because his hearers were entitled to attach to due process, for example, its common-law meaning.<sup>125</sup> Considering that, as Dimond observes, “the flood of [Bingham’s] rhetoric” may “sometimes have obscured his vision,”<sup>126</sup> how much more must it have obscured the understanding of his listeners. Dimond’s generalities furnish so little light on what the framers actually decided as to necessitate a summary of the historical data under the respective clauses whereby to measure his “evidence.” But first it is essential to note that three words—life, liberty, or property—are woven through the debates on the Act and the amendment and may be regarded as the link that binds the three clauses of the amendment together.

#### A. “Life, Liberty, or Property”

Dimond takes exception to my view that the three clauses of the amendment present “three facets of one and the same concern.”<sup>127</sup> This concern, I wrote, was

to insure that there would be no discrimination against the freedmen in respect of “fundamental rights,” which had clearly understood and narrow compass. Roughly speaking, the substantive rights were identified by the privileges or immunities clause; the equal protection clause was to bar legislative discrimination with respect to those rights; and the judicial machinery to secure them was to be supplied by nondiscriminatory due process of the several States. Charles Sumner summarized these radical goals: let the Negro have “the shield of *impartial laws*. Let him be heard in court.”<sup>128</sup>

For the “principal spokesmen” and theorists of the abolitionist movement, Lysander Spooner and Joel Tiffany, “privileges and immunities” meant that a citizen has a right “to full and ample *protection* in the enjoyment of his personal security, personal liberty, and private property . . . protection against oppression . . . against lawless violence.”<sup>129</sup> Early on, James Garfield stated in the House that the goal was that “personal liberty and personal rights are placed in the keeping of the nation; that the right to life, liberty and property shall be guaranteed to the citizen in reality . . . .”<sup>130</sup> In explaining

124. Dimond, *supra* note 3, at 482.

125. His fellow radical, William Higby of California, understood that the article IV clause and the fifth amendment due process clause constituted “precisely what will be provided” by the Bingham amendment. *GLOBE*, *supra* note 32, at 1054. Another radical, William Woodbridge of Ohio, stated, “It is intended to enable Congress by its enactments when necessary to give a citizen . . . those privileges and immunities which are guaranteed to him under the Constitution [article IV] . . . that protection to his property which is extended [by the due process clause].” *Id.* at 1088.

126. Dimond, *supra* note 3, at 494. Stanley Morrison concluded that Bingham’s “many statements . . . are so confused and so conflicting as to be of little weight.” Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 *STAN. L. REV.* 140, 161 (1949). For details see Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 *OHIO ST. L.J.* 435, 449, 453, 461–64 (1981).

127. Dimond, *supra* note 3, at 465.

128. R. BERGER, *supra* note 1, at 18 (quoting *GLOBE*, *supra* note 32, at 675).

129. J. TENBROEK, *EQUAL UNDER LAW* 108, 110 (1965) (emphasis added).

130. *GLOBE*, *supra* note 32, at app. 67.

the scope of the Civil Rights Bill, James Wilson, its manager, quoted Blackstone for the rights that “belong to Englishmen”: (1) “The right of personal security,” (2) “The right of personal liberty . . . ,” consisting, according to Blackstone, in “the power of locomotion . . . moving one’s person to whatever place one’s own inclination may direct, without imprisonment or restraint, unless by due course of law,” and (3) “The right of personal property . . . .”<sup>131</sup> And Wilson emphasized that the rights enumerated in the Civil Rights Bill were *no* “greater than the rights which are included in the general term ‘life, liberty, and property.’”<sup>132</sup> It is an index of Dimond’s scholarly trustworthiness that he describes this as Berger’s “tortured path back to the different ‘fundamental rights’ of Blackstone,”<sup>133</sup> apparently unaware of the interpretive canon that “the statements of those who supported the legislation and secured its passage will be accepted as determining its meaning,”<sup>134</sup> so that Wilson’s quotation of Blackstone defines the goal. Wilson left no doubt about the purpose of the Bill. Referring to “the right of personal security, the right of personal liberty, and the right to acquire and enjoy property,” he said, “[T]hese are the rights which this bill proposes to protect . . . .”<sup>135</sup>

William Lawrence advised the 39th Congress that judicial construction had “confined” the “privileges and immunities” to those “which were in their nature fundamental . . . the rights of *protection* of life and liberty, and to acquire and possess property.”<sup>136</sup> Commenting on Bingham’s proposed amendment, Wilson referred to the due process—life, liberty, or property—clause in the Bill of Rights and stated, “[T]hese constitute the civil rights . . . and these are the rights to which this bill relates . . . .”<sup>137</sup> That amendment, said Frederick Woodbridge of Vermont, was intended for “protection [for] his [the Negro’s] property which is extended” by the due process clause.<sup>138</sup> Bingham explained that the “equal protection” clause provided that state protection “shall be equal *in respect to* life and liberty and property to all persons,” “*nothing else.*”<sup>139</sup> Further illustrations of the framers’ all but exclusive preoccupation with protection of life, liberty, and property will appear in the particularized discussion of the three clauses.

Against this Dimond urges that

the syntax suggests that the guarantee of “equal protection of the laws” is separate from, and *not* limited to, “privileges or immunities” and procedural fairness

131. GLOBE, *supra* note 32, at 1118; Wilson also cited Kent for these three rights, *id.*, as did William Lawrence, *id.* at 1833. Dimond states, however, “These rights were *supposedly* enumerated in the 1866 Civil Rights Act . . . .” Dimond, *supra* note 3, at 466 n.19 (emphasis added). See *infra* text accompanying notes 157–58.

132. GLOBE, *supra* note 32, at 1295 (emphasis added).

133. Dimond, *supra* note 3, at 466.

134. Union Starch & Refining Co. v. NLRB, 186 F.2d 1008, 1012 (7th Cir. 1951).

135. GLOBE, *supra* note 32, at 1117.

136. *Id.* at 1835–36 (emphasis added).

137. *Id.* at 1294 (emphasis added).

138. *Id.* at 1088.

139. *Id.* at 1094 (emphasis added).

concerning "life, liberty or property." By its terms, the equal protection clause imposes *additiional* duties on the states, apart from the privileges or immunities and due process clauses.<sup>140</sup>

But the age-old rule, repeated by Judge Learned Hand, is that if the legislative purpose is "manifest" it "override[s] even the explicit words used,"<sup>141</sup> let alone the "syntax." At another point Dimond argues that the "precise meaning, if any, that Bingham intended by use of the phrase 'life, liberty, or property' is unclear."<sup>142</sup> Whatever the private meaning that he may have attached to terms he confessedly borrowed from article IV and the fifth amendment, it cannot overcome the traditional meaning called by Wilson to the attention of the framers. In fact, however, Bingham, like his fellows, identified "life, liberty, or property" with the Blackstonian cluster of rights.<sup>143</sup>

### B. "Due Process of Law"

The amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Indubitably, "due process of law" are code words. Summarizing 400 years of English and colonial law, Hamilton said on the eve of the Convention: "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice. They can never be referred to an act of the Legislature."<sup>144</sup> "Substantive" due process was therefore outside the phrase. Charles P. Curtis, an admirer of expansive review, wrote that the meaning of "due process of law" in the fifth amendment "was as fixed and definite as the common law could make a phrase. . . . It meant procedural due process."<sup>145</sup> Dimond recognizes that in 1862 the "commonly accepted" view was that the "fifth amendment due process clause . . . applied to procedure, not substance."<sup>146</sup> In the fourteenth amendment the phrase, the Supreme Court stated, "was used in the same sense and to no greater extent."<sup>147</sup>

The clause responded to the fact, noted by Dimond, that blacks were denied access to the courts;<sup>148</sup> the framers were concerned that they had been "denied process of law to enforce the right and avenge the wrong,"<sup>149</sup> and were anxious that they might be "denied remedy in the courts."<sup>150</sup> The chair-

140. Dimond, *supra* note 3, at 467 (emphasis in original).

141. *Cawley v. United States*, 272 F.2d 443, 445 (2d Cir. 1959).

142. Dimond, *supra* note 3, at 486 n.126.

143. *See infra* text accompanying notes 175-77.

144. THE PAPERS OF ALEXANDER HAMILTON 35 (Syrett & Cooke eds. 1962); *see* Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 311, 334 (1979). Judge William Lawrence, one of the framers, quoted the Hamilton definition in 1871. CONG. GLOBE, 41st Cong., 3d Sess. 1245 (1871).

145. Curtis, *Review and Majority Rule*, in SUPREME COURT AND SUPREME LAW 170, 177 (E. Cahn ed. 1954).

146. Dimond, *supra* note 3, at 484-85.

147. *Hurtado v. California*, 110 U.S. 516, 535 (1884).

148. *See supra* text accompanying note 102.

149. GLOBE, *supra* note 32, at 1263 (quoting John P. Broomall).

150. *Id.* at 1265.



man of the House Judiciary Committee, James Wilson, asked whether “if a State intervenes and deprives him [a black], without due process of law, of these rights”—“life, liberty, or property”—“have we no power to make him secure in these priceless possessions?”<sup>151</sup> Another framer, James Garfield of Ohio, who had restudied the 1866 debates, stated in 1871 that the fourteenth amendment “is copied from the fifth,” and he defined it as “an impartial trial according to the laws of the land,”<sup>152</sup> as had been adumbrated by Senator Edgar Cowan of Pennsylvania in the 1866 debates.<sup>153</sup> Bingham said that the meaning of the clause had been “settled” by the courts “long ago.”<sup>154</sup> Although these materials were available to Dimond, he refers to “Berger’s view that due process could mean *no process*.”<sup>155</sup> He furnishes no citation and can cite none for this grotesque attribution. In short, “due process of law” were *code words* and were so understood by Bingham, though that is irrelevant given that the framers could rely on the accepted meaning of the words.

### C. The “Privileges or Immunities” Clause

The phrase entered the fourteenth amendment via the Civil Rights Act of 1866:

there shall be no discrimination in civil rights or immunities . . . [all] inhabitants . . . shall have the same right to make and enforce contracts [etc.] . . . and to full and *equal benefit* of all laws for the *security of person and property*.<sup>156</sup>

Why, it may be asked, did the framers choose that enumeration instead of the “code words” “life, liberty, or property”? One answer may be that the enumeration responded precisely to the evils, listed by Dimond, of the Black Codes. Another is the explanation furnished by William Lawrence of Ohio, who reiterated that blacks were entitled to personal security, personal liberty, and the right to acquire property:

It is idle to say that a citizen shall have the right to life, yet to deny him the right to labor, whereby alone he can live. It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and the rewards of labor.<sup>157</sup>

“These,” he said, were the “necessary incidents of these absolute rights.”<sup>158</sup> Martin Thayer of Pennsylvania averred that “to avoid any misapprehension” as to what the “fundamental rights” are, “they are stated in the bill. The same section goes on to define with greater particularity the civil rights and immunities which are to be protected by the bill.”<sup>159</sup>

151. *Id.* at 1294. For additional citations see R. BERGER, *supra* note 1, at 201–02.

152. CONG. GLOBE APP. 42d Cong., 1st Sess. 153 (1871).

153. GLOBE, *supra* note 32, at 2899 (no punishment “unless by a fair trial . . . in due course of law”).

154. *Id.* at 1089.

155. Dimond, *supra* note 3, at 467 (emphasis in original).

156. GLOBE, *supra* note 32, at 474 (emphasis added).

157. *Id.* at 1833.

158. *Id.*

159. *Id.* at 1151. See also statement of Sen. Sherman, *infra* text accompanying note 164.

The terms "privileges and immunities" are first met in article IV of the Articles of Confederation; it provided that "the people of the different states in this union . . . shall be entitled to all privileges and immunities of free citizens in the several states," specifying "all the privileges of trade or commerce."<sup>160</sup> For the Founders, the enumerated "privileges of trade or commerce" limited the general words "privileges and immunities."<sup>161</sup> That phrase was picked up by article IV of the Constitution, and very early the courts of Maryland and Massachusetts construed them in terms of trade and commerce.<sup>162</sup> After reading from the several cases, Senator Trumbull, draftsman of the Bill, stated that "the great fundamental rights set forth in this bill [are] the right to acquire property, the right to come and go at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights set forth in this Bill,"<sup>163</sup> as its text corroborates. Senator John Sherman said the bill "defines what are the incidents of freedom, and says that these men must be *protected in certain rights*, and so careful is it in its language that it goes on and defines those rights, the right to sue and be sued," and so forth.<sup>164</sup> Quoting Kent, Chairman Wilson said, "I understand civil rights to be simply the absolute rights of individuals, such as—"The right of personal security, the right of personal liberty, and the right to acquire and enjoy property,""<sup>165</sup> emphasizing that the enumerated rights were no "greater than the rights which are included in the general term 'life, liberty, and property.'"<sup>166</sup>

Notwithstanding these assurances, Bingham protested that the "civil rights and immunities" phrase was "oppressive," that it would "embrace every right" and strike down "every State constitution which makes a discrimination on account of race or color in *any* of the civil rights of the citizen."<sup>167</sup> At his insistence the phrase was deleted, in order, as James Wilson

160. H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 111 (7th ed. 1963).

161. Madison wrote, "For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars." THE FEDERALIST NO. 41 at 269 (Mod. Lib. ed. 1937).

162. Campbell v. Morris, 3 H. & McH. 535, 554 (Md. 1797); Abbot v. Bayley, 23 Mass. (6 Pick.) 89, 92 (1827). Dimond prefers a rambling dictum of Justice Bushrod Washington on circuit in Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230). Dimond, *supra* note 3, at 498. For an analysis of *Corfield* see R. BERGER, *supra* note 1, at 31-33. Dimond relies on J. H. Ely, who "cogently comments" that "read in context what Washington says, in essence, is that he feels 'no hesitation in confining' privileges and immunities to everything but the kitchen sink." Dimond, *supra* note 3, at 498 n.195 (quoting J. ELY, DEMOCRACY AND DISTRUST 198 n.64 (1980)). But read in the context of what was *decided*—a Pennsylvania citizen may not dredge for oysters in Delaware waters—the reference to the "kitchen sink" is absurd. Washington did throw in the right to vote, but that was arrant nonsense. No visitor from Pennsylvania could claim the right to vote in Delaware without establishing domicile, so that Senator Trumbull was constrained to say, "This judge goes further than the bill" in including "the elective franchise." GLOBE, *supra* note 32, at 475. What counts is how Trumbull read the cases, *infra* text accompanying note 163, not Ely's reading of *Corfield*.

163. GLOBE, *supra* note 32, at 475.

164. *Id.* at 744 (emphasis added).

165. *Id.* at 1117.

166. *Id.* at 1295.

167. *Id.* at 1291 (emphasis added).

explained, to obviate a "construction going beyond the specific rights named in the section," a "latitudinarian construction not intended."<sup>168</sup> Dimond reads this account as my charge that Bingham was a "Negrophobe,"<sup>169</sup> whereas I viewed it as a "States' Rights manifesto," which in Dimond's eyes is "exaggerate[d]."<sup>170</sup> He considers that Bingham's objections were two: (1) lack of constitutional authorization to legislate on civil rights, and (2) the injustice of penalizing state officials who relied on long-standing state law.<sup>171</sup> That is not how the Court read the deletion:

The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights . . . . [T]he Senate bill did contain a general provision forbidding "discrimination in civil rights or immunities," preceding the specific enumeration of rights . . . . Objections were raised in the legislative debates *to the breadth of the rights of racial equality* that might be encompassed by a prohibition so general . . . . [A]n amendment was accepted striking the phrase from the bill.<sup>172</sup>

Soifer, one of Dimond's authorities, wrote that the deletion dismayed the "historians assisting Thurgood Marshall and his legal team in *Brown v. Board of Education*"<sup>173</sup> because, as Richard Kluger relates, "In calling for the deletion, Bingham, the former abolition theorist, had openly acknowledged that the bill as drafted would have prohibited statutes such as school segregation";<sup>174</sup> Bingham's insistence on deletion rejected such an invasion of state sovereignty.

The thinking of Bingham with respect to "privileges or immunities" was actually in accord with that of his fellows. In 1859, Dimond recounts, Bingham opposed the admission of Oregon because "limitations on travel, ownership of property, and access to the courts deprived blacks of the 'priv-

168. *Id.* at 1366. Wilson, however, had firmly rejected Bingham's over-broad reading of "civil rights," *id.* at 1294, but presumably yielded to obviate needless political conflict.

Dimond argues that "if the phrase 'privileges or immunities' is supposed to be a term of art for 'civil rights' [citation omitted] then John Bingham unequivocally expressed *his* understanding that the phrase embraced all 'social' and 'political rights . . . .'" Dimond, *supra* note 3, at 490 n.145. His understanding was not shared by his fellows, *supra* note 69. Moreover, his own shift from "civil rights" to the historic "privileges or immunities" insured a narrower compass.

169. Dimond, *supra* note 3, at 481.

170. *Id.* at 486 n.124. Dimond notes, however, that "Bingham attempted to minimize the damage to *his view of federalism and state responsibility* by proposing that Congress delete the sentence providing for 'no discrimination in civil rights' (thereby limiting the Bill to the enumerated rights)." *Id.* at 489 (emphasis added).

A Reconstruction historian, Alfred Kelly, who helped the NAACP frame the strategy of the desegregation case, conceded a decade later that "the commitment to traditional state-federal relations [state sovereignty] meant that the radical Negro reform program could be only a very limited one." Kelly, *Comment on Harold M. Hyman's Paper*, in *NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION* 55 (1966). Bickel concluded that "Bingham, while committing himself to the need for safeguarding by constitutional amendment the specific rights enumerated in the body of section 1, was anything but willing to make similar commitment with respect to 'civil rights' in general." Bickel, *The Original Understanding and the Segregation Decision*, 69 *HARV. L. REV.* 1, 24 (1955).

171. Dimond, *supra* note 3, at 486 n.124.

172. *Georgia v. Rachel*, 384 U.S. 780, 791-92 (1966) (emphasis added).

173. Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 *N.Y.U. L. REV.* 651, 685 n.169 (1979).

174. R. KLUGER, *SIMPLE JUSTICE* 640 (1976).

ileges and immunities' of national citizenship."<sup>175</sup> In 1862 "Bingham repeated his claim that free blacks" were entitled to "state *protection* of their privileges or immunities, life, liberty, and property."<sup>176</sup> In 1866, Dimond continues, Bingham stated that "'the word immunity . . . means [e]xemption from unequal burdens,' such as the racial restrictions imposed by Oregon . . . which he had opposed in 1859."<sup>177</sup> Dimond sums up in a splendid *non sequitur*: "Bingham, therefore, did not limit 'privileges and immunities,' 'life, liberty or property,' and 'equal protection' to Berger's 'fundamental rights' concerning the security of person and property."<sup>178</sup>

Against this mass of unequivocal explanations, Dimond maintains the words are "amorphous":<sup>179</sup> Senator Howard "expressed puzzlement over the precise meaning, if any, of the privileges or immunities clause."<sup>180</sup> It is a "puzzlement" that betrays inattention to the explanation by Senator Trumbull, chairman of the Senate Judiciary Committee, of the meaning of the terms. Howard's participation in the framing of the Civil Rights Act and the fourteenth amendment had been negligible, and he was called on to speak only because of the sudden illness of Senator Fessenden, chairman of the Joint Committee. His puzzlement cannot weigh in the scales against the fact that "privileges or immunities" were words of art because they had been judicially construed and those constructions were called to the framers' attention by Chairman Trumbull. William Lawrence observed that "the courts have by construction limited the words 'all privileges' to mean only 'some privileges,'"<sup>181</sup> noting that they were "'confined to those [privileges and immunities] which were in their nature fundamental . . . the rights of protection of life and liberty, and to acquire and enjoy property."<sup>182</sup>

On the basis of much thinner evidence the Court, per Justice Harlan, declared, "[W]e should not assume that Congress . . . used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation."<sup>183</sup>

Speaking after Howard, Senator Luke Poland said that the clause "*secures nothing beyond* what was intended by the original [article IV] provision in the Constitution."<sup>184</sup> Nor was Howard's "puzzlement" shared by contemporary Justices. Justice Bradley held that the particularization of the Act

175. Dimond, *supra* note 3, at 484. Bingham's reference "to national citizenship" is further evidence of his careless reading. Article IV provides that "[t]he citizens of *each State* shall be entitled . . ." It was borrowed *in haec verba* from the Articles of Confederation; the Confederation was a league of sovereign states.

176. Dimond, *supra* note 3, at 484 (emphasis added).

177. *Id.* at 487-88 (quoting *GLOBE*, *supra* note 32, at 1089-90).

178. Dimond, *supra* note 3, at 488.

179. *Id.* at 487.

180. *Id.* at 497.

181. *GLOBE*, *supra* note 32, at 1835.

182. *Id.* at 1835-36.

183. *Yates v. United States*, 354 U.S. 298, 319 (1957). Chief Justice Taney stated, "The members of the Convention unquestionably used the words they inserted in the Constitution in the same sense in which they used them in their debates." *Passenger Cases*, 48 U.S. (7 How.) 283, 477 (1849) (dissenting opinion).

184. *GLOBE*, *supra* note 32, at 2961 (emphasis added).

was incorporated in the privileges or immunities clause—"the first section of the bill covers the same ground as the fourteenth amendment."<sup>185</sup> Led by Justice Field, four dissenters in the *Slaughter-House Cases* declared that "[i]n the first section of the Civil Rights Act Congress has given its interpretation to these terms [privileges or immunities] . . . [including] the right 'to make and enforce contracts [etc.]'"<sup>186</sup> The majority, comparing article IV and the fourteenth amendment, stated, "There can be but little question that . . . the privileges and immunities intended are the same in each [case]."<sup>187</sup> Not the least remarkable aspect of Dimond's "refutation" is that he perceives no need to account for such discrepant facts.

#### D. "Equal Protection"

Dimond's discussion of equal protection is vitiated by several basic misconceptions. The "common understanding of the vagueness" of the language, he maintains, places the burden on Berger to prove that it "was intended to enumerate specific, narrow protections against racial discrimination."<sup>188</sup> But curtailment of state control of local matters reserved to them by the tenth amendment requires clear, not vague, language; and the burden is on those who urge that the "vague" language was intended to authorize the curtailment.<sup>189</sup> Another misconception resides in his rejection of "Berger's view [that] 'equal protection' bars only racially partial state statutes that provide one of these fundamental rights to whites but not to blacks."<sup>190</sup> Only one who gallops heedlessly to a predetermined result could overlook that the framers' sole aim was to preclude *discrimination* with respect to certain rights. The very words "equal protection" posit discrimination. A steady drumbeat on discrimination pervades the record. To begin with, the Civil Rights Act expressly prohibited "discrimination in civil rights or immunities"—a provision that was still too broad for Bingham—and went on to provide for the "same

185. *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649, 655 (C.C.D. La. 1870) (No. 8,408).

186. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96 (1872).

187. *Id.* at 75. Perry concluded that by "privileges or immunities" the framers meant only to protect, against state action discriminating on the basis of race, a narrow category of "fundamental" rights: those pertaining to the physical security of one's person, freedom of movement, and capacity to make contracts . . . and to acquire, hold, and transfer chattels and land—"life, liberty, and property" in the original sense.

Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 273 (1981).

Ignoring the effect of the *Yates* "words of art" rule, *supra* text accompanying note 183, and the *Smythe v. Reiche pari materia* rule, *infra* text accompanying note 203, Dimond argues that the evidence "does not show that the privileges or immunities clause was intended to have a precisely limited scope or that it incorporates only the rights enumerated in the 1866 Civil Rights Act." Dimond, *supra* note 3, at 501. A lawyer who ignores adverse evidence labors in vain.

188. Dimond, *supra* note 3, at 464.

189. See *supra* text accompanying notes 46-48. It is to be borne in mind that Madison assured the ratifiers that the federal "jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and *inviolable* sovereignty over all other objects." THE FEDERALIST NO. 39 at 249 (Mod. Lib. Ed. 1937) (emphasis added).

190. Dimond, *supra* note 3, at 466.

rights" as whites enjoyed.<sup>191</sup> Stevens, who, according to Dimond, "pushed the equality principle to its limits,"<sup>192</sup> had offered an amendment providing for "[n]o racial discrimination in civil rights."<sup>193</sup> And in explaining the fourteenth amendment, as Dimond notes, Stevens said: "Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree."<sup>194</sup> Dimond comments, "After giving some examples of existing racial discrimination, Stevens added, 'I need not enumerate these partial and oppressive laws [Black Codes].'"<sup>195</sup> Unless restrained, he continued, the Southern States will "keep up *this discrimination*, and crush to death the hated freedmen."<sup>196</sup> This modest goal of striking at violence and oppression is translated by Dimond as "push[ing] the equality principle to its limits"! The record is studded with references to discrimination as the goal, and the interested reader will find them collected in my index under the heading "Discrimination."<sup>197</sup> Here let it suffice that Chairman Trumbull twice told the Senate that in the absence of discrimination the Civil Rights Bill would not apply. Very early he explained that the Bill "will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to race or color."<sup>198</sup> And after Johnson's veto of the Bill, Trumbull reiterated that it "in no manner interferes with the municipal regulations of any State which protects all alike in their rights of person and property."<sup>199</sup>

Unlike "due process," which had an established "procedural" content at common law, and "privileges or immunities," which had a history and judicial constructions that were read to the framers, "equal protection" had no antecedents in the text or history of the Constitution. In that case, "[I]f words are used which seem to have no fixed signification," Senator Sumner advised the framers, "we cannot err if we turn to the framers . . ."<sup>200</sup> Throughout the debates on the Civil Rights Bill, which, it will be recalled, secured only the "equal benefit of all laws for security of person and property," the framers interchangeably referred to "equality before the law" and "equal protection," but always in the circumscribed context of the rights enumerated in the Bill.<sup>201</sup> So, Samuel Shellabarger said, "[W]hatever rights as to each of these *enumerated* civil (not political) matters the States may confer upon one race . . . shall be held by all races in equality. . . . It se-

191. GLOBE, *supra* note 32, at 474. In his conclusion, however, Dimond alludes to "the general antidiscrimination obligations" imposed by the fourteenth amendment. Dimond, *supra* note 3, at 511.

192. Dimond, *supra* note 3, at 495.

193. *Id.* at 491.

194. *Id.* at 496 (quoting GLOBE, *supra* note 32, at 2459-60).

195. Dimond, *supra* note 3, at 496.

196. *Id.* (quoting GLOBE, at 2459-60) (emphasis added).

197. R. BERGER, *supra* note 1, at 454.

198. GLOBE, *supra* note 32, at 476.

199. *Id.* at 1761; see also statements of Senator William Stewart, *id.* at 1785.

200. GLOBE, *supra* note 32, at 677.

201. For example, Samuel Moulton of Illinois said each state "shall provide for equality before the law, equal protection to life, liberty, and property, equal right to sue and be sued." *Id.* at 1622.

cures . . . equality of protection in those enumerated civil rights.”<sup>202</sup> Under the *pari materia* rule, this meaning is to be given the words in the “identical” amendment.<sup>203</sup> This was the content the words had for the framers, and it renders idle Dimond’s speculations as to the meaning of the “vague” terms. In the words of Justice Frankfurter, “Legal doctrines . . . derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve. To these they are bound as is a live tree to its roots.”<sup>204</sup> Dimond himself notices that the Joint Committee of Fifteen on Reconstruction, draftsmen of the fourteenth amendment, “reported extensively on the evils of these Black Codes,”<sup>205</sup> and noted the “deep-seated prejudice against color” that “leads to acts of cruelty, oppression and murder, which the local authorities are at no pains to prevent or punish.”<sup>206</sup> And he properly concluded, “Section 1 was designed to redress *this denial* by the states of the equal protection of their laws.”<sup>207</sup> Other than protection of this right to exist by contracting, owning property, or suing, Dimond would be at a loss to cite a reference to equal protection of any other rights.<sup>208</sup> To the contrary, the framers constantly associated “protection” and “equal protection” with the rights enumerated in the Civil Rights Act, themselves incidents of “life, liberty or property.”

Dimond argues, however, that “Bingham nowhere suggested that equal protection should be . . . tied only to ‘privileges or immunities’ and ‘life, liberty or property.’ . . . [N]or did he recant his view that the term ‘civil rights’ included all ‘social’ and ‘political rights . . . .”<sup>209</sup> His view of “civil rights” was not shared by his fellows.<sup>210</sup> In the Senate Trumbull emphasized that the Bill “carefully avoided conferring or interfering with political rights or privileges of any kind.”<sup>211</sup> Moreover, Bingham, who had objected that

202. *Id.* at 1293 (emphasis added).

203. *See, e.g.,* *Reiche v. Smythe*, 80 U.S. (13 Wall.) 162 (1871); *see also supra* note 183 and accompanying text.

In a characteristic exaggeration Dimond asserts that “Berger views the phrases ‘privileges or immunities,’ ‘due process,’ and ‘equal protection of the laws’ as terms of art to which the framers attached ‘received meanings’ virtually as specific as the provision in article II limiting the Presidency to ‘natural born citizens’ who ‘have attained the age of thirty five years.’” Dimond, *supra* note 3, at 465. The inept illustration betrays incapacity to distinguish the “received” procedural meaning of due process, and the association of privileges or immunities with the rights of “person and property,” from specificity in the extreme, a 35-year age limit.

204. *Reid v. Covert*, 354 U.S. 1, 50 (1957) (concurring).

205. Dimond, *supra* note 3, at 477. *See also supra* note 69.

206. Dimond, *supra* note 3, at 477 (quoting REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 2 H.R. REP. NO. 30, 39th Cong., 1st Sess. XVII (1866)).

207. Dimond, *supra* note 3, at 477–78.

208. I put to one side the utterances of Bingham and Howard respecting incorporation of the Bill of Rights in the fourteenth amendment. Reliance on these remarks by Justice Black in *Adamson v. California*, 332 U.S. 46, 73 (1947) (dissenting), has never been accepted by the Court, and the bulk of academic opinion is to the same effect. For citations see Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, n.105 (1981).

209. Dimond, *supra* note 3, at 492.

210. The manager of the Civil Rights Bill, Wilson, firmly rejected Bingham’s reading. *GLOBE*, *supra* note 32, at 1294.

211. *Id.* at 1760; *see supra* note 69.

“civil rights” was too broad and oppressive, discarded “civil rights” in favor of “privileges,” which in conjunction with “immunities” had an historically limited meaning.

Let Bingham refute Dimond as to the tie between equal protection and “life, liberty, or property.” Speaking in 1859, Bingham, then a leading abolitionist theorist, declared,

Nobody proposes or dreams of political equality any more than of physical or mental equality. It is as impossible for men to establish equality in these respects as it is for “the Ethiopian to change his skin” . . . Who, on the other hand, will be bold enough to deny all persons are equally entitled to the enjoyment of the rights of life and liberty and property.

. . . .  
 212 . [A]ll men, before the law, are equal in respect of those rights of person.

He acted on these principles in shaping his draft of the amendment. In an early version provision was made for both “the same political rights and privileges; and . . . equal protection in the enjoyment of life, liberty and property,”<sup>213</sup> testimony that “equal protection” did not embrace “political rights.” Bingham proposed a substitute, H.R. No. 63, that would empower Congress “to secure . . . all privileges and immunities . . . [and] equal protection in the rights of life, liberty and property.”<sup>214</sup> “Political rights and privileges” had been deleted; in its place was “privileges and immunities,” which never had embraced “political rights.” Bingham explained that his proposal would enable Congress to insure “that the protection given by the laws of the States shall be *equal in respect to* life and liberty and property to all persons.”<sup>215</sup> When Robert Hale of New York asked him to point to the clause on which he relied, Bingham replied, “The words ‘equal protection’ contain it, and *nothing else*.”<sup>216</sup> That statement alone reduces to rubble Dimond’s assertion that “Bingham nowhere suggested that equal protection should be limited to . . . ‘life, liberty, or property.’”<sup>217</sup> Moreover, Dimond misconceives the governing rule: having throughout associated “protection” and “equal protection” with “life, liberty, or property” and “privileges or immunities,” Bingham was not required to exclude other rights and privileges, the test being rather that of Chief Justice Marshall: The terms of the Constitution are not to be “extended to objects not . . . contemplated by its framers.”<sup>218</sup>

212. CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859). As early as 1857, Bingham had said, “This is equality. It protects not only life and liberty, but also property, the product of labor. It contemplates that no man shall be wrongfully deprived of the fruit of his toil any more than of his life.” CONG. GLOBE APP. 34th Cong., 3d Sess. 140 (1857).

213. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 31 (1955).

214. *Id.* at 33.

215. GLOBE, *supra* note 32, at 1094 (emphasis added).

216. *Id.* (emphasis added).

217. Dimond, *supra* note 3, at 492.

218. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827) (dissenting); *see also* *Yates v. United States*, 354 U.S. 298, 319 (1957).



## V. FROM SPECIFIC TO GENERAL LANGUAGE

Like his fellow activists, Dimond relies heavily on the fact that "[t]he language of the fourteenth amendment . . . is markedly different from that of the Act: it is more general and open-ended."<sup>219</sup> He is confident that the "amount of evidence that supports an open-ended reading of the amendment" runs counter to "Berger's claims that the fourteenth amendment dealt solely with the rights enumerated in the 1866 Act."<sup>220</sup> His "evidence"—Stevens' "push[ing of] the equality principle to its limits";<sup>221</sup> Howard's "puzzlement" as to the meaning of "privileges or immunities";<sup>222</sup> and Poland's "*all such partial state legislation*"<sup>223</sup>—has been examined earlier and found wanting.<sup>224</sup>

Act and amendment proceeded on parallel tracks in the same session of the same Congress so that the framers were quite familiar with the objectives of each. The amendment was designed, as Dimond acknowledges, "to constitutionalize the 1866 Act, both to prevent its repeal by a hostile future Congress and to resolve any doubts concerning Congress's power to pass the 1866 Act under the thirteenth amendment."<sup>225</sup> This does not weigh heavily with him, however, because "the framers consciously used broad language that is not a mere substitute for the 1866 Act."<sup>226</sup> Notwithstanding, the framers, without dissent, considered the two as *identical*. As Charles Fairman observed, "Over and over in this debate, the correspondence between Section I of the Amendment and the Civil Rights Act is noted. The provisions of

219. Dimond, *supra* note 3, at 477.

220. *Id.* at 495.

221. *Id.*

222. *Id.* at 497.

223. *Id.* at 500 (quoting GLOBE, *supra* note 32, at 2961) (emphasis added by Dimond).

224. Another bit of Dimond's "evidence": James Garfield said the amendment would "hold over every American . . . the protecting shield of law," Dimond, *supra* note 3, at 496 (quoting GLOBE, *supra* note 32, at 2462), a "broad definition of equal protection." Dimond, *supra* note 3, at 496. In 1871 Garfield, who emphasized that he "not only heard the whole debate at the time, but I have lately read over, with scrupulous care, every word of it as recorded in the Globe," said,

In the long debate which followed this section [1] of the amendment was considered as equivalent to the first section of the civil rights bill . . . . It was throughout the debate, with scarcely an exception, spoken of as a *limitation* of the power of the States to legislate unequally for the *protection of life and property*.

CONG. GLOBE APP., 42d Cong., 1st Sess. 151 (1871) (emphasis added). That, as we have seen, was Bingham's own view.

"In particular," Dimond charges, "Berger omits discussion of the broad reading of the equal protection clause invoked by Garfield . . ." Dimond, *supra* note 3, at 480 n.94. The nub of Dimond's quotation is "It is a broad and comprehensive limitation on the power of the State governments . . ." *Id.* (quoting CONG. GLOBE, 42d Cong., 1st Sess., app. 153 (1871)). But Dimond, ever preferring the general to the specific, ignores Garfield's above quoted summary: § 1 forbade states "to legislate unequally for the protection of life and property."

Dimond chides me for not addressing Bingham's view of his "historical dispute" with Garfield, Dimond, *supra* note 3, at 480 n.94; in 1871 Bingham sought to put a broader meaning on the amendment than he did in 1866. Garfield justly remarked that Bingham "can make but he cannot unmake history." CONG. GLOBE APP., 42d Cong., 1st Sess. 151 (1871). For those who prefer a lawyer to a rhetorician I commend Garfield's careful analysis of the 1866 debate, copiously larded with extracts.

225. Dimond, *supra* note 3, at 477.

226. *Id.*

the one are treated as though they were essentially identical with those of the other."<sup>227</sup> George B. Latham of West Virginia, speaking after Howard, expressed his "puzzlement" and stated that "the 'civil rights bill' which is now a law . . . covers exactly the same ground as this amendment."<sup>228</sup> Henry Raymond of New York referred to the Civil Rights Bill "by which Congress proposed to exercise *precisely* the powers which that [the Bingham] amendment was intended to confer."<sup>229</sup> Thayer considered "[I]t is *but incorporating* in the Constitution . . . the principle of the civil rights bill which has lately become a law" in order that it "shall be forever incorporated in the Constitution."<sup>230</sup> Harry Flack, a devotee of a broad construction of the fourteenth amendment, states, "[N]early all said that it was but an incorporation of the Civil Rights Bill. . . . [T]here was no controversy or misunderstanding as to its purpose and meaning."<sup>231</sup> Dimond notes that Bingham himself said that "the terms of the proposed Civil Rights Bill 'should be the law of every State' . . . ."<sup>232</sup> Because it was not, Bingham would remedy that lack "by amending the constitution . . . expressly prohibiting the States from any *such abuse* of power in the future."<sup>233</sup> It is passing strange that Dimond prefers the "generality" of the language to these unequivocal utterances. Justice Bradley, a contemporary of the amendment, held, on the other hand, that "the first section of the bill covers *the same ground* as the fourteenth amendment."<sup>234</sup>

Having been assured, for example, that the Act left segregated schools untouched, a seismic shift by the framers to a ban on segregation in the amendment, given pervasive and persisting racism, requires some explanation. None is offered by Dimond. The more "general" terms can be and were explained by Bickel: The "specific and exclusive enumeration of rights" in the Act presumably was considered "inappropriate in a constitutional provision,"<sup>235</sup> particularly because the "general" terms had consistently been associated with the narrow objectives of the Act, the protection of life, liberty, and property. And he informed Frankfurter, "It was doubtful that an explicit 'no discrimination' provision going beyond the enumerated rights in the Civil Rights Bill as finally enacted could have passed the Thirty-Ninth Congress . . . ."<sup>236</sup> It was more than doubtful, for the framers repeatedly rejected proposals to ban *all* discrimination.<sup>237</sup> "One is driven by the evidence,"

227. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 44 (1949).

228. GLOBE, *supra* note 32, at 2883 (emphasis added).

229. *Id.* at 2502 (emphasis added).

230. *Id.* at 2465 (emphasis added).

231. H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 81 (1908).

232. Dimond, *supra* note 3, at 490 (quoting GLOBE, *supra* note 32, at 1291).

233. *Id.* (emphasis added).

234. See *supra* note 185 and accompanying text.

235. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 61 (1955).

236. R. KLUGER, SIMPLE JUSTICE 654-55 (1976).

237. For citations see R. BERGER, *supra* note 1, at 163-64. Compare such rejections with Dimond's citation of Howard on the equal protection clause: It "abolishes *all* class legislation in the States . . . ." Dimond, *supra* note 3, at 499 (quoting GLOBE, *supra* note 32, at 2766). See statements of Stevens and Fessenden, *infra* text accompanying notes 255 and 256.

C. Vann Woodward wrote, "to the conclusion . . . that popular convictions were not prepared to sustain" a "guarantee of equality."<sup>238</sup>

The significance of another fact escapes Dimond: he observes that the 1870 Act "re-enacted the 1866 Civil Rights Act pursuant to the fourteenth amendment."<sup>239</sup> If the amendment had the breadth he assigns to it, why did not the Reconstruction Congress now go beyond the narrow confines of the Act? The answer, I submit, is that the amendment was not designed to go beyond assuring the constitutionality of the Act and safeguarding it from repeal.

## VI. THE OPEN-ENDED THEORY

Echoing Bickel's "open-ended" theory, Dimond insists that "[i]t proves nothing to say that the framers had no present intent to outlaw school segregation by specific statute; the question is whether they could have intended that future Congresses or the Court be free to do so under the authority of the more general fourteenth amendment."<sup>240</sup> We have seen that an intention to authorize invasion of state sovereignty over local concerns has to be stated clearly. Bickel failed to fashion an escape hatch from this requirement. Initially he had informed Justice Frankfurter that "it is impossible to conclude that the 39th Congress intended that segregation be abolished; *impossible* also to conclude that *they foresaw it might be*, under the language they were adopting."<sup>241</sup> Notwithstanding, Dimond maintains "Bickel argued that the contemporaneous *debates show* that Congress intended neither to outlaw dual schooling in 1866 nor to *prevent* Congress or the Court from *outlawing it in the future . . .*"<sup>242</sup> Of course one Congress cannot "prevent" another Congress from acting; the question is whether the framers *authorized* a future Congress "to outlaw dual schooling." Authority is not to be wrested from silence or from ambiguous terms when they serve to encroach on matters reserved to the states. It can be stated categorically that there is not an iota of evidence in the debates for the proposition that the framers employed two-faced language.

238. C. V. WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* 83 (1960); see also W. BROCK, *AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION* 286 (1963), and *supra* notes 69 and 78. These facts make no impression on Dimond. Instead he relies on the fact that "[i]he *opponents* of the fourteenth amendment complained at length about the risk of expansive 'construction' of § 1 and its open-ended phrasing . . ." Dimond, *supra* note 3, at 477 n.78. He himself notes that "exaggerating the scope of pending legislation to make it appear more unattractive is a classic opposition technique," but brushes that aside because "the proponents did not dispute these broad interpretations . . ." *Id.* at 497. There was no need to dispute because the proponents repeatedly had underscored the scope of their endeavors. "An unsuccessful minority cannot put words into the mouths of the majority . . ." *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 288 (1956). At one point, Senator Trumbull explained that he did not reply to opposition assertions "because I thought we should soonest get action on the bill by voting silently upon them." *GLOBE*, *supra* note 32, at 399. Dimond could have profited by a study of my chapter on opposition statements. R. BERGER, *supra* note 1, at 157-65.

239. Dimond, *supra* note 3, at 478.

240. *Id.* at 502; see also *id.* at 511 n.258.

241. R. KLUGER, *SIMPLE JUSTICE* 654 (1976) (emphasis added). In 1962 Bickel wrote that it was not the framers' intention "to forbid the States to enact and enforce segregation statutes." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 100 (1962). It is a mark of Dimond's careless reading that he should have interpreted Bickel's advice to Frankfurter as reflecting the "open-ended" theory. Dimond, *supra* note 3, at 511 n.258.

242. Dimond, *supra* note 3, at 463 (emphasis added).

Bickel did not rely on the debates but on a tentative, speculative hypothesis, retreating from his "impossible" under the influence of Frankfurter's drive for a desegregation decision. Seeking to answer the question why "what was equal in 1868 is not equal now," Frankfurter asserted that constitutional terms must accommodate "changes in men's feelings,"<sup>243</sup> so that equal protection could mean one thing in 1868 and the very opposite in 1954. Such a theory of interpretation, one may surmise, did not sit well with Bickel, who attempted to frame another, asking "what if any thought was given to the long-range effect"<sup>244</sup> of the amendment in the future? And he ventured the hypothesis: could resort to equal protection of the laws "have failed to leave the implication that the new phrase, while it did not necessarily, and certainly not expressly, carry greater coverage than the old, was nevertheless roomier, more receptive to 'latitudinarian' construction? *No one made the point* with regard to this particular clause [nor the other clauses]."<sup>245</sup> "It remains true," he wrote, "that an explicit provision going further than the Civil Rights Act could not have been carried in the 39th Congress . . ."<sup>246</sup> And he notes that the Republicans drew back from a "formulation dangerously vulnerable to attacks pandering to the prejudices of the people,"<sup>247</sup> a prejudice the draftsmen shared. But, he speculated, "[M]ay it not be that the Moderates and the Radicals reached a compromise permitting them to go to the country with language which they could, where necessary, defend against damaging alarms raised by the opposition, but which at the same time was sufficiently elastic to permit reasonable future advances?"<sup>248</sup> This is mere speculation, not "evidence." There was no need for "compromise." Senator John Sherman told an Ohio audience in 1866, while the amendment was up for ratification, "[W]e defeated every radical proposition . . ."<sup>249</sup> M.L. Benedict concluded that "[t]he nonradicals had enacted their program with the sullen acquiescence of some radicals and over the opposition of many."<sup>250</sup> Bickel hypothesizes that the "compromisers" concealed the future objectives they dared not avow lest the whole enterprise collapse. There is not a shred of evidence, let me repeat, that the framers employed double talk to hoodwink the ratifiers. If they did there was no ratification, because it requires "a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid . . ."<sup>251</sup> It remains to be said that activist

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243. R. KLUGER, *SIMPLE JUSTICE* 685 (1976). "Men's feelings" had not changed, for it is generally acknowledged that a desegregation amendment was unprocurable in 1954.

244. Bickel, *The Original Understanding and the Segregation Decision*, 69 *HARV. L. REV.* 1, 59 (1955).

245. *Id.* at 61 (emphasis added).

246. *Id.*

247. *Id.* at 62.

248. *Id.* at 61. "Most congressional Republicans were aware of (and shared) their constituents' hostility to black suffrage." M. KELLER, *AFFAIRS OF STATE* 67 (1977). For statements of Senator Sherman, see *supra* note 96.

249. J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 167 (1956).

250. M.L. BENEDICT, *A COMPROMISE OF PRINCIPLE* 210 (1975). The radical opposition to readmission of Tennessee because its Constitution excluded Negro suffrage was voted down 125 to 12 in the House and 34 to 4 in the Senate. *GLOBE*, *supra* note 32, at 3980, 4000.

251. *Owings v. Hull*, 34 U.S. (9 Pet.) 607, 629 (1835) (per Justice Story).

Michael Perry considers that Berger “devastated the notion that the framers of the fourteenth amendment . . . intended it to be ‘open-ended.’”<sup>252</sup> Reliance on this theory overlooks that Bickel himself later tacitly repudiated his earlier hypothesis. Testifying in 1968 before a Senate committee, he perceived that the question before the framers was “whether they expected Congress to have sort of an open-ended mandate, or whether they thought . . . section one particularly limited, imposed limits on what Congress could do, and there the history to me shows a clear choice.” They “voted down” Bingham’s original proposition which “left Congress too free,” free to “go in there in those States and simply rearrange the social scene . . . .”<sup>253</sup>

Dimond does not comment on the fact that the 39th Congress *repeatedly rejected proposals to bar ALL discrimination*.<sup>254</sup> Nor does he notice Stevens’—who had proposed such a bar at the outset—summation of his views on the amendment: He had hoped that the people “would have so remodeled all our institutions as to have freed them from every vestige of . . . inequality of rights . . . that no distinction would be tolerated . . . . This bright dream has vanished . . . . [W]e shall be obliged to be content with patching up the worst portions of the ancient edifice.”<sup>255</sup> The reason, said Senator Fessenden, the influential chairman of the Joint Committee of Fifteen on Reconstruction, was, “[W]e cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions . . . .”<sup>256</sup> In a statement strikingly applicable to the relation between the long-debated narrow compass of the Civil Rights Act and the “vague,” “general” terms of the amendment, Madison wrote, “[I]t exceeds the possibility of belief, that the known advocates in the Convention for a jealous grant & cautious definition of federal powers, should have silently permitted the introduction of words or phrases in a sense rendering fruitless the restrictions & definitions elaborated by them.”<sup>257</sup> Men do not use words to defeat their purposes: “[W]e cannot rightly prefer . . . [a meaning] which will defeat rather than effectuate the constitutional purpose.”<sup>258</sup> Dimond ignores these facts, proving once more that an artist [read activist] is known by what he omits.

Alone among activists, John Ely, who translated the “open-ended” terms as an “across-the-board invitation to import” extra-constitutional elements into the “constitutional decision process,”<sup>259</sup> shrank back from the

252. Perry, Book Review, 78 COLUM. L. REV. 685, 695 (1978).

253. *Hearings on the Supreme Court Before the Senate Subcommittee on Separation of Powers*, 90th Cong., 2d Sess. 44 (June 11, 1968).

254. For citations see R. BERGER, *supra* note 1, at 163-64.

255. GLOBE, *supra* note 32, at 3148.

256. *Id.* at 705.

257. 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 488 (1911).

258. *United States v. Classic*, 313 U.S. 299, 316 (1941). Dimond takes refuge in the Solicitor General’s amicus brief in *Brown*, which asserted that the framers left the issue of segregation “open for decision by the Court under the equal protection clause.” Dimond, *supra* note 3, at 511 n.258. But as Sidney Hook wrote, “[W]hat makes a thing true is not who says it, but the evidence for it . . . .” S. HOOK, PHILOSOPHY AND PUBLIC POLICY 121 (1980).

259. Berger, *Government by Judiciary: John Hart Ely’s “Invitation,”* 54 IND. L.J. 277, 277 (1979).

genie he had conjured, finding it "frightening," "scary."<sup>260</sup> He therefore proposed the formulation of principles whereby to limit the untethered discretion.<sup>261</sup> That leaves the limits in the discretion of the Court and is no better than the "self-restraint" that has so dismally failed. Under a Constitution that limits *all* power, it cannot be that the Court alone enjoys illimitable power.<sup>262</sup>

## VII. CONCLUSION

Dimond's obtention of subsidies to refute my historical data, picking up the gauntlet to cite "chapter and verse"<sup>263</sup> five years after my publication, suggests that prior efforts by his fellow crusaders, Soifer, Curtis & Co., failed to accomplish their mission. Like them, Dimond opposes fantasy to fact, generalities to limiting specifics,<sup>264</sup> and is given to inaccuracies and misstatements, which the foregoing account by no means exhausts. Let Justice Jackson draw the moral. In his guide to advocacy before the Supreme Court he cautioned the neophyte: "[I]f the first decision does not support [the proposition], I conclude the lawyer has a blunderbuss mind and rely on him no further."<sup>265</sup>

It is said that Thomas Hardy often answered harsh reviews "in an attempt to educate the critical fraternity, which seemed determined almost to a man to resist innovation."<sup>266</sup> There are quarters where the winds of change do not ruffle a hair,<sup>267</sup> but the rising tide of activists who acknowledge that the fourteenth amendment did not limit the rights of the states to control suffrage and segregation, and did not incorporate the Bill of Rights, testifies that my own educational efforts have not been in vain. Even so bitter a critic as Paul Brest, who in 1977 aligned me with "racists" because I questioned the sanctity of *Brown v. Board of Education*,<sup>268</sup> recently noted that advocates of "fundamental rights" not "specified by the text or original history of the Constitution" argue that "the judiciary is *nonetheless authorized*" (where?) to protect those "rights which can be discovered in conventional morality or

260. J. ELY, DEMOCRACY AND DISTRUST 34 (1980); Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 425 (1978).

261. Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 448 (1978).

262. For citations see R. BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 77-79 (1982).

263. Dimond, *supra* note 3, at 463 n.8.

264. Ely observes that "by favoring . . . the 'general over the particular'" one can support any conceivable position. J. ELY, DEMOCRACY AND DISTRUST 67 (1980).

265. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 804 (1951).

266. Broyard, *Books of the Times*, New York Times, May 12, 1982, Book Review, at C-29, col. 3. Writing of current criticism of Einstein's theory of special relativity, philosopher Michael Polyani notes that the believers "had so well closed their minds to any suggestion which threatened the new rationality achieved by Einstein's world-picture, that it was almost impossible for them to think again in different terms. Little attention was paid to the [current] experiments, the evidence being set aside in the hope that it would one day turn out to be wrong." Wade, *Shoot-out With Einstein in Arizona*, New York Times, April 19, 1982, The Editorial Notebook, at A-20, col. 1, 3.

267. Referring to the French Army's lamentable Operations Bureau in World War I, Barbara Tuchman observed, "They formed what a French military critic called 'a church outside which there was no salvation and which could never pardon those who revealed the falsity of its doctrine.'" B. TUCHMAN, THE GUNS OF AUGUST 416-17 (1962).

268. Brest, *Berger v. Brown et al.*, New York Times, Dec. 11, 1977, § 7 (Book Review), at 10.

derived through the methods of philosophy and adjudication.”<sup>269</sup> This merely seeks to rationalize what Chief Justice Warren did in fact. A worshipful admirer and former clerk of Warren, G. Edward White, said that Warren “was never concerned with constitutional text or intention. Rather, he believed that his job as judge lay in discovering and articulating the ‘ethical imperatives’ *he felt* were (or *should be*) embedded in the Constitution.”<sup>270</sup> Not what the Constitution required but what Warren “*felt*” it “*should*” require was his test of constitutionality—a palpable arrogation of power to revise the Constitution that article V confided to the people alone.

Little wonder that Brest challenged the assumption “that judges . . . were bound by the text or original understanding of the Constitution.”<sup>271</sup> That judges are sworn “to support the Constitution” is of no consequence. But when Brest came to examine the theories of “seven representative scholars who favor one or another form of fundamental rights adjudication,”<sup>272</sup> he concluded that they were largely in disagreement and that “their conclusions are not obviously determined by their sources and methods,”<sup>273</sup> implying that they are derived from their own predilections, as is confirmed by his adjuration to academe “simply to acknowledge that most of our writings [about judicial review] are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good.”<sup>274</sup> This is more than a confession of intellectual bankruptcy; it acknowledges that for a generation academe has diverted constitutional analysis from its constitutional channels in order to cram its moral and social norms down the throat of an unwilling public, *e.g.*, busing, pornography, death penalties, and the like.

In time to come, I predict, this will be regarded as an arrant disservice to democratic self-government, a sorry chapter in legal scholarship. Commenting on a collateral issue—“the incontrovertible conclusion that the [fourteenth] amendment was never intended to confer upon the recently enfranchised slaves the whole complex of social and political rights that would have made them equal to the white citizens, but only the restricted rights in relation to life, limb and property and access to the courts that have been spelled out in the Civil Rights Act”—Sir Max Beloff, an eminent Oxford emeritus, stated, “The quite extraordinary contortions that have gone into proving the contrary make sad reading for those impressed by the high quality of American legal-historical scholarship.”<sup>275</sup> Dimond, Soifer & Co. might take that to heart.

269. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1064 (1981) (emphasis added).

270. McDowell, *Earl Warren's Good Intentions Weren't Enough*, (book review of G.E. WHITE, EARL WARREN: A PUBLIC LIFE (1982)), Wall St. J., Aug. 26, 1982, at 20, col. 3 (emphasis added).

271. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 224 (1980).

272. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1067, 1089 (1981).

273. *Id.* at 1089.

274. *Id.* at 1109.

275. Beloff, *Arbiters of America's Destiny*, The London Times, April 7, 1978, (Higher Education Supplement), at II.

