

2015

The Problematics of the *Brown-is-Originalist* Project

Ronald Turner

Follow this and additional works at: <http://brooklynworks.brooklaw.edu/jlp>

Recommended Citation

Ronald Turner, *The Problematics of the Brown-is-Originalist Project*, 23 J. L. & Pol'y (2015).

Available at: <http://brooklynworks.brooklaw.edu/jlp/vol23/iss2/3>

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized administrator of BrooklynWorks. For more information, please contact matilda.garrido@brooklaw.edu.

THE PROBLEMATICS OF THE *BROWN-IS-ORIGINALIST* PROJECT

Ronald Turner*

On May 17, 1954, the United States Supreme Court issued its landmark decision in Brown v. Board of Education. Declaring “that in the field of public education the doctrine of ‘separate but equal’ has no place,” the Court determined that “we cannot turn the clock back to 1868 when the Fourteenth Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written.” Over the years, several originalist scholars have noted that an interpretive theory that produces the conclusion that Brown was wrongly decided will have little appeal, and have undertaken the task of demonstrating that Brown can be squared with and justified by originalism.

This essay examines and critiques these efforts and focuses, in particular, on one posited attribute and aspect of originalism: the constraint on judges and interpreters. This essay argues that certain originalist methodologies employed in the effort to justify Brown are in fact discretionary in several key respects, and that those answering in the affirmative “is Brown originalist?” have employed “discretionary originalism” in ways that are antithetical to originalism’s posited discretion-constraining promise.

* Alumnae Law Center Professor of Law, University of Houston Law Center. J.D., University of Pennsylvania Law School; B.A., Wilberforce University. The author acknowledges and is thankful for the research support provided by the Alumnae Law Center donors and the University of Houston Law Foundation.

I. INTRODUCTION AND OVERVIEW

II. RACE, RIGHTS, AND THE FOURTEENTH AMENDMENT

- A. The Black Codes, the Civil Rights Act of 1866, and the Fourteenth Amendment
- B. What Rights were to be Protected By The Fourteenth Amendment?

III. *BROWN V. BOARD OF EDUCATION*

- A. Originalist Arguments
- B. The Court's Decision

IV. DISCRETIONARY ORIGINALISM AND *BROWN*

- A. The *Brown*-Was-Wrongly-Decided Position
- B. The *Brown*-Was-Correctly-Decided Position
 - 1. Robert Bork
 - 2. Justice Antonin Scalia
 - 3. Michael McConnell
 - 4. Jack Balkin
 - 5. Steven Calabresi And Michael Perl
 - 6. John McGinnis And Michael Rappaport

V. CONCLUSION

INTRODUCTION

On May 17, 1954 the United States Supreme Court issued its landmark and canonical decision in *Brown v. Board of Education*.¹ The Court, interpreting and applying the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution,² and “consider[ing] public education in the light of its full development and its present place in American life throughout the nation,”³ declared “that in the field of public education the doctrine of ‘separate but equal’ has no place.”⁴ In so ruling, the Court determined that “we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”⁵

The *Brown* Court did not employ originalism, the label given to a family of theories that consider “the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”⁶ As

¹ 347 U.S. 483 (1954).

² See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

³ *Brown*, 347 U.S. at 492–93.

⁴ *Id.* at 495.

⁵ *Id.* at 492. For the Supreme Court’s full 1896 opinion, see *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁶ Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL’Y 599, 599 (2004) [hereinafter Whittington, *The New Originalism*]. For discussions and analyses of originalism, see JACK M. BALKIN, *LIVING ORIGINALISM* (2011); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (rev. ed. 2014); ROBERT W. BENNETT & LAWRENCE B. SOLUM, *CONSTITUTIONAL ORIGINALISM: A DEBATE* (2011); FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* (2013); DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* (2005); *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* (Jack N. Rakove ed., 1990); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* (Ivan R. Dee 2000) (1988); JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* (1999); JOHNATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005); *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* (Steven G. Calabresi ed., 2007); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1st Vintage Books ed.

Keith Whittington noted, originalism is both old and new.⁷ Old Originalism emphasized the Framers' intent at the time of drafting and was concerned with "prevent[ing] judges from acting as legislators and substituting their own substantive political preferences and values for those of the people and their elected representatives."⁸ New Originalism focuses on the original public meaning of constitutional text:⁹ "the meaning that the words and phrases had (or would have had) to ordinary members of the public."¹⁰ New Originalism, like Old Originalism, focuses on "judicial *constraint*—in the sense of promising to narrow the discretion of judges."¹¹

1997); THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION (Grant Huscroft & Bradley W. Miller eds., 2011); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1st reprt. 2001); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).

⁷ Whittington, *The New Originalism*, *supra* note 6, at 599.

⁸ *Id.* at 602.

⁹ *See id.* at 609–10.

¹⁰ Lawrence B. Solum, *We Are All Originalists Now*, in CONSTITUTIONAL ORIGINALISM: A DEBATE, *supra* note 6, at 2–3. Solum notes "four core ideas" defining New Originalism. (1) The "fixation thesis": "the meaning of each provision of the Constitution becomes *fixed* when that provision is framed and ratified," with meaning referring to "meaning in the linguistic sense." *Id.* at 2. (2) Original public meaning: "the meaning that the words and phrases had (or would have had) to ordinary members of the public." *Id.* at 2–3. (3) The original public meaning has "the force of law": "courts and officials are bound by the text of the Constitution" and the "linguistic meaning of the text . . . is the supreme law of the land." *Id.* at 3. (4) The distinction between *constitutional interpretation* and *constitutional construction*. Understanding and applying legal text involves a two-step process. The first step, constitutional interpretation, discerns the linguistic meaning of the text. The second step, constitutional construction, "enables officials to apply the text" as courts "fashion doctrines or rules of constitutional law" and Congress and the President act "in ways that require implementation of the Constitution." *Id.* at 3–4.

¹¹ Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 751 (2011); *see also* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 13 (2002) (scholars "alarmed at any hint of judicial discretion . . . in constitutional cases . . . seek a grand theory that will

With the judicial constraint justification for originalism foregrounded, can a persuasive argument be made that *Brown* is consistent with originalism? Originalists have observed that much rides on the answer to this question given the “widespread belief that [*Brown*] was inconsistent with the original understanding of the Fourteenth Amendment.”¹² Michael McConnell, a prominent originalist, has observed that the “supposed inconsistency between *Brown* and the original meaning of the Fourteenth Amendment has assumed enormous importance in modern debate over constitutional theory. Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited.”¹³ Another originalist, Robert Bork, remarked that “any theory that seeks acceptance must, as a matter of psychological fact, if not of logical necessity, account for the result in *Brown*.”¹⁴ As Pamela Karlan has noted, “Precisely because *Brown* has become the crown jewel of the United States Reports, every constitutional theory must claim *Brown* for itself. A constitutional theory that cannot produce the result reached in *Brown* . . . is a constitutional theory without traction.”¹⁵

constrain judges and provide definitive answers to difficult interpretive questions”).

¹² CROSS, *supra* note 6, at 92.

¹³ Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995).

¹⁴ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 77 (1990).

¹⁵ Pamela S. Karlan, *What Can Brown Do For You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009); *see also* KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* 68 (2006) (while “[s]ome originalists still take the position that *Brown* exemplifies illegitimate judicial decision-making in the name of a desirable result . . . most originalists are more concerned to explain how *Brown* is actually correct on originalist grounds, thinking (rightly) that an approach to constitutional interpretation under which *Brown* was wrongly decided will have little appeal for the American public”); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 280 (2006) (“Some have claimed that any respectable account of constitutional adjudication must be able to justify *Brown*.”); J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-*

This Article considers several efforts to square *Brown* with purportedly discretion-narrowing originalist theories. As discussed herein, various originalist accounts and theories that have been presented in support of the *Brown-is-originalist* position are grounded in interpreter discretion and interpretive choices. While this observation does not lead to the conclusion that all posited attributes of originalism are problematic, I argue that originalism does not meaningfully constrain interpreters who are and remain free to fashion and shape the methodology in ways that yield a *Brown-is-originalist* conclusion. Agreeing with legal scholar Andrew Koppelman, that the notion of a constitutional theory “that is self-sufficient and not vulnerable to penetration by discretion and contingency is a . . . self-protective delusion,”¹⁶ this Article concludes that the originalist methodologies discussed herein are in fact discretionary in at least four respects.

First, originalism “is itself a choice.”¹⁷ Constitutional interpreters and theorists may choose from a menu of interpretive choices, including originalism, living constitutionalism, history, text, purpose, precedent, doctrine, prudence, structure, political process concerns, ethical concerns, social values, consequences of decisions, and moral readings of the Constitution.¹⁸ Those who

GOVERNANCE 17 (2012) (“*Brown* affords living constitutionalists a nonoriginalist case whose ultimate salutary effect on American equality properly renders the result nearly immune from criticism.”); Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 958 (2002) (“[C]onservatives who are generally sympathetic to originalism cannot openly say that *Brown v. Board of Education* was wrongly decided” and so they “concoct implausible accounts of the Reconstruction Era understanding of segregation”).

¹⁶ Andrew Koppelman, *Why Jack Balkin is Disgusting*, 27 CONST. COMMENT. 177, 185 (2010).

¹⁷ Eric Posner, *Originalism Means Not Always Getting What You Want* (Feb. 10, 2014), <http://ericposner.com/originalism-means-not-always-getting-what-you-want/>.

¹⁸ See generally PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

believe that originalism is the only legitimate method of constitutional interpretation¹⁹ choose that theory over, and to the exclusion of, other methodologies. That choice may or may not be the correct one, but it is a choice nonetheless.

Second, an originalist has and enjoys unfettered discretion in choosing among several “diverse and, to some extent, conflicting” originalist theories,²⁰ including original intent, original understanding, original expected application, original public meaning, original methods, and framework originalism. These “originalisms” have been developed over time as originalism has been “working itself pure.”²¹

Third, an originalist is free to frame the inquiry and choose what she considers to be “the proper level of generality at which a right should be characterized.”²² Characterizing a claimed right broadly (for example, the right to a public education) or more precisely and narrowly (for example, the right to attend racially desegregated schools) is a critical descriptive as well as normative matter and choice, and one that can be influenced by an interpreter’s value choices and objectives.²³

Fourth, an originalist interpreter enjoys discretion in framing the parameters of the evidentiary inquiry relative to a particular constitutional issue under consideration. What are the facts and circumstances relevant to the “is *Brown* originalist” inquiry? Those found in Congressional and ratification debates about the Fourteenth Amendment? In the original public meaning of the Fourteenth Amendment and its various provisions? In the “real-world forms of institutionalized humiliation”²⁴ and the ways in

¹⁹ See Vasana Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1129 (2003).

²⁰ See Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 573 (2013).

²¹ Kesavan & Paulsen, *supra* note 19, at 1114.

²² Patrick S. Shin, *Discrimination Under a Description*, 47 GA. L. REV. 1, 33–34 (2012).

²³ See LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 73 (1991).

²⁴ 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 300 (2014).

which the “practice of segregated schooling was just a special case of a more general evil—the systematic perpetuation of ‘feelings of inferiority’”²⁵ In the history and lived experiences of those subjected to and subordinated by white supremacy before, at the time of, and after the adoption of the Fourteenth Amendment, an amendment which “was a failure in its time”²⁶

An “utterly unconstraining” and “malleable” originalism that “can be used for any desired end . . . is functionally dejustified as an interpretive standard.”²⁷ Given the aforementioned aspects of what I call *discretionary originalism*, are originalists addressing the *Brown* and originalism issue subject to and governed by the discretion-narrowing promise of originalism? This is an important question, for if originalism does not constrain judges and other interpreters “that fact totally undercuts the case for the method.”²⁸ Thus, the question whether originalism (or any other interpretive methodology) is meaningfully constraining is a critical one for all engaged in constitutional interpretation and application.²⁹

This Article’s discussion of these and other queries unfolds as follows. Part I provides a brief overview of “race,”³⁰ rights, and the

²⁵ *Id.* at 13.

²⁶ Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 980 (2012).

²⁷ CROSS, *supra* note 6, at 180–81.

²⁸ *Id.* at 20.

²⁹ For a skeptical view of the interpreter-constraining capacity of any interpretive theory, see John Harrison, *On the Hypotheses That Lie at the Foundations of Originalism*, 31 HARV. J. L. & PUB. POL’Y 473 (2008).

³⁰ The placement of quotation marks around the word “race” is done for the purpose of emphasizing that “race is a social construction” and “a biologically arbitrary grouping of individuals” with “no fundamental moorings in biology or genetics.” Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 28–30 (2013). An opposing view and theory posits “that race has a biological essence” and that “individuals belonging to a race are united by shared genes and are genetically more similar to one another than to those of different races.” *Id.* Biological race is a false belief that has been debunked and disconfirmed by the Human Genome Project’s revelation that, in genetic terms, all individuals are 99.9 percent the same. See DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* 50 (2011); see also Bridges, *supra*, at 32 (“The [Human Genome] Project revealed that all persons, without regard to racial ascription or identification, share 99.9 percent of the

Fourteenth Amendment, and includes a discussion of the three separate and distinct categories of rights recognized in the Reconstruction era: civil rights, political rights, and social rights. As demonstrated in that part, at the time of the adoption of the Fourteenth Amendment social rights (including the right to attend a desegregated school and to marry a person of another race) were deemed to be outside the protective scope of the amendment, a fact which calls into question the notion and conclusion that *Brown* is consistent with originalism.

Part II turns to *Brown*. Because Chief Justice Warren's opinion is typically not studied with care or precision, the Court's decision and reasoning, as well as certain matters leading up to the ruling (including originalist arguments made to the Court), are examined here in detail. Part III also comments on the Declaration of Constitutional Principles, also known as the "Southern Manifesto," and that declaration's originalist critique of the *Brown* decision. As discussed therein, in the Manifesto the vast majority of United States Senators and Representatives from southern states protested that *Brown* violated the original intent and understanding of the Fourteenth Amendment.

In Part III the essay examines originalist answers to the question of whether *Brown* can be squared with or justified by originalism(s). Some originalists (for example, Raoul Berger and Earl Maltz) have concluded that *Brown* is contrary to the original intent of the framers of the Fourteenth Amendment and was therefore wrongly decided. Other originalists (Robert Bork, Justice Antonin Scalia, Michael McConnell, Jack Balkin, Steven Calabresi and Michael Perl, and John McGinnis and Michael Rappaport) have answered the "is *Brown* originalist" query in the affirmative. In doing so, they have employed discretionary originalism in ways that are antithetical to the posited discretion-constraining promise of originalism.

same genes, and it concluded—definitively—that humans could not be divided into coherent biological races.” “[T]here are no biological races in the human species. Period.” ROBERTS, *supra*, at 77.

I. RACE, RIGHTS, AND THE FOURTEENTH AMENDMENT

While the United States Constitution of 1789 did not explicitly use the term “slavery,” a number of constitutional provisions directly or indirectly referred to that subject.³¹ The “peculiar institution” of this nation’s chattel slavery was justified, in part, by a white-supremacist theory of congenital inferiority, which posited that enslaved persons of African descent were genetically and intellectually inferior to whites³² (a view held by *The Star Spangled Banner* author Francis Scott Key).³³

The Supreme Court announced its agreement with the black-inferiority thesis in *Dred Scott v. Sandford*.³⁴ The Court’s decision, “the original sin of originalism,”³⁵ held that African slaves and

³¹ The Constitution prohibited Congressional interference with the slave trade before 1808. *See* U.S. CONST. art. I, § 9, cl. 1. Enslaved persons who escaped to a free state were to be “delivered up” and returned to the slave state from which they fled. *Id.*, art. IV, § 2, cl. 3; *Prigg v. Pennsylvania*, 41 U.S. 539, 540 (1842). Enslaved persons were to be counted as “three fifths of all other Persons” for purposes of determining representation in the United States House of Representatives and votes in the Electoral College, and for levying taxes among the states. U.S. CONST. art. I, § 2. This “federal ratio” enshrined in the three-fifths clause “richly rewarded the southern states, artificially inflating their House seats and electoral votes and helping to explain why four of the first five presidents hailed from Virginia.” RON CHERNOW, *ALEXANDER HAMILTON* 239 (2004).

³² *See* JOHN HOPE FRANKLIN, *RACE AND HISTORY: SELECTED ESSAYS 1938–1988*, at 325 (1992); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 197–236* (1956).

³³ *See* JEFFERSON MORLEY, *SNOW-STORM IN AUGUST: WASHINGTON CITY, FRANCIS SCOTT KEY, AND THE FORGOTTEN RACE RIOT OF 1835*, at 40 (2012) (“Key shared a general view of the free people of color as shiftless and untrustworthy: a nuisance, if not a menace, to white people. He spoke publicly of Africans in America as ‘a distinct and inferior race of people, which all experience proves to be the greatest evil that affects a community.’”).

³⁴ 60 U.S. 393 (1857). For more on *Dred Scott*, see MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2008).

³⁵ B. Jessie Hill, *Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the “Pragmatic Moment,”* 91 TEX. L. REV. 1815, 1833 (2013); *see also* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 23 n.51 (2009) (“Given the universal opprobrium that attaches to *Dred Scott*, it is unsurprising that Originalists would seek to disavow it.”).

their descendants were not and could not be citizens of the United States. The Court described enslaved persons and their progeny as “beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.”³⁶ The Court stated that “that race” “[was] not even in the minds of the Framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.”³⁷ Indeed,” the Court opined, “when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.”³⁸

The supposition of inferior and rightless persons of African descent, which the Court endorsed a mere eleven years before the adoption of the Fourteenth Amendment, was an undeniable aspect of social, political, legal, and economic life in pre- and post-Civil War America. Any discussion of race, rights, and the Fourteenth Amendment must account for the racial realities of this world and the racist worldviews of those who created, maintained, and benefited from them.

A. *The Black Codes, The Civil Rights Act of 1866, and the Fourteenth Amendment*

The Thirteenth Amendment to the Constitution formally banned slavery in 1865.³⁹ In the former Confederate states, Emancipation met a backlash in the forms of white vigilantism and lynchings.⁴⁰ The paramilitary Ku Klux Klan commenced a

³⁶ *Dred Scott*, 60 U.S. at 407.

³⁷ *Id.* at 412.

³⁸ *Id.*

³⁹ See U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

⁴⁰ See PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* (2002).

campaign of harassment, intimidation, and even murder, directed at freedpersons and others.⁴¹

“New slavery,” pursued via Black Codes,⁴² returned freedpersons to “a condition as close to their former one as it was possible to get without actually reinstating slavery.”⁴³ In the words of William A. Sinclair, who was born into slavery, southerners were determined to use the Black Codes “to suppress the colored man” and “make his condition worse under emancipation than it was under slavery, depriving him of every protection, making him an outcast.”⁴⁴ Expressing a different view, Columbia University history professor William Archibald Dunning’s 1907 book on Reconstruction argued that the Black Codes were

in the main a conscientious straightforward attempt to bring some sort of order out of the social and economic chaos which a full acceptance of the results of war and emancipation involved. The freedmen were not, and in the nature of the case could not for generations be, on the same social, moral, and intellectual plane with the whites; and

⁴¹ See STEVEN HAHN, *A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION* 267, 276–80 (2003).

⁴² “Black Codes were formally and facially asymmetric: They heaped disabilities on blacks but not on whites.” AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 149 (2012). For more on Black Codes, see DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* 8 (2001); PAUL D. MORENO, *BLACK AMERICANS AND ORGANIZED LABOR: A NEW HISTORY* 19 (2006). Post-slavery Black Codes were not the first such codes in the nation’s history. A number of post-Revolutionary northern states passed “Black Codes” that denied blacks fundamental rights and limited their opportunities to work and to move in search of work.” JACQUELINE JONES, *A DREADFUL DECEIT: THE MYTH OF RACE FROM THE COLONIAL ERA TO OBAMA’S AMERICA* 101 (2013).

⁴³ NICHOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR* 34 (2006).

⁴⁴ WILLIAM A. SINCLAIR, *THE AFTERMATH OF SLAVERY: A STUDY OF THE CONDITION AND ENVIRONMENT OF THE AMERICAN NEGRO* 3 (1905).

this fact was recognized by constituting them a separate class of the civil order.⁴⁵

African-American workers who lacked a labor contract or were unemployed were criminally prosecuted for vagrancy⁴⁶ and, once convicted, “were fined heavily and could be hired out by the state for a pittance until the fine was paid.”⁴⁷ Alabama leased 374 black prisoners to the Alabama & Chattanooga Railroad; Texas received \$12.50 per month for providing two railroad companies with 250 “convicts.”⁴⁸

Responding to the Black Codes, Congress, over the veto of white supremacist and “fervent Negrophobe” President Andrew Johnson,⁴⁹ enacted the Civil Rights of 1866. That legislation provided, in pertinent part:

[A]ll persons born in the United States . . . are hereby declared to be citizens of the United States and such citizens . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to the full and equal benefit of all laws and

⁴⁵ WILLIAM ARCHIBALD DUNNING, *RECONSTRUCTION, POLITICAL AND ECONOMIC, 1865-1877*, at 58 (1907). As noted by one scholar, the “Dunning school of Reconstruction historiography” assumed “negro incapacity” and “portrayed African Americans either as ‘children,’ ignorant dupes manipulated by unscrupulous whites, or as savages, their primal passions unleashed by the end of slavery.” ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* xxii (2005).

⁴⁶ See BRUCE BARTLETT, *WRONG ON RACE: THE DEMOCRATIC PARTY’S BURIED PAST* 33 (2008).

⁴⁷ *Id.*; see also BERNSTEIN, *supra* note 42, at 10 (vagrancy laws in North Carolina, Georgia, Virginia and Texas “essentially criminalized unemployment, even temporary unemployment”).

⁴⁸ DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 54 (2008).

⁴⁹ RANDALL KENNEDY, *THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA PRESIDENCY* 42 (2011); see also Annette Gordon-Reed, *Andrew Johnson*, in *THE AMERICAN PRESIDENTS* 112, 124 (Arthur M. Schlesinger, Jr. & Sean Wilentz eds., 2011) (discussing Johnson’s white supremacist views).

proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.⁵⁰

As the Supreme Court noted in *The Civil Rights Cases*,⁵¹ in enacting the 1866 Civil Rights Act

[C]ongress did not assume, under the authority given [to it] by the Thirteenth amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.⁵²

Thereafter, Congress, seeking to constitutionalize the 1866 legislation,⁵³ proposed the Fourteenth Amendment to the Constitution; the amendment was ratified and officially adopted in 1868.⁵⁴ Derisively referred to by some as the “negro equalization amendment,”⁵⁵ Section 1 provides:

⁵⁰ 42 U.S.C. § 1981 (2012) (originally enacted as Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27).

⁵¹ 109 U.S. 3 (1883).

⁵² *Id.* at 22 (emphasis added). On social rights, see *infra* notes 70–71 and accompanying text.

⁵³ See *Neal v. Delaware*, 103 U.S. 370, 386 (1881) (“[T]he Fourteenth Amendment . . . secure[s] to the colored race, thereby invested with the rights, privileges, and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white citizens.”); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 187, 195 (1998) (Section 1 of the Fourteenth Amendment “was consciously designed and widely understood to encompass” the Civil Rights Act of 1866). *But see* GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR RIGHTS IN POST-CIVIL WAR AMERICA* 165 (2006) (rejecting the view that § 1 of the Fourteenth Amendment was intended to constitutionalize the 1866 Civil Rights Act).

⁵⁴ One scholar has observed that the Fourteenth Amendment was “forced down the throats of the southern political establishment.” Greene, *supra* note 26, at 1009; see also WILLIAM D. WORKMAN, JR., *THE CASE FOR THE SOUTH* 14 (1960) (arguing that the Fourteenth Amendment was “adopted in . . . an uncivil, unrighteous and manifestly unconstitutional manner”); Thomas B.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁵⁶

Southerners were “terrified” that the Fourteenth Amendment “would giv[e] negroes political and social equality with the whites,” would “someday be interpreted to preclude laws banning interracial marriage,” and would “compel [them] to live with the sickening stench of degraded humanity.”⁵⁷

B. What Rights Were To Be Protected by the Fourteenth Amendment?

The text of the Fourteenth Amendment does not expressly prohibit racial classifications. As noted by legal historian Michael Klarman, “[a]dvocates of abolishing all racial classifications proposed suitable language, but it was rejected. Indeed, some Radical Republicans opposed ratification because they thought the amendment’s limited purpose rendered it a party trick designed only for electioneering purposes.”⁵⁸ Thus, as adopted and ratified, the amendment does not explicitly bar the states from engaging in any and all forms of racial classification.

Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 *Nw. U. L. REV.* 1627, 1629 (2013) (arguing that the Fourteenth Amendment “was ratified not by the collective assent of the American people but rather at gunpoint”).

⁵⁵ Colby, *supra* note 54, at 1647.

⁵⁶ U.S. CONST. amend. XIV, § 1.

⁵⁷ Colby, *supra* note 54, at 1647 (alterations in original) (footnote omitted) (internal quotation marks omitted).

⁵⁸ MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 18 (2004) (quotation marks omitted).

That the Fourteenth Amendment did not eliminate all racial classifications is unsurprising given the three distinct categories of rights recognized in the Reconstruction era: (1) civil rights, (2) political rights, and (3) social rights. *Civil rights* included “freedom of contract, property ownership, and court access—rights guaranteed in the 1866 Civil Rights Act, for which the Fourteenth Amendment was designed to provide a secure constitutional foundation.”⁵⁹ *Political rights*, including the right to vote, were not enjoyed by all persons, as African-American men were deemed civilly equal to white men.⁶⁰ (The Fifteenth Amendment, adopted in 1870, prohibits abridgment of the right to vote “on account of race, color, or previous condition of servitude.”)⁶¹ *Social rights* were understood to include the right to marry a person of another race and the right to attend a desegregated school.⁶² Many,

⁵⁹ *Id.* at 19; see also John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1762 (2010) (“[T]he Fourteenth Amendment was designed to render constitutional the Civil Rights Act of 1866, which stated that all citizens should have the same rights as white citizens and that if the rights are different under any description, they are not the same.”) (internal quotation marks omitted).

⁶⁰ KLARMAN, *supra* note 58, at 19; JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 144 (2011).

⁶¹ U.S. CONST. amend. XV, § 1.

⁶² KLARMAN, *supra* note 58, at 19; see also Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 130 n.241 (2013) (“Another possible reason why marriage would not be covered by the Fourteenth Amendment is that it was regarded as a social right rather than a civil right.”); David A. Strauss, *Can Originalism Be Saved?*, 82 B.U. L. REV. 1161, 1169 (2012) (discussing the “familiar and important point[] . . . that the Reconstruction Congress distinguished among civil, political, and social rights: the Fourteenth Amendment, as that Congress conceived it, protected civil rights but not political rights (quintessentially the right to vote) or social rights (of which the clearest example was the right to marry a person of another race)”; Eric Foner, *The Original Intent of the Fourteenth Amendment: A Conversation with Eric Foner*, 6 NEV. L.J. 425, 438 (2005-2006) (“And then there was this very amorphous area called social rights or social equality. Nobody who was talking about the Fourteenth Amendment except Charles Sumner believed in social equality.”); David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 823 (1998) (the “Court’s distinction between social rights, which were not protected by the Fourteenth Amendment, and civil rights, which were protected, was

including some Republicans, opposed the view that African Americans should have constitutionally protected social rights.⁶³ As legal scholar Jack Balkin points out, the concept of social equality for African Americans had a “racially charged meaning” and was viewed as “a code word for miscegenation and racial intermarriage. The idea (or rather the fear) was that the relative status of blacks and whites as a group would be altered if society had a preponderance of mixed-race children, or if blacks and whites regarded themselves as members of the same family.”⁶⁴

The Reconstruction-era taxonomy of rights is reflected in Jack Balkin’s “tripartite theory of citizenship.”⁶⁵ The “key point of the tripartite theory was that equal citizenship and equality before the law meant something less than what it does for us today: civil equality, but not political or social equality.”⁶⁶ Thus, those who framed, adopted and considered the meaning of the Fourteenth Amendment favored constitutionalizing certain civil rights while simultaneously opposing the recognition of constitutionally protected political and social rights. Giving blacks the right to vote

arguably consistent with the intent of the framers of the Fourteenth Amendment”); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1120 (1997) (“Social rights were those forms of association that, white Americans feared, would obliterate status distinctions and result in the ‘amalgamation’ of the races.”).

⁶³ KLARMAN, *supra* note 58, at 19.

⁶⁴ BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 60, at 145; *see also* DUNNING, *supra* note 45, at 213–14 (arguing that “civil rights and political power” had been “almost forced” upon African Americans who craved social equality in the form of “mixed schools” and sought the “hideous crime against white womanhood”); McConnell, *supra* note 13, at 1018 (“A significant undercurrent in the discussion of social rights was the fear that intermixing would lead to miscegenation, and that the theory of the Fourteenth Amendment . . . would logically extend to a right of racial intermarriage.”); Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777, 781 (2007) (“[S]ocial equality . . . was a label . . . enemies had long attempted to pin on the proponents of equal public rights in order to associate public rights with private intimacy and thereby to trigger the host of fears connected with the image of black men in physical proximity to white women.”).

⁶⁵ BALKIN, *supra* note 6, at 222.

⁶⁶ *Id.* at 222–23.

and marry persons of another race “in 1866 would have been politically explosive”;⁶⁷ the tripartite theory was thus a matter of “political necessity” reflecting “the balance of power and interests in American society, the political compromises necessary to ratify the Fourteenth Amendment, and the play of forces in the years that followed.”⁶⁸

Michael McConnell has also recognized the Reconstruction-epoch “social rights argument based on a tripartite division of rights, universally accepted at the time but forgotten today, between civil rights, political rights, and social rights.”⁶⁹ And Bruce Ackerman has observed that, “[f]or Reconstruction Republicans, only three spheres of life”—the civil, political, and social—“were worth distinguishing . . . Within this traditional trichotomy, the Reconstruction Amendments protected political and civil rights but not social rights.”⁷⁰

Ignorance or disregard of the tripartite theory and division of rights results in an originalist analysis that fails to take into account a critical fact: the placement of social rights outside the protective scope of the Fourteenth Amendment.⁷¹ With regard to school segregation, a social rights issue, it is noteworthy that African Americans “were almost universally excluded from, or segregated in, public schools when the Fourteenth Amendment was adopted.”⁷² “School segregation was infrequently discussed during the legislative debates in 1866. Democrats occasionally argued that the Civil Rights Act or the Fourteenth Amendment would produce horrible consequences, such as compulsory school integration, but

⁶⁷ *Id.* at 223.

⁶⁸ BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 60, at 146–47.

⁶⁹ McConnell, *supra* note 13, at 1016.

⁷⁰ ACKERMAN, *supra* note 24, at 130.

⁷¹ *See id.* at 299 (noting the “traditional understandings that placed social rights beyond the scope of the Fourteenth Amendment”); Michael C. Dorf, *Tainted Law*, 80 U. CIN. L. REV. 923, 933 n.36 (2012) (“Nineteenth century legal thinkers also distinguished a third category of social rights which were sometimes thought to be beyond the reach of the law”); Dorf, *supra* note 15, at 974 n.67 (social rights were “sometimes said to be entirely outside the purview of” the Fourteenth Amendment).

⁷² KLARMAN, *supra* note 58, at 19.

Republicans invariably denied such a possibility.”⁷³ These facts and points render debatable the proposition that the Fourteenth Amendment, at the time of its adoption, provided for a social right to racially desegregated schools.

If the right to attend a desegregated public school was considered a social right beyond the scope of the Fourteenth Amendment, the traditional and, in the words of Michael McConnell, universally accepted distinction between civil, political, and social rights calls into question the notion and conclusion that *Brown* is consistent with originalism.

II. *BROWN V. BOARD OF EDUCATION*

Does the Fourteenth Amendment prohibit state-mandated racial segregation in public schools? A unanimous Supreme Court, in an opinion by Chief Justice Earl Warren, answered that question in the affirmative in *Brown v. Board of Education*.⁷⁴ Because “lawyers and judges all fail to study Warren’s words with care, choosing instead to see the opinion as a way station on the route to some far more glorious principle,”⁷⁵ this part examines the Court’s decision and reasoning in some detail. The Court’s plain language is the starting point of this project’s focus and analysis.

A. *The Board’s Originalist Arguments*

In the 1954 *Brown* decision Chief Justice Earl Warren noted that the Segregation Cases before the Court⁷⁶ had first been argued during the Court’s 1952 Term. During that initial argument, John W. Davis, counsel for the school board in the South Carolina case,⁷⁷ noted that “the same Congress” that proposed the

⁷³ *Id.*

⁷⁴ 347 U.S. 483 (1954).

⁷⁵ ACKERMAN, *supra* note 24, at 128.

⁷⁶ In 1952 the Court took jurisdiction over four cases from Kansas, South Carolina, Virginia, and Delaware wherein lower courts rejected Fourteenth Amendment challenges to state-mandated racial segregation in public schools. *See Brown*, 347 U.S. at 486 n.1.

⁷⁷ Davis “was the most accomplished and admired appellate lawyer in America.” RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V.*

Fourteenth Amendment in June 1866 proceeded in July 1866 “to establish or to continue separate schools in the District of Columbia.”⁷⁸ Davis sought to demonstrate to the Court “how those who submitted this Amendment and those who adopted it conceded it to be, and what their conduct by way of interpretation has been since its ratification in 1868.”⁷⁹ He told the Court that thirty of the then thirty-seven states in the union ratified the Fourteenth Amendment in 1868, and that twenty-three of those thirty states “either then had, or immediately installed, separate schools for white and colored children under their public school systems. Were they violating the Amendment which they had solemnly accepted?”⁸⁰

As Chief Justice Warren noted in *Brown*, the Segregation Cases were set for reargument “largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868” and “consideration of the Amendment in Congress, [the] ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment.”⁸¹ In the December 1953 reargument, Davis again appeared before the Court on behalf of South Carolina. Repeating the count-the-states argument he made a year earlier, Davis made an original intent/original understanding argument, telling the Court that the “overwhelming preponderance of the evidence demonstrates that the Congress which submitted, and the state legislatures which ratified, the Fourteenth Amendment did not contemplate and did not understand that it would abolish segregation in public schools.”⁸²

Davis contended that “when we study the legislation enacted by Congress immediately before, immediately after, and during the

BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 545 (ed. 2004).

⁷⁸ Oral Argument, *Briggs v. Elliott*, U.S. Sup. Ct. No. 101, Dec. 10, 1952, in 49 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 331 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter *Briggs, Oral Argument*].

⁷⁹ *Id.* at 333.

⁸⁰ *Id.*

⁸¹ *Brown*, 347 U.S. at 489.

⁸² *Briggs, Oral Argument, supra* note 78, at 481.

period of the discussions of the Fourteenth Amendment, there can be no question left that Congress did not intend by the Fourteenth Amendment to deal with the question of mixed or segregated schools.”⁸³ He noted that the Freedmen’s Bureau, established by the same Congress that proposed the Fourteenth Amendment, “installed separate schools throughout the South.”⁸⁴ And, he argued, during Congressional consideration of the proposed Civil Rights Act of 1866 the claim that the law “would do away with the separate schools” was denied by the chair of the House Judiciary Committee.⁸⁵

B. *The Court’s Decision*

In *Brown*, Chief Justice Warren determined that the sources examined in the reargument “cast some light” but were “not enough to resolve the problem with which we are faced.”⁸⁶ At best, they are inconclusive.”⁸⁷ The Chief Justice explained that at the time of the adoption of the Fourteenth Amendment “[i]n the South,

⁸³ *Id.* at 482.

⁸⁴ *Id.* at 485.

⁸⁵ *Id.* at 486.

⁸⁶ *Id.* at 489.

⁸⁷ 347 U.S. at 489. On the Court’s inconclusivity conclusion, see RICHARD A. POSNER, *OVERCOMING LAW* 62 (1995) (“It was unclear, to say the least, that the framers or ratifiers of the Fourteenth Amendment had intended the equal protection clause to prevent racially segregated public school education.”); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 156 (1999) (“the very Congress that submitted the Fourteenth Amendment to the states for ratification also supported segregated schools in the District of Columbia” and the amendment’s supporters gave assurances that the amendment would not lead to desegregated schools); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 64 (1955) (“[T]he immediate objectives to which section 1 of the Fourteenth Amendment was addressed . . . was not expected in 1866 to apply to segregation . . .”); Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252 (1991) (“Evidence regarding the original understanding of the Fourteenth Amendment is ambiguous as to a wide variety of issues, but not school segregation. Virtually nothing in the congressional debates suggests that the Fourteenth Amendment was intended to prohibit school segregation, while contemporaneous state practices render such an interpretation fanciful . . .”).

the movement toward free common schools, supported by general taxation, had not yet taken hold.”⁸⁸ The education of white children “was largely in the hands of private groups” while the “[e]ducation of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states.”⁸⁹ The impact of the Fourteenth Amendment on public education in the northern states “was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today.”⁹⁰

The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.⁹¹

Moving to the Court’s early Fourteenth Amendment decisions, Chief Justice Warren remarked that in those cases the Court interpreted the amendment “as proscribing all state-imposed discriminations against the Negro race.”⁹² The separate-but-equal doctrine “did not make its appearance in this [C]ourt until 1896 in the case of *Plessy v. Ferguson* . . . involving not education but transportation.”⁹³ Declaring that “we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written,”⁹⁴ Warren focused instead on “public education in the light of its full development and its present place in American life throughout the Nation.”⁹⁵

⁸⁸ *Brown*, 347 U.S. at 489–90.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 490 & n.5 (citing *Slaughter-House Cases*, 83 U.S. 36 (1873); *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Virginia v. Rives*, 100 U.S. 313 (1879); *Ex Parte Virginia*, 100 U.S. 339 (1880)).

⁹³ *Id.* at 491.

⁹⁴ *Id.* at 492.

⁹⁵ *Id.* at 493.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.⁹⁶

Chief Justice Warren then asked whether segregating children by race unconstitutionally deprived children of color of equal educational opportunities, even though physical facilities and other tangible factors were “equal.”⁹⁷ Noting the Court’s invalidation of segregated education in the graduate school setting,⁹⁸ he opined that the Court’s focus on intangible considerations in those cases “apply with added force to children in grade and high schools.”⁹⁹ “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹⁰⁰ Chief Justice Warren supported this statement with a finding from the district court that heard the Kansas case:

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *See id.* at 492 (citing *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938)).

⁹⁹ *Id.* at 493–94.

¹⁰⁰ *Id.*

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system.¹⁰¹

Chief Justice Warren concluded: “Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.”¹⁰²

Accordingly, Chief Justice Warren wrote, “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”¹⁰³ The plaintiffs and other similarly situated persons had been “deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”¹⁰⁴

Brown, a nonoriginalist if not an anti-originalist decision,¹⁰⁵ looked to the role, dynamics, and function of public school education at the time of the Court’s 1954 decision. The Court

¹⁰¹ *Id.* (internal punctuation omitted).

¹⁰² *Id.* at 494–95 & n.11. The “modern authority” language in the quoted text was supported by footnote 11’s citation to social science studies, including Dr. Kenneth Clark’s report on the results of his doll test. For more on footnote 11, see ACKERMAN, *supra* note 24, at 132; ANGELO N. ANCHETA, SCIENTIFIC EVIDENCE AND EQUAL PROTECTION OF THE LAW 42–58 (2006); ROY L. BROOKS, INTEGRATION OR SEPARATION?: A STRATEGY FOR RACIAL EQUALITY 13–15 (1996).

¹⁰³ *Brown*, 347 U.S. at 495.

¹⁰⁴ *Id.*

¹⁰⁵ See RICHARD A. POSNER, REFLECTIONS ON JUDGING 198 (2013) (arguing that *Brown* is a nonoriginalist decision); CROSS, *supra* note 6, at 92 (arguing that *Brown* is “functionally an antioriginalist opinion”).

expressly declared that its ruling and analysis were not tied to or in any way dictated by events occurring in 1868, when the Fourteenth Amendment was adopted, or in 1896, the year in which the Court issued its infamous *Plessy* decision. As legal scholar David Strauss has remarked, the Court’s “formal abandonment” of the separate-but-equal doctrine in the context of public primary and secondary schools “was no revolution but just the final step in a common law development. . . . Earlier Courts, trying to apply separate but equal, kept coming to the conclusion that the particular separate facilities before them were not equal.”¹⁰⁶ In “taking one further step in a well-established progression,” Strauss continued, the Court acted “not as the interpreter of the views of mid-nineteenth-century politicians, but as a court with responsibility for the evolution—in a properly restrained, common law fashion—of the living Constitution.”¹⁰⁷

Supporters of the pre-*Brown* segregationist status quo reacted negatively—and on originalist grounds—to the Court’s decision. For instance, in March 1956 the vast majority of United States Senators and Representatives from southern states issued the “Declaration of Constitutional Principles.”¹⁰⁸ This declaration, also known as the “Southern Manifesto,”¹⁰⁹ was drafted by Senators Strom Thurmond, Sam Ervin, Harry Byrd, Richard Russell, and others.¹¹⁰ Protesting that the “unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always

¹⁰⁶ STRAUSS, *supra* note 18, at 92; see *supra* note 99 and accompanying text.

¹⁰⁷ STRAUSS, *supra* note 18, at 92.

¹⁰⁸ See 102 CONG. REC. 4255, 4459–61 (1956) (statement of Sen. Walter George); *id.* at 5445 (statement of Sen. Strom Thurmond). Albert Gore and Estes Kefauver of Tennessee and Lyndon B. Johnson of Texas were “the only three southern Senators who did not sign” the Manifesto. Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1079 (2014).

¹⁰⁹ For an excellent analysis and discussion of the Southern Manifesto, see Driver, *supra* note 108.

¹¹⁰ See KARL E. CAMPBELL, SENATOR SAM ERVIN, THE LAST OF THE FOUNDING FATHERS 5–7 (2007); ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 785 (2002); DAN T. CARTER, THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS 86 (2d ed. 2000).

produced when men substitute naked power for established law,”¹¹¹ the Manifesto presented an originalist critique of *Brown*.

The original Constitution does not mention education. Neither does the 14th amendment nor any other amendment. The debates preceding the submission of the 14th amendment clearly show that there was no intent that it should affect the systems of education maintained by the States.

The very Congress which proposed the amendment subsequently provided for segregated schools in the District of Columbia.

When the amendment was adopted in 1868, there were 37 States of the Union. . . . Every one of the 26 states that had substantial racial differences among its people either approved the operation of segregated schools already in existence or subsequently established such schools by action of the same law-making body which considered the 14th Amendment.¹¹²

As can be seen, the “Manifesto’s central critique asserted that the [*Brown*] decision violated the original understanding of the Fourteenth Amendment. In doing so, the Manifesto placed in the foreground precisely the argument that the Court’s opinion in *Brown* sought to force into the background.”¹¹³

III. DISCRETIONARY ORIGINALISM AND *BROWN*

The discussion now turns to the question whether any of the various forms of originalism can square with or justify *Brown*. While some originalists have concluded that *Brown* was wrongly decided, others have reached the opposite conclusion. In so doing,

¹¹¹ 102 CONG. REC. at 4459–60.

¹¹² *Id.* The Manifesto also approvingly referred to *Plessy v. Ferguson*, stating that the *Plessy* Court’s validation of the separate-but-equal doctrine “became a part of the life of the people of many of the States and confirmed their habits, customs, tradition and way of life. It is founded on elemental humanity and commonsense, for parents should not be deprived by Government of the right to direct the lives and education of their own children.” *Id.*

¹¹³ Driver, *supra* note 108, at 1063.

all have engaged in discretionary originalism and made outcome-influential interpretive choices and moves.

A. *The Brown-Was-Wrongly-Decided Position*

Raoul Berger, the “ur-originalist,”¹¹⁴ addressed the “is *Brown* originalist?” question in his book *Government by Judiciary: The Transformation of the Fourteenth Amendment*.¹¹⁵ While he believed that *Brown* was “a long overdue attempt to rectify the grievous wrongs done to the blacks,”¹¹⁶ Berger approached the case as a legal historian and asked “whether the Fourteenth Amendment authorized the Supreme Court to perform that act. For the Court, like every agency of government, may act only within the limits of its constitutional powers.”¹¹⁷

Focusing on the original intent of the framers of the Fourteenth Amendment, Berger contended that *Brown* was wrongly decided.¹¹⁸ “Congress had permitted segregated schools in the

¹¹⁴ CROSS, *supra* note 6, at 11. Berger was one of the earliest champions of originalism.

¹¹⁵ See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (2d ed. 1997).

¹¹⁶ *Id.* at 132.

¹¹⁷ *Id.*

¹¹⁸ Berger’s analysis focused on the “‘original intention’—shorthand for the meaning attached by the Framers to the words they employed in the Constitution and its Amendments.” *Id.* at 402. He quoted the “archradical” Massachusetts Senator Charles Sumner’s view that “[e]very Constitution embodies the principles of its framers. It is a transcript of their minds.” *Id.* at 410 (quoting Sumner). With respect to the Equal Protection Clause, Berger argued that the framers “left abundant evidence that . . . in employing ‘equal protection of the laws’ they had in mind only a ban on discrimination with respect to a limited category of ‘enumerated’ rights. Disregard of that intention starkly poses the issue of whether the Court may ‘interpret’ black to mean white.” *Id.*

For more on original intent originalism, see Robert H. Bork, *The Constitution, Original Design, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986) (“original intent is the only legitimate basis for constitutional decisionmaking”); Edwin Meese III, *Speech Before the American Bar Association* (July 9, 1985), *reprinted in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE, *supra* note 6, at 48 (“The text of the document and the original intention of those who framed it would be the judicial standard in giving effect

District of Columbia from 1864 onward; and Senator Charles Sumner vainly fought to abolish segregated Negro schools in the District of Columbia.”¹¹⁹ The argument that Congress “steadfastly refus[ed] to abolish segregated schools in the District” and then sought to “cram desegregation down the throats of the States” was not maintainable.¹²⁰ Berger also noted that public schools in the North barred African Americans, regarding them as racially inferior and incapable of education.¹²¹

Had the framers proposed to bar segregated schools in the North, such interference with state control of internal affairs would have imperiled enactment and adoption of the Fourteenth Amendment. Such a proposal was far from the framers’ minds, as is demonstrated by James Wilson’s assurance that the parallel Civil Rights Bill—regarded as identical with the Fourteenth Amendment, whose purpose was to safeguard the Bill from repeal—did not

to the Constitution.”); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 699 (1976) (the Founding Fathers “intended the Constitution itself to suggest answers to the manifold problems that they knew would confront succeeding generations”); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 17 (1971) (interpreters should “take from the document rather specific values that text or history show the framers actually to have intended and which are capable of being translated into principled rules”).

For influential critiques of original intent originalism, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). Powell found “no indication that” the Philadelphia framers “expected or intended future interpreters to refer to any extratextual intention revealed in the convention’s secretly conducted debates.” Powell, *supra*, at 903. As noted by Lawrence Solum, the “strongest implication of [Powell’s] article is that original intentions originalism is a self-effacing theory because it requires that the Framers’ intentions regarding interpretation be respected, but those intentions require that the Framers’ intentions be disregarded.” Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 929 (2009).

¹¹⁹ BERGER, *supra* note 115, at 26 (quotation marks and citations omitted).

¹²⁰ *Id.*

¹²¹ *See id.*

require that all children shall attend the same schools.¹²²

Berger found additional evidence that the framers of the Fourteenth Amendment did not intend to prohibit school segregation in the fact that “the Senate gallery itself was segregated” during that body’s deliberation over the amendment.¹²³ And subsequent to the 1868 adoption of the Fourteenth Amendment, Charles Sumner unsuccessfully attempted to move a supplementary bill requiring “that State constitutions provide for a system of nondiscriminatory public schools.”¹²⁴ Accordingly, Berger concluded, “the imperfect understanding of equal protection in 1866 means that the framers did not conceive it in the vastly broadened terms given to the phrase by the Warren Court.”¹²⁵ On that view and application of original intent originalism, *Brown* was incorrectly decided.

Another scholar, Earl Maltz, has remarked that the originalist case against *Brown* is grounded in the argument that “a direct constitutional attack on segregated schools was unthinkable in the period in which the Fourteenth Amendment was drafted, passed, and ratified.”¹²⁶ Maltz argued that during that time period school segregation was common in the northern states and prevalent in the lower northern states. Thus, according to Maltz, “any direct-broad-based effort to attack segregated schools would have carried with it substantial political risks.”¹²⁷ Republicans crafted the Fourteenth Amendment “to appeal to swing voters in the post-Civil War electorate” and “mainstream Republicans repeatedly assured those voters that Section 1 would have only a minimal impact on Northern state laws—a claim they could not make if Section 1 had

¹²² *Id.* Wilson was the chairman of the House Judiciary Committee.

¹²³ *Id.* at 139.

¹²⁴ *Id.* at 140.

¹²⁵ *Id.* at 141; *see also id.* at 151 (“There was no need . . . to write segregation into the text” of the Fourteenth Amendment “because confessedly no one then imagined that the equal protection clause might affect school segregation.” (internal quotation marks omitted)).

¹²⁶ Earl Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223, 228 (1996) [hereinafter Maltz, *Originalism and the Desegregation Decisions*].

¹²⁷ *Id.*

been generally understood to outlaw segregated schools.”¹²⁸ And as Republicans were not willing to attack segregated schools in the District of Columbia, the “contextual evidence strongly suggests that the framers of the Fourteenth Amendment did not believe that they were outlawing segregation in public schools.”¹²⁹

Applying an original intent methodology, Berger and Maltz marshalled evidence demonstrating the framers’ no-desegregation intent and unflinchingly concluded that *Brown* was wrongly decided. As they demonstrate, the Congress that framed the Fourteenth Amendment simultaneously established and maintained racially segregated public schools in the District of Columbia, which rendered problematic the proposition that segregation permitted in the District was to be prohibited in the states. In addition, the argument that the amendment would outlaw segregated schools was not politically palatable. And legislative efforts to abolish segregated schools, both within and outside the District, failed. Given these facts, there is a sound basis for the conclusion that the framers of the Fourteenth Amendment did not intend to prohibit racial segregation in public schools.

B. The *Brown*-Was-Correctly-Decided Position

1. Robert Bork

Discretionary originalism is on full display in Robert Bork’s varying originalist analyses of *Brown*. In his 1971 article *Neutral Principles and Some First Amendment Problems*, Bork addressed the intent of the men who added the Fourteenth Amendment to the

¹²⁸ *Id.* at 228–29; see also Earl M. Maltz, *A Dissenting Opinion To Brown*, 20 S. ILL. U. L.J. 93, 94 (1995) [hereinafter Maltz, *A Dissenting Opinion*] (The Fourteenth Amendment “was in large measure a campaign document, designed to outline the Republican program of Reconstruction for the upcoming election of 1866.”).

¹²⁹ Maltz, *Originalism and the Desegregation Decisions*, *supra* note 126, at 229; Maltz, *A Dissenting Opinion*, *supra* note 128, at 95 (noting that Republicans continued to support segregated schools in the District of Columbia, and arguing that the suggestion “that Republicans would at the same time act against school segregation by a nationally applicable constitutional amendment is to attribute to them an almost Orwellian mentality”).

Constitution.¹³⁰ He stated that some of those men believed “that blacks were entitled to purchase property from any willing seller but not to attend integrated schools, or that they were entitled to serve on juries but not to intermarry with whites, or that they were entitled to equal physical facilities but that the facilities should be separate.”¹³¹ The *Brown* Court could not “conceivably know how these long-dead men would have resolved these issues had they considered, debated, and voted on each of them.”¹³²

However, Bork argued, the Court did know that the Fourteenth Amendment “was intended to enforce a core idea of black equality against governmental discrimination”¹³³ and had to “choose a general principle of equality that applies to all cases.”¹³⁴ In his view, this (his) equality principle justified choosing *Brown*’s no-segregation rule over *Plessy*’s separate-but-equal doctrine.¹³⁵

Bork made two interpretative choices. First, he noted but then set aside the long-dead men’s views on the Fourteenth Amendment because the Court could not know how the deceased would have resolved or voted on school segregation and other issues. Second, Bork formulated and applied his unspecified and undefined core of black equality. What constitutes the core and the periphery, how “equality” is conceptualized, and what is and is not subject to the equality mandate are critical but unaddressed questions. Bork did not seek to discern the framers’ intent with regard to the issue of the constitutionality of school segregation. His reasoning, analysis, and conclusion are just that—his and not the framers.

Bork returned to the *Brown* and originalism subject in his book *The Tempting of America: The Political Seduction of the Law*.¹³⁶ He observed that the “great and correct decision” in *Brown* “was supported by a very weak opinion.”¹³⁷ Moving from an original intent to an original understanding approach,¹³⁸ Bork stated that the

¹³⁰ Bork, *supra* note 118.

¹³¹ *Id.* at 14.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 14–15.

¹³⁵ *See id.* at 15.

¹³⁶ BORK, *supra* note 14.

¹³⁷ *Id.* at 75.

¹³⁸ Original understanding originalism focuses on the Constitution’s

[I]nescapable fact is that those who ratified the amendment did not think it outlawed segregated education or segregation in any aspect of life. If the ratifiers had intended segregation as the central meaning of the equal protection clause, it is impossible to see how later studies on the baleful psychological effects of segregation could change that meaning. . . . It is difficult to believe that those who ratified the fourteenth amendment and also passed or continued in force segregation did not similarly understand the psychological effects of what they did. They didn't care.¹³⁹

Having concluded that the ratifiers did not seek to ban segregation of any kind,¹⁴⁰ Bork nonetheless curiously posits that the result in *Brown* “is consistent with, indeed is compelled by, the original understanding of the fourteenth amendment’s equal protection clause.”¹⁴¹ Consider his path to that conclusion: The Equal Protection Clause does not mention segregation; the debates concerning the clause did not suggest that segregation was being constitutionalized; and the ratifiers “probably assumed that segregation was consistent with equality but they were not addressing segregation.”¹⁴²

In Bork’s view, when the Court decided *Brown* in 1954 “it had been apparent for some time that segregation rarely if ever produced equality.”¹⁴³ The Court was thus “faced with a situation in which the courts would have to go on forever entertaining

ratifiers as it was their action and understanding of what the framers intended that “gave legal life to the otherwise dead words on paper drafted by the Philadelphia Convention and the Congresses proposing the amendments.” Kesavan & Paulsen, *supra* note 19, at 1137.

¹³⁹ BORK, *supra* note 14, at 75–76; see also *id.* at 82 (“[T]he ratifiers had no objection to the psychological harm segregation inflicted.”).

¹⁴⁰ In reaching this conclusion, Bork also assumed that *Plessy v. Ferguson* “correctly represented the original understanding of the fourteenth amendment” and that the ratifiers of the amendment assumed that “equality and state-compelled separation of the races were consistent.” *Id.* at 81.

¹⁴¹ *Id.* at 76.

¹⁴² *Id.* at 82.

¹⁴³ *Id.*

litigation about primary schools, secondary schools, colleges, washrooms, golf courses, swimming pools, drinking fountains, and the endless variety of facilities that were segregated, or else the separate-but-equal doctrine would have to be abandoned.”¹⁴⁴

Bork determined that the Court had to make a choice between two options, both “mutually inconsistent” with “one aspect of the original understanding”: allow segregation and abandon the “quest for equality,” or “forbid segregation in order to achieve equality.”¹⁴⁵ The Court chose the latter. “[I]t is obvious the Court must choose equality and prohibit state-sanctioned segregation. The purpose that brought the fourteenth amendment into being was equality before the law, and equality, not separation, was written into the text.”¹⁴⁶ An opinion in *Brown* based on this approach “would have clearly been rooted in the original understanding, and its legitimacy would have been enhanced for those troubled by the way in which the Court arrived at a moral result without demonstrating its mooring in the historic Constitution.”¹⁴⁷

Bork’s choice of “equality” over state-imposed segregation is neither obvious nor compelled. The text of the Equal Protection Clause does not facially require equality; rather, it requires the equal protection of the laws, a vague and not self-defining phrase.¹⁴⁸ Nor is the text of the clause inconsistent with “separate but equal” as “[t]here is nothing in the term ‘equal protection’ that seems to forbid separation, even separation on grounds ordinarily considered invidious, such as sex and race.”¹⁴⁹ On that view, separate facilities meeting some standard or metric of equality would not violate the clause as written, understood and applied in this country prior to *Brown*. Whether that pre-*Brown* view is consistent with (Bork’s variant of) originalism is the question. As previously noted, Bork concluded that the ratifiers of the Fourteenth Amendment did not intend to outlaw segregation. Yet, and as he did in 1971, Bork formulated his (and not the framers’ or

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 82–83.

¹⁴⁸ See Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1375 (1990).

¹⁴⁹ RICHARD A. POSNER, HOW JUDGES THINK 344 (2008).

ratifiers') own value-partial concept of equality,¹⁵⁰ constructed a dichotomous "equality"-or-segregationist world, and declared that the Court had to choose equality over segregation. These contestable choices and discretionary moves ignore facts and history showing that "segregation was not necessarily contrary to this nation's notion of equality" in the 1866–1868 period or thereafter.¹⁵¹ Bork's position that the Court made the correct in choice in 1954, whether correct or not, is not grounded in the framers' and ratifiers' understanding of the Fourteenth Amendment as applied to school segregation (a point he concedes). Moreover, Bork's analysis does not contemplate that those who proposed and adopted the Fourteenth Amendment did not seek to protect or promote social rights for African Americans, including the social right to attend a desegregated public school.¹⁵²

The result in *Brown* is consistent, not with the original understanding of those who ratified the Fourteenth Amendment, but with Bork's discretionary and unconstrained interpretive approach to the school segregation issue. His analysis is nonoriginalism cloaked in the garb of originalism.

2. Justice Antonin Scalia

What has another prominent originalist, Justice Antonin Scalia, said about *Brown*?¹⁵³

Justice Scalia is an advocate of the original public meaning variant of originalism. "[T]he Great Divide with regard to constitutional interpretation is not that between Framers' intent and

¹⁵⁰ See TRIBE & DORF, *supra* note 23, at 80 ("[H]ow can [Bork] select a meaning for equality in a value-neutral way?").

¹⁵¹ Ronald Turner, *Was "Separate But Equal" Constitutional?: Borkian Originalism and Brown*, 4 TEMP. POL. & CIV. RTS. L. REV. 229, 259 (1995).

¹⁵² See *supra* notes 61–63 and accompanying text.

¹⁵³ Justice Scalia has also made a traditionalist defense of *Brown*, grounding his analysis of the Equal Protection Clause in the nation's tradition and history. See Ronald Turner, *Were Separate-But-Equal and Antimiscegenation Laws Constitutional?: Applying Scalian Traditionalism to Brown and Loving*, 40 SAN DIEGO L. REV. 285 (2003). For a discussion of the difference between originalism and traditionalism, see *infra* notes 238–42 and accompanying text.

objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning."¹⁵⁴ Justice Scalia looks for "the original meaning of the

¹⁵⁴ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Guttmann ed., 1997) (bracketed material added).

For more on original public meaning originalism, see Kesavan & Paulsen, *supra* note 19, at 1131 (the words and phrases of the Constitution must be applied "in accordance with the meaning they would have had at the time they were adopted as law, within the political and linguistic community that adopted the text as law"); *id.* at 1132 ("*original, objective-public-meaning textualism*" asks "how the words and phrases, and structure (and sometimes even the punctuation marks!) would have been understood by a hypothetical, objective, reasonably well-informed reader of those words and phrases, in context, at the time they were adopted") (citation omitted); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002) (original public meaning originalism "is a hypothetical inquiry that asks how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision"); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006) ("when interpreting the Constitution, the touchstone is . . . the hypothetical understandings of a reasonable person who is artificially constructed by lawyers") (citation omitted).

For critiques of original public meaning originalism, see Larry Alexander, *Originalism, The Why and the What*, 82 FORDHAM L. REV. 539, 541 (2013) (noting that original public meaning originalism's "hypothetical person cannot be nonarbitrarily constructed"); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 722 (2009) (arguing that the "perfect objectivity" of the fictional reasonable person "must be compromised the moment we inject him or her into a real factual context," and that the choices made "as to education, region, vocation and the information he or she possessed . . . may make a difference in the resulting interpretation"); *id.* ("And, of course, it would not be surprising if a judicial interpreter were to hit upon a reasonable speaker who might view the relevant language as supporting a rule that the interpreter thinks a proper constitution ought to have."). See also Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625, 643, 667 (2012) (noting that in eighteenth and nineteenth century America "literacy levels were much lower, and most people had to work longer hours, leaving less time for learning about political issues," and arguing that the "reality of widespread political ignorance poses a serious challenge for original meaning originalism" as "there may not be any clear original meaning of a constitutional provision because a rationally ignorant electorate simply did not know about the issue").

text, not always what the original draftsmen intended.”¹⁵⁵ While originalists will not agree “as to what the original meaning was” or “how that original meaning applies to the situation before the court . . . the originalist at least knows what he is looking for: the original meaning of the text.”¹⁵⁶

Justice Scalia has observed that originalism, done correctly, “requires the consideration of an enormous mass of material” and necessitates “immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices, and loyalties that are not those of our day.”¹⁵⁷ Having at one time confessed “that in a crunch I may prove to be a faint-hearted originalist” who would invalidate “a statute that imposes the punishment of flogging,”¹⁵⁸ Justice Scalia recently declared that he now attempts to be a “stouthearted” and “honest originalist.”¹⁵⁹

How has Justice Scalia the originalist interpreted and applied the Equal Protection Clause? He has instructed that the “[d]enial of equal protection” is unconstitutional, and he answers “the question of what *constitutes* a denial of equal protection” “on the basis of the ‘time-dated’ meaning of equal protection in 1868.”¹⁶⁰ Did that time-dated meaning outlaw school segregation? Appearing in 2009 with Justice Stephen G. Breyer at a program at the University of

¹⁵⁵ Scalia, *supra* note 154, at 38; *see also* District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (the Court was “guided by the principle that the Constitution was written to be understood by the voters; its words and phrases are used in their normal and ordinary as distinguished from technical meaning”).

¹⁵⁶ Scalia, *supra* note 154, at 45.

¹⁵⁷ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989).

¹⁵⁸ *Id.* at 864; but *cf.* Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7 (2006) (discussing the ways that Justice Scalia escapes Originalism when it is convenient for him to do so).

¹⁵⁹ Jennifer Senior, *In Conversation With Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/>; MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 165 (2013).

¹⁶⁰ Scalia, *supra* note 154, at 148–49.

Arizona, the Justices' conversation turned to the Equal Protection Clause. Justice Breyer said to his colleague: "Where would you be with school desegregation? It's certainly clear that at the time they passed the 14th Amendment, which says people should be treated equally, there was school segregation and they didn't think they were ending it."¹⁶¹ (This question is posed to Justice Scalia "so often in his public appearances that he will say things like 'Waving the bloody shirt of *Brown* again, eh?'"¹⁶²) Justice Scalia initially responded, "As for *Brown v. Board of Education*, I think I would have . . .," before stating that he would have voted with the dissent in *Plessy v. Ferguson*.¹⁶³

More recently, in their book *Reading Law: The Interpretation of Legal Texts*, Justice Scalia and Bryan Garner submit that a "frequent line of attack against originalism consists in appeal to popular Supreme Court decisions that are assertedly based on a rejection of original meaning."¹⁶⁴ Noting that *Brown* is the most often cited weapon wielded in this attack, Scalia and Garner write that

[T]he text of the Thirteenth and Fourteenth Amendments, and in particular the Equal Protection Clause of the Fourteenth Amendment, can reasonably be thought to prohibit all laws designed to assert the separateness and superiority of the white race, even those that purport to treat the races equally. Justice John Marshall Harlan took this position in his powerful (and thoroughly originalist) dissent in *Plessy v. Ferguson*.¹⁶⁵

Plessy, one of the Court's anti-canon decisions,¹⁶⁶ upheld

¹⁶¹ Adam Liptak, *From 19th Century View, Desegregation is a Test*, N.Y. TIMES, Nov. 9, 2009, <http://www.nytimes.com/2009/11/10/us/10bar.htm> (quoting Justice Breyer).

¹⁶² Margaret Talbot, *Supreme Confidence*, THE NEW YORKER, Mar. 28, 2005, <http://www.newyorker.com/magazine/2005/03/28/supreme-confidence>.

¹⁶³ Liptak, *supra* note 161 (internal quotation omitted).

¹⁶⁴ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 87 (2012).

¹⁶⁵ *Id.*

¹⁶⁶ See Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39

against an equal protection challenge Louisiana's Separate Car Law mandating "equal but separate accommodations for the white, and colored races" on railway cars.¹⁶⁷ By a 7-1 vote, the Court held that Louisiana's law was a "reasonable regulation" that did not violate the Equal Protection Clause.¹⁶⁸ Reflecting the Reconstruction-era taxonomy of civil, political, and social rights,¹⁶⁹ the Court opined that Fourteenth Amendment "equality" was not "intended to abolish distinctions based upon color, or to enforce *social*, as distinguished from political, equality, or to a commingling of the two races upon terms unsatisfactory to either."¹⁷⁰ "If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."¹⁷¹ Interestingly, the Court also mentioned state-mandated "separate schools for white and colored children" as an illustrative example of laws "generally, if not universally, recognized as within the competency of state legislatures."¹⁷²

Justice Harlan's lone dissent made clear his view that "[i]n respect of *civil rights*, all citizens are equal before the law," and that race must not be taken into account when "*civil rights* as guaranteed by the supreme law of the land are involved."¹⁷³ The "real meaning" of the Separate Car Law was that "colored citizens are so far inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."¹⁷⁴ As Homer

PEPP. L. REV. 75 (2011); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 412-17 (2011).

¹⁶⁷ *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896) (quoting Louisiana statute).

¹⁶⁸ *Id.* at 550.

¹⁶⁹ *See supra* notes 58-69 and accompanying text.

¹⁷⁰ *Plessy*, 163 U.S. at 544 (emphasis added).

¹⁷¹ *Id.* at 551-52.

¹⁷² *Id.* at 544.

¹⁷³ *Id.* at 559 (emphasis added) (Harlan, J. dissenting).

¹⁷⁴ *Id.* at 560; *id.* at 557 ("Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.").

Plessy's civil right to purchase a ticket and ride in a railway car with whites had been denied, Justice Harlan concluded that the at-issue law violated the Equal Protection Clause.¹⁷⁵

Justice Harlan then made clear that he was not arguing for or endorsing the social equality of African Americans and whites:

[S]ocial equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting.¹⁷⁶

Justice Harlan's dissent is also known for his metaphoric conception of a constitution blind to color and caste "In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."¹⁷⁷ That passage is preceded by Justice Harlan's declaration that "the white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt

¹⁷⁵ John McGinnis and Michael Rappaport have urged that "the law prevented Homer Plessy from having an equal right to contract for the carriage in which he wanted to sit," thereby violating the Fourteenth Amendment which, in turn, was designed to constitutionalize the Civil Rights Act of 1866. John O. McGinnis & Michael B. Rappaport, *David Souter's Bad Constitutional History*, WALL ST. J., June 14, 2010, <http://www.wsj.com/articles/SB10001424052748703509404575300740568539352>.

¹⁷⁶ *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting); see also *Civil Rights Cases*, 109 U.S. 3, 59 (1883) (Harlan, J., dissenting) ("Whether one person will permit or maintain social relations with another is a matter with which government has no concern. I agree that if one citizen chooses not to hold social intercourse with another, he is not and cannot be made amenable to the law for his conduct in that regard; for no legal right of a citizen is violated by the refusal of others to maintain merely social relations with him," even upon grounds of race.).

¹⁷⁷ *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.”¹⁷⁸

Justice Harlan thus endorsed “white superiority in the very paragraph in which he claimed fealty to colorblindness.”¹⁷⁹ He was acutely conscious of race and racial hierarchy¹⁸⁰ and “believed in the centrality of race and in the legitimacy of racial thinking.”¹⁸¹ A “person of his time,”¹⁸² Justice Harlan joined the Court’s pre-*Plessy* decision rejecting an equal protection challenge to an Alabama criminal law’s penalty-enhancement for adultery and fornication engaged in by black-white couples.¹⁸³ And he wrote the Court’s opinion in a post-*Plessy* decision holding that a county school board did not violate the Equal Protection Clause when it closed an all-black high school and continued to operate a high school for whites;¹⁸⁴ he deemed the board’s “separate and unequal scheme” to be reasonable and therefore constitutional.¹⁸⁵

What does or could Justice Scalia mean when he says that he would have voted with Harlan in *Plessy* and characterized the *Plessy* dissent as “thoroughly originalist”? Does Justice Scalia recognize, as did Justice Harlan, the Reconstruction-era distinction between civil, political, and social rights? Does Justice Scalia agree with Justice Harlan that the issue of the constitutionality of state-mandated racial segregation in railways cars concerned the civil but not the social rights of African Americans? If he does, must he not then conclude that the right to attend a desegregated school is not a right subject to and protected by the Fourteenth

¹⁷⁸ *Id.*

¹⁷⁹ Ian Haney López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 993 (2007).

¹⁸⁰ See Davison M. Douglas, *The Surprising Role of Racial Hierarchy in the Civil Rights Jurisprudence of Justice John Marshall Harlan*, 15 U. PA. J. CONST. L. 1037 (2013).

¹⁸¹ Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and “Federal Courts,”* 81 N.C. L. REV. 1927, 2021 (2003).

¹⁸² *Id.*

¹⁸³ See *Pace v. Alabama*, 106 U.S. 583 (1883).

¹⁸⁴ See *Cumming v. Richmond Bd. of Ed.*, 175 U.S. 528 (1899).

¹⁸⁵ KLARMAN, *supra* note 58, at 45.

Amendment? And if Justice Scalia does not recognize the Reconstruction-era understanding of rights, has he disregarded information pertinent to determining the 1868 “time-dated” meaning of the Equal Protection Clause? Given these questions, Justice Scalia’s statement that he would have voted with Justice Harlan in *Plessy* is quite problematic.

And what is originalist, thoroughly or otherwise, about Justice Harlan’s dissent? To reiterate, Justice Harlan recognized civil but not social rights, endorsed white supremacy, and voted against equal protection challenges to racial discrimination in social rights cases. Justice Scalia’s contention that, per Justice Harlan, the Equal Protection Clause prohibits “*all laws designed to assert the separateness and superiority of the white race*”¹⁸⁶ is flatly contradicted by Justice Harlan’s judicial opinions and clearly stated racial views. Justice Scalia wrongly attributes to Justice Harlan positions and views that Harlan did not hold.

3. Michael McConnell

Michael McConnell’s much-cited *Originalism and the Desegregation Decisions* article addressed the “supposed inconsistency between *Brown* and the original meaning of the Fourteenth Amendment.”¹⁸⁷ Examining “the legal thinking of the antagonists in the debate” over the Civil Rights Act of 1875,¹⁸⁸ McConnell argues that “actions taken by Congress from 1868 to 1875 to enforce the Fourteenth Amendment and the congressional deliberations over those measures . . . present the best evidence of the original understanding of the meaning of the Amendment as it bears on the issue of school segregation.”¹⁸⁹

This postoriginalist choice and move¹⁹⁰ shifts the temporal focus away from the 1866–1868 proposal and ratification period. *i.e.*, away from the actual period in which the Fourteenth Amendment was proposed, debated, and ratified. McConnell

¹⁸⁶ SCALIA & GARNER, *supra* note 164, at 88 (emphasis added).

¹⁸⁷ McConnell, *supra* note 13, at 952.

¹⁸⁸ *Id.* at 954.

¹⁸⁹ *Id.* at 984.

¹⁹⁰ See POSNER, HOW JUDGES THINK, *supra* note 149, at 344.

acknowledges that proof “that a majority of the members of Congress between 1871 and 1875 supported legislation premised on the unconstitutionality of school segregation does not conclusively prove that this was the predominant understanding of those who drafted and ratified the Amendment in the period 1866 to 1868.”¹⁹¹ What matters is “that a very substantial portion of the Congress, including leading framers of the Amendment, subscribed to the view that school segregation violates the Fourteenth Amendment.”¹⁹²

McConnell postulates continuity in Congressional opinion from the time of the adoption of the Fourteenth Amendment to the enactment of the Civil Rights Act of 1875,¹⁹³ stating that a number of “leaders of the movement to adopt the Fourteenth Amendment” supported the movement for the 1875 legislation.¹⁹⁴ According to Michael Klarman, McConnell neglects the possibility that values changed in the interim” between the adoption of the Fourteenth Amendment and the 1875 legislation and “pays relatively little heed to the possibility of a . . . dramatic opinion shift . . . as to the desirability of school integration between 1866-68 and 1875.”¹⁹⁵ As noted by Klarman, “School desegregation, which in most of the North was anathema at the time of the Fourteenth Amendment’s ratification, had been largely effectuated (at least in formal legal enactments) by the 1880s,” and “it seems clear that Northern opinion in 1875 was more favorable toward school desegregation than it had been in 1866-68. Thus Congressional debates on the 1875 CRA seem unreliable evidence as to what congressmen thought the Fourteenth Amendment meant when they passed it in 1866.”¹⁹⁶

McConnell notes, further, that Congress struck a provision prohibiting school segregation from the bill that was ultimately

¹⁹¹ McConnell, *supra* note 13, at 1105.

¹⁹² *Id.* at 1093.

¹⁹³ 18 Stat. 335 (1875). This act was struck down in *The Civil Rights Cases*, 109 U.S. 3 (1883).

¹⁹⁴ McConnell, *supra* note 13, at 1105.

¹⁹⁵ Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1903–04 (1995).

¹⁹⁶ *Id.* at 1904–05.

enacted as the 1875 Civil Rights Act.¹⁹⁷ But that failure to proscribe racial segregation in the schools did not dissuade him from concluding that *Brown* is consistent with the original meaning of the Fourteenth Amendment.

Turning to *Brown*, McConnell observes that the Court's opinion "gives every impression that the Court thought it was struggling *against* the historical understanding and original meaning of the Constitution—an impression that, I am now convinced, was unnecessary and even misleading."¹⁹⁸ He acknowledges that "the practice of school segregation was widespread in both Southern and Northern states, as well as the District of Columbia, at the time of the proposal and ratification of the Amendment, and almost certainly enjoyed the support of a majority of the population even at the height of Reconstruction."¹⁹⁹ McConnell thus doubts that Congress would have proposed or that the people of the states would have ratified "an Amendment understood to outlaw so deeply ingrained an institutional practice."²⁰⁰ One could understandably conclude that this acknowledgement and doubt foreclosed any argument that a—or the—meaning of the Fourteenth Amendment prohibited racial segregation in the public schools. But McConnell's originalist analysis evades this conclusion by focusing not on the 1866–1868 framing/adoption period but on his chosen 1868–1875 post-ratification timeframe.

McConnell's analysis does not adequately account for the Reconstruction-era distinction between civil, political, and social rights. According to Balkin, "Everyone in the debates over the 1875 Civil Rights Act accepted the basic distinction, and the two sides were merely arguing over whether access to public education was a civil or social right. The really important question, then, is not whether *Brown* can be squared with original public meaning; it is whether conservative originalism can reject the

¹⁹⁷ See McConnell, *supra* note 13, at 1069, 1082; see also Cass R. Sunstein, *Black on Brown*, 90 VA. L. REV. 1649, 1659 (2004) (noting that the "efforts to ban segregated schools" in the 1875 Civil Rights Act "ultimately failed").

¹⁹⁸ *Id.* at 1132.

¹⁹⁹ *Id.* at 955–56.

²⁰⁰ *Id.* at 956.

civil/political/social distinction.”²⁰¹ If the original public meaning includes knowledge and acceptance of that distinction (one known to McConnell),²⁰² the tripartite theory “offered in order to explain and justify giving blacks and women a limited form of equality” is part of that meaning.²⁰³ That equality-limiting meaning does not support the *Brown-is-originalist* position.

It is also noteworthy that in the year following the enactment of the 1875 Civil Rights Act Democratic presidential candidate Samuel J. Tilden received more popular votes than his opponent, Republican Rutherford B. Hayes, but did not receive a majority of the votes in the Electoral College. As the election results in Florida, Louisiana, and South Carolina were disputed,²⁰⁴ Congress created a fifteen-person commission, composed of eight Republicans and seven Democrats, to resolve the election issue.²⁰⁵ The commission, with the deciding vote cast by Justice Joseph P. Bradley (a Republican) ruled in favor of Hayes.²⁰⁶ Hayes then promised Democrats that, in exchange for their acceptance of the commission’s decision, he would withdraw federal troops from the south and would not enforce the Fifteenth Amendment’s ban on racial discrimination in voting.²⁰⁷ The deal was accepted and Hayes assumed the presidency; thereafter, federal troops were withdrawn from the south.²⁰⁸

The Hayes-Tilden Compromise betrayed and ended Reconstruction and was followed by “a sea-change in public, intellectual, governmental and legal opinion. Support and

²⁰¹ BALKIN, *supra* note 6, at 227.

²⁰² *See supra* note 69 and accompanying text.

²⁰³ BALKIN, *supra* note 6, at 228.

²⁰⁴ *See* Justice John Paul Stevens (Ret.), *Glittering Generalities and Historical Myths*, 51 U. LOUISVILLE L. REV. 419, 426 (2013).

²⁰⁵ *See id.* at 426–27.

²⁰⁶ *See id.* at 427.

²⁰⁷ *See* CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* 248–49 (2008); ROY MORRIS, JR., *FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876*, at 3 (2003); C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (1951).

²⁰⁸ *See* LANE, *supra* note 207, at 248.

protection for the rights of black citizens passed away and were replaced by the regime of Jim Crow.”²⁰⁹ Expanding McConnell’s chosen 1868–1875 time period by a few years would bring into the picture a key development—the end of Reconstruction and the beginning of Jim Crow—that may be of critical if not dispositive relevance to the discussion of the originalism and school segregation topic.

4. Jack Balkin

Now consider Jack Balkin’s “framework originalism” and “text and principle” method. Balkin argues that “[f]idelity to original meaning as original semantic content does not require that we must apply the equal protection clause the same way that people at the time of enactment would have expected it would be applied.”²¹⁰ In his view, faithfulness to original meaning requires knowledge of the concepts referenced in the Equal Protection Clause at the time of its 1868 adoption.²¹¹ This analysis requires knowledge of whether the “words in the clause were understood nonliterally” and “whether some words referred to generally recognized terms of art.”²¹²

For Balkin, the original meaning of the Fourteenth Amendment’s equal protection mandate is enforced “today because the text continues to require it, just as the text continues to require that the president must be thirty-five years old. How we apply the principles of equal protection, however, may well be different from what people expected in 1868, based in part on our contemporary understandings and a history of previous constitutional constructions.”²¹³ Balkin insists that his framework originalism is compatible with living constitutionalism,²¹⁴ although “many originalists will read Balkin to be a living constitutionalist

²⁰⁹ McConnell, *supra* note 13, at 1089.

²¹⁰ BALKIN, *supra* note 6, at 3, 13.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 44.

²¹⁴ See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009).

in disguise—and may not let him into their club.”²¹⁵

Balkin has identified four types of treatment prohibited by the Equal Protection Clause: (1) laws making arbitrary and unreasonable distinctions between persons; (2) class legislation unjustifiably singling out a group for special benefits or special burdens; (3) caste legislation creating or maintaining a subordinated or disfavored group; and (4) legislation restricting or abridging the basic rights of citizenship and treating persons as second-class citizens.²¹⁶ “These four conceptions are principles underlying the equal protection clause” and are “heuristics, aids to understanding the text and its principled commitments.”²¹⁷ Reasoning that a law requiring racial segregation in public schools is an obvious example of the aforementioned types of unconstitutional and unequal treatment,²¹⁸ Balkin concludes that *Brown* is an “obvious and uncomplicated application[] of the principles underlying the Fourteenth Amendment,” and the Court’s decision is a constitutional construction “foundational to our understanding of the equal protection clause.”²¹⁹

Balkin’s framework originalism identifies principles and concepts to be referenced in deciding whether a claimed right is one protected by the Equal Protection Clause. The content of those principles and how they are to be applied is not bound by or to an application of the clause expected by those living at the time of its adoption. The interpreter is free to use her own discretion and judgment as to the content of equal protection principles as well as to the application of those principles to allegedly unconstitutional conduct. That Balkin’s framework originalism leads him to a *Brown-is-originalist* conclusion is not surprising given his focus, not on the Fourteenth Amendment’s nineteenth-century proposal and adoption period, but contemporary understandings and prior constructions of the Equal Protection Clause in the specific context of public school segregation.

²¹⁵ Ethan J. Lieb, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 355 (2007).

²¹⁶ See BALKIN, *supra* note 6, at 222.

²¹⁷ *Id.* at 222, 266.

²¹⁸ See *id.* at 231.

²¹⁹ *Id.*

5. Steven Calabresi and Michael Perl

A more recent originalist effort to justify *Brown* is found in Steven Calabresi and Michael Perl's article *Originalism and Brown v. Board of Education*.²²⁰ The authors set out an analysis that would not "have been as clear a pronouncement to lay people on the unconstitutionality of public school education as was Chief Justice Earl Warren's opinion for the Supreme Court in *Brown* . . . The legal argument we make is complex and could easily have been missed by many if not most Americans living in 1868."²²¹

Calabresi and Perl argue that "the right to a public school education was already by 1868 a fundamental state constitutional right of State citizenship and that segregation in public schools was therefore unconstitutional from 1868 on."²²² In fact, they contend, "*Brown* is only justifiable on originalist grounds—at least if one focuses on the right to a public school education as it stood in state constitutional law in 1868 and in 1954."²²³

Calabresi and Perl focus on the Fourteenth Amendment's Privileges or Immunities Clause,²²⁴ a provision that "was only meant to protect fundamental civil rights that are deeply rooted in American history and tradition."²²⁵ (In support of this position the authors cite, among other cases, *Washington v. Glucksberg*,²²⁶ one of the Court's modern-era substantive due process decisions.) According to Calabresi and Perl, "any right that existed in 1868, the year the Fourteenth Amendment was passed, could fairly be

²²⁰ Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education* (Aug. 8, 2013), Northwestern Public Law Research Paper No. 13-26, <http://ssrn.com/abstract=2307651>.

²²¹ *Id.* at 163.

²²² *Id.* at 5–6.

²²³ *Id.* at 12.

²²⁴ See U.S. CONST. amend. XIV, § 1 (1868) ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."). For the argument that the Privileges or Immunities Clause prohibits discrimination on the basis of race and caste, see John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

²²⁵ Calabresi & Perl, *supra* note 220, at 13.

²²⁶ 521 U.S. 702 (1997); see Calabresi & Perl, *supra* note 220, at 13.

argued to be a fundamental right that is deeply rooted in American history and tradition” and “is therefore a ‘Privilege or Immunity’ of national and state citizenship.”²²⁷ Moreover, the authors contend that “any right protected by more than three-quarters of the states in 1868 in their state constitutions”—the number of states required to amend the United States Constitution²²⁸—“is a strong candidate to be a Fourteenth Amendment fundamental right.”²²⁹

Calabresi and Perl employ the count-the-states analytic that the Supreme Court has used Eighth Amendment and Fourteenth Amendment cases²³⁰ and citing another recent substantive due process case (*Lawrence v. Texas*).²³¹ they also look to state constitutional provisions circa 1868. By their count, in 1868 the constitutions of thirty of the thirty-seven states of the Union explicitly required state establishment of a public school system.²³² Three states—Kentucky, Tennessee, and Iowa—constitutionally required school funding but did not mandate public school systems. The constitutions of four states—Connecticut, Illinois, New Jersey, and Virginia—did not recognize the right to a free public education in 1868, according to the authors.²³³

It is thus as clear as day that there was an Article V consensus of three quarters of the states in 1868 that recognized that children have a fundamental right to a free public education. A child’s right to a free public school education was clearly a privilege or immunity of state citizenship in 1868 as to which racial discrimination was forbidden by the Fourteenth Amendment. The outcome of *Brown v.*

²²⁷ Calabresi & Perl, *supra* note 220, at 13–14.

²²⁸ See U.S. CONST. art. V.

²²⁹ Calabresi & Perl, *supra* note 220, at 15.

²³⁰ See *id.* at 17 (citing, among other cases, *Roper v. Simmons*, 543 U.S. 551 (2005), and *Atkins v. Virginia*, 536 U.S. 304 (2002)); see also *Roper v. Simmons*, 543 U.S. 551 (2005) (finding evidence of a national consensus against the juvenile death penalty in the fact that a majority of states rejected the imposition of the penalty on juvenile offenders under the age of 18).

²³¹ 539 U.S. 558 (2003); see Calabresi & Perl, *supra* note 220, at 17.

²³² Calabresi & Perl, *supra* note 220, at 24–28 (listing states requiring the establishment of schools).

²³³ *Id.* at 31–32.

Board of Education was thus a correct outcome not only in 1954 but also in 1868.²³⁴

Calabresi and Perl note Michael McConnell's observation that at the time of the framing of the Fourteenth Amendment it was not likely that Congress would have proposed, and the states would have ratified, an amendment understood to outlaw the "deeply ingrained" practice of school segregation.²³⁵ Not contesting the accuracy of that observation, they state that their difference with McConnell

is nothing less than the difference between formalism and realism. From a formalist perspective, the focus should be on the text of state constitutional provisions as they were formally written and in place in 1868. . . . Professor McConnell's focus on the actual practice of the states in the 1860s reflects a kind of realism that disregards the law and the actual text of the state constitutions.²³⁶

Calabresi and Perl's analysis is problematic in several respects. First, they recognize that many if not most Americans living in 1868 could have missed their complex legal argument.²³⁷ If most persons alive in 1868 did not know of or could not comprehend their analysis, one must question whether and how any operative original understanding or meaning did or could exist.

Second, Calabresi and Perl's reliance on the Court's

²³⁴ *Id.* at 33. Calabresi & Perl note that in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Court held that there is no fundamental right to a public school education. *Id.* at 151. Expressing no opinion as to whether *Rodriguez* was correctly decided, they state that "it is certainly possible that *Rodriguez* was in fact decided incorrectly based on the erroneous understanding or assumption that there was no right to a public education in 1973." Calabresi & Perl, *supra* note 220, at 151, 154. The "Court did not discuss the fact that at least three quarters of the state constitutions in place in 1868 explicitly recognized a right to a public education This fact is obviously relevant to the question whether the right to an education was deeply rooted in American history and tradition." *Id.* at 152.

²³⁵ *Id.* at 37 (quoting McConnell, *supra* note 13, at 955–56); *see also supra* note 200 and accompanying text.

²³⁶ Calabresi & Perl, *supra* note 220, at 37–38.

²³⁷ *See supra* note 223 and accompanying text.

substantive due process traditionalist jurisprudence imports a nonoriginalist methodology into a purportedly originalist analysis.²³⁸ Due process traditionalism²³⁹ interprets the Constitution “in accordance with the long-standing and evolving practices, experiences, and tradition of the nation.”²⁴⁰ Traditionalism does not seek to discern a fixed and time-dated meaning of a constitutional provision and “differs from originalism, which draws its normative authority not from historical practice but from a social contract theory of precommitment by the American people.”²⁴¹ For instance, in *Washington v. Glucksberg*, cited by the authors, the Court held that the asserted right to assistance in committing suicide was not a fundamental interest protected by the Fourteenth Amendment. The Court looked to 700 years of Anglo-American common law tradition punishing or disapproving of suicide and assisting suicide; the common law of the American colonies; the prohibition of suicide in colonial and early state legislatures and courts; the criminalization of assisted suicide in most states at the time of the 1868 ratification of the Fourteenth Amendment; and states’ recent reexamination and reaffirmation of the assisted-suicide ban.²⁴² The conclusion that the claimed right was not constitutionally protected

²³⁸ Justice Scalia has expressed his “misgivings about Substantive Due Process as an original matter.” *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3050 (2010) (Scalia, J., concurring). Justice Clarence Thomas has made clear his view that “the original meaning of the Fourteenth Amendment offers a superior alternative” to the “legal fiction” of the Court’s substantive due process doctrine. *Id.* at 3062 (Thomas, J., concurring in part and concurring in the judgment). Justice Thomas has called for the application of the Privileges or Immunities Clause, opining that “a return to that meaning would allow this Court to enforce the rights that the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed.” *Id.*

²³⁹ See Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543 (2008); Ronald Turner, *On Substantive Due Process and Discretionary Traditionalism*, 66 SMU L. REV. 841 (2013).

²⁴⁰ Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1133 (1998).

²⁴¹ John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CALIF. L. REV. 1211, 1241 (1998).

²⁴² *Washington v. Glucksberg*, 521 U.S. 702, 711–16 (1997).

was reached following a traditional and historical—and not originalist—judicial inquiry.

Was the right to a public school education a deeply rooted right and tradition in 1868? Calabresi and Perl answer that question in the affirmative. It is not apparent, however, that the fundamentality analysis supports their conclusion. The fact that public schools existed in many states in 1868 does not, standing alone, establish the requisite deeply rooted history and tradition. Were public schools a traditional or a new and developing aspect of state governance and practice in 1868? As *Brown* noted, “the movement toward free common schools, supported by general taxation, had not yet taken hold” at the time of the adoption of the Fourteenth Amendment.²⁴³ If this is correct, state-mandated public education was not deeply rooted and was therefore not a fundamental right as understood by Calabresi and Perl.

Third, Calabresi and Perl’s count-the-state-constitutions analysis illustrates the importance of interpreter discretion in selecting the level of generality at which a claimed right is framed and characterized.²⁴⁴ *Glucksberg* instructed that “a careful description of the asserted fundamental interest” is required.²⁴⁵ Calabresi and Perl tally the number of state constitutions requiring the establishment of a public school system as of 1868 and use that count as the basis for their conclusion that in 1868 children had a fundamental right to a free public education.

Note that the authors framed the issue as one involving the general right to a free public education and not as the narrower and more carefully described right to attend desegregated public schools. Asking not what number of states had constitutions requiring public school education in 1868, but rather what number of states had racially segregated schools at, near, or after the time of the ratification of the Fourteenth Amendment, is the more careful description of the asserted fundamental right. An 1868 state constitutional mandate of a public school system does not negate the fact that at the time of the proposal and adoption of the

²⁴³ *Brown v. Bd. of Educ.*, 347 U.S. 483, 490 (1954).

²⁴⁴ See *supra* notes 22–23 and accompanying text.

²⁴⁵ *Glucksberg*, 521 U.S. at 721 (quotation marks and citation omitted).

Fourteenth Amendment “the practice of school segregation was widespread in both Southern and Northern states, as well as the District of Columbia.”²⁴⁶ As previously noted, during the *Brown* oral argument, the Court was advised that at the time of the ratification of the Fourteenth Amendment 23 of the 30 ratifying states had or immediately installed separate schools for African-American and white children.²⁴⁷ And *Brown* noted that “any education of Negroes was forbidden by law in some states.”²⁴⁸ That state constitutions required a free public education does not mean that that education was available to all without regard to race.

Fourth, and related to the previous point, Calabresi and Perl’s rejection of McConnell’s “focus on the actual practices of the states in the 1860s”²⁴⁹ ignores “the vast gap that can separate the law on the books from the law in life.”²⁵⁰ Constitutional text proclaiming a right does not mean that that right actually exists and is protected in the real world.²⁵¹ Surely the actual and undeniable segregationist practices and policies of the 1860s are relevant and even critical evidence. Ignoring facts and evidence of the social meaning of racial segregation and subordination and the real-world and enervating effects of white supremacy is to construct a world bleached of the prejudices and beliefs existing before, at the time of, and in the years following Reconstruction. That formalist choice to give primacy of place to words on paper and not African Americans’ lived and racialized experiences is yet another exemplar of the unconstrained discretion that originalists enjoy.

²⁴⁶ McConnell, *supra* note 13, at 955–56.

²⁴⁷ See *supra* notes 78–80 and accompanying text.

²⁴⁸ *Brown*, 347 U.S. at 490.

²⁴⁹ Calabresi & Perl, *supra* note 220, at 38.

²⁵⁰ ACKERMAN, *supra* note 24, at 298.

²⁵¹ See Ann Bartow, *Privacy Laws and Privacy Levers: Online Surveillance Versus Economic Development in the People’s Republic of China*, 74 OHIO ST. L.J. 853, 856 (2013) (noting the “disconnect between enumerated constitutional rights” in the Chinese Constitution “and the lived reality of Chinese people”); Paul D. Carrington, *Writing Other People’s Constitutions*, 33 N.C. J. INT’L L. & COM. REG. 167, 172 (2007) (“The Soviet Constitution published in 1924 proclaimed all manner of individual rights but was merely hortatory . . .”).

Fifth, and finally, Calabresi and Perl argue for recognition of a fundamental right not considered and tested in the Constitution's formal Article V amendment process. As previously noted, they argue that any right protected by the constitutions of more than three-fourths of the states in 1868 may be considered a fundamental right and privilege or immunity of state citizenship protected by the Fourteenth Amendment;²⁵² that in 1868 thirty of the thirty-seven state constitutions required a public school education; and, accordingly, that there was an Article V consensus to such an education at the time of the adoption of the Fourteenth Amendment. This Article V consensus argument is a departure from the formalist view that "the only way We the People can speak is through the forms specified by Article V."²⁵³ Bruce Ackerman has remarked that constitutional originalists' exclusive focus on "the 1787 text and its amendments under Article V does not merely reinforce the formalist tendencies already apparent in modern case law; it represents nothing less than an elitist effort to erase the constitutional legacy left behind by our parents and grandparents as they fought and won the popular struggles of the twentieth century."²⁵⁴ Calabresi and Perl's non-formalist Article V consensus approach is offered in support of their position that the outcome in *Brown* was correct in 1868 and in 1954. Discretionary originalism and outcome-influential interpretive choices are key to their analysis and conclusions.

6. John McGinnis and Michael Rappaport

John McGinnis and Michael Rappaport, proponents of original methods originalism,²⁵⁵ find it striking that "originalists have not

²⁵² See Calabresi & Perl, *supra* note 220, at 15.

²⁵³ ACKERMAN, *supra* note 24, at 19.

²⁵⁴ *Id.*

²⁵⁵ "To find the original intent of the Constitution's enactors, one must look to the interpretive rules that the enactors expected to be employed to understand their words." MCGINNIS & RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 117 (2013). This positive interpretive approach "does not attempt to provide a comprehensive theory of interpretation. Rather, it insists on a single core idea: that determining the meaning of language requires reference to interpretive rules and methods that were deemed applicable to the

addressed the . . . critique . . . that the original meaning of a document built on exclusion cannot be a guide to constitutional interpretation in a society where that exclusion is almost universally condemned as unjust and is indeed rightly seen as the original sin of the United States.”²⁵⁶ The Constitution “was enacted when African Americans and women did not have the franchise and could not participate in the constitution-making process. Not surprisingly, a constitution so fabricated did not include provisions that reflected their interests—most notably, of course, a prohibition on slavery.”²⁵⁷ McGinnis and Rappaport believe that the exclusion of African Americans from the supermajoritarian constitutional enactment process “makes more pointed and general the difficulty for originalism created by the famous holding in *Brown v. Board of Education* that invalidated school segregation.”²⁵⁸

McGinnis and Rappaport note that the Supreme Court “failed to enforce the civil rights guaranteed by the Constitution.”²⁵⁹ In their view, *Plessy v. Ferguson*’s failure to strike down Louisiana’s separate-but-equal law “represented a denial of the equality to contract and thus of a privilege or immunity guaranteed by the Fourteenth Amendment because African Americans were denied the same right to contract to sit in particular coaches as whites.”²⁶⁰ *Plessy*’s reasoning allowed state and local governments “to extend this apartheid regime to a variety of important contractual services” and the Court’s “distortion of the Fourteenth Amendment thus became a legal foundation for Jim Crow.”²⁶¹ In their view, the “root of the tragedy” of the “greatest political evil in the history of the US polity” is the failure of government (including the Court) “to enforce the original meaning of the corrections [to the Constitution] enacted through the amendment process.”²⁶² “This perspective suggests that the emphasis on *Brown v. Board of Education* in discussions of civil rights jurisprudence has obscured

Constitution at the time it was enacted.” *Id.* at 118.

²⁵⁶ *Id.* at 9–10.

²⁵⁷ *Id.* at 9.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 110.

²⁶⁰ *Id.*; McGinnis & Rappaport, *supra* note 59, at 175.

²⁶¹ MCGINNIS & RAPPAPORT, *supra* note 255, at 110.

²⁶² *Id.* at 110–11.

a salient truth about the history of civil rights and constitutional interpretation.”²⁶³ Notably absent from this account, as in other originalist discussions of *Brown*, is consideration of the question whether school segregation involves a social and not a civil right.²⁶⁴ If attending a desegregated school is a social right, those who fail to understand or who ignore the civil-social rights distinction make a categorical mistake and erroneously construe the Fourteenth Amendment to cover that which is beyond the scope of the amendment.²⁶⁵

McGinnis and Rappaport then take up the question of whether *Brown* can be squared with originalism. Citing Michael McConnell’s “admittedly controversial thesis,” they attempt to reconcile originalism and *Brown*²⁶⁶ and conclude that *Brown*’s holding “can be defended on originalist grounds, even if the opinion’s reasoning was not originalist.”²⁶⁷ They argue further:

[W]hether or not originalism is compatible with *Brown*, the world would likely have been so different, had the Reconstruction Amendments not been nullified for generations by the refusal of all the branches to follow the Constitution’s original meaning, that it is not even clear that *Brown* would have been necessary to secure educational equality for blacks. That is, the greater economic and voting power that would have come with a fair enforcement of the Reconstruction Amendments would likely have eroded the caste system of public education in the South.²⁶⁸

This position—that *Brown* would have been unnecessary in a world in which the branches of government followed the original

²⁶³ *Id.* at 111.

²⁶⁴ Interestingly, as Reva Siegel has noted, the issue of equal access to transportation involves “a civil right” while “*integrated* access” to that same transportation involves “questions of *social* rights, and was unacceptable because it threatened status relations forged in the institution of slavery.” Siegel, *supra* note 62, at 1124.

²⁶⁵ See *supra* note 71 and accompanying text.

²⁶⁶ MCGINNIS & RAPPAPORT, *supra* note 255, at 240 n.31.

²⁶⁷ *Id.* at 111.

²⁶⁸ *Id.*

meaning of the Reconstruction Amendments—introduces a significant complexity. The problem with this counterfactual approach, involving as it does a thought experiment and the conjectural consideration of an imagined world, “is that one’s counterfactual comparisons and conclusions will always remain highly debatable because, given the absence of a reality metric, no one can be right or wrong in a counterfactual world.”²⁶⁹ This counterfactual analysis is yet another example of discretionary originalism and the ways in which originalist interpreters are not meaningfully constrained in formulating and applying a (their) preferred originalist theory. And the view that the world may have been different and *Brown* would have been unnecessary had the original meaning of the Reconstruction Amendments been followed is certainly a debatable proposition. Those engaged in that debate have and can employ interpretive discretion as they consider the is-*Brown*-originalist query.

CONCLUSION

It is understandable that some originalists are concerned that the conclusion that *Brown* was wrongly decided could discredit and delegitimize originalism. However, that understanding does not justify or excuse deviations from originalist dictates in the form of discretionary originalism. Some originalists “have gone to implausible lengths to square their accounts with *Brown*,” “reading aspirational clauses at low levels of generality” and arguing that the Equal Protection Clause’s “cryptic language must be read to condemn segregated schools, perhaps if we stare hard enough at the word ‘equal.’”²⁷⁰

One can conclude that *Brown* was wrongly decided as an originalist matter²⁷¹ without calling into question the validity of the methodology, for “the view that accounts of constitutional interpretation and judicial review should be tested against any

²⁶⁹ Gregory Mitchell, *Case Studies, Counterfactuals, and Causal Explanations*, 152 U. PA. L. REV. 1517, 1550 (2004).

²⁷⁰ VERMEULE, *supra* note 15, at 280.

²⁷¹ *See supra* Part III-A.

particular decision is seriously misguided.”²⁷² As Lawrence Solum has observed, “[c]onstitutional theorists of all stripes must confront the possibility that their preferred method of constitutional interpretation will sanction horrendous evil. On those occasions, it is the law that must give way—not our theories of constitutional interpretation.”²⁷³ In his view, *Brown* was “right to adopt what amounts to an unlawful judicial amendment to the Constitution” if there were no originalist grounds justifying the decision and the Court determined that a unanimous decision “was the best or only means to end the evil of segregation . . .”²⁷⁴ Those with a “perfectionist faith”²⁷⁵ who claim or are engaged in the quest for originalist purity may not agree.

An originalist interpreter has and is free to exercise interpretive discretion in deciding to employ an originalist and not a nonoriginalist methodology; in choosing from a menu of originalist theories; in framing the inquiry and selecting the level of generality at which the constitutional issue is defined; in selecting the pertinent time period for originalist evaluation; and in determining what facts and factors should be included in the decisional calculus. An interpreter free to make such choices with few or no interpretive constraints can construct and map any and all routes to a preferred destination, including one in which *Brown* can be squared with originalism and was not wrongly decided.

²⁷² VERMEULE, *supra* note 15, at 280.

²⁷³ Solum, *supra* note 9, at 48.

²⁷⁴ *Id.*

²⁷⁵ VERMEULE, *supra* note 15, at 281.