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The Originalist Case for Brown v. Board of Education

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During the Bork debacle in 1987, one of the most potent weapons of Judge Bork's adversaries was to claim that his originalist approach to constitutional interpretation would have forced the Court to approve of racially segregated schools in 1954, in *Brown v. Board of Education*.[1] It seemed a fair point, or at least one of the fairer points that was made against him. An impressive array of academic authorities, from across the ideological and jurisprudential spectrum—including such figures as Alexander Bickel, Laurence Tribe, Richard Posner, Mark Tushnet, Raoul Berger, Ronald Dworkin, and Walter Burns—had come to the conclusion that under the original understanding of the Fourteenth Amendment, racial segregation of public schools was constitutionally permissible.[2]

Some (Tribe, Dworkin, Tushnet) greeted this as proof that originalism is morally bankrupt; some (Burns, Berger) accepted it, with equanimity, as part of the price we pay for having a constitution with determinate meaning that may not always coincide with our moral convictions; and some (Bork, Michael Perry) attempted to salvage *Brown* without abandoning originalism by moving to a higher level of generality, at which it might be said that no matter what the framers of the Fourteenth Amendment may have meant by "equal protection" or "privileges or immunities," the principle is commodious enough to accommodate the decision in *Brown*. But almost no one questioned the basic premise that, as a historical matter, segregation did not violate the commonly accepted meaning of the Amendment at the time it was drafted and ratified.

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1. 347 U.S. 483 (1954).

2. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY 117-33, 241-45 (1977); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 12-13 (1991); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374 (1990); Mark Tushnet, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1919 (1991).

My first inkling that this formidable academic consensus might be questionable came from reading an earlier *Brown* decision: *Railroad Company v. Brown*,[3] decided in 1873, in which the Supreme Court unanimously held that racial segregation is "discrimination"—indeed, that the railroad company's argument that separate-but-equal cars are nondiscriminatory was "an ingenious attempt to evade a compliance with the obvious meaning of the requirement"![4] The Court stated that in passing the nondiscrimination requirement in 1863, Congress necessarily must have intended to prohibit segregation, because "in the temper of Congress at the time, it is manifest the grant could not have been made without" the condition prohibiting segregation.[5]

To be sure, this *Brown* decision was not based on constitutional grounds and involved no point of interpretation of the Fourteenth Amendment. Nonetheless, if it seemed so obvious in 1873 that Congress in 1863 would have deemed segregation to be both "discriminatory" and "unjust," it is a bit odd that the Fourteenth Amendment, proposed in 1866 and ratified in 1868, should fail to recognize segregation as a form of inequality.

The earlier *Brown* decision caused me to wonder whether there might be other information bearing on the segregation question that had not found its way into the standard works on the subject. I therefore began to investigate the treatment of segregation during Reconstruction. To my surprise, I found that—far from being an accepted part of national life—school segregation had been the subject of extended debate in the years immediately following ratification. A close examination of the debates and votes on segregation between 1870 and 1875 now convinces me that *Brown v. Board of Education* was correctly decided on originalist grounds, not on the basis of any high level of generality about equality, but on the basis of the actual discussions and understandings of school segregation in the period immediately following ratification of the Amendment. At a minimum, history shows that the position adopted by the Court in *Brown* was within the legitimate range of interpretations commonly held at the time.[6]

3. 84 U.S. (17 Wall.) 445 (1873).

4. *Id.* at 452.

5. *Id.* at 452-53.

6. For a fuller account, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 955-84 (1995).

The difference between my analysis and most earlier treatments of the issue is that I look at the years immediately following ratification of the Amendment—to the debates over enforcement of the Amendment—instead of confining attention to the period leading up to ratification. Admittedly, 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. Even John W. Davis, arguing for a South Carolina board of education, who had every incentive to magnify the weight of this evidence, told the Court that "perhaps there has never been a Congress in which the debates furnished less real pablum on which history might feed."[7] It may come as a surprise to most modern lawyers, for whom equal protection and due process are central concepts of constitutional law, that the section of the Amendment containing these provisions was little discussed or debated at the time, and that Sections two and three of the Amendment, which are irrelevant today, received the lion's share of attention. The academic consensus that segregation was consonant with the original understanding is based on popular opinion and actual practice at the time, coupled with a few ambiguous statements in the legislative history. Not much to go on.

By contrast, the history from the period a few years later is extremely rich. School segregation was the dominant political issue of the early 1870s, as Congress debated what was to become the Civil Rights Act of 1875.[8] As originally proposed by Senator Charles Sumner, the Civil Rights Act guaranteed equality in access to various types of public accommodation, including railroads, inns, theaters, steamboats, cemeteries, and—most controversially—public schools.[9] We pay relatively little attention to this Act now because it was struck down as unconstitutional only a few years after it was enacted.[10] But it was struck down for reasons other than the segregation issue,[11] and the congressional deliberations over the Act are a useful source of insight into the

7. Argument of John W. Davis, Esq., on behalf of Appellees R.W. Elliott et al., *Brown v. Board of Education*, *in* 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 481 (Philip B. Kurland & Gerhard Casper eds., 1975).

8. *See* Civil Rights Act of 1875, 18 Stat. 335-37 (1875).

9. *See* CONG. GLOBE, 42d Cong., 2d Sess. 244 (1872).

10. *See Civil Rights Cases*, 109 U.S. 3 (1883).

11. The Act was invalidated because of the state action question. *See* McConnell, *supra* note 6, at 1090-91.

legal interpretation of the new Amendment by leading political figures of the era.

The Sumner bill unquestionably forbade segregation, and not just exclusion from facilities. The debates leave no doubt about that. For example, when the issue first came to the floor of the Senate, Joshua Hill, a Republican from Georgia, engaged in a colloquy with Sumner in which he said that he did not think it was a denial of equality to require blacks to sit in a different place in a railroad car. Sumner responded, "Why, sir, we have had in this Chamber a colored Senator from Mississippi," referring to Hiram Revels, "but according to the rule of the Senator from Georgia we should have set him apart by himself; he should not have sat with his brother Senators." Sumner asked whether Hill favored such a rule. To this Hill responded, "No," because "it is under the institutions of the country that he becomes entitled by law to his seat here; we have no right to deny it to him." "Very well," Sumner stated, "and I intend to the best of my ability to see that under the institutions of his country he is equal everywhere."[12]

Later in the debates, after Sumner's death, the new floor leader for the bill, Frederick Frelinghuysen of New Jersey, stated that under the bill, "a colored child has a right to go to a white school, or a white child to go to a colored school."[13] The leader of the Northern Democratic opposition, Allen Thurman of Ohio, when confronted with questions about the meaning of the bill, declared that "I do not think there is one member of the majority of the Judiciary Committee who will not say, if the question is put directly to him, that the meaning of the section is that there shall be mixed schools."[14]

The bill was debated for three and a half years. Both sides in the debate offered elaborate and sophisticated interpretations of the Constitution in support of their position. It must be understood that, at the time, the only conceivable source of congressional authority to pass the civil rights bill was the authority under Section five to enforce the substantive provisions of the Fourteenth Amendment.[15] Support for the bill was, therefore, tantamount to an interpretation of the Amendment. This is not

12. The colloquy is reported at CONG. GLOBE, 42d Cong., 2d Sess. 242 (1872).
13. 2 CONG. REC. 4168 (1874).
14. *Id.* at 4088.
15. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

mere conjecture; both supporters and opponents of the bill explicitly acknowledged that its validity hinged on the meaning of the Fourteenth Amendment. The Chairman of the Senate Judiciary Committee, for example, stated that one thing on which "both sides agree" is that the question was one of constitutional interpretation, and not merely of legislative policy:

> [E]ither . . . the democratic view of the amendment is right, that it does not touch these subjects at all, and therefore we cannot interfere with the right of the State to regulate its common schools . . . or else it does confer upon citizens of the United States a right, and that right is inherent . . . .[16]

General Benjamin Butler, Chairman of the House Judiciary Committee and primary sponsor of the bill in that chamber, explained that the bill's supporters "have all come to a conclusion on this subject . . . that these are rights guaranteed by the Constitution to every citizen, and that every citizen of the United States should have the means by which to enforce them."[17]

Thus, the votes and deliberations over the bill must be understood as *acts of constitutional interpretation* and not merely as political policymaking. In my view, these debates constitute the best available source of evidence about how the generation that framed the Fourteenth Amendment thought about the constitutionality of segregation. John Lynch, a black Representative and a leading supporter of the civil rights bill, stressed that his interpretation was based on the belief that "the Constitution as a whole should be so construed as to carry out the intention of the framers of the recent amendments . . . ."[18]

Let me provide a brief summary of the constitutional theory of the proponents. The Fourteenth Amendment, at its heart, embraces the principle of equality of civil rights: any civil right to which a white person would be entitled must be extended to all citizens on exactly the same terms. The civil rights to which this principle was understood to refer were, for the most part, common law rights, such as the right to enter into contracts, to own property, to sue and be sued, to be subject to the same criminal laws. This is the set of common law rights that were protected by the Civil Rights Act of 1866.[19] The Civil Rights Act of 1875 pro-

16. 2 CONG. REC. 4172 (1874).
17. *Id.* at 457.
18. 3 CONG. REC. 943 (1875).
19. *See* Civil Rights Act of 1866, § 1, 14 Stat. 27, 27 (1866).

ceeded on a similar theory. It protected another set of common law rights—those having to do rights of access to common carriers, public accommodations, and public facilities such as common schools. The theory of the Act is that black citizens, like white citizens, have the right to use these accommodations on an equal basis.

Opponents of the Act could respond either that segregation is not a form of inequality, or that education is a social rather than a civil right. One or the other of these arguments must be accepted if the proponents' constitutional theory is to be refuted.

On the question of segregation, the proponents found it obvious that segregation was a form of inequality. It is simply not true, as commonly thought, that segregation was universally accepted during this period as natural and normal. Sumner called segregation an "indignity, an insult, and a wrong."[20] There were endless speeches by supporters of the Act—not confined to radical Republicans—declaring that the only argument for segregation was "prejudice," and that segregation was "caste" legislation.[21]

On the "social rights" argument, opponents of the Act argued that individuals could not be coerced in their choice of association. This proved to be an ironic position, however, for under this theory, the Jim Crow laws of later generations were just as objectionable as the civil rights bill. Indeed, one of the most diehard opponents of civil rights, Representative H.D. McHenry of Kentucky, made the sarcastic statement that:

> If a man sees proper to associate with negroes, to eat at the same table, ride on the same seat with them in cars, or sees proper to send his children to the same schools with them, and place himself upon the same level with them in any regard, I would not abridge his right to do so . . . .[22]

Of course, this is precisely what the Jim Crow laws did—they abridged the right of white and black citizens to associate with one another. Thus, paradoxically, the "social rights" argument of the opposition turned out to be an argument against de jure segregation, just as much as against de jure integration.

In any event, the proponents had a ready answer: they required desegregation only of facilities and accommodations for

20. CONG. GLOBE, 42d Cong., 2d Sess. 242 (1872).
21. *See generally* McConnell, *supra* note 6, at 1011-14.
22. CONG. GLOBE, 42d Cong., 2d Sess. app. 217 (1872).

which there was a preexisting legal regime inhibiting freedom of association. The only change they were making, they said, was to prevent States from singling out race as a reasonable basis for classification. Confederate General P.G.T. Beauregard was quoted as saying:

> It would not be denied that in traveling and at places of public resort, we often share these privileges in common with thieves, prostitutes, gamblers, and others who have worse sins to answer for than the accident of color; but no one ever supposed that we thereby assented to the social equality of these people with ourselves. I therefore say that participation in these public privileges involves no question of social equality.[23]

These were areas in which the common law permitted only "reasonable" distinctions—and States were not permitted to treat race as a "reasonable" ground for classification.

How did these constitutional arguments fare?

In numerous votes between introduction of the bill in 1870 and passage of a stripped-down version of the bill in 1875, majorities in both Houses of Congress supported the desegregation position. At the high-water mark in May and June of 1874, the bill passed the Senate by a vote of 29-16 and won the support of the House (on a procedural vote) by a margin of 141-72.[24] That comes close to two-thirds. The margin of victory among supporters of the Fourteenth Amendment was far higher.[25] Moreover, both Houses consistently rejected versions of the bill that would have allowed separate-but-equal facilities.[26] The bill failed only because procedural rules in the House, permitting filibustering and dilatory motions, made a two-thirds vote necessary. Supporters of the bill came tantalizingly close, but could never break that barrier. On one fateful date in June, 1874, the switch of just two votes would have carried the measure, and the requirement of school desegregation would have been written into the law. Would history not have looked different if those two votes had changed?[27]

But the bill, in its strong version, failed. The Democrats were able to stave off action on the bill in the House throughout 1874.

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23. 2 CONG. REC. app. 479 (quoted by Rep. Darrall).

24. *See* McConnell, *supra* note 6, at 1094-95.

25. *See id.* at 1095-96.

26. *See id.* at 1098-99.

27. The schools provision of the Act would not have been subject to the "state action" problem that doomed the public accommodations provisions of the Act in the *Civil Rights Cases*, 109 U.S. 3 (1883).

Then, in the elections of that November, the Democrats won a landslide victory. When the lame duck Congress met in early 1875, the Republican majority was demoralized. Even then, their last great project was passage of the civil rights bill. The Democrats were willing to acquiesce in the bill if it were amended to permit separate-but-equal schools, but the Republicans angrily denounced this effort to introduce what they called "invidious discrimination in the laws of this country."[28] They preferred to delete coverage of schools from the bill altogether, rather than to countenance a separate-but-equal provision for schools. That did not mean that their constitutional interpretation had changed, but only that their political power to achieve enforcement of that interpretation had changed. Supporters of desegregated education still had hopes for the courts. James Monroe, Republican from Ohio, stated that black Americans "think their chances for good schools will be better under the Constitution with the protection of the courts than under a bill containing such provisions as this."[29]

Defeat of the schools provision was fateful as a legislative matter, but viewing the course of deliberations as an exercise in constitutional interpretation by persons well situated to know and understand the original meaning of the Fourteenth Amendment, the evidence of original meaning survives the defeat of the bill. Large majorities of both houses of Congress, and even larger majorities of supporters of the Fourteenth Amendment, concluded that it forbade de jure segregation of public schools. That fact puts to rest the notion that the Supreme Court had to disregard the original meaning of the Amendment in order to "do the right thing" in *Brown*.

28. 3 CONG. REC. 981 (1875) (remarks of Rep. Cain).
29. *Id.* at 998.