

1995

The Originalist Justification for Brown: A Reply to Professor Klarman

Michael W. McConnell

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Michael W. McConnell, "The Originalist Justification for Brown: A Reply to Professor Klarman," 81 Virginia Law Review 1937 (1995).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

REPLY

THE ORIGINALIST JUSTIFICATION FOR *BROWN*: A REPLY TO PROFESSOR KLARMAN

*Michael W. McConnell**

IN the preceding response, Professor Michael Klarman defends the conventional wisdom that the original understanding of the Fourteenth Amendment is inconsistent with the Supreme Court's decision in *Brown v. Board of Education*.¹ He writes in response to my article, *Originalism and the Desegregation Decisions*,² where I argued that congressional debates relating to the Civil Rights Act of 1875³ showed that the Fourteenth Amendment was widely understood at the time to forbid de jure segregation of public schools. Klarman concedes that those debates "demonstrate[] the existence of far broader support for school integration than many constitutional scholars would have thought likely at this early date."⁴ (Indeed, I showed that a substantial majority of both Houses of Congress and well over two-thirds of supporters of the Amendment supported legislation premised on the unconstitutionality of segregation.)⁵ And he concedes that my argument is "persuasive" that "this congressional support for school desegregation should be understood not merely as a policy preference, but also as probative of constitutional interpretation."⁶ That, coming from one of the most adamant defenders of the conventional wisdom, is a considerable concession. What, then, is the basis for Klarman's

* William B. Graham Professor of Law, University of Chicago Law School. The author wishes to thank the Arnold and Frieda Shure Research Fund for financial support during the preparation of this Reply.

¹ 347 U.S. 483 (1954).

² 81 Va. L. Rev. 947 (1995).

³ 18 Stat. 335 (1875).

⁴ Michael J. Klarman, *Brown*, Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 Va. L. Rev. 1881, 1882 (1995).

⁵ McConnell, *supra* note 2, at 953, 1099-1100.

⁶ Klarman, *supra* note 4, at 1882.

continued insistence that *Brown* is not even “‘within the legitimate range of interpretations’ of the Fourteenth Amendment”⁷—that my interpretation is “plainly indefensible”⁸ Surprisingly, for one defending so strong a claim, Klarman points to no new historical evidence that I overlooked and has little quarrel with the accuracy of my presentation of the facts. Only on one point (whether the Civil Rights Act of 1875 was clearly understood to require desegregation and not merely inclusion of blacks) does Klarman challenge the accuracy of my account of the facts, and (as I will show below) on that point he is plainly mistaken. Instead, putting aside his insinuations about my ideological motivations for writing the article, Klarman bases his position on questions of the relative weight to be given to actual practice as opposed to legal argument; to congressional interpretation as opposed to popular opinion; and to opinions expressed in 1872-75 as opposed to those expressed in 1866-68. Most significantly, he bases his position on a point of methodology: the supposed distinction between “principle” and “prejudice,” which he says underlies my analysis. None of this is persuasive.

I. POPULAR OPINION AND ACTUAL PRACTICE

Klarman’s interpretation of the original meaning of the Fourteenth Amendment is based primarily on evidence of popular opinion and actual practice regarding school segregation during the period of ratification. In effect, Klarman argues that given popular opinion and actual practice, the Fourteenth Amendment could not possibly have the meaning ascribed to it by the supporters of the 1875 Act—no matter what the words might say and no matter how those words may have related to the legal concepts of the day.⁹ On the facts, we have no disagreement: as I noted in the original article, school desegregation was deeply unpopular among whites, in

⁷ *Id.* at 1883.

⁸ *Id.* at 1935.

⁹ See *id.* at 1893-94 (criticizing my article for “analyz[ing] the legal concepts embedded in the Fourteenth Amendment” rather than “focusing upon popular attitudes toward school integration”); see also *id.* at 1884 (criticizing my article for “focus[ing] excessively on what the Fourteenth Amendment must have meant, given the conceptual legal apparatus with which Republicans approached issues of racial equality, and insufficiently on the practical reality that racial mores in most of the country in the mid-1860s were hostile to school desegregation”) (emphasis omitted).

both North and South, and school segregation was very commonly practiced. In ordinary times, this might be dispositive, or nearly so. Constitutional amendments generally reflect, rather than contradict, popular opinion.¹⁰ But these were not ordinary times. This was a time when a political minority, armed with the prestige of victory in the Civil War and with military control over the political apparatus of the rebel states, imposed constitutional change on the Nation as the price of reunion, with little regard for popular opinion.¹¹

Consider the Fifteenth Amendment. Given the clarity of its language, I do not suppose that Klarman or anyone else would dispute that the Amendment's purpose was to give otherwise qualified black citizens the vote. Yet the evidence of popular opinion and actual practice on this issue is virtually the same as that regarding school desegregation: enfranchisement of black citizens was wildly unpopular, had been rejected overwhelmingly by popular referenda in numerous states, was repudiated by the Republican platform in 1868, and had been adopted in actual practice only by a small handful of states.¹² If we follow Klarman's canons of interpretation—if we focus on evidence of popular opinion rather than the legal concepts embodied in the Amendment—the Fifteenth Amendment cannot possibly mean what it says.

Klarman states that "Republicans rammed the Fifteenth Amendment through Congress and the requisite number of state legislatures" in "clear contravention of the wishes of a majority of citizens in most Northern states."¹³ He does not explain why he thinks a similar explanation is so untenable with respect to the Fourteenth Amendment. But in fact, it would have been *easier* for Republicans to use language with potentially unpopular secondary conse-

¹⁰ We should not forget, however, that the nation recently came very close to ratifying a constitutional amendment (the ERA) that in all likelihood would have required a deeply unpopular result (conscription of women). Arguments of this sort should, therefore, be approached with caution.

¹¹ This is not to deny that the Republican drafters of the Fourteenth Amendment were forced to limit its scope in deference to racist popular opinion. See Klarman, *supra* note 4, at 1898, 1922-23. But the principal way in which the Fourteenth Amendment was limited was to exclude political rights from its ambit—a limitation that did not affect the segregation issue.

¹² See Klarman, *supra* note 4, at 1922-24 & nn. 106-111.

¹³ Klarman, *supra* note 4, at 1923-24.

quences than to put across an amendment, like the Fifteenth, that was explicitly and solely devoted to an objective that the majority disliked. Section One of the Fourteenth Amendment was drafted in technical legal language and was little discussed. Few ordinary citizens could have had much of an idea what it meant. Sections Two and Three, popular among Northerners (but of no modern significance), received most of the attention.¹⁴ The most conspicuous purpose and effect of Section One—constitutionalization of the Civil Rights Act of 1866—commanded widespread support. All of this made it unlikely that popular hostility to desegregation would have manifested itself in effective opposition to the Amendment.

Actual practice is no surer a guide than popular opinion. It takes time for changes in the law to be fully implemented. The Republicans in Congress first turned their attention to the most pressing problem—Black Codes—then to suffrage, then to violence against the freedmen, and then, finally, to segregation. By the time they got to the issue of segregation, their political power was on the wane and the nation was weary of civil rights enforcement. This does not mean their interpretation of the law was wrong. Even in states with unambiguous laws forbidding segregation in public schools and common carriers, for example, most jurisdictions continued to maintain the forbidden practice.¹⁵ By Klarman's way of thinking, this must mean that even explicit and unambiguous state antisegregation laws did not outlaw segregation.

It should be obvious that there were great disjunctions between legal enactments, popular opinion, and actual practice at this time. I do not pretend to have a theory explaining why the political system diverged so sharply from popular opinion, other than to suspect that in the aftermath of a Civil War, the political victors considered entrenchment of their principles more important than pleasing constituents.¹⁶ Whatever the explanation, constitutional interpreters would make a serious mistake if they assumed that

¹⁴ Klarman so notes. See *id.* at 1897-98.

¹⁵ Klarman acknowledges that "after enactment of a school desegregation law, it was not unusual to find particular localities continuing to maintain their segregated schools . . ." See *id.* at 1904 n. 58; 1908 n. 66; 1927 & nn. 118-19.

¹⁶ Klarman himself calls attention to the controversy among historians over the motivations of the congressional Republicans for deviating so sharply from the desires of their constituents. *Id.* at 1923 n. 110.

popular opinion and actual practice during this period were an accurate indication of legal meaning. As we know from examples of unambiguous provisions of law, like the Fifteenth Amendment, this was not always the case. That is why I have focused here on the legal dimension of the debate over school segregation, the actual arguments made by opponents and proponents regarding the meaning of the new amendment. That, it seems to me, is a more reliable guide to legal meaning than either popular opinion or actual practice.

II. THE MEANING OF THE SCHOOLS PROVISION

Only on one point does Klarman disagree with my account of the historical events surrounding the school desegregation controversy in Congress during Reconstruction. He states that "McConnell too readily dismisses the possibility that some supporters of the schools provision intended only to bar the exclusion of blacks from public education altogether, . . . rather than to require integration."¹⁷ With all respect, I do not think this suggestion can withstand examination of the debates. If the bill had only barred exclusion of black children from the schools it would not have been controversial. Even most opponents of the measure conceded that black children could not be excluded altogether. Typical was this statement by Augustus Merrimon of North Carolina, an articulate Democratic opponent of the bill:

[T]he State Legislature cannot pass a law providing that white children should be educated and that colored children should not be, because that would deny the equal protection of the laws. But when it affords the same provision, the same measure, the same character for the colored race that it afforded for the white race, there is no more discrimination against one race than there is against the other.¹⁸

The three and one half years of vitriolic debate over the bill were not based on disagreement about exclusion. The debate was about segregation and "mixed schools."¹⁹

¹⁷ *Id.* at 1911.

¹⁸ 2 Cong. Rec. app. at 359 (May 21, 1874).

¹⁹ A perusal of the debate over segregation, summarized in McConnell, *supra* note 2 at 1006-23, will confirm that segregation was the most prominent issue, from the first debate to the last.

Klarman speculates that the language of the bill "was probably understood to be ambiguous on the integration question," and indeed "may have been approved precisely because of its ambiguity."²⁰ It is odd, then, that leaders of both sides in the debate denied any ambiguity and stated unequivocally that it went beyond access, to desegregation. When confronted with Democratic proposals to allow separate but equal facilities, George Edmunds of Vermont, Chairman of the Judiciary Committee, responded, "if there is anything in the bill, it is exactly contrary to that."²¹ Frederick Frelinghuysen of New Jersey, floor leader for the bill, referred to it as forbidding "classification by race, separate schools for colored children."²² He said 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."²³ None of the Republican leaders made any attempt to maintain the ambiguity that Klarman speculates they so prized. Allen Thurman of Ohio, the leading opponent among northern Democrats, declared: "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."²⁴ Even if the language was ambiguous (or appears so to a modern reader), the debates cleared it up.

Even Klarman admits that "most Republican supporters of the schools provision who expressed an opinion" spoke in favor of "integration" and not merely inclusion.²⁵ When "most" advocates of a measure hold a certain interpretation (including the floor leader and committee chairman, seconded by the leader of the opposition), that generally is deemed sufficient to resolve doubts about its intended meaning. In this case, however, there is more: there was a debate over the meaning of the language, in which Senator George Boutwell argued that an amendment was necessary "to make clearer than the text of the bill seems to do what I suppose is the intention of the committee, and the intention of the

²⁰ Klarman, *supra* note 4, at 1912.

²¹ 2 Cong. Rec. 4171 (May 22, 1874).

²² 2 Cong. Rec. 3452 (Apr. 29, 1874).

²³ *Id.* at 4168.

²⁴ 2 Cong. Rec. 4088 (May 20, 1874).

²⁵ Klarman, *supra* note 4, at 1911.

Senate”—namely, to forbid segregation.²⁶ His amendment was defeated precisely because floor leaders denied that it was necessary, and Boutwell’s own language was suspected of going beyond the requirement of desegregation.²⁷

Klarman’s only examples of supporters of the bill who did not favor desegregation are Senators Pratt of Indiana and Alcorn of Mississippi.²⁸ Pratt and Alcorn, however, were part of a large group of Republicans (discussed in my original article)²⁹ who opposed *de jure* segregation but held that separate schools could be maintained in communities where the black population “prefer their children should be educated by themselves.”³⁰ On this basis they denied, in the speeches Klarman cites,³¹ that the bill would necessarily entail “mixed schools.” Klarman ignores the rest of Pratt’s speech, where he made it clear that the law should not permit official segregation of public facilities:

²⁶ 2 Cong. Rec. 4167 (May 22, 1874).

²⁷ See McConnell, *supra* note 2, at 1071-73. Klarman’s treatment of the Boutwell amendment is especially misleading. He states: “That those Senate Republicans holding the balance of power rejected both a pro- and an anti-segregation amendment would seem to confirm their preference for ambiguity.” See Klarman, *supra* note 4, at 1913. But the debates clearly reveal that the Republicans rejected amendments allowing separate-but-equal facilities (not once, but four times) *on the merits*, while they rejected Boutwell’s amendment on the ground that it was unnecessary and might lead to unintended consequences. The two amendments are not equivalent.

²⁸ Klarman, *supra* note 4, at 1911 n. 74. He also mentions three congressmen who “expressed no view on integration, while stating that they supported the bill because blacks in the South often were still being excluded altogether from public education.” *Id.* at 1911 & n. 75. One of these congressmen, Richard Cain, a black Republican from South Carolina, later cast a vote to eliminate schools from the protections of the bill rather than to prohibit exclusion at the price of permitting official segregation. On the context of this vote, see McConnell, *supra* note 2, at 1081-85. In his statement explaining this vote, Cain spoke passionately about the importance of education to the freedmen of the South and even stated that most blacks had no desire to attend “mixed schools.” Nonetheless, official segregation was unacceptable:

[I]f we cannot rally our friends to those higher conceptions entertained by Mr. Sumner . . . then I am willing to agree to a compromise. If the school clause is objectionable to our friends, and they think they cannot sustain it, then let it be struck out entirely. We want no invidious discrimination in the laws of this country.

3 Cong. Rec. 981 (Feb. 4, 1875).

²⁹ McConnell, *supra* note 2, at 1073-76.

³⁰ 2 Cong. Rec. 4082 (May 20, 1872) (statement of Sen. Pratt).

³¹ See Klarman, *supra* note 4, at 1911 n.74. I quoted these statements of Pratt and Alcorn fully in McConnell, *supra* note 2, at 1074 n.628, along with an explanation of their context.

... [I]f you will travel in a public conveyance, you must be content to share your convenience with the Indian, negro, Turk, Italian, Swede, Norwegian, or any other foreigner who avails himself of the same facility. . . . And so, if you choose to sit down at a public table in a public inn open to all comers who behave themselves, you must be content to sit beside or opposite to somebody whose skin or language, manners or religion, may shock your sensibilities.

....
In one State the practice of mixed schools has always been the rule, and in several of the Southern States the rule has been established by State laws. Pass this bill and all opposition will cease in a few months, when it is known that the question is settled; for people will come to see that the law is supported by reason and justice, and that free government demands the abolition of all distinctions founded on color and race.³²

If this is the best counterexample Klarman can find, he has confirmed, not refuted, my thesis.

III. QUESTIONS OF TIMING

Klarman's strongest argument is that the debates in the early 1870s are an unreliable indication of the understanding of an Amendment that was ratified between 1866 and 1868. This is a legitimate point. Indeed, I discussed this problem at some length in the original article, conceding that the timing of the evidence weakens my position but providing reasons why this should not be treated as dispositive.³³ In a nutshell, I consider the debates the best evidence of meaning in this context because they occur very shortly after ratification and provide the only significant body of evidence of the legal interpretation of the Amendment by those who participated in the process. Although in theory, evidence of the understanding of the state legislatures at the precise time of ratification would be a superior basis for interpretation, it does not exist. The debates over the 1875 Act are the best we have.

In my opinion, specific, extensive, focused debate regarding precisely the question at issue—even if it occurred a few years after ratification—is more illuminating than generalized, sporadic,

³² 2 Cong. Rec. 4082, 4083 (May 20, 1874).

³³ McConnell, *supra* note 2, at 1105-07.

ambiguous statements from 1866. Indeed, it is often the case that application of a new legal principle to secondary questions (that is, questions other than those that were the focus for adoption of the principle) will not receive serious consideration until after its adoption. That is the time when difficult questions of interpretation often first arise. Where only a few years have passed and there is no reason to believe that opinions have undergone dramatic transformation in the interim, post-enactment history is a common and perfectly legitimate source of information about the original understanding.

Klarman cannot dispute that the debates over the 1875 Act occurred only a few years after ratification. The bill was introduced in 1870, approximately two years after ratification; the most extensive debates occurred in 1872 and 1874; it was passed, in modified form, in 1875, less than seven years after ratification. This is roughly comparable in proximity of time to events of the Washington Administration, which are commonly considered useful evidence of the original understanding of the original Constitution.

To make his case, therefore, Klarman must contend that there was a "dramatic opinion shift . . . as to the desirability of school integration between 1866-68 and 1875."³⁴ But Klarman cannot quite bring himself to make the argument. Although at one point he says there is "abundant evidence" that this is the case,³⁵ he does not present any,³⁶ and a few pages later he concedes that "it is possible that McConnell is right," acknowledging that "Northern support for federal civil rights legislation" was "waning" and that it was "fairly common by the mid-1870s to find former defenders of black suffrage confessing the possibility that the Fifteenth Amendment had been a mistake."³⁷ It stands to reason that those who came to believe black suffrage was a mistake may have become less

³⁴ Klarman, *supra* note 4, at 1904.

³⁵ *Id.*

³⁶ He makes only the argument that since Northern desegregation had been "largely effectuated" by the 1880s, and the 1875 Act "chronologically bisected this period," it "seems clear that Northern opinion in 1875 was more favorable toward school desegregation than it had been in 1866-68." *Id.* The argument seems to be that if we have data points at both ends of a line, we can make confident predictions about the midpoint. Although this might satisfy the criteria for a rough conjecture, I would not call it "abundant evidence."

³⁷ *Id.* at 1907.

enthusiastic about other aspects of civil rights as well. I have seen nothing, in Klarman's response or elsewhere, to cast doubt on the conventional view that support for federal civil rights enforcement increased in the late 1860s and waned in the early 1870s.

Klarman's arguments to the contrary are mutually contradictory. On the one hand, he argues that the Democratic landslide in 1874 was evidence of popular rejection of the civil rights bill.³⁸ But of course this implies that enthusiasm for civil rights was at a low point—not a high point—in 1874-75. Accordingly, he shifts course and argues that the election of 1874 was not really a mandate against federal civil rights legislation after all, but only against the military aspects of Reconstruction. Now, he says: “[t]hat many Northerners lost their ardor for military intervention in Southern elections [in 1874] says little about their attitude toward federal civil rights legislation.”³⁹ If the election of 1874 “says little” about the public's attitude toward civil rights legislation, then Klarman has contradicted his own argument that popular opinion, expressed in the election of 1874, was opposed to the school desegregation bill.

Perhaps recognizing the trap he has set for himself, Klarman shifts course again, now contending that “any diminution in support for the general notion of federal civil rights legislation was counterbalanced by a significant increase in Northern support for the underlying substantive rights.”⁴⁰ The argument seems to be that Northerners were willing to protect civil rights in their own states, but not in Southern states and not by means of federal intervention. Even if this revisionist history is true (and peculiar though it sounds, I think there is something to it),⁴¹ it does not support Klarman's argument against my argument. If there was declining support in the early 1870s for federal enforcement of civil rights, then the passage of the 1875 Act and the near-passage of the school desegregation provisions cannot be attributed to a “dramatic shift” in opinion between 1868 and 1875 in favor of federal civil rights enforcement.

³⁸ *Id.* at 1901-03.

³⁹ *Id.* at 1907.

⁴⁰ *Id.*

⁴¹ See Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 *Const. Commentary* 115; 131 (1994).

The real answer, it seems to me, is that these points are inconclusive. Popular opinion regarding federal civil rights laws fluctuated during this period, first in favor and then against, but there is no reason to think that the net change was "dramatic" in one direction or the other.⁴² Accordingly, though evidence from the earlier period would—in theory—be of greater weight, there is no reason to dismiss pertinent evidence from 1870-75 in considering the original understanding of an amendment ratified in 1868.

IV. THE CONSTITUTIONAL ARGUMENTS OF 1870-75

My thesis that segregated education violated the original understanding of the Fourteenth Amendment is based primarily on a detailed analysis of the arguments made by proponents of the schools provision of the 1875 Act. Klarman does not dispute either the accuracy of this account of their constitutional views or the cogency of those arguments in terms of the legal-interpretive canons of the day. I found that a substantial majority of the Congress (and overwhelming majorities of Fourteenth Amendment supporters) either explicitly (through their arguments) or implicitly (through their votes) took the position that public school segregation violates the Fourteenth Amendment. I argued that, viewed as an act of interpretation, this was powerful evidence that the predominant understanding of the Amendment (especially among its supporters) was that it forbade school segregation.

Even more provocative than this evidence of majority opinion, however, was the stance of the Democratic minority. Opposition to the school desegregation bill commanded somewhat more than

⁴² By contrast, historical evidence abounds that attitudes toward civil rights changed dramatically at or around the time of the Compromise of 1877. See Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 575-87 (1988); C. Vann Woodward, *Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction* (1951); McConnell, *supra* note 41. Klarman accuses me of being "inconsistently attentive to the possibility that constitutional values shift over time" because I maintain that opinion regarding federal enforcement of civil rights had shifted by the time of the *Civil Rights Cases* in 1883, but pay "relatively little heed to the possibility of a similarly dramatic opinion shift" between 1866-68 and 1875. Klarman, *supra* note 4, at 1903-04. I think one should always be alert to the possibility of opinion shifts. The difference is that there was indubitably an opinion shift of enormous magnitude around 1877, whereas I find little evidence of such a shift during the relatively short span of Reconstruction.

one third of the members of each house of Congress. This was a large enough block to prevent passage of the school desegregation bill, because of filibustering and procedural hurdles that precluded action by majority vote in 1872 or 1874. But even this overstates the degree of support for the interpretation of the Fourteenth Amendment that was advocated by the segregationists and rejected by the Court in *Brown*. First, some part—unquantifiable but substantial—of the opposition to the schools bill was based on admittedly nonconstitutional arguments, which should not be taken into consideration in assessing the dominant understanding of the constitutional provision. Moreover, key elements of the constitutional arguments made against the civil rights bill, properly understood, constitute arguments *against* the result in *Plessy* and *in favor* of the result in *Brown*. Klarman's lack of interest in what he calls "conceptual legal apparatus"⁴³ causes him to overlook entirely this significant aspect of the 1875 Act debates.

In Part II of the article, I identified and discussed the four major arguments of the opponents of the Act. Two of these are what I call the "constitutional arguments of the opposition":⁴⁴ that segregation is not unequal within the meaning of the Amendment,⁴⁵ and education is not a civil right protected by the Amendment.⁴⁶ A third argument was based on considerations of "policy" or practical consequences: desegregation, many Democrats and some Republicans said, would imperil public education in the South.⁴⁷ The fourth argument was that the principles of the Reconstruction Amendments were pernicious and should not be extended any farther.⁴⁸ It is worth considering each of these in turn.

⁴³ Klarman, *supra* note 4, at 1884.

⁴⁴ McConnell, *supra* note 2, at 1005.

⁴⁵ *Id.* at 1006-23.

⁴⁶ *Id.* at 1023-43.

⁴⁷ *Id.* at 1043-46.

⁴⁸ *Id.* at 1046-49. Klarman suggests that there exists another principled constitutional argument against the bill that I overlooked. Following Professor Herbert Wechsler's well-known argument against *Brown*, Klarman observes that desegregation could "coerce individuals into undesired associations," which the Fourteenth Amendment does not require. Klarman, *supra* note 4, at 1899. Wechsler's position, however, was simply a restatement (without attribution) of the Democrats' argument that the 1875 Act legislated "social rights" rather than "civil rights"—an argument I treated at length in the original article. McConnell, *supra* note 2, at 1014-23. As I explained there, the Republicans responded that the common law of common carriers *already* had the effect of coercing

A. Segregation

As to the first argument, I showed that the theory that segregation is not a form of inequality was roundly rejected in a number of votes throughout the period, including the final passage of the Act. Klarman essentially concedes this point, in a footnote in which he acknowledges extensive historical evidence that segregation was viewed as unequal *in the context of transportation*.⁴⁹ Thus, even Klarman concedes that the argument that *Plessy* was incorrectly decided on originalist grounds is powerful. Indeed, he says the argument against *Plessy* is "even stronger" than I made out.⁵⁰ Of course, if segregation is unequal in streetcars, it is unequal in schools as well.

Surprising though it is (given the conventional wisdom on this issue) that segregation was so widely deemed to be a form of invidious discrimination, it is even more intriguing to find that one of the most prominent arguments against the Act in the early 1870s—that the bill interfered with "social rights"⁵¹—was an argument *against* the result in *Plessy v. Ferguson* in 1896. According to this argument, the desegregation bill was unconstitutional because it purported to regulate social relations, which, opponents said, must be left to private decisionmaking. Thus, Representative Durham said that "[w]e have no more right or power to say who shall enter a theater or a hotel and be accommodated therein than to say who shall enter a man's private house."⁵² McHenry said that "[i]f 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, . . . I would not abridge his right to do so."⁵³ Senator Thurman described government interfer-

individuals into undesired associations and that the proposed Act would simply forbid states from singling out race as a reasonable ground of distinction. I particularly refer readers to the speeches quoted in McConnell, *supra* note 2, 1022.

⁴⁹ Klarman, *supra* note 4, at 1882 n. 7.

⁵⁰ *Id.*; This is at the beginning of the article. By the end, Klarman is excoriating constitutional scholars who criticize *Plessy*, which he says was "regrettable, but essentially inevitable, given the background social and political context within which the Court necessarily functions." Klarman, *supra* note 4, at 1932.

⁵¹ See McConnell, *supra* note 2, at 1014-23; see also *id.* at 1121-23 (relating Democrats' arguments that desegregation would interfere with the right to voluntary association).

⁵² Cong. Globe, 42d Cong., 2d Sess. 3251 (May 9, 1872).

⁵³ Cong. Globe, 42d Cong., 2d Sess. app. at 217 (Apr. 13, 1872).

ence with the citizens' private rights in these regards as tyranny.⁵⁴ This principle—that social rights and social relations are outside the legitimate range of governmental regulation and must be left to private choice—was violated just as clearly by the Jim Crow laws of *Plessy* as it was by the school desegregation provisions of the civil rights bill. Thus, by the very arguments of the opposition, *Plessy* was wrongly decided.

B. Education as a Civil Right

The second argument—that public education is not a “civil right” for which equality was required under the Fourteenth Amendment—was a closer question at the time. A substantial majority of both Houses of Congress (and an even more substantial majority of supporters of the principles of the Reconstruction Amendments) cast votes at various times that were premised on the constitutional view that education *was* such a civil right. But they were never able to surmount procedural hurdles in the House and thus never enacted these principles into law. The ultimate compromise version of the Civil Rights Act of 1875, which forbade segregation in common carriers but not schools, but which blocked explicit endorsement of separate-but-equal schools, can be seen as reflecting the view that schooling was not a civil right.

It is significant, however, that leading figures in the opposition to the Act expressly conceded that education was within the ambit of constitutional protection (disputing only that segregation is a form of unconstitutional inequality). Representative Vance of North Carolina, for example, agreed that “[o]ne of the civil rights of the colored man undoubtedly is the right to be educated out of moneys raised by taxation,”⁵⁵ and Augustus Merrimon, a leading Democratic spokesman in the Senate, under questioning by Morton of Indiana, “admit[ted] . . . with all its force” that “if the State law excludes the colored children from the schools entirely, that is a violation of the fourteenth amendment.”⁵⁶ It is evident, then, that not only the Republican majority, but a significant portion of the Democratic opposition, believed that education was a civil right.

⁵⁴ Cong. Globe, 42d Cong., 2d Sess. 27 (Feb. 6, 1872).

⁵⁵ 2 Cong. Rec. 555 (Jan. 10, 1874).

⁵⁶ 2 Cong. Rec. app. at 359 (May 21, 1874).

That, to me, is more significant than the final vote, in which a hodgepodge of reasons to oppose the schools provision, some of them mutually inconsistent and some of them nonconstitutional, combined to produce the result.

Moreover, even under key arguments of those opponents who denied that education was a civil right under the conditions of the 1870s, education would become a civil right by the turn of the century and certainly by the time of *Brown*. The nub of the argument was that "civil rights" do not include all benefits of state law, but are confined to those that are stable, reasonably uniform among the states, nondiscretionary, and enforceable as a matter of law. Education in the early 1870s, especially in the South, was—by contrast—in a fledgling and uncertain state. No child (white or black) could be confident of receiving a public education, and no such right was legally recognized or enforced. By the turn of the century, however, a right to public education in some form was included in almost every state constitution. Common schools had become the "pillars of the republic."⁵⁷ I thus argued that *even assuming the arguments of the opponents were correct when made*, they would not support the same conclusion under the different factual circumstances of 1954.⁵⁸

Klarman seizes on this argument as an example of the indeterminacy of originalism: the problem of selecting the appropriate level of generality.⁵⁹ To the contrary, I think the example confirms that the level of generality is itself an historical question, susceptible of reasoned historical inquiry.⁶⁰ It is not controversial that the framers of the Fourteenth Amendment used the concept of "civil" (as opposed to "social" or "political") rights as their basis for analysis. The two sides in the 1875 Act debates argued about whether education is a civil right; they did not argue about whether civil rights are protected by the Amendment. This categorization of education as a "civil right" (or not) was not a matter of mere conclusory

⁵⁷ See McConnell, *supra* note 2, at 967 n.79 (citing Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780-1860*, at 176-79 (1983)).

⁵⁸ I explain this point in McConnell, *supra* note 2, at 1103-04.

⁵⁹ Klarman, *supra* note 4, at 1926-28.

⁶⁰ See Robert Bork, *The Tempting of America: The Political Seduction of the Law* 149 (1990) ("[A] judge should state the principle at the level of generality that the text and historical evidence warrant.").

labelling or assertion, but of reasoned legal argument, which we can understand and evaluate. Klarman does not question my demonstration that education was a civil right according to the theories of the Republican majority. It is telling that education in its present form is a civil right even under many of the arguments of the Democratic minority. Klarman attempts to equate this form of conventional legal analysis with free-form modernist interpretation, in which interpreters can choose whatever level of generality they wish.⁶¹ That, it seems to me, is not a fair reading.⁶²

C. *Nonconstitutional Arguments*

It is my position that the opponents' third and fourth arguments—based on policy and on hostility to the Fourteenth Amendment—should be disregarded when assessing the relative strength of the two opposing interpretations of the Amendment. If an argument is expressly based on a nonconstitutional ground, it is not an argument about the meaning of the Amendment. Thus, to the extent that the Democratic opposition to the bill was “a rearguard action by Southern conservatives who had supported slavery, opposed Reconstruction, and now were opposing desegregation on much the same ground,”⁶³ that portion of the opposition should be disregarded as an interpretive matter.⁶⁴ I would have thought this uncontroversial.

Klarman takes strong exception to this analysis. But his attack is based on a misunderstanding—if deliberate, a distortion—of my position. In place of the distinction between constitutional and nonconstitutional arguments, which I thought I had made rather clearly (even labelling them as such in the subheadings), Klarman interprets my article as distinguishing between arguments based on “principle” (meaning “a commitment to racial equality”) and “prejudice” (meaning “support for white supremacy or racial seg-

⁶¹ Klarman, *supra* note 4, at 1919.

⁶² Klarman's reading, *supra* note 4, at 1899 & n. 39; 1917-19, seems to be based largely on my statement that “the legal concept, ‘civil right,’ introduces a degree of contingency.” McConnell, *supra* note 2, at 1103. Perhaps my word choice (“contingency”) was a bit modernist. I meant only that this legal concept, like so many others, involves an application of legal criteria to facts, and facts can change.

⁶³ McConnell *supra* note 2, at 1066-67.

⁶⁴ I explain this position in McConnell, *supra* note 2, at 1033, 1048-49, 1095.

regation").⁶⁵ According to Klarman, I reach my conclusions about the originalist justification for *Brown* by assuming that "[o]nly constitutional principle, not prejudice, counts in [the] originalist calculus."⁶⁶

I agree with Klarman that an argument of this sort would be nonsensical. Fortunately, the "principle/prejudice dichotomy," on which so much of Klarman's criticism rests, is Klarman's dichotomy, not mine.⁶⁷ The argument in my original article does not depend, to any extent whatsoever, on this supposed distinction. In my view, the proper distinction is between positions (whether prejudiced or not) that are based on *interpretation* of the Constitution and those that are not. Thus, I treated the arguments that segregation is not unequal and that education is not a civil right as serious interpretations of the Constitution, without regard for whether they were "prejudiced" in the sense of being motivated by racial bias. By the same token, I gave serious consideration to the possibility that some Republican support for the bill was predicated on grounds of "policy" as opposed to interpretation⁶⁸ and concluded that support for the bill necessarily rested on constitutional interpretation.⁶⁹ Whether an argument is "prejudiced" does not affect my treatment of the argument.

The conclusion remains: out of the slightly more than one third of the congressmen who opposed the school desegregation bill, a substantial, though unquantifiable, portion of the opposition was based on reasons that were nonconstitutional in nature. To the extent that this is true, the preponderance of constitutional opinion in favor of school desegregation was correspondingly even higher than the votes on the schools provision indicate.

⁶⁵ Klarman, *supra* note 4, at 1894-95. For reiterations of the "principle"/"prejudice" dichotomy, see *id.* at 1896-1903.

⁶⁶ *Id.* at 1894.

⁶⁷ Klarman juxtaposes the terms "principle" and "prejudice" at least nine times. I never do. Not only do none of Klarman's citations to my article reveal any such dichotomy, but a computer search indicates that I never used the terms "principle" and "prejudice" within 20 words of each other, except in a quotation from Senator Frelinghuysen.

⁶⁸ See McConnell, *supra* note 2, at 1110-17.

⁶⁹ Klarman apparently agrees with this part of my analysis. See Klarman, *supra* note 4, at 1909 ("I am persuaded by McConnell's claim that few Republicans would have seen themselves free, under Section Five of the Fourteenth Amendment, to enact a law broader in scope than the rights protected against state interference by Section One.").

V. CONCLUSION

There is a consistent theme to Klarman's criticisms of my position. It has little to do with differences over the events of 1866-68 or of 1870-75, but has much to do with the meaning of constitutional law. In my view, constitutional language is an embodiment of legal principles; it is necessary to understand those principles in order to understand the Constitution. To Klarman—apparently—the Constitution is nothing but a set of policies that enjoy popular acceptance at the time of ratification, followed by judicial “interpretation” in light of the conditions and opinions of later years. Thus, Klarman says that the question for an originalist is whether “a majority of state legislators in a supermajority of the states supported [school desegregation] at the time of ratification.”⁷⁰ To me, the question is whether school desegregation fits within the legal principle of equality with regard to civil rights, which the Fourteenth Amendment was understood to embody. I believe a dispassionate look at the debates over the 1875 Act in the context of the legal arguments of the Reconstruction era will confirm that there is a strong historical case that *Brown* was an accurate reflection of the original meaning, lost as a consequence of the end of Reconstruction and the many decades of Jim Crow.

Klarman is critical of my preoccupation with “legal concepts” and “conceptual legal apparatus.” But that is a product of his own preoccupation with the “historical forces—political, social, economic, ideological, cultural”⁷¹ that influence the changing interpretation of constitutional meaning over time. I do not begrudge him his preoccupation; indeed, I am grateful for it and learn a great deal from his labors. But we should not fail to perceive the underlying assumption that he brings to his scholarship: there is no point in trying to figure out whether decisions were right or wrong—in “justifying” decisions or explaining why they were “mistakes.”⁷² We should understand constitutional decisions as nothing more than “inevitable byproducts of very different political and social milieus.”⁷³ As shown by his observations on Bruce Ackerman and

⁷⁰ Klarman, *supra* note 4, at 1885.

⁷¹ Klarman, *supra* note 4, at 1934.

⁷² Klarman, *supra* note 4, at 1932-36.

⁷³ Klarman, *supra* note 4, at 1933.

John Hart Ely,⁷⁴ this is not just an attack on originalism. It is an attack on the traditional enterprise of constitutional law, in which the meaning of the Constitution is seen to be a legitimate question for historical and interpretive inquiry.

⁷⁴ Klarman, *supra* note 4, at 1929.

