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ON *BROWN V. BOARD OF EDUCATION* AND DISCRETIONARY ORIGINALISM

Ronald Turner*

Abstract

In 1954, the United States Supreme Court issued its seminal decision in Brown v. Board of Education.¹ Interpreting and applying the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, a unanimous Court held “that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”² In so holding, the Court determined that it could “not turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written.”³ The Court chose, instead, to “consider public education in the light of its full development and its present place in American life throughout the Nation.”⁴

Is Brown consistent with—can the Court’s separate-but-equal-is-unconstitutional holding be justified by—originalism? This Article examines originalists’ affirmative answers to this question. Originalism seeks to determine the fixed meaning of constitutional text at the time of its adoption and emphasizes constraining interpreters’ discretion and ability to introduce and act upon their personal predilections, preferences, values, and beliefs when engaged in constitutional interpretation. This Article’s focus is on how the “Is Brown originalist?” query addresses the claim that originalist analyses of that issue performed the posited constraint and discretion-limiting functions. As argued herein, originalism is in fact a discretion-laden methodology, providing readers of constitutional text with the freedom and flexibility to make discretionary and outcome-influential choices as they interpret and apply the document. Discretionary originalism, as employed by those seeking to demonstrate that Brown was rightly decided as an original matter, calls into question the methodology’s capacity to meaningfully constrain, in a principled and consistent manner, originalists engaged in the enterprise of interpreting the Fourteenth Amendment.

* © 2015 Ronald Turner. 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.

¹ 347 U.S. 483 (1954).

² *Brown*, 347 U.S. at 495.

³ *Id.* at 492.

⁴ *Id.* at 492–93.

*Methodologies are not strongly constraining. That is in large measure the burden of American constitutional history.*⁵

*In the abstract, a legal interpretive theory ought to be able to say “theories generate results; results don’t generate theories.”*⁶

I. INTRODUCTION

In 1954, the United States Supreme Court issued its seminal decision in *Brown v. Board of Education*.⁷ Interpreting and applying the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution,⁸ a unanimous Court held “that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”⁹ In so holding, the Court determined that “we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”¹⁰ The Court chose, instead, to “consider public education in the light of its full development and its present place in American life throughout the Nation.”¹¹

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.”¹² Is the result in *Brown* consistent with—can that result be squared with—originalism? For originalists, much rides on the answer(s) to this question. There is a “widespread belief that the [Court’s] decision was inconsistent with the original understanding of the Fourteenth Amendment.”¹³ Michael McConnell 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

⁵ John Harrison, *On the Hypotheses That Lie at the Foundations of Originalism*, 31 HARV. J.L. & PUB. POL’Y 473, 481 (2008).

⁶ Will Baude, *Does Originalism Justify Brown, and Why Do We Care So Much?*, WASH. POST (Jan. 29, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/29/does-originalism-justify-brown-and-why-do-we-care-so-much/>, archived at <http://perma.cc/67MK-R3EG>.

⁷ 347 U.S. 483 (1954).

⁸ See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

⁹ *Brown*, 347 U.S. at 495.

¹⁰ *Id.* at 492.

¹¹ *Id.* at 492–93.

¹² Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599 (2004).

¹³ FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 92 (2013).

is seriously discredited.”¹⁴ The late Robert Bork commented, “*Brown* has become the high ground of constitutional theory. Theorists of all persuasions seek to capture it, because any theory that seeks acceptance must, as a matter of psychological fact, if not of logical necessity, account for the result in *Brown*.”¹⁵ “Precisely because *Brown* has become the crown jewel of the *United States Reports*,” Pamela Karlan has observed, “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.”¹⁶

This Article examines and critiques originalists’ efforts to demonstrate that *Brown* was correctly decided. More specifically, the Article argues that these efforts are grounded in discretion-laden originalist methodologies that allow—indeed depend upon—the originalist interpreter’s freedom and flexibility to make outcome-influential choices when formulating and applying originalist theories. This is a matter of significance, for originalism has been championed as a methodology that constrains the ability of interpreters (including judges) to resort to and implement

¹⁴ Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995).

¹⁵ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 77 (1990).

¹⁶ Pamela S. Karlan, Lecture, *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 GREGORY BASSHAM, *ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY* 105 (1992) (“The acid test of originalism, as indeed of any theory of constitutional adjudication, is its capacity to justify what is now almost universally regarded as the Supreme Court’s finest hour: its decision in *Brown v. Board of Education* . . .” (citation omitted)); 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*. In view of such claims, theorists have gone to implausible lengths to square their accounts with *Brown*.”); J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY* 17 (2012) (“*Brown* affords living constitutionalists a nonoriginalist case whose ultimate salutary effect on American equality properly renders the result nearly immune from criticism.”); Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 21 (2006) (discussing *Brown* and the claim that “because the original meaning of the Fourteenth Amendment cannot deliver the desired result, the meaning of the text must be changed by judges to something that is morally superior” and guessing “that this argument motivates the approach of ninety percent of constitutional law professors.”); 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 they “concoct implausible accounts of the Reconstruction Era understanding of segregation.” (citation omitted)).

their ideological and political preferences as they interpret constitutional provisions.¹⁷ But originalism is, in fact, a discretionary methodology providing ample room for originalists to introduce and act upon their personal predilections, preferences, values, and beliefs as they interpret and apply the Constitution.

As developed herein, *discretionary originalism* provides originalists with several interpretive choice points. First, originalism “is itself a choice.”¹⁸ Interpreters may choose from a menu of methodologies when considering constitutional questions, including originalism, living constitutionalism, common law constitutionalism, history, text, purpose, precedent, doctrine, prudence, structure, political process concerns, ethical concerns, social values, decisional consequences, and moral readings of the document.¹⁹ Originalists thus choose that methodology as a preferred or the only legitimate interpretive theory. That choice may or may not be the correct one, but it is a choice nonetheless.²⁰

¹⁷ See Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1777 (2013) (noting the premise that “judges will be inclined to implement their political or policy preferences; if that were not the case, then the self-constraining advantage of originalism, textualism, and rule following would be unnecessary.”).

¹⁸ Eric Posner, *Originalism Means Not Always Getting What You Want*, ERIC POSNER (Feb. 10, 2014), <http://ericposner.com/originalism-means-not-always-getting-what-you-want/>, archived at <http://perma.cc/WAS5-ST82>.

¹⁹ For discussions of interpretive methodologies, see generally PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION, at xvi (1991) (discussing how to choose from among six types of constitutional arguments “without sacrificing either legitimacy or justice”); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 9–124 (1982) (describing six types of constitutional arguments); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION 3 (2008) (exploring the “role of the United States Supreme Court in interpreting the Constitution”); RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996) (advocating for a “moral reading” of the Constitution); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 181 (1980) (arguing for a “representation-reinforcing theory of judicial review”); DAVID A. STRAUSS, THE LIVING CONSTITUTION 1–5 (2010) (rejecting originalism and advocating for “a common law approach to the Constitution”).

²⁰ For an early case in which the Supreme Court chose not to adopt an originalist approach, see *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934):

If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.

Id. at 442–43; *but see id.* at 448–49 (Sutherland, J., dissenting) (“A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time . . . [The meaning of] the contract impairment clause, when framed and adopted . . . means the same now.”).

Second, originalists may choose from different originalist theories, including original intent, original understanding, original public meaning, original methods, and framework originalism.²¹ These “diverse and, to some extent, conflicting theories”²² have been developed over time as originalism was “working itself pure”²³ and comprise “big tent” originalism unified “by a core commitment to the interpretive primacy of the ‘fixed’ meaning of the constitutional text at the time of enactment.”²⁴

Third, originalists enjoy discretion in framing the inquiry and in choosing what they consider to be “the proper level of generality at which a right should be characterized.”²⁵ Framing an issue and characterizing a right broadly (for example, the right to a public school education) or narrowly and more precisely (for example, the right to attend a racially integrated or desegregated public school) is a critical descriptive and normative matter, influenced by an interpreter’s value choices and substantive positions.²⁶

Fourth, originalist interpreters choose the parameters of the evidentiary inquiry relative to the constitutional question under consideration. Are the evidence and facts relevant to the “Is *Brown* originalist?” inquiry those found in congressional and ratification debates over the Fourteenth Amendment? In Reconstruction-era understandings of the rights protected by and falling outside the scope of the Fourteenth Amendment? What is the (is there a) relevant time period for an originalist evaluation of issues involving the Fourteenth Amendment’s equal protection mandate? Is it the amendment proposal and ratification period of 1866–1868 or some other time period? How does interpreter discretion affect and guide the answers to these questions?

The ensuing discussion of *Brown* and discretionary originalism unfolds in four parts. Part II provides an overview of and commentary on constitutional originalism and certain originalist theories (original intent, original understanding, original public meaning, and framework originalism) included under the originalism umbrella. Part III considers race, racism, and Reconstruction and the factual and legal backdrop preceding and culminating in the 1868 adoption of the Fourteenth Amendment. In addition, Part III focuses on three separate and distinct categories of rights recognized in the Reconstruction era—civil, political, and social—and

²¹ See *infra* Part II.

²² Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 573 (2013).

²³ Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1114 (2003).

²⁴ Williams, *supra* note 22, at 573.

²⁵ Patrick S. Shin, *Discrimination Under a Description*, 47 GA. L. REV. 1, 33–34 (2012).

²⁶ See LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 73 (1991); see also WILKINSON, *supra* note 16, at 52 (“[D]ebates rage about the original understanding of the level of generality of the equal protection clause. Does it forbid discrimination on the basis of race? Or does it only forbid discrimination against African Americans?” (citation omitted)).

explicates the significance of and difficulties presented by this trichotomy of rights for those who contend that the result in *Brown* can be squared with originalism. Part IV turns to *Brown's* interment of the separate-but-equal doctrine in the context of public school education and notes post-*Brown* arguments and actions by supporters of the segregationist status quo invalidated by the Court's decision, including the originalist critique of *Brown* made in the "Southern Manifesto." Part V's discussion of originalism and *Brown* identifies and critiques the various discretionary moves and outcome-influential interpretive choices made by originalists. As argued in that Part, these moves and choices provide originalists with various interpretive paths to their desired *Brown-is-originalist* terminus, thereby calling into question the theory's capacity to meaningfully constrain, in a principled and consistent manner, originalist interpreters of the Fourteenth Amendment. The Article concludes that the instances of discretionary originalism examined herein in support of the *Brown-is-originalist* position avoid the undesirable result and outcome—because school segregation did not violate the Fourteenth Amendment, *Brown* was wrongly decided—of an undiluted and unflinching originalism.

II. ORIGINALISM(S): OLD AND NEW

As previously noted, originalists have developed and may choose from a menu of differing originalist theories.²⁷ This Part provides a survey of various originalisms and their theoretical underpinnings, as well as scholarly critiques identifying the weaknesses of the theories discussed herein and responses thereto. This account and analysis of the development of diverse and sometimes conflicting originalist theories provides the background for the question presented and discussed in this Article: whether the result in *Brown v. Board of Education* can be squared with originalist interpretations and applications of the Fourteenth Amendment.

As noted by Keith Whittington, originalism is both old and new.²⁸ Old Originalism,²⁹ emphasizing the intent of the framers of constitutional provisions, was said to limit judicial interpreters' opportunity to substitute their personal preferences for constitutional mandates and the values of the people.³⁰ Critics of certain decisions of the Warren Court employed original-intent originalism in furtherance of the desired ends of limiting judicial discretion and promoting judicial

²⁷ See *supra* note 19 and accompanying text.

²⁸ See Whittington, *supra* note 12, at 599.

²⁹ *Id.* at 599–603.

³⁰ See Jonathan R. Macey, *Originalism as an "Ism,"* 19 HARV. J.L. & PUB. POL'Y 301, 302 (1996) ("[O]riginalism is defensible not because it restrains judges completely, or even well, but because it restrains judges better than alternative methods of judging."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (stating that originalism is "less likely to aggravate the most significant weakness of the system of judicial review," that "judges will mistake their own predilections for the law."); Whittington, *supra* note 12, at 602 (stating that the "primary commitment" of Old Originalism "was to judicial restraint.").

restraint.³¹ In their view, this form of originalism would constrain a court that was making rather than interpreting the law³² and was “the movement to curb the pretensions of the Warren Court and return the meaning of the Constitution to what it said.”³³

Unlike Old Originalism’s focus on the private and subjective intentions of the Framers and the understanding of ratifiers of constitutional text,³⁴ New Originalism seeks to determine the original public meaning of constitutional text³⁵: “the meaning that the words and phrases had (or would have had) to ordinary members of the public.”³⁶ For the original public meaning originalist, “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.”³⁷ This meaning “has the force of law” and, as “the supreme law of the land,” binds courts and officials.³⁸ While one analyst has argued that New Originalism “is grounded more clearly and firmly in an argument about what judges are supposed to be interpreting and what that implies, rather than an argument about how best to limit judicial discretion,”³⁹ another scholar has suggested that New Originalism “continues to a substantial degree to emphasize judicial *constraint*—in the sense of promising to narrow the discretion of judges.”⁴⁰

The rubric of constitutional originalism is best described as an array of constitutional originalisms. Interpreters who choose to employ originalism may select from a menu of originalist theories, including those discussed in this Part: original intent, original understanding, original public meaning, and framework originalism.⁴¹

³¹ See Brad Snyder, *The Former Clerks Who Nearly Killed Judicial Restraint*, 89 NOTRE DAME L. REV. 2129, 2147 (2014); Whittington, *supra* note 12, at 599–600.

³² See Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 711 (2011) (noting this view).

³³ Antonin Scalia et al., In Memoriam, *Robert H. Bork*, 36 HARV. J.L. & PUB. POL’Y 1231, 1233 (2013).

³⁴ See Whittington, *supra* note 12, at 607–12.

³⁵ *Id.* at 609–10.

³⁶ Lawrence B. Solum, *We Are All Originalists Now*, in CONSTITUTIONAL ORIGINALISM: A DEBATE 2–3 (2011).

³⁷ *Id.* at 2.

³⁸ *Id.* at 3 (emphasis omitted).

³⁹ Whittington, *supra* note 12, at 609.

⁴⁰ Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 751 (2011).

⁴¹ Other originalist approaches not discussed in the next Part include: (1) Original expected application originalism, which “asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with some terms of art).” JACK M. BALKIN, *LIVING ORIGINALISM* 7 (2011); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 935 (2009) (original expected application originalism focuses on “expectations about the application of that meaning to future cases” and not on the linguistic meaning of the text). (2) Original-methods originalism, a theory relying on the “interpretive methods that the constitutional

A. *Original Intent*

The theory of original intent originalism posits that the intent of those who drafted and framed constitutional text must be discerned and given effect when interpreting the Constitution.

During the United States Senate Judiciary Committee's 1967 confirmation hearings on the nomination of Thurgood Marshall to the United States Supreme Court, North Carolina Senator Sam Ervin (a critic of *Brown v. Board of Education*) asked Marshall the following question: "Is not the role of the Supreme Court simply to ascertain and give effect to the intent of the framers of the Constitution and the people who ratified the Constitution?"⁴² Marshall responded in the affirmative to Ervin's question while also stating that "the Constitution was meant to be a living document."⁴³

A few years later, another Court nominee, William H. Rehnquist, assured the Judiciary Committee that he would not "disregard the intent of the framers of the Constitution and change it to achieve a result that . . . might be desirable for

enactors would have deemed applicable" at the time of the adoption of a constitutional provision. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751 (2009); see also JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 82 (2013) [hereinafter MCGINNIS & RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION] (arguing that "[a] good constitution enacted under supermajority rules should be interpreted according to its original meaning," with that meaning "determined using the interpretive methods that the enactors would have deemed applicable to the constitution."). *But see* Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 660 (2009) (arguing that the McGinnis and Rappaport approach is "needlessly confusing" and that "even if a majority of those who approved a constitution had other methods of interpretation in mind, their assumed or expected methods did not thereby become a part of the meaning of the text."); Kurt T. Lash, *Originalism All The Way Down?*, 30 CONST. COMMENT. 149, 165 (2015) (reviewing MCGINNIS & RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION, *supra*) (arguing that McGinnis and Rappaport fail to recognize that methods of constitutional interpretation were under-resolved and were the subject of debate at the time of the Founding). (3) Decisional originalism, Steven Smith's tentative label for an alternative to original-meaning originalism calls for constitutional interpretation and adjudication respecting, as the controlling criterion, the original decisions of lawmakers. See Steven D. Smith, *Meanings or Decisions? Getting Originalism Back on Track*, LIBR. L. & LIBERTY (Dec. 2, 2014), <http://www.libertylawsite.org/liberty-forum/meanings-or-decisions-getting-originalism-back-on-track/>, archived at <http://perma.cc/3KGG5-P2MW>.

⁴² *Nomination of Thurgood Marshall: Hearing Before the S. Comm. on the Judiciary*, 90th Cong. 49 (1967) (statement of Sen. Sam J. Ervin, Jr., Member, S. Comm. on the Judiciary).

⁴³ *Id.*

society.”⁴⁴ In a subsequent law review article, Justice (later Chief Justice) Rehnquist expressed his concern about living constitutionalism and “the substitution of some other set of values for those which may be derived from the language and the intent of the framers.”⁴⁵ In his view, the Founding Fathers intended the Constitution itself to suggest answers to the manifold problems that they knew would confront succeeding generations: “The Constitution that they drafted was indeed intended to endure indefinitely, but the reason for this very well-founded hope was the general language by which national authority was granted to Congress and the Presidency.”⁴⁶

Original intent was also advocated by “the father of originalism,”⁴⁷ Robert Bork, as “the only legitimate basis for constitutional decisionmaking.”⁴⁸ In his influential article *Neutral Principles and Some First Amendment Problems*, Bork urged that one method of deriving rights from the Constitution “is to 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.”⁴⁹

Raoul Berger’s 1977 book *Government by Judiciary: The Transformation of the Fourteenth Amendment* championed what Berger termed the “‘original intention’—shorthand for the meaning attached by the Framers to the words they employed in the Constitution and its Amendments.”⁵⁰ In support of his position, Berger quoted the “archradical” Massachusetts Senator Charles Sumner:

Every Constitution embodies the principles of its framers. It is a transcript of their minds. If its meaning in any place is open to doubt, or if words are used which seem to have no fixed signification, we cannot err if we turn to the framers; and their authority increases in proportion to the evidence which they left on the question.⁵¹

In a 1985 speech to the American Bar Association, Reagan Administration Attorney General Edwin Meese shared with the audience his view that

⁴⁴ *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearing Before the S. Comm. on the Judiciary*, 92d Cong. 19 (1971) (statement of Sen. John L. McClellan, Member, S. Comm. on the Judiciary).

⁴⁵ William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976).

⁴⁶ *Id.* at 699.

⁴⁷ Steven G. Calabresi & Lauren Pope, *Judge Robert H. Bork and Constitutional Change: An Essay on Ollman v. Evans*, 80 U. CHI. L. REV. DIALOGUE 155, 155 (2013).

⁴⁸ Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 823 (1986).

⁴⁹ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 17 (1971).

⁵⁰ RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 402 (2d ed. 1997).

⁵¹ *Id.* at 409–10 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866)).

[a]s the ‘faithful guardians of the Constitution,’ the judges were expected to resist any political effort to depart from the literal provisions of the Constitution. The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.⁵²

Meese announced that the Reagan Administration would “press for a jurisprudence of original intention. In the cases that we file and those we join as *amicus*, we will endeavor to resurrect the original meaning of constitutional provisions”⁵³

The theory of original-intent originalism was persuasively critiqued. Three months after Meese’s speech to the ABA, Justice William J. Brennan, Jr. addressed “those who find legitimacy in fidelity to what they call ‘the intentions of the Framers.’”⁵⁴ “In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them.”⁵⁵ Justice Brennan observed that this view “feigns self-effacing deference to the specific judgments of those who forged our original social compact” and “is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions.”⁵⁶ Stating that the Framers did not agree about the meaning or application of specific constitutional provisions and “hid their differences in cloaks of generality,” he noted that “it is far from clear whose intention is relevant—that of the drafters, the congressional disputants, or the ratifiers in the states?”⁵⁷

Academic critiques of original-intent originalism were powerful and devastating.⁵⁸ Ronald Dworkin opined, “there is no such thing as the intention of the Framers waiting to be discovered”⁵⁹ Paul Brest argued that it is impossible to determine institutional intent by counting the “individual intention-votes” of “a single multimember law-making body, and a fortiori where the assent of several such bodies were required.”⁶⁰ While one framer of a constitutional provision may have had a “determinate intent,” other Framers may have had an indeterminate intent or no intent whatsoever, and those with an indeterminate intent may have “intended

⁵² Edwin Meese III, U.S. Att’y Gen., Speech Before the American Bar Association (July 9, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47–48 (Steven G. Calabresi ed., 2007).

⁵³ *Id.* at 54.

⁵⁴ Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium (Oct. 12, 1985), in ORIGINALISM, *supra* note 52, at 58.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 248 (2009) (describing the criticism of original-intent originalism as “savage”).

⁵⁹ Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 477 (1981).

⁶⁰ Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 214 (1980).

to delegate to future decisionmakers the authority to apply the clause in light of the general principles underlying it.”⁶¹ Referring to statutory interpretation practices and canons of the eighteenth through the mid-nineteenth century, Brest argued that those practices “suggest[] that the adopters assumed—if they assumed anything at all—a mode of interpretation that was more textualist than intentionalist.”⁶² He also made the critical point that one must determine the level of generality and abstraction at which the purported collective intention is to be understood.⁶³

In another influential critique, H. Jefferson Powell argued “[t]he Philadelphia framers’ primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language.”⁶⁴ He found “no indication that they expected or intended future interpreters to refer to any extratextual intentions revealed in the convention’s secretly conducted debates.”⁶⁵ As noted by Lawrence Solum, “[t]he 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.”⁶⁶

B. Original Understanding

In the wake of the aforementioned critiques of original-intent originalism, the focus of originalist theory shifted to the original understanding of the Constitution’s ratifiers.⁶⁷ This move responded to the argument that the document drafted at the Philadelphia Convention and by the Congresses proposing amendments thereto had no legal effect until they were approved by ratifying conventions and state legislatures.⁶⁸ Framers’ intention did not control; “it is what the Ratifiers understood the Framers to have *intended* or, better yet, what the Ratifiers understood the words and phrases themselves to *mean* that should count. This might be subtly (or significantly) different from what was in fact subjectively intended by the provision’s drafters.”⁶⁹

Robert Bork, at one time a proponent of original-intent originalism,⁷⁰ embraced a different version of the methodology in his book *The Tempting of America: The*

⁶¹ *Id.* at 214, 216.

⁶² *Id.* at 215.

⁶³ *See id.* at 216–17.

⁶⁴ H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903 (1985).

⁶⁵ *Id.*

⁶⁶ Solum, *supra* note 41, at 929.

⁶⁷ *See id.* at 930 (discussing original understanding originalism’s emphasis on “either the state ratifying conventions understood as corporate bodies or of the individuals who attended the ratifying conventions and voted in favor of ratification.”).

⁶⁸ *See* Kesavan & Paulsen, *supra* note 23, at 1137.

⁶⁹ *Id.*

⁷⁰ *See supra* notes 47–48 and accompanying text.

Political Seduction of the Law.⁷¹ Remarking that original-intent originalism “is now very much out of favor among the theorists of the field,”⁷² he wrote that

[s]ecret reservations or intentions count for nothing. All that counts is how the words used in the Constitution would have been understood at the time. The original understanding is thus manifested in the words used and in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.⁷³

Reliance on ratifier understanding does not obviate many of the problematic aspects of original-intent originalism and the “paradox of numerosity.”⁷⁴ Efforts to determine an operative ratifiers’ understanding present the difficult problem of ascertaining the intention not of one group of Framers, but of many groupings of persons meeting in a number of ratifying conventions.⁷⁵ By this logic,

The individual intentions of drafters or adopters must be shared by a sufficient number of delegates to count as law, but unless those intentions are understood at a level of generality too high to give practical guidance, it will often be the case that individual Framers—and a fortiori individual adopters—had either an indeterminate intent or none at all with respect to particular questions.⁷⁶

C. *Original Public Meaning*

The discussion now turns to “the mainstream of originalist theory”: original public meaning originalism.⁷⁷

In a 1986 speech, United States Court of Appeals Judge (later Supreme Court Justice) Antonin Scalia stated that he “ought to campaign to change the label [of originalism] from the Doctrine of Original Intent to the Doctrine of Original Meaning.”⁷⁸ Focusing on the “original intent of the Constitution,” rather than on the “original intent of the Framers,” he stated that one must ask, “What was the most plausible meaning of the words of the Constitution to the society that adopted it—

⁷¹ BORK, *supra* note 15, at 143–44.

⁷² *Id.* at 143.

⁷³ *Id.* at 144.

⁷⁴ Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1687 (2012).

⁷⁵ See Solum, *supra* note 41, at 930.

⁷⁶ Greene, *supra* note 74, at 1687.

⁷⁷ Solum, *supra* note 36, at 9–10.

⁷⁸ Justice Antonin Scalia, Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 106 (1987).

regardless of what the Framers might secretly have intended?”⁷⁹ For Justice Scalia, those who invoked the “original intent” of the “Founding Fathers” invoked them as “strong indications of what the most knowledgeable people of the time understood the words to mean.”⁸⁰

Addressing the difference between original intent and original meaning originalism in 1997, Justice Scalia remarked, “What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”⁸¹ In his view, “the Great Divide with regard to constitutional interpretation is not that between Framers’ intent and objective meaning, but rather that between *original* meaning . . . and *current* meaning.”⁸² The Justice rejected the notion of “The Living Constitution, a body of law that . . . grows and changes from age to age, in order to meet the needs of a changing society.”⁸³ “It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.”⁸⁴

⁷⁹ *Id.* at 103 (internal quotation marks omitted); *see also* *District of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008) (“[T]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning,” including “an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.” (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931))).

⁸⁰ Scalia, *supra* note 78, at 103; *see also id.* at 104–05 (arguing that “it is perfectly clear that the original intent was that the Constitution would be interpreted according to its original meaning” and citing Alexander Hamilton and James Madison in support of that position).

⁸¹ Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38 (Amy Gutmann ed., 1997).

⁸² *Id.* Original meaning versus current meaning was discussed in a recent interview in which Justice Scalia was asked whether the Fourteenth Amendment applied to sex discrimination. It did not, he stated: “You do not need the Constitution to reflect the wishes of the current society. Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn’t. Nobody ever thought that that’s what it meant. Nobody ever voted for that.” *The Originalist*, CAL. LAW. (Jan. 2011), <http://www.callawyer.com/clstory.cfm?eid=913358>, archived at <http://perma.cc/QLL5-8GAL>.

⁸³ Scalia, *supra* note 81, at 38.

⁸⁴ *Id.* at 40; *see also* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 92 (2012) (espousing original-meaning originalism and renouncing the search for historical intent). Justice Scalia at one time confessed that he was “a faint-hearted originalist” and could not imagine upholding a statute imposing the punishment of flogging. Scalia, *supra* note 30, at 864. He recently stated that he now attempts to be a stout-hearted and honest originalist. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10/>, archived at <http://perma.cc/8MMS-2ZV2>; *see also* MARCIA COYLE, *THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION* 165 (2013) (noting that Justice Scalia “has ‘recanted’ being a ‘faint-hearted originalist.’”).

Justice Scalia has also observed that the “greatest defect” of originalism “is the difficulty of applying it correctly” and that “it is often exceedingly difficult to plumb the original understanding of an ancient text.”⁸⁵ Done correctly, the methodology “requires the consideration of an enormous mass of material” and “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.”⁸⁶

Consider Vasan Kesavan and Michael Stokes Paulsen’s theory of original, objective-public-meaning textualism.⁸⁷ They posit that the “interpreter who applies the Constitution as law must be bound by the meaning of the words and phrases written down in the text,”⁸⁸ with that meaning faithfully applied “in accordance with the meaning they would have had at the time they were adopted as law.”⁸⁹ For Kesavan and Paulsen, the originalist inquiry asks how constitutional words and phrases “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, and within the political and linguistic community in which they were adopted.”⁹⁰ Where an answer to a constitutional question is not expressly answered by the text, they instruct that reference should be made to second-best sources of original public meaning, including early treatises on the Constitution, the public debates of the ratifying conventions, and the public writings of the Anti-Federalists and the Federalists.⁹¹

Another proponent of original public meaning originalism, Gary Lawson, does not focus on the original meaning held by actual people. Instead, he asks

⁸⁵ Scalia, *supra* note 30, at 856.

⁸⁶ *Id.* at 856–57.

⁸⁷ See Kesavan & Paulsen, *supra* note 23, at 1132.

⁸⁸ *Id.* at 1129.

⁸⁹ *Id.* at 1131.

⁹⁰ *Id.* at 1132.

⁹¹ *Id.* at 1148–53. “[A]cademic writers and jurists have cited the Federalist Papers as evidence of the original meaning of the Constitution more than any other historical source except the text of the Constitution itself.” Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 802 (2007). In assessing the evidentiary value of the Federalist Papers it should be noted that “there is substantial reason to doubt that many of the ratifiers actually read the Federalist Papers.” *Id.* at 822. The Papers “had a very small circulation,” *id.* at 827, and, given the secrecy of the Constitutional Convention, the Papers’ authors “could have distorted purposefully (or even accidentally) the original intent without much fear of contradiction.” *Id.* at 836; see also JOSEPH J. ELLIS, *AMERICAN CREATION: TRIUMPHS AND TRAGEDIES AT THE FOUNDING OF THE REPUBLIC* 117 (2007) (“[T]here is reason to believe that *The Federalist* has exerted more influence on modern-day constitutional arguments than on the eighteenth-century debates that occasioned it. Its distribution beyond New York was spotty; with a few exceptions, the language of the essays was inaccessible to ordinary readers; and its greatest impact was to galvanize support among Federalist delegates already committed to ratification.”).

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. Actual historical understandings are, of course, relevant to that inquiry, but they do not conclude or define the inquiry—nor are they even necessarily the best available evidence.⁹²

Thus,

the touchstone is not the specific thoughts in the heads of any particular historical people—whether drafters, ratifiers, or commentators, however distinguished and significant within the drafting and ratification processes they may have been—but rather the hypothetical understandings of a reasonable person who is artificially constructed by lawyers. The thoughts of historical figures may be relevant, but the ultimate inquiry is legal.⁹³

The meaning of a constitutional provision is therefore determined by “the mental states that *would* have been held by some person or persons who *might or might not* ever have actually existed under conditions that *might or might not* ever have been actually realized.”⁹⁴

Original-meaning originalism also implicates the issue of the meaning of “meaning.” “‘Meaning’ is a capacious concept, and indeed, it has many different meanings, including semantic content, purposes, intentions, practical entailments, and cultural associations. Conceived most broadly, ‘meaning’ includes a vast array of cultural associations, traditions, conventions, and background assumptions.”⁹⁵ Given the ambiguity of the word “meaning,” any discernment or “version of ‘original meaning’ in legal interpretation must inevitably carve out a subset of these cultural meanings and treat this portion as remaining in legal force over time.”⁹⁶ Selection of a subset of “meaning” is not “natural and value-free”; it is a discretionary choice informed by an interpreter’s view and understanding of the purposes of the Constitution and of constitutional interpretation.⁹⁷ Whatever choice

⁹² Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002).

⁹³ Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006); *see also id.* at 72 (The hypothetical reasonable person “obviously had a high degree of intelligence and education” and a “strong commitment to human reason” and, whether or not a lawyer, “is learned in the law.”); *id.* at 73 (The “reasonable person of the law” is “highly intelligent and educated and capable of making and recognizing subtle connections and inferences” and “is familiar with the peculiar language and conceptual structure of the law.”).

⁹⁴ *Id.* at 56.

⁹⁵ Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 828 (2012).

⁹⁶ *Id.*

⁹⁷ *Id.*

should be made “cannot be settled by the meaning of ‘meaning,’ much less the meaning of ‘original.’”⁹⁸

As with other originalist theories, original public meaning originalism has been the subject of critique. Richard Kay contends that there is “no ‘real’ public meaning. Public meaning is, quite explicitly, an artificial construct.”⁹⁹ That “the general public might have *understood* the proposed text in a particular way . . . does not mean that any particular number of them *approved* of the text understood in any way.”¹⁰⁰ Moreover, “it is hard to explain why interpreters should prefer the public meaning, which, by hypothesis, we believe the constitution-makers did *not* intend.”¹⁰¹

Deciding the meaning of constitutional text by reference to “what the public most likely thought” the text meant when it was enacted¹⁰² can be problematic where much of the public was politically ignorant. In his insightful analysis of rational voter behavior and political ignorance,¹⁰³ Ilya Somin points out that original public meaning originalism implicitly assumes a certain level of public knowledge at the time of the ratification of constitutional provisions.¹⁰⁴ With respect to eighteenth- and nineteenth-century America, there is reason to believe that the levels of political knowledge were not high, given barriers to the acquisition of information, low literacy levels, and long hours of work that left people with less time to learn about political issues.¹⁰⁵ As the reasonable person, championed by some original public meaning advocates, “presumably would have knowledge limitations similar to those of actual members of the public at the time,”¹⁰⁶ political ignorance poses a problem

⁹⁸ *Id.*

⁹⁹ Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 720 (2009).

¹⁰⁰ *Id.* at 706–07.

¹⁰¹ *Id.* at 713.

¹⁰² *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3075 (2010) (Thomas, J., concurring in part and concurring in the judgment) (discussing the public’s understanding of the Privileges and Immunities Clause at the time of its enactment).

¹⁰³ “Because the chance of any one vote influencing the outcome of an election is infinitesimally small, there is little or no incentive to become knowledgeable about politics if the only reason for doing so is to become a ‘better’ voter.” Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625, 643 (2012) [hereinafter Somin, *Originalism*]. For more on this subject, see generally ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* 3–4 (2013) (summarizing the extent of political ignorance in the United States and the problems it creates).

¹⁰⁴ See Somin, *Originalism*, *supra* note 103, at 630. The implicit assumptions are: (1) “the public knows that the relevant constitutional provision has been enacted, or at least is under consideration”; (2) “the public knows that the relevant provision applies to whatever issue happens to be under consideration by the observer seeking to determine the original meaning”; and (3) “the public must have some knowledge or understanding of how that particular issue would be resolved under” the proposed constitutional provision. *Id.* at 631.

¹⁰⁵ *Id.* at 643 (“At the time of ratification, some of the Founding Fathers themselves believed that public knowledge of politics was low and worried about allowing too much public influence over policy.”).

¹⁰⁶ *Id.* at 633.

for original public meaning originalism: “there may not be any clear original meaning of a constitutional provision because a rationally ignorant electorate simply did not know about the issue.”¹⁰⁷

Commentators have also questioned and criticized the hypothetical reasonable person approach to original public meaning. “Scholars invoking such imaginary readers do not seem to be familiar with the rich scholarly literature on reader-response literary criticism, the history of publishing and reading, or recent historical writing on the social and cultural history of the Founding era.”¹⁰⁸ Why should the meaning of a constitutional provision be the meaning held by a purportedly objective reasonable person? Who is, and how does one define, that person? Larry Alexander makes the cogent observation that the

hypothetical person cannot be nonarbitrarily constructed: Is the person a he or a she? Does he or she live in the city or the country? How much education and of which kind has he or she had? How much information does he or she possess about the law in question and the reasons behind its promulgation, etc.?¹⁰⁹

How those who construct a (their) reasonable person answer these questions can affect interpretive approaches and outcomes. And “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.”¹¹⁰

D. Framework Originalism

“Is our Constitution a living document that adapts to changing circumstances, or must we interpret it according to its original meaning?”¹¹¹ Believing that this “choice is a false one,” Jack Balkin has formulated a constitutional theory called “framework originalism,” a “text and principle” theory of interpretation and construction that “is both originalist and living constitutionalist.”¹¹²

“Framework . . . originalism views the Constitution as an initial [governing] framework” within which politics begins “and must be filled out over time through constitutional construction.”¹¹³ The theory requires judges to apply the original

¹⁰⁷ *Id.* at 667.

¹⁰⁸ Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 *FORDHAM L. REV.* 721, 735 (2013).

¹⁰⁹ Larry Alexander, *Originalism, the Why and the What*, 82 *FORDHAM L. REV.* 539, 541 (2013).

¹¹⁰ Kay, *supra* note 99, at 722.

¹¹¹ BALKIN, *supra* note 41, at 3.

¹¹² *Id.*

¹¹³ *Id.* at 21. Constitutional construction of legal text involves a two-step process. The first step, interpretation, discerns the linguistic meaning of the text. The second step,

meaning of the Constitution and assumes that judges will engage in, elaborate, and apply constitutional constructions.¹¹⁴ Under this approach, “fidelity to original public meaning entails fidelity to our abstract framework and commitments,”¹¹⁵ not fidelity to the original intention or expected applications of those who drafted and ratified constitutional provisions.¹¹⁶

Balkin’s text-and-principle model recognizes that

[t]he text of [the] Constitution . . . contains determinate rules (the President must be thirty-five, there are two houses of Congress)[,] . . . standards (no ‘unreasonable searches and seizures’ . . .)[,] . . . [and] principles (no prohibitions of the free exercise of religion, no abridgements of the freedom of speech, no denials of equal protection).¹¹⁷

Why those who designed the Constitution chose to use certain language demands our attention, Balkin urges.¹¹⁸ Fixed rules are used to limit discretion.¹¹⁹ Standards or principles are used “to channel politics through certain key concepts but delegate the details to future generations”¹²⁰ and must be applied “to our own circumstances in our own time.”¹²¹ Balkin’s approach, which views history as a resource, differs from what he calls conservative originalism, which views history as a command.¹²²

* * *

As discussed in this Part, originalism is more accurately described and understood as originalisms. The foci of and questions posed by originalist interpreters of the Constitution have concentrated on the Framers, the ratifiers, the public at the time of the adoption of a constitutional provision, hypothetical reasonable persons, or interpreters engaging in constitutional constructions and displaying fidelity to the Constitution’s abstract framework and commitments.

construction, “enables officials to apply the text” as courts “fashion doctrines or rules of constitutional law.” Solum, *supra* note 36, at 3.

¹¹⁴ BALKIN, *supra* note 41, at 22.

¹¹⁵ James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1793 (2013).

¹¹⁶ JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 229–30 (2011) [hereinafter BALKIN, CONSTITUTIONAL REDEMPTION].

¹¹⁷ BALKIN, *supra* note 41, at 6.

¹¹⁸ *Id.* (“If the text [of the Constitution] states a determinate rule, we must apply the rule because that is what the text offers us. . . . [We] should pay careful attention to the reasons why constitutional designers choose particular kinds of language.”).

¹¹⁹ *Id.* (“Adopters use fixed rules because they want to limit discretion”)

¹²⁰ *Id.* at 7.

¹²¹ *Id.* For an argument critiquing and finding doubtful Balkin’s claim that some constitutional norms are “principles,” see Larry Alexander, *The Method Of Text and ? : Jack Balkin’s Originalism With No Regrets*, 2012 U. ILL. L. REV. 611, 614 (2012).

¹²² BALKIN, *supra* note 41, at 229.

The question here is whether the result in *Brown v. Board of Education* can be squared with any of the foregoing originalist approaches to and accounts of the Fourteenth Amendment to the Constitution. Before turning to that issue in Part III, the next Part presents a brief overview of race, racism, the post-Civil War Reconstruction, and the adoption of the Fourteenth Amendment.

III. RACE, RACISM, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT

The issue presented in *Brown v. Board of Education*—whether state-mandated racial segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment—should be situated in and requires consideration of this nation’s history of the enslavement of Africans and their progeny, constitutional acknowledgement and protection of the system of chattel slavery, and the failed post-Civil War Reconstruction during which the Fourteenth Amendment was proposed and ratified. These aspects of the country’s history of white supremacy, racial hierarchy, and subordination of enslaved persons form the factual, contextual, and legal background for the discussion of the political and intellectual atmosphere preceding and culminating in the 1868 adoption of the Fourteenth Amendment.

A. *The Constitution, the Color Line, and Slavery*

The color line¹²³ was an indisputable feature of the United States Constitution of 1789, a document built on the exclusion of African Americans, which is “rightly seen as the original sin of the United States.”¹²⁴ While the original Constitution did not explicitly use the terms “race” or “slavery,” a number of constitutional provisions concerned those subjects.¹²⁵ The Constitution expressly prohibited congressional interference with the slave trade prior to the year 1808,¹²⁶ provided that enslaved people who escaped to a free state were to be “delivered up” and returned to the enslavers from which they fled;¹²⁷ and mandated that enslaved people were to be counted as “three fifths of all other Persons” for purposes of determining

¹²³ See W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 45 (David W. Blight & Robert Gooding-Williams eds., Bedford Books 1997) (1903) (“The problem of the twentieth century is the problem of the color-line,—the relation of the darker to the lighter races of men in Asia and Africa, in America and the islands of the sea.”).

¹²⁴ MCGINNIS & RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION*, *supra* note 41, at 10.

¹²⁵ See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 4 (1987) (noting that “racial issues have riveted attention” of the country’s decision makers).

¹²⁶ See U.S. CONST. art. I, § 9, cl. 1. Article V of the Constitution provided that no amendment could be made prior to 1808 that would “in any Manner affect” Article I, Section 9. See *id.* art. V.

¹²⁷ *Id.* art. IV, § 2, cl. 3; see *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 561 (1842) (explaining that the Constitution “declares that the fugitive shall be delivered up, on claim, to the party to whom his service or labour may be due.”).

representation in the United States House of Representatives and the Electoral College and for levying taxes among the states.¹²⁸

The United States thus began “in black plunder and white democracy, two features that are not contradictory but complementary.”¹²⁹ Africans were enslaved and “plundered of their bodies, plundered of their families, and plundered of their labor.”¹³⁰ Black bodies created wealth for enslavers and for others; indeed, those bodies were the largest financial asset in the nation’s economy.¹³¹ Black families were sundered. An enslaved person in parts of the South “stood a 30 percent chance of being sold in his or her lifetime. Twenty-five percent of interstate trades destroyed a first marriage and half of them destroyed a nuclear family.”¹³² The enslaved were subjected to forced migration and were whipped, tortured, and murdered by enslavers, aggressively and viciously pursuing ever greater production by black children, women, and men.¹³³ Cotton “dominated US exports and the financial sector [and] also drove the expansion of northern industry.”¹³⁴ Textiles made from cotton “employ[ed] a working class whose wages created a consumer market that encouraged ever more dynamic market production in other areas.”¹³⁵

The “peculiar institution” of this nation’s chattel, slavery,¹³⁶ was justified in part by a white-supremacist theory of congenital inferiority, which posited that Africans and their descendants were genetically and intellectually inferior to

¹²⁸ See U.S. CONST. art. I, § 2, cl. 3. The federal ratio enshrined in the three-fifths clause “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). For more on the three-fifths clause, see GARRY WILLS, “NEGRO PRESIDENT”: JEFFERSON AND THE SLAVE POWER 2 (2003); GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 532 (2009).

¹²⁹ Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631/>, archived at <http://perma.cc/Q865-BVQ7>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ See EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* 140–43 (2014) (describing the ways slave owners tortured their slaves).

¹³⁴ *Id.* at 317.

¹³⁵ *Id.* at 318; SVEN BECKERT, *EMPIRE OF COTTON: A GLOBAL HISTORY* 244 (2014) (discussing America’s ascent to dominance in the world cotton market and noting that “[s]lavery stood at the center of the most dynamic and far-reaching production complex in human history”); BECKERT, *supra* (“Cotton, and thus slavery, were indispensable to the modern world, the very foundation of the United States’ and Europe’s astonishing material advances.”).

¹³⁶ See generally KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 197–236 (The Easton Press 1995) (1956) (relating the laws, rules, and customs regulating slavery in the ante-bellum South).

whites.¹³⁷ This racist view can be found in the pages of the United States Reports. In its infamous *Dred Scott v. Sandford*¹³⁸ decision, described by one scholar as “the original sin of originalism,”¹³⁹ the Supreme Court held that Africans and their descendants were not and could not be citizens of the United States.¹⁴⁰ Chief Justice Roger Brooke Taney (an owner of slaves)¹⁴¹ described enslaved persons 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.”¹⁴² Taney declared that members of “that race” “were 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.”¹⁴³ “Indeed,” he 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.”¹⁴⁴

¹³⁷ See JOHN HOPE FRANKLIN, *RACE AND HISTORY: SELECTED ESSAYS 1938–1988*, at 325 (1989). Francis Scott Key, the author of the *Star Spangled Banner*, held this view. 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 afflicts a community.’”). See generally THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA 138–43* (William Peden ed., 1954) (setting forth Jefferson’s views on the supposed inferiority of black persons).

¹³⁸ 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹³⁹ 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, 22 n.51 (2009) (“Given the universal opprobrium that attaches to *Dred Scott*, it is unsurprising that Originalists would seek to disavow it.”).

¹⁴⁰ *Dred Scott*, 60 U.S. at 404 (“The question before us is, whether [African Americans] . . . compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which the instrument provides for and secures to citizens of the United States.”).

¹⁴¹ See JAMES F. SIMON, *LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT’S WAR POWERS* 90 (2006).

¹⁴² *Dred Scott*, 60 U.S. at 407.

¹⁴³ *Id.* at 411–12.

¹⁴⁴ *Id.* at 412. Chief Justice Taney also determined that the phrase “all men are created equal” in the Declaration of Independence “would seem to embrace the whole human family, and if they were used in a similar instrument at this day [they] would be so understood.” *Id.* at 410. However, he concluded, “it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration” *Id.* The “great men” “who framed this declaration . . . perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race” *Id.*

B. Reconstruction, the Black Codes, and the Civil Rights Act of 1866

During the post-Civil War Reconstruction,¹⁴⁵ much of which “was a failure in its time,”¹⁴⁶ slavery was formally banned in 1865 by the Thirteenth Amendment to the Constitution.¹⁴⁷ Three and one half million enslaved persons were freed, joining approximately half a million individuals who escaped slavery during the Civil War.¹⁴⁸

Emancipation was met by a vigorous and violent backlash in the former states of the Confederacy.¹⁴⁹ As noted by William A. Sinclair, an individual who was enslaved at birth, “the white people of the South . . . regarded the freeing of the colored man as a wrong to the white man.”¹⁵⁰ Efforts by Radical Republicans to reconstruct the nation were resisted by redeemers, “White Liners, Red Shirts, and Klansmen bent on upholding a society formed for the *white*, not for the black man.”¹⁵¹ The Ku Klux Klan, a paramilitary outfit founded at the beginning of Reconstruction by Confederate veterans, commenced a campaign of harassment, intimidation, and murder.¹⁵² This form of new slavery was imposed and pursued via Black Codes,¹⁵³ returning freedpersons to “a condition as close to their former one

¹⁴⁵ See An Act to Provide for the More Efficient Government of the Rebel States (Military Reconstruction Act), ch. 153, 14 Stat. 428 (1867). This legislation divided the South into five military districts, and provided that military rule would end and readmission of the Confederate states into the United States would be permitted when those states established new governments and new state constitutions, ratified the Fourteenth Amendment, and granted African Americans the right to vote. *Id.* §§ 1, 5, 14 Stat. at 428–29.

¹⁴⁶ Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 997 (2012); see also DOUGLAS R. EGERTON, *THE WARS OF RECONSTRUCTION: THE BRIEF, VIOLENT HISTORY OF AMERICA’S MOST PROGRESSIVE ERA* 19 (2014) (arguing that Reconstruction “did not fail” but “was violently overthrown”).

¹⁴⁷ See U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

¹⁴⁸ JIM DOWNS, *SICK FROM FREEDOM: AFRICAN-AMERICAN ILLNESS AND SUFFERING DURING THE CIVIL WAR AND RECONSTRUCTION* 21 (2012).

¹⁴⁹ See WILLIAM A. SINCLAIR, *THE AFTERMATH OF SLAVERY: A STUDY OF THE CONDITION AND ENVIRONMENT OF THE AMERICAN NEGRO* 3 (Afro-Am Press 1969) (1905).

¹⁵⁰ *Id.*

¹⁵¹ Coates, *supra* note 129 (internal quotation marks omitted).

¹⁵² See STEVEN HAHN, *A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION* 275–80 (2003) (discussing an investigation of the paramilitary politics of the Ku Klux Klan).

¹⁵³ As described by the United States Supreme Court, Black Codes “imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value” *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70 (1872).

as it was possible to get without actually reinstating slavery.”¹⁵⁴ In a 1907 book, Columbia University history professor William Archibald Dunning¹⁵⁵ described the codes as

a conscientious and 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 this fact was recognized by constituting them a separate class in the civil order.¹⁵⁶

Responding to the Black Codes,¹⁵⁷ the United States Congress, over the veto of “fervent Negrophobe” President Andrew Johnson,¹⁵⁸ passed the Civil Rights Act 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

¹⁵⁴ NICHOLAS LEMANN, *REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR* 34 (2006); *see also* SINCLAIR, *supra* note 149, at 74 (Southerners used the Black Codes “to suppress the colored man” and “make his condition worse under emancipation than it was under slavery . . .”).

Post-slavery Black Codes were not the first such codes in the history of the United States, as several post-Revolutionary northern states enacted codes denying fundamental rights to black persons and limiting their opportunities to obtain work. *See* JACQUELINE JONES, *A DREADFUL DECEIT: THE MYTH OF RACE FROM THE COLONIAL ERA TO OBAMA’S AMERICA* 101 (2013).

¹⁵⁵ 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*, at xxii (2005). John W. Burgess, a leading Dunning school figure and “a founder of American political science, taught that ‘a black skin means membership in a race of men which has never of itself succeeded in subjecting passion to reason, and has never, therefore, created any civilization of any kind.’” *Id.*; *see also* Greene, *supra* note 146, at 1006 (“Through the middle of the twentieth century, the dominant narrative of Reconstruction was supplied by denizens of the Dunning School . . .”).

¹⁵⁶ WILLIAM ARCHIBALD DUNNING, *RECONSTRUCTION: POLITICAL AND ECONOMIC 1865–1877*, at 58 (1907).

¹⁵⁷ *See* BERGER, *supra* note 50, at 34 (the 1866 Civil Rights Bill was “a studied response to a perceived evil, the Black Codes, which the Republicans averred were designed to set emancipation at naught, to restore the shackles of the prior Slave Codes, and to return the blacks to serfdom.” (citation omitted)); *see also* ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877*, at 243–45, 454–59 (1988) (outlining Congress’s response to the Black Codes).

¹⁵⁸ RANDALL KENNEDY, *THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA PRESIDENCY* 42 (2011); *accord* Annette Gordon-Reed, *ANDREW JOHNSON* 112, 124 (Arthur M. Schlesinger, Jr. & Sean Wilentz eds., 2011).

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 full and equal benefit of all laws and 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.¹⁵⁹

As the Supreme Court noted in 1883, in enacting the 1866 Civil Rights Act, Congress

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.¹⁶⁰

C. *The Fourteenth Amendment*

Thereafter, and seeking to constitutionalize the 1866 legislation, a “partial, ‘rump’ Congress—devoid of Southern representation—. . . proposed the Fourteenth Amendment”¹⁶¹ to the Constitution.¹⁶² As Confederate states’ readmission to the United States was conditioned on their ratification of the amendment,¹⁶³ it has been

¹⁵⁹ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981, 1982).

¹⁶⁰ The Civil Rights Cases, 109 U.S. 3, 22 (1883) (emphasis added).

¹⁶¹ Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1643 (2013).

¹⁶² See *Neal v. Delaware*, 103 U.S. 370, 386 (1880) (“[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 persons”); AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 381 (2005) (In proposing the Fourteenth Amendment, Congress “aimed to provide an unimpeachable legal foundation” for the 1866 Civil Rights Act.); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 187 (1998) (ebook) (Section 1 of the Fourteenth Amendment “was consciously designed and widely understood to embrace” the Civil Rights Act of 1866); BERGER, *supra* note 50, at 32–33 (The Fourteenth Amendment “was designed to ‘constitutionalize’ the [1866 Civil Rights] Act”); John Harrison, *Time, Change, and the Constitution*, 90 VA. L. REV. 1601, 1606 (2004) (“The primary point of Section 1 [of the Fourteenth Amendment] was to constitutionalize a statutory ban on race discrimination, the Civil Rights Act of 1866.”).

¹⁶³ See *supra* note 145 and accompanying text. On the issue of the states’ ratification of the Fourteenth Amendment, see also GERARD N. MAGLIOCCA, *AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT* 129–31 (2013)

remarked that the amendment was “forced down the throat of the southern political establishment”¹⁶⁴ and “was ratified not by the collective assent of the American people, but rather at gunpoint.”¹⁶⁵

Officially adopted in 1868, Section 1 of the amendment provides:

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.¹⁶⁶

As can be seen, the text of the Fourteenth Amendment does not expressly prohibit racial classifications; a proposal to do so was made during the drafting process but was rejected.¹⁶⁷ “Indeed, some Radical Republicans opposed ratification because they thought the amendment’s limited reach rendered it a party trick designed only for electioneering purposes.”¹⁶⁸ Some Southerners “referred to the Fourteenth Amendment as the ‘negro equalization amendment,’ and were ‘terrified’ that it would . . . someday be interpreted to preclude laws banning interracial marriage,” while compelling whites “to live on a level with the sickening stench of degraded humanity.”¹⁶⁹

What conduct was forbidden by the Fourteenth Amendment? Three separate and distinct categories of rights were generally recognized in the Reconstruction era. *Civil rights* included “freedom of contract, property ownership, and court access—rights guaranteed in the 1866 Civil Rights Act, for which the Fourteenth Amendment

(commenting on Congress’s possible response to the states’ refusal to ratify the Fourteenth Amendment).

¹⁶⁴ Greene, *supra* note 146, at 1009.

¹⁶⁵ Colby, *supra* note 161, at 1629; *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.”).

¹⁶⁶ U.S. CONST. amend. XIV, § 1.

¹⁶⁷ The Congressional Joint Committee on Reconstruction considered but did not adopt the following language: “No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.” MAGLIOCCA, *supra* note 163, at 121 (quoting BENJAMIN B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 296 (1914)). The Committee’s draft was not acceptable to Republicans who were “leery of seeming too attached to black interests” and “probably wanted to protect white unionists in the South from oppression by reconstructed state governments controlled by ex-Confederates.” Harrison, *supra* note 162, at 1606–07.

¹⁶⁸ MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 18 (2004) (internal quotation marks omitted).

¹⁶⁹ Colby, *supra* note 161, at 1647 (citations omitted).

was designed to provide a secure constitutional foundation.”¹⁷⁰ “All adult members of the political community possessed civil equality; that is what black males obtained when they became free.”¹⁷¹ “[P]olitical rights, such as voting or jury service,” were not enjoyed by all persons.¹⁷² “[P]eople could be civilly equal but not politically equal. Black men and unmarried women were civilly equal to white men but not politically equal.”¹⁷³ Racial discrimination in voting was prohibited in the Fifteenth Amendment, two years after the adoption of the Fourteenth Amendment.¹⁷⁴

“[S]ocial rights, such as interracial marriage or school integration,” were resisted by many, including by Republicans.¹⁷⁵ The concept of social equality had “a racially charged meaning” and was considered 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.”¹⁷⁶ Thus, as Rebecca Scott observed, “[t]o conflate the phrase ‘social equality’ with an imagined taxonomy of civil, political, and social rights is to mistake an insult for an analytic exercise.”¹⁷⁷ Social 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.”¹⁷⁸ With respect to public school education, African Americans “were almost universally excluded from, or segregated in, public schools when the Fourteenth Amendment was adopted.”¹⁷⁹ The subject of infrequent discussion

¹⁷⁰ KLARMAN, *supra* note 168, at 19; *see also* McConnell, *supra* note 14, at 961 n.48 (noting an 1872 speech by Senator Lyman Trumbull in which Trumbull stated that the Civil Rights Act of 1866 was confined to civil rights and did not apply to political or social rights).

¹⁷¹ BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 116, at 144.

¹⁷² KLARMAN, *supra* note 168, at 19.

¹⁷³ BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 116, at 144.

¹⁷⁴ *See* U.S. CONST. amend. XV.

¹⁷⁵ KLARMAN, *supra* note 168, at 19; *see also* Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 325 [hereinafter Klarman, *The Plessy Era*] (“Many northern Republicans in 1866 continued to resist the extension to blacks of either equal political rights, such as voting or jury service, or social rights, such as interracial marriage or school integration.”); Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1898 (1995) [hereinafter Klarman, Brown, *Originalism, and Constitutional Theory*] (Section 1 of the proposed Fourteenth Amendment “was consistently defended in public debate—both in Congress and in the constituencies—as a guarantee of civil, not political or social, rights.”).

¹⁷⁶ BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 116, at 145 (citation omitted).

¹⁷⁷ Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777, 781 (2008).

¹⁷⁸ *Id.*; *see also* McConnell, *supra* note 14, 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.”).

¹⁷⁹ KLARMAN, *supra* note 168, at 19.

during the 1866 debates over the amendment, Democrats argued and Republicans denied that the provision would protect a social right to compulsory school integration.¹⁸⁰ In sum, Reconstruction-era legal thought did not envisage governmental guarantee of social rights.¹⁸¹

The Reconstruction-era taxonomy of rights is recognized in Jack Balkin's "tripartite theory of citizenship."¹⁸² He notes that "the key point of the tripartite theory was that equal citizenship and equality before the law meant something less than it does for us today: civil equality, but not political or social equality."¹⁸³ This understanding of the rights protected and not protected by the Fourteenth Amendment is consistent with the fact that at the time of the amendment's adoption, the Framers and ratifiers (including a number of Republicans) "did not want to give blacks the right to vote and . . . did not want to challenge state laws banning interracial marriage; to do so in 1866 would have been politically explosive."¹⁸⁴ Further evidence and confirmation of the existence and recognition of the civil-political-social-rights trichotomy is found in *Plessy v. Ferguson*.¹⁸⁵ As one of the

¹⁸⁰ *Id.*

¹⁸¹ See Mark Tushnet, *Contemporary Issues of Race Relations*, 24 RUTGERS L.J. 699, 700–01 (1993); see also GEORGE RUTHERGLEN, *CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866*, at 11 (2013) ("Consistent with the understanding of civil rights at the time, the act stopped well short of protecting full participation in public life. It did not protect political rights, such as the right to vote, or social rights, such as the right to marry." (citation omitted)); Eric Foner, *The Original Intent of the Fourteenth Amendment: A Conversation with Eric Foner*, 6 NEV. L.J. 425, 438 (2006) ("Nobody who was talking about the Fourteenth Amendment except Charles Sumner believed in social equality. Social equality tended to mean intermarriage between black and white. . . . Social equality was for individuals; the state could not mandate."); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 291 (1998) ("Through most of Reconstruction and the years that followed, it was generally understood that blacks were constitutionally entitled to the same civil rights as whites but not necessarily to the same social and political rights."); Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 29 (2011) (during the Reconstruction era "courts assessed the constitutionality of antidiscrimination laws by determining whether such laws conferred civil, political, and social rights."); Jeffrey Rosen, *The Color-Blind Court*, 45 AM. U. L. REV. 791, 792 (1996) ("The Framers of the Fourteenth Amendment said repeatedly that the Amendment was intended to protect civil rights, but not political or social rights."); Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1208–09 (1992) (the Fourteenth Amendment protected civil but not social rights).

¹⁸² BALKIN, *supra* note 41, at 222.

¹⁸³ *Id.* at 222–23; see also McConnell, *supra* note 14, at 1016 ("The 'social rights' argument was based on a tripartite division of rights, universally accepted at the time but forgotten today, between civil rights, political rights, and social rights."); *id.* at 1024 ("It was generally understood that the nondiscrimination requirement of the Fourteenth Amendment applied only to 'civil rights.' Political and social rights, it was agreed, were not civil rights and were not protected.").

¹⁸⁴ BALKIN, *supra* note 41, at 223.

¹⁸⁵ 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

cases in the American anti-canon,¹⁸⁶ *Plessy* rejected an equal protection challenge to Louisiana's Separate Car Law mandating "equal but separate accommodations for the white, and the colored races."¹⁸⁷ Speaking for the Court, Justice Henry Billings Brown determined that the law was a reasonable regulation, with the "question of reasonableness" answered by the state's "liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."¹⁸⁸

Of special interest is the Court's construction of the Equal Protection Clause. In Justice Brown's view, the mandate that the state shall not deny to any person the equal protection of the laws was not "intended to abolish distinctions based upon color, or to enforce *social*, as distinguished from *political*[,] equality, or a commingling of the two races upon terms unsatisfactory to either."¹⁸⁹ Laws mandating the separation of blacks and whites did "not necessarily imply the inferiority of either race to the other," and "the establishment of separate schools for white and colored children . . . has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."¹⁹⁰ And "[l]aws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom to contract, and yet have been universally recognized as within the police power of the State."¹⁹¹

In addition, Justice Brown found flawed the assumption that social prejudices can be overcome by legislation: "If the two races are to meet upon terms of *social equality*, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."¹⁹² Expressly distinguishing between civil, political, and social rights, he concluded: "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."¹⁹³

The sole dissenter in *Plessy*, Justice John Marshall Harlan, opined, "[e]very 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."¹⁹⁴ The "real meaning" of the at-issue law was to ensure that "inferior and degraded" African

¹⁸⁶ See Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75, 76 (2011); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

¹⁸⁷ *Plessy*, 163 U.S. at 540 (quoting 1890 La. Acts 152).

¹⁸⁸ *Id.* at 550.

¹⁸⁹ *Id.* at 544 (emphasis added).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 545.

¹⁹² *Id.* at 551 (emphasis added).

¹⁹³ *Id.* at 551–52 (emphasis added).

¹⁹⁴ *Id.* at 557 (Harlan, J., dissenting).

Americans could not sit in public coaches with whites.¹⁹⁵ Justice Harlan viewed the railway car segregation mandated by the Separate Car Law as the denial of a civil right and “a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.”¹⁹⁶

Notably, Justice Harlan (who had owned slaves and opposed the Emancipation Proclamation, the Thirteenth Amendment, and the Freedmen’s Bureau)¹⁹⁷ did not endorse or argue for the protection of African Americans’ social equality:

[S]ocial equality no more exists between two races when travelling 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.¹⁹⁸

Justice Harlan’s dissent also set forth his metaphoric conception of the Constitution. In a passage preceded by language endorsing the racial superiority of whites,¹⁹⁹ he stated: “[I]n 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.”²⁰⁰ That he was referring only to civil rights was made clear:

In respect of *civil rights*, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his *civil rights* as guaranteed by the supreme law of the land are involved.²⁰¹

To reiterate, Justice Harlan’s equal protection analysis reflects the reality that at the time of its adoption, it was understood that the Fourteenth Amendment

¹⁹⁵ *Id.* at 560.

¹⁹⁶ *Id.* at 562.

¹⁹⁷ See Ronald Turner, *A Critique of Justice Antonin Scalia’s Originalist Defense of Brown v. Board of Education*, 62 UCLA L. REV. DISCOURSE 170, 183 (2014).

¹⁹⁸ *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting).

¹⁹⁹ Justice Harlan made clear his view that “[t]he 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 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.” *Id.* at 559. Justice Harlan thus recognized and endorsed “white superiority in the very paragraph in which he proclaimed fealty to colorblindness.” Ian F. Haney López, “*A Nation of Minorities*”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 993 (2007).

²⁰⁰ *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

²⁰¹ *Id.* (emphasis added).

protected civil but not social rights.²⁰² This understanding of the protective scope of the clause is also evidenced by the Court's pre-*Plessy* decision in *Pace v. Alabama*.²⁰³ In *Pace*, Justice Harlan joined the Court's decision and holding that a state criminal law's penalty enhancement for adultery and fornication engaged in by black-white couples did not violate the Equal Protection Clause.²⁰⁴ The Court reasoned that punishing different-race couples more harshly than same-race couples engaging in the same conduct did not violate the clause because the more severe punishment was "directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same."²⁰⁵ *Pace* thus preserved "[c]ivil equality . . . because members of each race were subject to the same punishments if they slept with persons of a different race, and securing social equality was not a proper concern of the Fourteenth Amendment."²⁰⁶ Moreover, in cases decided after *Plessy*, Justice Harlan joined the Court's ruling upholding a racially discriminatory poll tax²⁰⁷ and wrote the Court's opinion rejecting an equal protection challenge to a separate-but-unequal scheme involving a school board's closing of an all-black high school and continued operation of a high school for whites.²⁰⁸

* * *

The foregoing and necessarily brief discussion of certain aspects of this nation's history of white supremacy and racial hierarchy is presented to provide a factual and legal backdrop and context relevant to the consideration of the political and intellectual atmosphere and beliefs, attitudes, and prejudices extant at the time of the proposed and ratified Fourteenth Amendment. That exercise requires reference to and recognition of mid-nineteenth century facts and racial/racist realities. An informed and unflinching recognition of American apartheid's racist regime and the subordinating practices of that time is essential to an accurate reporting of life in that deeply racist era. "For the intellectual elite of the late nineteenth century," racism was "a feature of reality. . . . Racism constituted how people saw the world—how normal people saw the world. To deny or question racism didn't make you curious, or clever. To deny it made you weird."²⁰⁹

²⁰² See Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1211–12 (2014) (In *Plessy*, "Justice Harlan's dissent agreed that the Fourteenth Amendment did not reach inequalities in social rights. His disagreement with the Court rested on his conclusion that railroad segregation implicated civil, rather than social, equality." (citation omitted)).

²⁰³ 106 U.S. 583 (1882), *overruled by* *McLaughlin v. Florida*, 379 U.S. 184 (1964).

²⁰⁴ *Id.* at 584–85; see Turner, *supra* note 197, at 182.

²⁰⁵ *Pace*, 106 U.S. at 585.

²⁰⁶ BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 116, at 145.

²⁰⁷ See *Williams v. Mississippi*, 170 U.S. 213, 225 (1898).

²⁰⁸ See *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528, 545 (1899); KLARMAN, *supra* note 168, at 45.

²⁰⁹ Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1421 (1997).

Was that world one in which the Fourteenth Amendment recognized and protected black children's social right to a desegregated public school education?

IV. *BROWN V. BOARD OF EDUCATION*

Was state-mandated racial segregation in public schools prohibited by the Fourteenth Amendment? This Part examines *Brown v. Board of Education*, a case about the social right to education,²¹⁰ and the Supreme Court's 1954 invalidation of state-mandated racial segregation in public schools. In addition, post-*Brown* actions by supporters of the segregationist status quo are considered, including originalist arguments made by United States Senators and Representatives in their "Southern Manifesto" opposing the Court's decision.

A. *The Segregationist and Originalist Defense*

In December 1952, the Supreme Court heard oral argument in the Segregation Cases from Kansas, South Carolina, Virginia, and Delaware wherein the lower courts rejected Fourteenth Amendment challenges to state-mandated racial segregation in public schools.²¹¹ John W. Davis, counsel for the school board in the South Carolina case, addressed "the condition of those who framed" the Fourteenth Amendment.²¹² He noted that "the same Congress" that proposed the amendment in June 1866 proceeded in July 1866 "to establish or to continue separate schools in the District of Columbia."²¹³ Turning to the states, Davis advised the Court that thirty of the thirty-seven states of the union ratified the Fourteenth Amendment; of those ratifying states, twenty-three had or immediately installed racially segregated public schools.²¹⁴ "Were they violating the Amendment which they had solemnly accepted?," Davis asked the Court.²¹⁵ "Were they conceiving of it in any other sense than that it did not touch their power over their public schools?"²¹⁶

In the Court's post-argument conference, Chief Justice Fred Moore Vinson expressed his view that "the *Plessy* case was right"²¹⁷ Justice William O.

²¹⁰ See Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1570 (2004).

²¹¹ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 n.1 (1954).

²¹² Oral Argument, *Briggs v. Elliott*, 342 U.S. 350 (1952), *rev'd sub nom. Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *reprinted 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 LANDMARK BRIEFS AND ARGUMENTS].

²¹³ *Id.*

²¹⁴ See *id.* at 333.

²¹⁵ *Id.*

²¹⁶ *Id.* Davis argued that as of 1952 seventeen states provided for racially segregated schools and that four states permitted school boards to segregate black and white students. *Id.*

²¹⁷ MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, at 187 (1994).

Douglas believed that “if the cases were to be then decided the vote would be five to four in favor of the constitutionality of segregation in the public schools in the States”²¹⁸ When Justice Felix Frankfurter persuaded his colleagues that the cases should be reargued the following Term, the Court ordered reargument and asked the parties to address several questions, including this query: “What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?”²¹⁹

Appearing at the December 1953 reargument,²²⁰ John W. Davis addressed the Court’s question regarding congressional and ratifiers’ understandings as to whether the Fourteenth Amendment would abolish racially segregated schools.²²¹ Davis reiterated the count-the-states argument he made to the Court a year earlier²²² and contended that a study of legislation by Congress before, after, and during the time period in which the amendment was discussed made clear that “Congress did not intend by the Fourteenth Amendment to deal with the question of mixed or segregated schools.”²²³ Moreover, Davis continued, the Freedmen’s Bureau established by the same Congress that proposed the Fourteenth Amendment established racially separate schools throughout the South.²²⁴ He argued, in addition, that during the House of Representatives’ consideration of the bill that would become the Civil Rights Act of 1866, the complaint was made that the legislation “would do away with the separate schools.”²²⁵ Responding to that assertion, Representative James Wilson, the chairman of the House Judiciary Committee, “said on the floor that the Act did not mean that their children should attend the same school, and, in effect, that it was absurd so to interpret it.”²²⁶

²¹⁸ *Id.*; see THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 661 (Del Dickson ed., 2001).

²¹⁹ *Brown v. Bd. of Educ.*, 345 U.S. 972, 972 (1953) (per curiam).

²²⁰ Prior to the reargument, Chief Justice Vinson suffered a fatal heart attack and was replaced on the Court by Earl Warren. See JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 256 (2006). Upon learning of Chief Justice Vinson’s death, Justice Frankfurter reportedly said, “This is the first indication that I have ever had that there is a God.” BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 72 (1983).

²²¹ 49A LANDMARK BRIEFS AND ARGUMENTS, *supra* note 212, at 479, 481.

²²² *Id.* at 481.

²²³ *Id.* at 482.

²²⁴ *Id.* at 484.

²²⁵ *Id.* at 485.

²²⁶ *Id.*

B. The Court's Decision

On May 17, 1954, a unanimous Court issued its nonoriginalist, if not antioriginalist, decision.²²⁷ Speaking for the Court, Chief Justice Earl Warren noted that the 1953 reargument “was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868,” and “covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment.”²²⁸ While “these sources cast some light,” the Chief Justice stated, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.”²²⁹ This conclusion is certainly questionable. “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.”²³⁰ Alexander Bickel, one of Justice Frankfurter’s law clerks, published an article in 1955 in which he concluded that “the immediate objectives to which section I of the fourteenth amendment was addressed . . . was not expected in 1866 to apply to segregation.”²³¹

²²⁷ See CROSS, *supra* note 13, at 92 (asserting that “*Brown* [is] functionally an antioriginalist opinion.”); RICHARD A. POSNER, REFLECTIONS ON JUDGING 198 (2013) (concluding that *Brown* is a nonoriginalist decision).

²²⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954).

²²⁹ *Id.* Chief Justice Warren opined that the proponents of the post-Civil War amendments “intended them to remove all legal distinctions among ‘all persons born or naturalized in the United States,’” while opponents “were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited [legal] effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.” *Id.* In addition, he determined that at the time of the adoption of the Fourteenth Amendment the free public school movement “had not yet taken hold” and that education of black persons “was almost nonexistent” and was “forbidden by law in some states.” *Id.* at 490. Given that record, he was not surprised that there was “little in the history of the Fourteenth Amendment relating to its intended effect on public education.” *Id.*

²³⁰ RICHARD A. POSNER, OVERCOMING LAW 62 (1995).

²³¹ Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 64 (1955); see also ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 100 (1962) (“Was it the intention of the framers of that Amendment—the Reconstruction 39th Congress—to forbid the states to enact and enforce segregation statutes? . . . The framers did not intend or expect then and there to outlaw segregation, which, of course, was a practice widely prevalent in the North.”); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 156 (1999) (“[T]he 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 require racially integrated schools.); Michael 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

Looking to the Court's initial Fourteenth Amendment decisions, Chief Justice Warren observed that the Court interpreted the amendment "as proscribing all state-imposed discriminations against the Negro race,"²³² and that the separate-but-equal doctrine did not appear in the Court until the 1896 *Plessy v. Ferguson* decision involving racial segregation in public transportation.²³³ The Chief Justice opined that "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."²³⁴ Focusing instead on "public education in the light of its full development and its present place in American life throughout the Nation,"²³⁵ he formulated a then-present-day approach to the issue before the Court:

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.²³⁶

Chief Justice Warren then asked and answered in the affirmative the question of whether segregating children by race deprived children of color of equal educational opportunities, even though physical facilities and other tangible factors were "equal."²³⁷ Noting that the Court had considered intangible considerations in invalidating segregated education in the professional school setting,²³⁸ he determined that:

school segregation, while contemporaneous state practices render such an interpretation fanciful" (citation omitted)).

²³² *Brown*, 347 U.S. at 490, 490 n.5 (citing *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Virginia v. Rives*, 100 U.S. 313 (1879); *Ex Parte Virginia*, 100 U.S. 339 (1879); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)).

²³³ *See id.* at 490–91.

²³⁴ *Id.* at 492.

²³⁵ *Id.* at 492–93.

²³⁶ *Id.* at 493.

²³⁷ *Id.*

²³⁸ *See McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 641–42 (1950); *Sweatt v. Painter*, 339 U.S. 629, 634–37 (1950); *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631, 632–33 (1948) (per curiam). David Strauss argues that in relying on these higher education cases the *Brown* Court completed an evolutionary "common law process." STRAUSS, *supra* note 19, at 92.

Such considerations apply with added force to children in grade and high schools. 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.²³⁹

“Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*,” the finding that racial segregation in public schools has a detrimental effect upon children of color “is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.”²⁴⁰

Having rejected certain language in but not expressly overruling *Plessy*,²⁴¹ Chief Justice Warren declared “that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”²⁴² Accordingly, the plaintiffs and other similarly situated persons had been “deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”²⁴³

C. Post-Brown Developments

Supporters of the pre-*Brown* segregationist status quo responded to *Brown*. In March 1956, virtually all United States Senators and Representatives from southern states issued a “Declaration of Constitutional Principles,” also known as the “Southern Manifesto.”²⁴⁴ Drafted by Senators Strom Thurmond, Sam Ervin, Harry Byrd, Richard Russell and others,²⁴⁵ the manifesto proclaimed that the Founding Fathers “framed this Constitution with its provisions for change by amendment in

²³⁹ *Brown*, 347 U.S. at 494.

²⁴⁰ *Id.* at 494–95 (citation omitted). Footnote 11 to the “modern authority” text of the Court’s opinion cited social science studies, including Dr. Kenneth Clark’s doll test. *See id.* at 494 n.11. For more on footnote 11, see ROY L. BROOKS, INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY 13–15 (1996); Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 292–96 (2005).

²⁴¹ David A. Strauss, *Little Rock and the Legacy of Brown*, 52 ST. LOUIS U. L.J. 1065, 1070 (2008) (“*Brown* did not formally overrule *Plessy*, [but] it squarely . . . [addressed] the claim, central to *Plessy*, that segregation did not necessarily denote inferiority.”). Segregated public transportation was subsequently held unconstitutional in *Gayle v. Browder*, 352 U.S. 903, 903 (1956) (mem.) (per curiam), *aff’g* 142 F. Supp. 707 (M.D. Ala. 1956).

²⁴² *Brown*, 347 U.S. at 495.

²⁴³ *Id.*

²⁴⁴ *See* 102 CONG. REC. 4459–61 (1956) (statement of Sen. George); *id.* at 5445 (statement of Sen. Thurmond). Only three southern senators—Albert Gore and Estes Kefauver of Tennessee and Lyndon B. Johnson of Texas—did not sign the manifesto. Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1079 (2014).

²⁴⁵ *See* KARL E. CAMPBELL, SENATOR SAM ERVIN, LAST OF THE FOUNDING FATHERS 105–07 (2007); ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE 785 (2002).

order to secure the fundamentals of government against the dangers of temporary popular passion or the personal predilections of public officeholders.”²⁴⁶ The manifesto regarded *Brown* as “a clear abuse of judicial power” and the culmination of a trend of federal court legislation “in derogation of the authority of Congress” that “encroach[ed] upon the reserved rights of the States and the people.”²⁴⁷ This “unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law.”²⁴⁸

Consider the manifesto’s 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 system 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 any 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.²⁴⁹

The manifesto also approvingly referred to *Plessy v. Ferguson*, stating that the 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, traditions, 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.²⁵⁰

The manifesto’s critique of *Brown* “placed in the foreground precisely the argument that the Court’s opinion . . . sought to force into the background.”²⁵¹ For the manifesto’s authors, the states’ power to segregate children on the basis of race was consistent with the original and established law of the Fourteenth Amendment.²⁵² *Brown*’s “naked power” grab did what the manifesto authors would

²⁴⁶ 102 CONG. REC. 4460 (1956).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Driver, *supra* note 244, at 1063.

²⁵² *Id.* (“The Manifesto’s central critique asserted that the decision violated the original understanding of the Fourteenth Amendment.”).

not have done: formally interred a significant component and manifestation of Jim and Jane Crow's white-supremacist racial hierarchy and subordination.

Other opponents of *Brown* turned to state legislatures in Alabama, Georgia, Mississippi, South Carolina, and Virginia and obtained declarations that the Court's decision was null and void.²⁵³ The employment of Georgia state officers who refused to enforce that state's segregation laws could be terminated.²⁵⁴ Virginia announced that it would employ "all 'honorabl[e], legal[] and constitutional[]' means to 'resist this illegal encroachment upon our sovereign powers.'"²⁵⁵

Individuals seeking to integrate public schools experienced resistance. For instance, in 1957, the Arkansas National Guard carried out the orders of Governor Orval Faubus and prevented the enrollment of nine African American students at the Little Rock Central High School.²⁵⁶ Although he sympathized with Southerners concerned that their "sweet little girls [would] be seated alongside some big overgrown Negroes,"²⁵⁷ President Dwight D. Eisenhower dispatched one thousand soldiers from the 101st Airborne Division to Little Rock to restore order and allow the students to enroll.²⁵⁸ In 1960, federal marshals escorted six-year-old Ruby Bridges past an egg- and tomato-throwing crowd and into the William Frantz Elementary School in New Orleans, Louisiana (an event depicted in Norman Rockwell's famous "The Problem We All Live With" painting).²⁵⁹ She was the first African American student to racially integrate a New Orleans school.²⁶⁰

As set forth in this Part, an originalist argument in defense of the separate-but-equal doctrine in the context of public education was in fact made to the Supreme Court in the *Brown* argument and reargument. Deciding the case on the basis of its view of the role and dynamics of public education circa 1954, the Court did not look to the time of the adoption of the Fourteenth Amendment or to *Plessy's* late-nineteenth-century validation of Louisiana's apartheid separation and subordination of African Americans. Stridently opposed by those favoring the

²⁵³ Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 NW. U. L. REV. 92, 93 (1994); Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1014 n.93 (1989).

²⁵⁴ See Kennedy, *supra* note 253, at 1014.

²⁵⁵ LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 60 (2000) (quoting S.J. Res. 3, 1956 Gen. Assemb., Reg. Sess., 1956 Va. Acts 1213, 1215).

²⁵⁶ See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63, at 222 (1988).

²⁵⁷ EARL WARREN, THE MEMOIRS OF CHIEF JUSTICE EARL WARREN 291 (1977) (quoting Eisenhower).

²⁵⁸ BRANCH, *supra* note 256, at 224.

²⁵⁹ See DOUGLAS BRINKLEY, THE GREAT DELUGE: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST 257 (2006).

²⁶⁰ *Id.*

segregationist status quo and pressing an originalist critique of its decision, the Court's nonoriginalist, if not antioriginalist, decision holds an exalted place in the nation's constitutional law canon.

V. DISCRETIONARY ORIGINALISM AND *BROWN*

Can *Brown* be squared with originalism? Over the years, originalist scholars asking this question have engaged in one or more aspects of discretionary originalism. They have chosen originalism over other available methodologies; selected a particular originalist methodology from among a menu of originalist theories; framed the inquiry and defined the level of generality at which the claimed right to a desegregated public school education should be characterized; and determined the parameters of the evidentiary inquiry relevant to the issue addressed in *Brown*. While a few originalists have concluded that *Brown* was wrongly decided, more advocates of the methodology have reached the opposite conclusion. In doing so, they employed varying conceptions and theories of originalism and made discretionary interpretive and analytical moves en route to their determination that the result in *Brown* can be squared with originalism. That discretionary originalism is discussed in this Part.

A. Original-Intent Originalism

In *Government by Judiciary: The Transformation of the Fourteenth Amendment*, Raoul Berger examined the “sacred cow of modern constitutional law, *Brown v. Board of Education*.”²⁶¹ Berger believed that *Brown* was “a long overdue attempt to rectify the grievous wrongs done to the blacks.”²⁶² He did not believe, however, that the Fourteenth Amendment authorized the Supreme Court to outlaw racial segregation in public schools.²⁶³

Berger noted that “Congress . . . permitted segregated schools in the District of Columbia from 1864 onward” and had refused to abolish such schools.²⁶⁴ “How can it be maintained that Congress, after steadfastly refusing to abolish segregated schools in the District, . . . would cram desegregation down the throats of the States?”²⁶⁵ Black students, “still widely regarded as ‘racially inferior’ and ‘incapable of education,’” could not attend public schools in the North, Berger stated.²⁶⁶ And a proposal to ban segregated schools in the North “was far from the framers’ minds,” for “such interference with state control of internal affairs would have imperiled

²⁶¹ BERGER, *supra* note 50, at 25.

²⁶² *Id.* at 132.

²⁶³ *See infra* notes 264–272.

²⁶⁴ BERGER, *supra* note 50, at 26 (quoting RICHARD KLUGER, *SIMPLE JUSTICE* 635 (1976)).

²⁶⁵ *Id.*

²⁶⁶ *Id.* (quoting HOWARD JAY GRAHAM, *EVERYMAN’S CONSTITUTION* 290 n.70 (1968)); *see also id.* at 152 (“Segregated schools were deeply entrenched in the North.”).

enactment and adoption of the Fourteenth Amendment.”²⁶⁷ In fact, Berger observed, House Judiciary Committee Chairman James Wilson gave his “assurance that the parallel Civil Rights Bill—regarded as ‘identical’ with the Fourteenth Amendment . . .—did not require” desegregated schools.²⁶⁸

Berger found additional evidence that the Framers did not intend to prohibit school segregation in the fact that at the time of the proposal of the Fourteenth Amendment, the Senate gallery was segregated,²⁶⁹ and a post-amendment-adoption effort by Charles Sumner to move a supplemental bill requiring a provision for nondiscriminatory public schools in state constitutions failed.²⁷⁰ Accordingly, “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.”²⁷¹ It was not necessary to refer to such segregation in the amendment’s text “because confessedly no one then imagined that the equal protection clause might affect school segregation. Why provide against the unimagined?”²⁷² On Berger’s view and application of original intent originalism, *Brown* was wrongly decided.

Another scholar, Earl Maltz, has argued that the originalist case against *Brown* is grounded in the view that “a direct constitutional attack on segregated schools was unthinkable in the period in which the Fourteenth Amendment was drafted, passed, and ratified.”²⁷³ Maltz observed that school segregation was common in the northern states and was prevalent in the lower northern states during the time in which the amendment was considered.²⁷⁴ “Thus, any direct, broad-based effort to attack segregated schools would have carried with it substantial political risks.”²⁷⁵ The Fourteenth Amendment was crafted to appeal to swing voters, and mainstream Republicans assured voters that the amendment’s impact on the laws of northern states would be minimal, “a claim they could not make if Section 1 had been generally understood to outlaw segregated schools.”²⁷⁶ Like Berger, Maltz determined that congressional unwillingness to abolish segregated schools in the District of Columbia suggested that the Framers did not intend to prohibit segregation in the public schools.²⁷⁷

²⁶⁷ *Id.* at 26.

²⁶⁸ *Id.* at 26–27.

²⁶⁹ *Id.* at 139.

²⁷⁰ *Id.* at 140.

²⁷¹ *Id.* at 141.

²⁷² *Id.* at 151 (internal quotation marks omitted).

²⁷³ Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223, 228 (1996).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 228–29; see also Earl M. Maltz, *A Dissenting Opinion to Brown*, 20 S. ILL. U. L.J. 93, 94 (1995) (The Fourteenth Amendment “was in large measure a campaign document, designed to outline the Republican program of Reconstruction for the upcoming election of 1866.”).

²⁷⁷ See Maltz, *supra* note 273, at 229.

Consider Robert Bork's original-intent analysis of *Brown*. In *Neutral Principles and Some First Amendment Problems*,²⁷⁸ he urged that a court deciding the issue before the *Brown* Court would identify two facts.²⁷⁹ Fact 1: "[T]he men who put the amendment in the Constitution intended that the Supreme Court should secure against government action some large measure of racial equality. That is certainly the core meaning of the amendment."²⁸⁰ Fact 2: "[T]hose same men were not agreed about what the concept of racial equality requires."²⁸¹

What was the intent of those men? Bork stated that some 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."²⁸² He asserted that the *Brown* Court could not "know how these long-dead men" would have voted on these issues, but did know that the amendment "was intended to enforce a core idea of black equality against governmental discrimination."²⁸³ Contending that the Court could not require equality in some but not other cases, Bork concluded that the Court had to "choose a general principle of equality that applie[d] to all cases."²⁸⁴ For Bork, that (his) equality principle justified the Court's choice of a no-segregation rule over *Plessy's* separate-but-equal doctrine.²⁸⁵

As can be seen, Bork made two discretionary and outcome-influential interpretive moves. First, he noted but set to the side the pro-segregation views of the aforementioned long-dead men who amended the Constitution. Second, Bork's formulation of a core idea of black equality is the foundation for his conclusion that school segregation violated the Equal Protection Clause. Bork's conclusion that *Brown* was rightly decided was reached via a (his) theory of black equality, concededly not recognized by, and certainly not consistent with, the intent of the Fourteenth Amendment's Framers. And his determination that the Framers intended to secure an undefined large measure of equality expands the protective scope of the Fourteenth Amendment beyond that provision's civil rights focus.

B. Original-Understanding Originalism

Years later, Bork moved from original intent to original-understanding originalism in his book *The Tempting of America: The Political Seduction of the Law*.²⁸⁶ He argued that the "inescapable fact is that those who ratified the amendment did not think it outlawed segregated education or segregation in any aspect of

²⁷⁸ Bork, *supra* note 49.

²⁷⁹ *Id.* at 14.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 14–15.

²⁸⁵ *See id.* at 15.

²⁸⁶ BORK, *supra* note 15.

life.”²⁸⁷ Bork also assumed that *Plessy v. Ferguson* correctly represented the original understanding of the Fourteenth Amendment, “that equality and state-compelled separation of the races were consistent.”²⁸⁸ He supposed, in addition, that the amendment’s ratifiers did not object to the psychological harm suffered by those subjected to segregation.²⁸⁹ “If those things are true, then it is impossible to square the *opinion* in *Brown* with the original understanding.”²⁹⁰

Notwithstanding these observations, Bork concluded that *Brown*’s result “is consistent with, indeed is compelled by, the original understanding” of the Equal Protection Clause.²⁹¹ Consider his result-squaring argument. When the Court decided *Brown* in 1954, “it had been apparent for some time that segregation rarely if ever produced equality.” Thus, the Court faced “a situation in which the courts would have to go on forever entertaining 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.”²⁹² Bork believed that the Court had to choose between two “mutually inconsistent” options: (1) allow segregation and “abandon the quest for equality” or (2) “forbid segregation in order to achieve equality.”²⁹³ For Bork, the choice was clear—“the Court must choose equality and prohibit state-imposed segregation. The purpose that brought the fourteenth amendment into being was equality before the law, and equality, not separation, was written into the text.”²⁹⁴ 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.”²⁹⁵

Bork’s framing and choice of equality over state-imposed segregation is neither obvious nor compelled. The word “equality” is not found in the text of the Equal Protection Clause;²⁹⁶ nor is a ban on racial separation.²⁹⁷ Yet, as he did in 1971, Bork formulated and applied his own concept of equality grounded in his own value-partial view²⁹⁸ of the Fourteenth Amendment’s purpose. This discretionary move is especially questionable given facts and history demonstrating that “segregation was

²⁸⁷ *Id.* at 75–76.

²⁸⁸ *Id.* at 81.

²⁸⁹ *Id.* at 82.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 76.

²⁹² *Id.* at 82.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 82–83.

²⁹⁶ See Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1375 (1990).

²⁹⁷ See RICHARD A. POSNER, HOW JUDGES THINK 344 (2008) (“There is nothing in the term ‘equal protection’ that seems to forbid separation, even separation on grounds ordinarily considered invidious, such as sex and race . . .”).

²⁹⁸ See TRIBE & DORF, *supra* note 26, at 80 (“[H]ow can [Bork] select a meaning for equality in a value-neutral way?”).

not necessarily contrary to this nation's notion of equality" circa 1866–1868²⁹⁹ (as Bork concedes), and that the amendment did not address or protect the social rights of black children.³⁰⁰ Bork's discretionary originalism is grounded, not in the understanding of the Fourteenth Amendment's ratifiers, but in his own nonoriginalist assumptions, premises, and preferences. His conclusion that *Brown's* result is consistent with and compelled by the original understanding of the Equal Protection Clause is thus fundamentally flawed and egregiously incorrect.

Another constitutional theorist, Michael Perry, argues that *Brown* was correctly decided.³⁰¹ For Perry, the "originalist approach *correctly understood*" asks "the fundamental question about the meaning of a provision of the constitutional text . . . : What directive (or directives) did the people—or those who represented them, in particular the ratifiers—understand the provision to communicate; what directive does the provision, as originally understood, represent?"³⁰² The state action at issue in *Brown* implicates the Fourteenth Amendment's Privileges or Immunities Clause, Perry submits; that provision refers, among other things, to the fundamental right to liberty and to basic rights of property and contract.³⁰³ The clause "protects, by its very terms, not merely some of the privileges and immunities enjoyed by citizens under state law, but all of them."³⁰⁴ Therefore, he concluded, state provision of a free public education to white citizens cannot constitutionally be denied to nonwhite citizens.³⁰⁵ "Unquestionably, then, the state laws at issue in *Brown* violated the Fourteenth Amendment. . . . [T]hey violated the directive represented by the Privileges or Immunities Clause as that clause was originally understood."³⁰⁶

Is Perry correct? While his argument that the terms of the clause can be read as protecting all and not some privileges or immunities is a plausible one, evaluating that position as an originalist matter is difficult given the absence of facts and specific evidence supporting his conclusion that the ratifiers understood that the Privileges or Immunities Clause mandated the invalidation of school segregation. The absence of such evidence is of critical significance, for the question remains whether Perry's approach can be squared with the Reconstruction-era view that the Fourteenth Amendment protected civil but not social rights.³⁰⁷ Does he dispute that era's taxonomy of rights? Did the ratifiers hold or not hold this view? What facts

²⁹⁹ Ronald Turner, *Was "Separate but Equal" Constitutional?: Borkian Originalism and Brown*, 4 TEMP. POL. & CIV. RTS. L. REV. 229, 259 (1995).

³⁰⁰ *Id.* at 231.

³⁰¹ Michael J. Perry, *Brown, Bolling, & Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 S. ILL. U. L.J. 53, 54 (1995).

³⁰² *Id.*

³⁰³ *See id.* at 60–62.

³⁰⁴ *Id.* at 64.

³⁰⁵ *See id.* at 66.

³⁰⁶ *Id.*; *see also* MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* 91 (1999) (arguing that "a law creating one set of schools for white students and another set for students of African ancestry" is inconsistent with the privileges or immunities norm established by the "[w]e the people" generation).

³⁰⁷ *See supra* notes 175–181 and accompanying text.

and evidence must one consider and evaluate in determining an, or the, answer to this question? Conclusory assertions are no substitute for a rigorous and evidence-based originalist analysis of the school segregation question.

C. Original Public Meaning Originalism

Original public meaning originalists have also argued and concluded that *Brown* is an originalist decision. This section provides an overview of the following advocates of this view: Justice Scalia, Michael McConnell, Michael Stokes Paulsen, Steven Calabresi, and Michael Perl.

What has Justice Scalia, a prominent advocate of original public meaning originalism, said about *Brown*? Recall that the Justice has made clear that he looks for the original and most plausible meaning of constitutional text to the adopting society.³⁰⁸ He has also instructed that those searching for that meaning must immerse themselves “in the political and intellectual atmosphere of the time.”³⁰⁹

With regard to *Brown*, Justice Scalia has argued in a dissenting opinion that “the Fourteenth Amendment’s requirement of ‘equal protection of the laws,’ combined with the Thirteenth Amendment’s abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid.”³¹⁰ He stated further that “even if one does not regard the Fourteenth Amendment as crystal clear on this point, a tradition of *unchallenged* validity did not exist with respect to the practice in *Brown*,”³¹¹ as the separate-but-equal doctrine was challenged as unconstitutional and upheld by the Supreme Court in *Plessy v. Ferguson* over the dissent of Justice Harlan.³¹²

Justice Scalia’s analysis is a notable illustration of discretionary originalism. His argument that the Equal Protection Clause is “crystal clear” and unambiguously prohibits segregation rests on his reading of the text of the Equal Protection Clause and the Thirteenth Amendment and his view of the significance of Homer Plessy’s challenge to the separate-but-equal doctrine rejected by the Court twenty-eight years after the adoption of the Fourteenth Amendment. That an original public circa 1866–1868 would have agreed with Justice Scalia’s interpretation is a doubtful and frankly incredible proposition. What is obvious and crystal clear to him is not indisputably obvious at all. And how does the *Plessy* decision issued twenty-eight years after the adoption of the Fourteenth Amendment—a seven-to-one decision validating the separate-but-equal doctrine—in any way demonstrate or even suggest that the original public meaning of the amendment prohibited school segregation?

More recently, in his book *Reading Law: The Interpretation of Legal Texts*,³¹³ Justice Scalia and his coauthor Bryan Garner submit that a “frequent line of attack

³⁰⁸ See *supra* notes 78–79 and accompanying text.

³⁰⁹ Scalia, *supra* note 30, at 856.

³¹⁰ *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting).

³¹¹ *Id.* at 95–96 n.1.

³¹² *Id.* at 96 n.1.

³¹³ SCALIA & GARNER, *supra* note 84.

against originalism consists in appeal to popular Supreme Court decisions that are assertedly based on a rejection of original meaning.³¹⁴ The authors refer to *Brown* as the most cited example of the view that “only nonoriginalism could have produced . . . generally acclaimed results.”³¹⁵ This is not so, Justice Scalia and Garner contend, for the text of the Thirteenth Amendment and the Fourteenth Amendment’s Equal Protection Clause “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*.”³¹⁶

The characterization of Justice Harlan’s *Plessy* dissent as in any way, let alone thoroughly, originalist and supportive of the result in *Brown* is dubious. Recall that while Justice Harlan argued that the challenged separate-but-equal law in *Plessy* unconstitutionally violated an African American’s civil rights,³¹⁷ neither he nor the *Plessy* majority departed from or rejected the Reconstruction-era division of rights into civil, political, and social categories.³¹⁸ An interpreter who subscribed to that trichotomy approach could consistently and simultaneously determine that the Fourteenth Amendment (1) required the invalidation of the separate-but-equal doctrine as applied to the civil right to desegregated public transportation (as did Justice Harlan, but not the *Plessy* majority) and (2) did not require the invalidation of state laws mandating racial segregation as applied to the claimed social right to attend desegregated public schools. Thus, Justice Harlan’s civil-rights-focused *Plessy* dissent in no way supports the constitutional recognition of a social right to attend a racially integrated public school. Failure to comprehend and adhere to the Reconstruction-era taxonomy of rights attributes to Justice Harlan views he did not hold, and invoking Harlan tells us nothing about the posited original meaning of the Fourteenth Amendment held by the public at the time of the provision’s adoption in 1868.

A significant contribution to the discussion of originalism and *Brown* is found in Michael McConnell’s *Originalism and the Desegregation Decisions*.³¹⁹ Addressing the “supposed inconsistency between *Brown* and the original meaning of the Fourteenth Amendment,”³²⁰ McConnell studied “the legal thinking of the antagonists in the debate” over the Civil Rights Act of 1875.³²¹ In doing so, he posited that congressional actions to enforce the Fourteenth Amendment taken between 1868 and 1875 constitute the best evidence of the original meaning of the amendment as applied to the school segregation question.³²²

³¹⁴ *Id.* at 87.

³¹⁵ *Id.*

³¹⁶ *Id.* at 88.

³¹⁷ See *supra* note 201 and accompanying text.

³¹⁸ See *supra* notes 187–190 and accompanying text.

³¹⁹ See McConnell, *supra* note 14.

³²⁰ *Id.* at 952.

³²¹ *Id.* at 954.

³²² *Id.* at 984.

Note McConnell's discretionary move and interpretive choice. Instead of focusing on the Fourteenth Amendment's 1866–1868 framing-ratification period, he examines a seven-year post-adoption period culminating in the enactment of the 1875 Civil Rights Act.³²³ Congress debated the constitutionality of school segregation as it considered the bill that ultimately became law in 1875 but struck from that legislation a provision outlawing school segregation.³²⁴ For McConnell, this congressional refusal to legislatively proscribe public school segregation did not foreclose the conclusion that the original meaning of the Fourteenth Amendment prohibited such segregation.

[I]f instead we assume that the courts must interpret the Amendment in light of its most probable understood meaning at the time it was enacted, and if we treat the opinions of the congressmen as evidence of the opinions of informed people of the day, what should we make of this debate? That is, viewing this episode not as an act of *lawmaking* but as evidence of contemporaneous *interpretation*, what do we learn about the meaning that people at that time attached to the words of the Fourteenth Amendment?³²⁵

On this view, the original public meaning of the Fourteenth Amendment is the same as and can be established by an examination of the opinions of members of Congress. This approach combines two different and potentially conflicting theories—Framers' original intent and original public meaning.³²⁶

McConnell argued that a substantial portion of the members of Congress, including members who participated in the framing of the Fourteenth Amendment, held the view that school segregation violated the Fourteenth Amendment.³²⁷ He acknowledged that proof that a congressional majority supported legislation banning school segregation in the time period of 1871–1875 does not convincingly establish that that was the predominant understanding of those who framed and ratified the amendment in the 1866–1868 time period.³²⁸ Positing continuity in opinion from 1866 to the enactment of the 1875 Civil Rights Act, he stated that a number of

³²³ Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *invalidated by* The Civil Rights Cases, 109 U.S. 3, 25–26 (1883).

³²⁴ McConnell, *supra* note 14, at 1092–93.

³²⁵ *Id.* at 1093.

³²⁶ See Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257, 260 (2005) (“McConnell’s work can be viewed as focusing more on original intent than on original meaning . . .”).

³²⁷ Michael Klarman does not share this view. He has argued that school desegregation was not favored in the North at the time of the Fourteenth Amendment’s ratification, and that “Northern opinion in 1875 was more favorable toward school desegregation than it had been in 1866–68. Thus congressional debates on the 1875 [Civil Rights Act] seem unreliable evidence as to what congressmen thought the Fourteenth Amendment meant when they passed it in 1866.” Klarman, Brown, *Originalism, and Constitutional Theory*, *supra* note 175, at 1904–05 (citation omitted).

³²⁸ See McConnell, *supra* note 14, at 1105.

“leaders of the movement to adopt the Fourteenth Amendment” supported the movement for the 1875 legislation.³²⁹ This supposed continuity may not have existed, however, given the material shift in opinions regarding the desirability of school integration during the interim between the 1868 adoption of the Fourteenth Amendment and the 1875 legislation.³³⁰

McConnell also assumed that the majority of both Houses of Congress voting in 1872–1874 for legislation that would have desegregated public schools “understood themselves to be enforcing the dictates of the Constitution and not merely deciding whether they believed public schools should be segregated.”³³¹ A vote for a law prohibiting school segregation was, for McConnell, “an implicit (and often an explicit) statement regarding the congressman’s interpretation of the Fourteenth Amendment.”³³² “Thus, if it is established that a majority supported legislation to forbid school segregation under Section 5 [of the Fourteenth Amendment], this proves that the majority understood the Fourteenth Amendment to forbid the racial segregation of public schools.”³³³ This analysis is speculative and conjectural, for as previously noted, a provision outlawing school segregation that may have obtained the imagined majority support was struck from the legislation.³³⁴

Turning to *Brown*, McConnell observed that the 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.”³³⁵ To McConnell, the question is what the Fourteenth Amendment meant to “the great mass of citizens and their representatives” and not to the amendment’s proponents and enemies.³³⁶ In McConnell’s view, hostility to the amendment by “a significant segment of the population . . . is utterly irrelevant to its meaning,³³⁷ and the intention of the amendment’s “most avid proponents” did not matter.³³⁸

McConnell recognized that school segregation was a widespread practice in both southern and northern states and the District of Columbia at the time of the proposed and ratified Fourteenth Amendment, and that school segregation “almost certainly enjoyed the support of a majority of the population even at the height of

³²⁹ *Id.*

³³⁰ See Klarman, Brown, *Originalism, and Constitutional Theory*, *supra* note 175, at 1903–04.

³³¹ McConnell, *supra* note 14, at 1110.

³³² *Id.* at 1117.

³³³ *Id.*; see U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

³³⁴ See *supra* note 323 and accompanying text.

³³⁵ McConnell, *supra* note 14, at 1132.

³³⁶ *Id.* at 1133.

³³⁷ *Id.* McConnell noted that this significant segment’s hostility could be relevant where “their understanding of the *meaning* of the Amendment casts light on its commonly accepted meaning.” *Id.*

³³⁸ *Id.* What the proponents intended could matter where “they claimed, and others accepted, that their intentions had been embodied in the Amendment.” *Id.*

Reconstruction.”³³⁹ He thus doubted that Congress would have proposed and that the people of the states would have ratified “an Amendment understood to outlaw so deeply engrained an institutional practice.”³⁴⁰ If one stops here, the answer to the question “Did the original meaning of the Fourteenth Amendment circa 1866–1868 prohibit school segregation?” would be “no.”

But McConnell did not stop there. As previously noted, he shifted the temporal focus away from the 1866–1868 proposal-ratification period to the post-ratification period of 1868–1875.³⁴¹ That discretionary and postoriginalist choice and move selects a time period that does not include the inconvenient facts noted in the preceding paragraph.³⁴² In answering “yes” to the question “Did the original meaning of the Fourteenth Amendment circa 1868–1875 prohibit school segregation?,” McConnell formulated and applied a theory of originalism more conducive to his originalist defense of the result in *Brown*.

It is also noteworthy that McConnell’s focus on the 1868–1875 time period does not discuss in depth an important and relevant event occurring a few years after the enactment of the 1875 act, the Hayes-Tilden Compromise of 1877.³⁴³ Addressing disputed results in the presidential election of 1876 between Republican candidate Rutherford B. Hayes and Democratic candidate Samuel J. Tilden, Congress created a fifteen-person commission to resolve the election issue.³⁴⁴ When the commission ruled in favor of Hayes, he 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.³⁴⁵ That deal was accepted, Hayes assumed the presidency, and federal troops were removed from the South.³⁴⁶ This development betrayed and ended Reconstruction and was followed by “a sea-change in public, intellectual, governmental and legal opinion. Support and protection for the rights of black

³³⁹ *Id.* at 955–56.

³⁴⁰ *Id.* at 956.

³⁴¹ *Id.*

³⁴² See POSNER, *supra* note 297, at 344; Cass R. Sunstein, *Black on Brown*, 90 VA. L. REV. 1649, 1659 (2004) (“[T]he post-ratification views of members of Congress are not decisive evidence about constitutional meaning.”). McConnell has admitted that “this kind of postratification evidence is not as strong, in principle, as evidence bearing on the actual process of drafting and ratification. But the earlier evidence is scant and inconclusive.” Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL’Y 457, 459 (1996).

³⁴³ See generally McConnell, *supra* note 14 (arguing that the decision in *Brown* is consistent with the original meaning of the Fourteenth Amendment).

³⁴⁴ See Justice John Paul Stevens (Ret.), *Glittering Generalities and Historical Myths*, 51 U. LOUISVILLE L. REV. 419, 426–27 (2013).

³⁴⁵ See ROY MORRIS, JR., *THE FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876*, at 247 (2003); C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* 8 (1951).

³⁴⁶ WOODWARD, *supra* note 345, at 7–8.

citizens passed away and were replaced by the regime of Jim Crow.³⁴⁷ Expanding the 1868–1875 review period by a few years brings into the sociopolitical and legal picture a significant development of great relevance to an argument grounded in a purported postoriginalist public meaning of the Fourteenth Amendment.

Now consider Michael Stokes Paulsen’s recent argument that the Fourteenth Amendment prohibits public school segregation.³⁴⁸ Paulsen “focuses on the objective original linguistic meaning of the words of the text, in context, rather than on the subjective intentions or expectations of specific persons involved in the process of enacting them—a distinction foundational to written constitutionalism.”³⁴⁹ In his view, the text of the Equal Protection Clause “appear[s] to state a sufficiently determinate rule that the government may not treat classes of persons differently and adversely for purposes of legal privileges and entitlements because of race.”³⁵⁰ Noting that “[t]here is perhaps some room to argue about whether this is the necessary meaning of the words of the text, and over the exact scope of the principle stated,” he concludes that this “is not much of a textual stretch at all: it is a reasonably straight-line reading of the language; if there is room to argue over this reading, it is not a great deal of room.”³⁵¹ Paulsen thus reads and chooses to construct a clause purposefully written at a high level of generality as if it sets forth a governing rule written at a narrow and specific level of generality.³⁵²

Does public school segregation on the basis of race violate Paulsen’s Equal Protection Clause’s rule/principle?³⁵³ Referring to the “real-world factual and social

³⁴⁷ McConnell, *supra* note 14, at 1089.

³⁴⁸ See Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar’s Unwritten Constitution*, 81 U. CHI. L. REV. 1385, 1402–03 (2014) (reviewing AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012)).

³⁴⁹ *Id.* at 1402.

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² See *supra* notes 25–26 and accompanying text.

³⁵³ On the difference between rules and principles, see *supra* notes 118–120 and accompanying text. Paulsen incongruously articulates what he perceives to be a determinate rule stated by the Equal Protection Clause and a principle of equal protection. See Paulsen, *supra* note 348, at 1402. The clause does not expressly set out a determinate rule addressing the subject of school segregation (say, “no state shall discriminate on the basis of race in determining who may or may not attend a public school”). See BALKIN, *supra* note 41, at 6–7. For the judiciary, the interpretation and application of such a textually determinate provision would not present the interpretive difficulties encountered in construing indeterminate text like the Equal Protection Clause, which sets out not a rule but an abstract principle that is indeterminate in scope and reach. See *id.*; Ronald Turner, *On Neutral and Preferred Principles of Constitutional Law*, 74 U. PITT. L. REV. 433, 469–71 (2013). Applying a principle can result in a range of arguably correct results, and the principles themselves (a racial hierarchy principle, a white supremacy principle) can lead one to constitutional but discriminatory and unjust outcomes. See Steven D. Smith, *That Old-Time Originalism* 12 (Univ. of San Diego Sch. of Law, Research Paper No. 08-028, 2008), available at <http://ssrn.com/abstract=1150447>, archived at <http://perma.cc/3V2Z-PQLU>.

context” of racial segregation practices in the nineteenth and twentieth centuries, Paulsen states that the answer to that question “was an embarrassingly obvious *yes*.”³⁵⁴ That “not all persons in the generation that drafted and ratified the Fourteenth Amendment” comprehended “this [was] largely beside the point” and did “not alter the meaning of the language used in the Constitution” or “the reality that racial segregation violated that meaning.”³⁵⁵ Accordingly, “*Brown* was rightly decided . . . on reasonably straightforward textual-interpretation reasoning.”³⁵⁶

Paulsen’s certainty that *Brown* was correctly decided as an original matter must not mask critical interpretive choices made en route to that conclusion. His textualist focus on an objective original linguistic meaning of the Equal Protection Clause is different from the textualist methodology proposed in his earlier work. Recall that Paulsen and his coauthor declared (1) that 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,” and (2) that this methodology asks how those words and phrases “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, and within the political and linguistic community in which they were adopted.”³⁵⁷ His analysis discussed in the two preceding paragraphs does not explicitly assess the original meaning at the time of the adoption of the Fourteenth Amendment; nor does he expressly inquire about the adoption-time understanding of a hypothetical reasonable person in a particular political and linguistic community. In his 2013 analysis view, the views of the drafting and ratifying generations do not matter. The text prohibits racial discrimination. For Paulsen, nothing more is needed.

More—much more—is needed, however, for those who do not accept Paulsen’s view that the text of the Equal Protection Clause sets out a determinate rule and principle governing the resolution of the school segregation issue. Paulsen’s proffered no-race-discrimination approach does what the Fourteenth Amendment’s drafting committee did not do.³⁵⁸ The text of the adopted clause, framed and written at a higher level of generality, does not expressly refer to race, does not explicitly require equality, and does not forbid racial segregation.³⁵⁹ While the provision’s “general concern—equality—is clear enough,” the “content beyond that cannot be derived from anything within its four corners”³⁶⁰

If Paulsen is correct that state-mandated racial discrimination violates the Equal Protection Clause, the question remains whether as an original matter the clause prohibits racial discrimination in all of its forms and manifestations. As Paulsen

³⁵⁴ Paulsen, *supra* note 348, at 1403.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ Kesavan & Paulsen, *supra* note 23, at 1131–32.

³⁵⁸ See *supra* notes 323–324 and accompanying text.

³⁵⁹ See *supra* notes 284, 296–297 and accompanying text.

³⁶⁰ ELY, *supra* note 19, at 31.

notes, the exact scope of an equality principle is arguable.³⁶¹ At the time of the adoption of the Fourteenth Amendment, that scope did not encompass and protect the social right to a desegregated public school education.³⁶² If this is correct, the no-race-discrimination rule/principle he finds in the text is consistent with contemporary approaches to and understandings of the Equal Protection Clause, but it is not consistent with—indeed is contrary to—the adoption-time original meaning of the Equal Protection Clause.

Additionally, Paulsen’s analysis refers to an unspecified factual and social context of nineteenth- and twentieth-century practices of racial segregation.³⁶³ This is a finding of original linguistic meaning informed and confirmed by events occurring long after the drafting and ratification period which were obviously and by definition not known to those living in mid-nineteenth-century America.

Another recent originalist effort to justify the result in *Brown* is found in Steven Calabresi and Michael Perl’s article *Originalism and Brown v. Board of Education*.³⁶⁴ Making a legal argument that “is complex and could easily have been missed by many, if not most, Americans living in 1868,”³⁶⁵ the authors 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.”³⁶⁶ 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.”³⁶⁷

Calabresi and Perl state that Section 1 of the Fourteenth Amendment “was publicly understood as providing a constitutional basis for the Civil Rights Act of 1866, which in turn protected the civil rights of individuals, but not their political rights.”³⁶⁸ (Note the absence of any reference to social rights.)³⁶⁹ In their view, the rights specifically protected by the 1866 statute³⁷⁰ were not the only fundamental rights protected by the Fourteenth Amendment’s Privileges or Immunities Clause; that clause also protects “fundamental civil rights that are deeply rooted in American history and tradition.”³⁷¹ Thus, they argue, “[a]ny right that existed widely in 1868, the year the Fourteenth Amendment was passed, could fairly be argued to be a fundamental right that is deeply rooted in American history and tradition and . . . is therefore a ‘Privilege or Immunity’ of national or state citizenship.”³⁷² And, they

³⁶¹ See Paulsen, *supra* note 348, at 1401–02.

³⁶² See *supra* notes 175–181 and accompanying text.

³⁶³ See Paulsen, *supra* note 348, at 1403.

³⁶⁴ See Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 429–33.

³⁶⁵ *Id.* at 569.

³⁶⁶ *Id.* at 435.

³⁶⁷ *Id.* at 440.

³⁶⁸ *Id.* at 441.

³⁶⁹ See *supra* notes 175–181 and accompanying text.

³⁷⁰ See *supra* note 159 and accompanying text.

³⁷¹ Calabresi & Perl, *supra* note 364, at 441.

³⁷² *Id.* at 442.

further contend, any right protected in 1868 by more than three-quarters of the state constitutions—the number of states required to amend the Constitution pursuant to Article V of the Constitution³⁷³—“is a strong candidate to be a Fourteenth Amendment fundamental right.”³⁷⁴

By the authors’ count, in 1868 the constitutions of thirty of the thirty-seven states in the union explicitly required the establishment of a public school system; three states required school funding but did not mandate public schools; and four states did not recognize the right to a free public education.³⁷⁵ “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 school education.”³⁷⁶ That right was “a privilege or immunity of state citizenship . . . as to which racial discrimination was forbidden by the Fourteenth Amendment. The outcome of *Brown v. Board of Education* was thus a correct outcome not only in 1954 but also in 1868.”³⁷⁷ Calabresi and Perl acknowledge that their fundamentality analysis runs counter to *San Antonio Independent School District v. Rodriguez*,³⁷⁸ wherein the Court held that there is no fundamental right to a public school education under the Equal Protection Clause.³⁷⁹ Expressing no opinion as to whether *Rodriguez* was correctly decided, they argue that it is possible that *Rodriguez* was wrongly decided on the basis of the erroneous assumption that there is no right to a public education.³⁸⁰ They also note that *Rodriguez* did not employ their count-the-states analysis and consider the fact that three-quarters of state constitutions in effect in 1868 recognized the right to a public school education, a “fact [that] is obviously relevant to the question of whether the right to an education was deeply rooted in American history and tradition.”³⁸¹

Moreover, Calabresi and Perl disagree with Michael McConnell’s observation that it was not likely that “Congress would have proposed, or the . . . states would have ratified, an Amendment understood to outlaw [the] deeply engrained” practice of school segregation.³⁸² They complained that McConnell focused on the actual

³⁷³ U.S. CONST. art. V.

³⁷⁴ Calabresi & Perl, *supra* note 364, at 443.

³⁷⁵ *See id.* at 438, 450–56.

³⁷⁶ *Id.* at 460.

³⁷⁷ *Id.*

³⁷⁸ 411 U.S. 1 (1973).

³⁷⁹ *Id.* at 33–34; *see* Calabresi & Perl, *supra* note 364, at 558–63. In concluding that education is not a fundamental right, the Court opined that education “is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.” *Rodriguez*, 411 U.S. at 35. Not disputing the plaintiff’s assertion that education is essential to the exercise of First Amendment freedoms and the right to vote, the Court stated that it has “never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice.” *Id.* at 36.

³⁸⁰ *See* Calabresi & Perl, *supra* note 364, at 560.

³⁸¹ *Id.* at 560–61.

³⁸² *Id.* at 466 (quoting McConnell, *supra* note 14, at 956); *see supra* notes 339–340 and accompanying text.

state practices in the 1860s and not on the text of state constitutional provisions in place in 1868.³⁸³ Unlike the examination of state constitutions conducted in their approach, McConnell's approach "reflects a kind of realism that disregards the law and the actual text of the state constitutions."³⁸⁴

Calabresi and Perl's analysis is problematic in several respects. First, they recognize that their legal argument could have been missed by many if not most Americans living in 1868. If most of the public did not know of or could not comprehend their particular originalist approach, one must question whether and how any original public meaning or other understanding did exist or could have existed.

Second, Calabresi and Perl's fundamental rights analysis imports a nonoriginalist and itself discretionary methodology into their originalist analysis. They cite two substantive due process cases, *Washington v. Glucksberg*³⁸⁵ and *Lawrence v. Texas*,³⁸⁶ in which the Court employed not originalism but a separate and distinct due process traditionalist methodology³⁸⁷ (an approach questioned by

³⁸³ Calabresi & Perl, *supra* note 364, at 464.

³⁸⁴ *Id.* Anticipating the critique that their formalistic reliance on the texts of 1868 state constitutions does not consider how state education clauses were actually applied and that "the actual practice on the ground was one of racial segregation," *id.* at 564, the authors provide two responses. First, "no state constitution required racially segregated public schools in 1868" and, beginning in 1870, fifteen states revised their constitutions and explicitly required school segregation. *Id.* at 565. If racially segregated schools were common in 1868, "there should have been no need for the fifteen state constitutional provisions requiring racially segregated schools . . ." *Id.* Second, "maybe racial segregation in public schools was not commonplace in 1868, and it only started to appear in 1870." *Id.*

³⁸⁵ 521 U.S. 702 (1997).

³⁸⁶ 539 U.S. 558 (2003).

³⁸⁷ Traditionalism interprets the Constitution "in accordance with the long-standing and evolving practices, experiences, and tradition of the nation." Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1133 (1998). Traditionalism is thus different from and should not be confused with originalism's search for the fixed meaning of constitutional text. See John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CALIF. L. REV. 1211, 1241 (1998).

Glucksberg held that the asserted right to assistance in committing suicide was not a fundamental liberty interest protected by the Fourteenth Amendment's Due Process Clause. 521 U.S. at 728. In so holding the Court looked to, among other things, 700 years of Anglo-American common-law tradition punishing or disapproving of suicide and assisted suicide; *id.* at 711; the common-law approach adopted by the American colonies; *id.*; the prohibition of suicide in colonial and state legislatures and courts; *id.* at 712–13; the criminalization of assisted suicide in most states at the time of the ratification of the Fourteenth Amendment in 1868; *id.* at 714–15; and states' recent reexamination and reaffirmation of the assisted suicide ban. *Id.* at 715–16.

Lawrence struck down as violating the Due Process Clause a Texas statute making it a crime for two people of the same sex to engage in certain intimate conduct. 539 U.S. 558, 578–79 (2003). The Court conducted a historical survey beginning with English criminal laws passed in 1533 and continuing through the prohibition of sodomy in the American

originalist Justices Scalia and Clarence Thomas).³⁸⁸ The Court's due process traditionalism analysis is not limited to and does not seek to determine the fixed meaning of constitutional text at the time of the adoption of the Fourteenth Amendment in 1868.³⁸⁹ Under that approach, the Court surveys historical events and developments at various points in time including, but not limited to, the time of the adoption of a constitutional provision.³⁹⁰

Third, Calabresi and Perl's fundamental rights/count-the-state-constitutions analysis illustrates the importance of an interpreter's discretion to frame the inquiry and the level of generality at which a claimed right should be characterized. In *Glucksberg*, a substantive due process decision cited by the authors, the Court instructed that "a 'careful description' of the asserted fundamental liberty interest" is required.³⁹¹ The specific Fourteenth Amendment issue of the constitutionality of state-mandated school segregation addressed in *Brown* is narrower than the broader and more general claimed right to a free public education as framed by Calabresi and Perl. Relevant and material to a careful description of the asserted interest is evidence of the actual existence of racially segregated schools in the states and not just the number of state constitutions containing public education provisions. Calabresi and Perl's sole and limited focus on the text of state constitutions ignores

colonies, the absence of state criminal prosecutions of persons engaging in same-sex relations until the 1970s, and state abolition of criminal laws prohibiting same-sex relations over the past few decades. *Id.* at 568–72. The Court then concluded that the nation's "laws and traditions in the past half century . . . show an emerging awareness that liberty" protects adults with regard to their decisions concerning their private sexual conduct. *Id.* at 571–72.

Interestingly, in the majority opinion in *Lawrence*, Justice Kennedy stated that the Framers and Ratifiers of the Due Process Clauses of the Fifth and Fourteenth Amendments "might have been more specific" if they had "known the components of liberty in its manifold possibilities." *Id.* at 578.

They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles on their own search for greater freedom.

Id. at 578–79. This passage clearly speaks to an evolving and not fixed constitutional meaning.

³⁸⁸ See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (Scalia, J., concurring) (expressing his "misgivings about Substantive Due Process as an original matter"); *id.* at 3062 (Thomas, J., concurring in part and concurring in the judgment) (arguing that "the original meaning of the Fourteenth Amendment offers a superior alternative" to the "legal fiction" of the Court's substantive due process doctrine).

³⁸⁹ See, e.g., *Lawrence*, 539 U.S. 558 (2003); *Glucksberg*, 521 U.S. 702 (1997).

³⁹⁰ See *supra* note 387 and accompanying text.

³⁹¹ *Id.* at 721 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 277–78 (1990)).

“the vast gap that can separate the law on the books from the law in life.”³⁹² That the text of a constitution proclaims a right or mandates certain protections does not mean that that right or protection actually existed in the real world.³⁹³ Actual history, lived experiences, and the real social meaning of racial segregation and subordination in public education and other areas matter. A sanitized account and exclusive focus on text renders invisible racist and white supremacist realities and fails to fully and accurately capture the specifics and dynamics of American apartheid.

Calabresi and Perl also state that the Privileges or Immunities Clause protects traditional and deeply rooted “fundamental civil rights” and argue that any right existing in 1868 could fairly be argued to be fundamental.³⁹⁴ Missing again is any recognition that the school integration issue involved a social and not a civil right. And the argument that any right existing in 1868 was arguably fundamental cannot be correct in all circumstances. Some rights may have been traditional and deeply rooted at that time; other rights in existence in 1868 may have been new or recent and therefore non-traditional and not yet deeply rooted ones. A more specific and precise description of the deeply rooted fundamentality approach is needed.

Fourth, and finally, Calabresi and Perl’s 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.”³⁹⁵ As Calabresi noted in an earlier work, “Legitimate transformative social change only happens, as it did in 1868 . . . when two-thirds of both houses of Congress and three-quarters of the states agree on a textual change.”³⁹⁶ Calabresi and Perl’s Article V consensus argument is not formalist, for they seek legal recognition of a purported fundamental right not actually considered, tested, and added to the Constitution via the Article V amendment process and by We the People. This consensus analysis is not consistent with fixed and original public meaning originalism.

D. Framework Originalism

Jack Balkin’s framework originalism considers the concepts referred to in the words in the Equal Protection Clause at the time of that provision’s enactment.³⁹⁷ “This is not purely an investigation into semantic definitions. We also want to know

³⁹² 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 298 (2014).

³⁹³ 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 Peoples’ 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 . . .”).

³⁹⁴ See *supra* notes 371–372 and accompanying text.

³⁹⁵ ACKERMAN, *supra* note 392, at 19.

³⁹⁶ Steven G. Calabresi, *Does the Fourteenth Amendment Guarantee Equal Justice for All?*, 34 HARV. J.L. & PUB. POL’Y 149, 156 (2011).

³⁹⁷ BALKIN, *supra* note 41, at 13.

if words in the clause were understood nonliterally—for example, as a metaphor or a synecdoche—and we want to know whether some words referred to generally recognized terms of art.”³⁹⁸

For Balkin, the original meaning of the “equal protection of the laws” 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.”³⁹⁹ Balkin submits that today’s application of the principles of equal protection may differ from the expectations people had in 1868 given our contemporary understandings and prior constitutional constructions.⁴⁰⁰ Vague and abstract clauses, like the Equal Protection Clause, “will likely reflect contemporary understandings rather than original understandings” as principles and standards are applied in changed circumstances.⁴⁰¹

What, then, are the underlying principles of the Equal Protection Clause? Balkin identifies four types of prohibited unequal treatment: 1) laws making “arbitrary and unreasonable distinctions between persons”; 2) “‘class legislation’ . . . unjustifiably singl[ing] out a group for special benefits or special burdens”; 3) “‘caste’ legislation . . . creat[ing] or maintain[ing] a disfavored caste or subordinated . . . group”; and 4) legislation restricting the “basic rights of citizenship” and treating persons as “second-class citizens.”⁴⁰²

Balkin concludes that state-mandated racial segregation in public schools violates these principles.⁴⁰³ Accordingly, *Brown* is an “obvious and uncomplicated application[] of the principles underlying the Fourteenth Amendment” and is a constitutional construction “foundational to our understanding of the equal protection clause.”⁴⁰⁴ Not bound by expected applications or the original public meaning or Framers’ intent or ratifiers’ understandings, Balkin’s heuristic and discretionary framework analysis of the Equal Protection Clause easily squares *Brown* with his originalist theory.

As demonstrated in this Part, the constitutional originalism employed by those addressing and answering in the affirmative the question whether *Brown* can be squared with and justified by originalism is in fact a discretionary interpretive methodology. Consider these discretionary moves:

1. The formulation of a core idea of black equality protected by the Fourteenth Amendment and putting the *Brown* Court to the choice of equality or segregation (Bork).

³⁹⁸ *Id.*

³⁹⁹ *Id.* at 44.

⁴⁰⁰ *See id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 222.

⁴⁰³ *Id.* at 230–31.

⁴⁰⁴ *Id.* at 231.

2. A textualist approach to the Privileges or Immunities Clause yielding a no-school-segregation directive not found in the text of that provision and not consistent with the Reconstruction-era taxonomy of rights (Perry).

3. Combining the Fourteenth Amendment's Equal Protection Clause and the Thirteenth Amendment's abolition of slavery and invoking Justice Harlan's dissent in *Plessy v. Ferguson* (Justice Scalia).

4. A focus on the post-adoption time period of 1868–1875 instead of the 1866–1868 proposal/ratification period of the Fourteenth Amendment (McConnell).

5. The formulation of a posited and textually derived determinate rule/principle violated by public school racial segregation and characterizing as beside the point the views of those in the Fourteenth Amendment's drafting and ratifying generation (Paulsen).

6. The articulation of a legal argument so complex that it could have been missed by those living in 1868, and the finding that by 1868 and as of 1954 the right to a public school education was fundamental and school segregation was therefore unconstitutional (Calabresi and Perl).

7. A framework originalist analysis identifying and applying underlying principles of the Equal Protection Clause and concluding that public school segregation on the basis of race violates those principles (Balkin).

These moves and choices and the marking of different paths to the *Brown*-is-originalist terminus do not meaningfully constrain interpreter discretion, nor do they faithfully and consistently seek the discoverable intent, understanding, or public meaning of a constitutional provision at the time of its adoption. Originalists seeking to demonstrate that *Brown* was rightly decided have clearly exercised discretion in ways that call into question the claimed constraining and restraining functions of originalism.

VI. CONCLUSION

This Article has examined originalists' efforts to demonstrate that the result reached by the Supreme Court in *Brown v. Board of Education* is consistent with and justified by originalism. As discussed herein, originalism is a discretionary interpretive methodology presenting originalists with several interpretive choice points and ample room for the introduction of an interpreter's preferences, predilections, values, and beliefs. That discretion has been exercised in originalist accounts contending (wrongly, in my view) that *Brown's* invalidation of state-mandated racial segregation in public schools can be squared with the original intent, understanding, or public meaning of the Reconstruction-era Fourteenth Amendment.

The concern that an interpretive approach leading to the conclusion that *Brown* was wrongly decided would not pass "the acid test" of originalism⁴⁰⁵ need not lead to the concoction of "implausible accounts of the Reconstruction Era understanding

⁴⁰⁵ BASSHAM, *supra* note 16, at 105.

of segregation.”⁴⁰⁶ “Man is not the measure of all things, as Socrates replied to the Sophists, and neither is *Brown* An interpretation of the Constitution is not wrong because it would produce a different result in *Brown*.”⁴⁰⁷ One could thus conclude that under a preferred interpretive methodology *Brown* was wrongly decided without calling into question the general validity of that methodology.⁴⁰⁸ While this would not alleviate the concern of some that such a conclusion could discredit originalism, it would be a candid acknowledgment that undiluted and unflinching originalism can in fact lead to an undesirable result and outcome (for example, school segregation does not violate the Fourteenth Amendment). Such methodological purity and consistency could reduce the temptation to make and act on discretionary and outcome-influential choices that evade and avoid the *Brown*-was-wrongly-decided position.

⁴⁰⁶ Dorf, *supra* note 16, at 958.

⁴⁰⁷ John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1463 n.295 (1992).

⁴⁰⁸ See VERMEULE, *supra* note 16, at 280. Vermeule advocates a Thayerian regime of judicial review in which judges defer to the legislatures and administrative agencies when the meaning of legal text is not clear and specific. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 142–43 (1893). Vermeule acknowledges that on this view “*Brown* was indeed wrong, in the sense that the judges had no business deciding that sort of question in the first place.” VERMEULE, *supra* note 16, at 280. While “[t]here is no general mechanism that can produce only happy endings,” under Vermeule’s approach the Court would not have “declared a constitutional right to own slaves,” “invalidated a generation’s worth of legislation against child labor,” or “invalidated congressional attempts to provide legal redress for gender-motivated violence.” *Id.* at 281.