RESPONSE

BROWN, ORIGINALISM, AND CONSTITUTIONAL THEORY: A RESPONSE TO PROFESSOR MCCONNELL

Michael J. Klarman*

Is the Supreme Court's decision in Brown v. Board of Education\(^1\) consonant with the original understanding of the Fourteenth Amendment? If "original understanding" is taken to mean the Framers' specific intentions with regard to the practice of school segregation, the overwhelming consensus among legal academics has been that Brown cannot be defended on originalist grounds.\(^2\) Those who have sought to reconcile Brown with the original understanding have done so by elevating the level of generality at which the Framers' intentions are described—for example, by highlighting their decision to employ general equality language rather than to enumerate a list of prohibited practices and protected rights.\(^3\) In an important and provocative recent article, Professor Michael McConnell argues that Brown is susceptible of a more persuasive originalist justification than most commentators have appreciated.\(^4\) Focusing upon the congressional debates surrounding the 1875 Civil Rights Act ("1875 CRA"),\(^5\) McConnell argues that in 1874 a

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* Professor of Law and Class of 1966 Research Professor, University of Virginia. I have benefited from the enormously helpful comments of Mike Seidman, John Harrison, Bill Stuntz, Barry Cushman and Eric Foner. Melissa Mather provided both excellent research assistance and insightful comments on an early draft. By mutual agreement Professor McConnell has received the final word in this exchange; I did not see his reply until after my Response was sent to the printer for the last time.


2 See the sources cited in Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 950-53 & nn.6-16 (1995) (collecting sources illustrative of this "conventional wisdom").

3 See sources cited infra note 94; see also McConnell, supra note 2, at 952 n.14 (collecting illustrative sources).

4 McConnell, supra note 2.

5 18 Stat. 335 (1875).
majority of both Houses of Congress evinced support for compulsory school desegregation. Because these debates constitute the most extensive congressional discussion of the school segregation issue during Reconstruction, McConnell contends, they shed important light on the original understanding of the Fourteenth Amendment.

McConnell makes an important contribution to our understanding of congressional attitudes toward school segregation in the 1870s. He demonstrates the existence of far broader support for school integration than many constitutional scholars would have thought likely at this early date. Furthermore, McConnell 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—that is, most congressmen at the time would have understood the congressional enforcement power under Section Five of the Fourteenth Amendment as limited in scope to the rights protected against state interference by Section One. Finally, McConnell offers tantalizing support for the proposition that, even if the original understanding of the Fourteenth Amendment cannot justify Brown, it can condemn Plessy v. Ferguson, since most congressional Republicans apparently deemed racial segregation on common carriers to be unconstitutional.\(^6\)

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\(^6\) 163 U.S. 537 (1896).


McConnell notes not only that Congress did include common carriers, unlike schools, in the final version of the 1875 CRA, but also that Congress insisted on the desegregation of railroads in the District of Columbia during the 1860s, while simultaneously refusing to integrate the district's schools. McConnell, supra note 2, at 982, 984-85. On these points, see also Maltz, "Separate But Equal," supra, at 558-67. The originalist case against Plessy is even stronger than this, however. Many cities' streetcars, unlike their public schools, were integrated in actual practice around the time of the Fourteenth Amendment's ratification, often owing to the War's ideological spin-off effects. See, e.g., Roger A. Fischer, The Segregation Struggle in Louisiana, 1862-77, at 37-38 (1974); Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877, at 28, 371 (1988); August Meier & Elliott Rudwick, Along the Color Line: Explorations in the Black Experience 309
Yet the crux of McConnell’s claim is unpersuasive: He fails to show either that Brown is correct on originalist grounds, or even, as he more modestly claims, that Brown is “within the legitimate range of interpretations” of the Fourteenth Amendment. Part I of this Response addresses the four principal difficulties with McConnell’s originalist defense of Brown based on the 1875 CRA debates: his focus on legal principle rather than actual practice, his prioritization of congressional sentiment over popular opinion, his failure adequately to consider the possibility of values changing over time, and his equation of “full and equal enjoyment” language with integrationism. In seeking to defend Brown on originalist grounds, McConnell unintentionally illuminates three of the principal difficulties with originalist constitutional theory. Part II discusses these problems in the context of the school desegregation debate: dead hand control, whose intentions count (framers or ratifiers), and multiple levels of generality. Finally, Part III briefly considers some broader issues involving Brown and the relevance of history to constitutional theory.


McConnell, supra note 2, at 1093; id. at 956 (arguing that the historical evidence “is far more equivocal than the scholarly consensus suggests”); id. at 1140 (suggesting that the Court in Brown could have “discovered strong support for its holding” in original understanding).
I. The Original Understanding of the Fourteenth Amendment Does Not Support Brown

McConnell's effort to justify Brown on originalist grounds fails for four independent reasons. First and foremost, McConnell neglects sufficiently to consider the political and social context in which the Fourteenth Amendment was drafted and ratified. It is inconceivable that most—indeed even very many—Americans in 1866-68 would have endorsed a constitutional amendment to forbid public school segregation. McConnell focuses 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. Second, McConnell never adequately defends his particular brand of originalism—that the meaning of the Fourteenth Amendment reposes in the intentions of its congressional drafters, rather than in those of its state legislative ratifiers (or of either's constituents, manifesting their preferences at the polls). Thus he fails to show why opposition to school segregation as manifested in congressional debates on the 1875 CRA should count more heavily in the originalist calculus than does popular hostility toward school desegregation as manifested in the overwhelming repudiation of the Republican Party in the 1874 congressional elections. Third, McConnell's argument relies almost entirely upon congressional debates occurring between 1872 and 1874. He pays insufficient attention to the possibility that civil rights sentiment changed dramatically between 1866 and 1872-74 and thus that the congressional debates on the 1875 CRA might constitute unreliable evidence of what congressmen intended when they drafted the Fourteenth Amendment. Fourth and finally, McConnell exaggerates the extent to which congressmen who supported the schools provision of the civil rights bill in 1874 understood its "full and equal enjoyment" language to require desegregation, as opposed to simply prohibiting exclusion of blacks altogether from public education.

A. Principle, Practice, and Prejudice

For an originalist to believe that the Fourteenth Amendment forbade school segregation, it would seem necessary to show, roughly
speaking, that a majority of state legislators in a supermajority of the states supported that position at the time of ratification. One might quibble with this statement by arguing, for example, that legislators sometimes are willing to swallow the "disagreeable" consequences (school desegregation) that accompany embrace of a valued principle (race neutrality). But this possibility seems remote when the disagreeable consequence arouses great intensity of preference and the valued principle already has been narrowed (limited to "civil" equality) in order to accommodate constituent preferences (the racism of Northern whites). Thus if, as I shall now endeavor to show, Northern state legislatures continued to oppose school desegregation in 1866-68, it is highly unlikely that they would have understood the Fourteenth Amendment to prohibit that practice or that they would have acquiesced in its passage had this been their understanding.

McConnell concedes that nowhere near a supermajority of state legislatures would have endorsed school desegregation in 1866-68. He proffers arguments as to why this basic fact is not fatal to his claim, but they are problematic. I shall examine them momentarily. First, though, it may be useful to conduct a brief state-by-state canvass to demonstrate precisely how little public support existed for school desegregation in the United States in 1866-68.

In the immediate postbellum period, racially integrated schools were the norm only in parts of New England and the upper Midwest. Vermont and New Hampshire had never segregated the small numbers of black children attending public school in those states. The Massachusetts legislature, dominated by Know-Nothings and responding to the furor raised by the Kansas-Nebraska

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9 See McConnell, supra note 2, at 1100.
10 I agree with McConnell that the original understanding of the Southern state legislatures, which were coerced into ratifying the Fourteenth Amendment as a price of regaining their congressional representation, may not be a meaningful notion. See infra note 105.
11 McConnell, supra note 2, at 956 (conceding that school segregation "almost certainly enjoyed the support of a majority of the population even at the height of Reconstruction"); see also id. at 968-70.
Act, had desegregated the Boston schools in 1855 (thus effectively overruling the Massachusetts Supreme Court decision in Roberts v. City of Boston\textsuperscript{13}), while other Massachusetts towns had voluntarily desegregated their schools some years earlier. In Rhode Island, desegregation legislation had been successfully resisted from the late antebellum period through 1865, before being enacted in 1866. In Connecticut there had been no organized effort to desegregate the schools before the Civil War, and integration legislation was enacted only in 1868—perhaps too late to be considered part of that state’s original understanding of the Fourteenth Amendment. Wisconsin apparently had no segregated schools at any time, while in Michigan, Minnesota and Iowa such schools were aberrational and certainly did not constitute official state policy. In 1867 the Michigan legislature mandated school desegregation for those localities, including Detroit, which had not already integrated on their own initiative.\textsuperscript{14}

Throughout most of the rest of the former nonslaveholding states, segregation remained the rule at the state level, although occasionally integration prevailed in particular (often formerly abolitionist) locales. New York state law in the late 1860s permitted, and sometimes required, localities to segregate their schools; the first significant local antisegregation movements—in places like Albany and Buffalo—achieved results only in the early 1870s.\textsuperscript{15} Not until 1873 did New York pass a statute which many contemporaries understood to require integration, though subsequent courts consistently interpreted it to permit segregation. Segregated education remained largely undisturbed in the areas of highest black population concentration, New York City and Brooklyn, until roughly 1880, and large percentages of black students in


\textsuperscript{14} For this paragraph, see J. Morgan Kousser, Dead End: The Development of Nineteenth-Century Litigation on Racial Discrimination in Schools 18, 47 & n.59 (1986); Fishel, supra note 12, at 169-83, 238-43; Ment, supra note 13, at 12-129.

\textsuperscript{15} The only exception was Rochester, New York, where the schools were integrated in the 1850s. See Ment, supra note 13, at 76-81.
those cities continued to attend segregated schools well into the 1890s. Not until 1900 did New York State enact an unambiguous ban on school segregation. The Pennsylvania legislature in 1854 had required the creation of segregated schools in districts with twenty or more black schoolchildren; previously blacks could simply be excluded from public education altogether. Yet this legislation was widely ignored through the early 1870s, as blacks in many locales continued to be denied public education. Pennsylvania did not enact a compulsory desegregation law until 1881. Many northern New Jersey communities began to desegregate on their own initiative in the early 1870s, though state legislation barring school segregation did not pass until 1881. That legislation was widely ignored in southern New Jersey towns and cities through the final decades of the nineteenth century.16

Midwestern states were even less supportive of school integration than their Mid-Atlantic counterparts. Before the Civil War, Ohio passed legislation requiring localities to extend public education to blacks, but segregation was permitted as a matter of local option. At the time of the Fourteenth Amendment’s ratification, public schools remained segregated everywhere except in northern parts of the state, especially in the Western Reserve around Cleveland and Oberlin. Central Ohio cities such as Dayton, Springfield and Columbus voluntarily moved toward integration in the 1880s (usually for financial reasons), but state law did not actually require desegregation until 1887, and was routinely defied in Cincinnati and smaller southern Ohio towns with large percentages of blacks well into the twentieth century. The Indiana legislature as late as 1867 continued to reject the governor’s recommendation to extend public education to blacks (in segregated schools). Legislation adopted in 1869 finally required Indiana localities to provide separate schools for blacks, and in 1877 the law was strengthened to mandate the integration of the common schools where no separate black schools had been established. Not until after World War II did Indiana law forbid racial segregation in public schools. Likewise in Illinois, many localities continued to exclude blacks entirely.

from public education through the late 1860s and early 1870s. Not until Illinois adopted a new constitution in 1870 and enacted implementing school legislation in 1872 were local communities required to provide public education to blacks; segregation was authorized as a matter of local option. While that law was strengthened two years later in response to some local failures to provide any public instruction to blacks, and many northern Illinois communities had integrated their schools by the early 1870s, Illinois law continued to require integration only where blacks lived in insufficient numbers to justify maintenance of a separate school. Kansas law did not prohibit school segregation until 1874, and then did so for only five years, at least with regard to the state's largest cities. Far Western states were, in many ways, even more racist than their Midwestern counterparts, probably owing to complications posed by their large Chinese populations. As late as 1872 the California legislature enacted a law explicitly endorsing school segregation; the state did not mandate integration until 1880.17

To appreciate fully the depth of Northern hostility toward school integration at this time, it is useful to recall how virulently racist many of these states were in the antebellum period, and to an only mildly reduced extent in the early postbellum period. As late as 1867, blacks were enfranchised in only five New England states and, subject to a discriminatory property requirement, in New York. State after state rejected black suffrage proposals in popular referenda between 1865 and 1867: Minnesota, Wisconsin, Connecticut, Kansas, Ohio, and New York. In Ohio's referendum of 1867, black suffrage was rejected by a majority of 38,000, while Republi-

cans managed narrowly to carry the governorship (suggesting that nearly twenty thousand Republican voters rejected black suffrage). An 1865 referendum in the Colorado Territory rejected black suffrage by a margin of almost nine-to-one. The New Jersey and Pennsylvania legislatures in 1867-68 refused by overwhelming margins to consider amending their state constitutions to extend suffrage to blacks.\(^{18}\) Since hostility to school integration has consistently outranked resistance to black political participation on the white supremacists' hierarchy of preferences, it seems logical that Northern states continuing to reject black suffrage through 1867 would also resist school integration (as indeed their school laws generally confirmed they did).\(^ {19}\)

Particularly in the Midwest, hostility to black rights extended well beyond denial of the franchise. Illinois, Indiana, Iowa and Oregon in the 1850s all barred black immigration entirely, while their courts rejected constitutional challenges to such exclusion laws under the Privileges and Immunities Clause of Article IV. Blacks already resident in these states were barred not only from the ballot, but also from testifying in court cases involving whites and from serving on juries and in the state militia. Support for the exclusion articles of state constitutions had been overwhelming in

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\(^{19}\) This rank ordering of racist preferences existed in the post-Reconstruction South, where black voters were tolerated, often in large numbers, while school integration was nonexistent. It also was present in the pre-\textit{Brown} South, where many whites accepted black political participation (especially after the Supreme Court invalidated the white primary in Smith v. Allwright, 321 U.S. 649 (1944)), while continuing to resist school desegregation. On the post-Reconstruction era, see, e.g., Cartwright, supra note 7, at 18, 119, 147; Fischer, supra note 7, at 136 n.9. On the widespread continuation of Southern black voting through the 1880s and in some places well into the 1890s, see J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910, at 15 tbl. 1.2, 42 tbl. 1.6, 241-42 tbls. 9.3, 9.4 (1974). On the pre-\textit{Brown} period, see, e.g., Steven F. Lawson, Black Ballots: Voting Rights in the South, 1944-1969, at 148-49, 179-80, 345 (1976).
the antebellum period—Oregon’s was passed by a margin of eight-to-one, and Illinois’s was reaffirmed by a margin of well over 100,000 votes in an 1862 referendum. This support did not evaporate at war’s end. In 1865 the Indiana legislature specifically refused to abandon its exclusion law. Many Midwestern supporters of black exclusion also endorsed overseas colonization as a solution to their “race problem,” notwithstanding the fact that blacks constituted only about 1-2% of these states’ populations. The Great Emancipator himself remained a supporter of colonization through the first years of his presidency.\(^{20}\)

It would be mistaken to deny that the War ameliorated this antebellum racism to a certain extent. Many historians have observed that large scale black military service translated into greater popular support for black rights and especially the franchise. Bowing to repeated protests, Congress toward the end of the War provided equal pay, uniforms and equipment for black soldiers. Congress also repealed statutory bars on black postal carriers and black testimony in federal court. Streetcars were desegregated in many Northern cities during the War. Even in the oppressively racist Midwestern states, the War hastened the demise of the antebellum Black Codes, though often only in the face of intense Democratic resistance.\(^{21}\)

Yet the War’s ideological consequences for race relations were neither unlimited, nor even unidirectional. Northern Democrats made political hay of Lincoln’s preliminary Emancipation Proclamation in September 1862 by fueling popular fears of a mass “invasion” of freedmen into the North. The result was race riots in

\(^{20}\) For this paragraph, see George M. Fredrickson, The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817-1914, at 133-34, 147-51 (1971); Foner, supra note 7, at 6; Litwack, supra note 18, ch. 8; Benjamin P. Thomas, Abraham Lincoln 382-83 (1952); Thornbrough, supra note 17, at 21-22, 31, 63-64, 82-85, 122-23, 203-04; Earl M. Maltz, Civil Rights, the Constitution, and Congress, 1863-1869, at 5 (1990). In 1866 the Indiana Supreme Court invalidated under the Privileges and Immunities Clause of Article IV the exclusion law which the legislature had refused to repeal. See Thornbrough, supra note 17, at 234-35.

\(^{21}\) On these various points, see Foner, supra note 7, at 8-10, 27-28; Fredrickson, supra note 20, at 167-68; Gerber, Black Ohio, supra note 17, at 35; Gillette, supra note 18, at 81, 85; Maltz, supra note 20, at 6; James M. McPherson, Abraham Lincoln and the Second American Revolution 29-37 (1991); James M. McPherson, Battle Cry of Freedom: The Civil War Era 494-97 (1988); Thornbrough, supra note 17, at 192, 200, 238; Bridges, supra note 17, at 86; Fishel, supra note 12, at 288-89; Ment, supra note 13, at 101.
southern Ohio and Indiana, as well as renewed efforts to enforce the exclusion laws of Midwestern states and even to enact more stringent versions. As we have seen, moreover, the War's egalitarian spinoff effect failed to induce a single Northern state to extend the suffrage to black citizens prior to 1868. And the War did not, in its immediate aftermath, induce most Northern states to desegregate their schools, though there were a few exceptions, such as Rhode Island, Connecticut and Michigan. As one close student of postbellum Northern race relations puts it, the moral tone provided to the War by Lincoln's emancipation policy "only dented the shell of anti-Negro sentiment in the north."22

Thus, in the former nonslaveholding states, support for school integration in the early postbellum period was confined to New England and the upper Midwest, as well as to isolated cities and towns in the lower North states, such as Cleveland and Chicago, where schools had long been integrated notwithstanding state laws permitting segregation. In the South the situation was far more unitary: with the partial exception of New Orleans, school segregation was essentially universal in the postbellum period (as had been the exclusion of blacks from public education altogether in the antebellum period). The universality of school segregation in the South is especially striking given that the newly drafted state constitutions of Louisiana and South Carolina, states possessing black voting majorities after passage of the Reconstruction Act of 1867, explicitly barred the practice. Notwithstanding these unambiguous state constitutional mandates, schools in both Louisiana (outside of New Orleans) and South Carolina were almost completely segregated throughout Reconstruction. Even in New Orleans, the only Southern city enjoying school desegregation during this period, the experiment did not commence until 1870-71 (years after the Fourteenth Amendment's original understanding had been fixed); at no point did it include more than one-fifth (and averaged only one-tenth) of the city's black students; and it resulted in frequent white violence, student boycotts and an explosion in the number of private white academies. White opinion in the South only barely

22 Fishel, supra note 12, at 56. On Democratic-inspired fears of a Northern invasion of freedmen and the ensuing race riots, see Foner, supra note 7, at 31-32; Gerber, Black Ohio, supra note 17, at 28-29; Thornbrough, supra note 17, at 184-91; Fishel, supra note 12, at 57.
accepted the notion of public education for blacks; integration was beyond the realm of possibility. Appreciating this basic reality, black leaders, with the exception of New Orleans’ unique community of antebellum free blacks, tended not to press for it. Once Southern whites “redeemed” their states from Republican political control, they immediately formalized in state constitutions and statutes the existing status quo of school segregation.23

The situation of black education in the former slaveholding border states was not very different from that in the South. The Kentucky legislature, which remained under the control of Democrats during Reconstruction, resisted even the extension of public education to blacks until 1874. Black schools established by the Freedmen’s Bureau were violently expunged wherever federal troops were unavailable to protect them. Military security was likewise necessary for the privately established black schools that operated in St. Louis during the War. The Missouri legislature, under

Republican control, quickly established a system of segregated schools after the War. Maryland and West Virginia continued to exclude blacks from their public schools in the early postbellum years. It would have been surprising had white Unionists in these states proved supportive of integrated schools, given that they preferred to maintain political control by disfranchising large numbers of whites rather than enfranchising blacks.\(^{24}\)

In sum, actual school segregation practices reveal that nowhere near a majority, let alone a supermajority, of the states would have endorsed a constitutional ban on school segregation in 1866-68. Moreover, such a ban is not what Northerners thought they were voting for, either at the polls in the 1866 congressional elections, which were widely understood to constitute a referendum on the Fourteenth Amendment, or in the state legislatures that ratified that Amendment in 1866-68. Section One of the Fourteenth Amendment generally was understood to be addressed toward preventing Southern blacks from being slaughtered (as in the Memphis and New Orleans race riots of 1866) or from being effectively re-enslaved (as under the Southern Black Codes which most of the Johnson governments were enacting in 1865-66). Nobody thought the purpose of the Amendment was to integrate the public schools.\(^{25}\)

As I have said, McConnell concedes that contemporaneous school segregation practices cut against his argument. He seeks to evade this difficulty by employing a distinction that is critical to the success of his argument—a distinction between principle and prejudice, or, relatedly, between legal concepts and practical attitudes. This distinction is problematic for several reasons.

Rather than focusing upon popular attitudes toward school integration in 1866-68, which we have just canvassed, McConnell ana-


lyzes the legal concepts embedded in the Fourteenth Amendment, which he argues necessarily translate into repudiation of public school segregation. Thus he begins by asserting the well-established distinction drawn by the Fourteenth Amendment’s Framers between civil, political and social rights. Only with regard to civil rights, he notes, did the Fourteenth Amendment reject racial inequality. Next, McConnell argues that because the school segregation issue received so little attention during the debates on the Fourteenth Amendment, our best evidence as to whether Republicans regarded education as a “civil right” and segregation as “inequality” lies in the congressional debates on the 1875 CRA. These debates, McConnell argues, reveal that Republican congressmen overwhelmingly understood public education to be a civil right and segregation to constitute inequality. As to the ultimate excision of the schools provision from the civil rights bill, McConnell contends that if this was “an unprincipled accommodation to popular sentiment,” rather than a principled rejection of the notion that education is a civil right, then it provides no support for the segregationist position in Brown. Only constitutional principle, not prejudice, counts in McConnell’s originalist calculus.

Let us set aside momentarily the difficulty that interpretive statements from the 1870s may not constitute reliable evidence of what constitutional provisions were thought to mean when enacted in 1866 (especially if, as I shall argue, attitudes on civil rights issues were changing dramatically over brief periods of time). Here I wish to argue a different point: McConnell fails either to justify his prioritization of principle over prejudice or to explore some of the difficulties inherent in that dichotomy. There are several distinct problems. First, McConnell offers no criteria by which to distinguish a principle, which counts in his originalist calculus, from a prejudice, which does not. He plainly regards a commitment to

26 McConnell, supra note 2, at 953-54, 1005-43.
27 Id. at 961-62, 1023-29. This point is well-established in the literature. See sources cited infra note 99.
28 McConnell, supra note 2, at 984.
29 Id. at 1102-03. If the deletion of the schools provision was based on a principled rejection of education as a civil right, McConnell argues, Brown still can be justified on originalist grounds because the category of civil rights possessed “a degree of contingency” for congressional Republicans, allowing for the possibility of expansion over time. Id. at 1103-04. I criticize this argument infra text accompanying notes 92-100.
racial equality as principled, while support for white supremacy or racial segregation is prejudiced. But he does not explain why.\textsuperscript{30} One senses that McConnell is playing upon our modern abhorrence of racism and our tendency to regard racial prejudice as "irrational" and racial differences as socially rather than biologically constructed. It is odd, however, for an originalist to differentiate the principles and prejudices of a past era on the basis of modern intuitions (or even of modern evidence). The best "scientific" evidence of the mid-nineteenth century held that racial differences were natural, the supremacy of the white race self-evident, and racial segregation an imperative for the survival of both races.\textsuperscript{31} Measured against such an intellectual backdrop, it is unclear why a preference for racial segregation should be regarded as prejudiced or a preference for integration as principled. Yet to ignore that intellectual backdrop would seem to require repudiating originalism. One cannot "cleanse" the original understanding of its less seemly aspects by labeling them prejudices rather than principles and still claim to be an originalist.

\textsuperscript{30} Perhaps it is unfair to criticize McConnell for this lapse, as much contemporary constitutional theory seems to regard the distinction between principle and prejudice (or, relatedly, between public- and private-regarding motivations) as self-evident. John Hart Ely's refinement of the prejudice prong of \textit{Carolene Products}, Bruce Ackerman's "constitutional dualism," and Cass Sunstein's "republican" constitutionalism—to name a few prominent examples—all assume the distinction between principle and prejudice without adequately defining it. See Bruce Ackerman, \textit{We the People: Foundations} (1991); John Hart Ely, \textit{Democracy and Distrust} (1980); Cass Sunstein, \textit{The Partial Constitution} (1993). If the distinction is elusive, though, the fact that McConnell shares good company in embracing it is hardly reassuring. I am not the first to point out the difficulty. See, e.g., Bruce A. Ackerman, \textit{Beyond Carolene Products}, \textit{98 Harv. L. Rev.} 713, 737 (1985) ("One person's 'prejudice' is, notoriously, another's 'principle.'"); Paul Brest, \textit{The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship}, \textit{90 Yale L.J.} 1063, 1094-95 (1981) (noting that racial segregation was contemporaneously justified on the basis of a sincere belief in moral principles rather than as "prejudice"). The psychological compunction to understand one's own motivations as principled rather than prejudiced renders the distinction all the more elusive. For elucidating discussion, see Richard H. McAdams, \textit{Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination}, \textit{108 Harv. L. Rev.} 1003, 1032 & n.110, 1060-61 (1995) (noting that "[e]ven in the Jim Crow South, whites attempted to justify segregation not by reference to naked self-interest but by claims that blacks were inherently inferior, that blacks preferred segregation, or that segregation somehow reflected the natural order of things").

Second, assuming one grants the coherence of the principle/prejudice distinction, it remains necessary to justify prioritizing the former over the latter. McConnell's argument depends heavily on this prioritization, because he must discount as manifestations of prejudice both the ultimate excision of the schools provision from the 1875 Act and the 1874 Republican electoral debacle (which arguably indicated some measure of public hostility toward the civil rights bill). Yet he offers no argument for why an originalist should accord this priority to principle over prejudice.\textsuperscript{32} Originalists aim to recapture the original understanding or intention of a constitutional provision; there is every reason to believe that both principle and prejudice (assuming the distinction between them is coherent) are components of the original picture. While arguments may exist for privileging principle over prejudice in constitutional interpretation,\textsuperscript{33} they are not dictated by the simple logic of originalism.

This gap in McConnell's argument is ironic, because the very same Republicans who drafted the Fourteenth Amendment appreciated that constitutional enactment and interpretation require a blending of principle and prejudice (i.e., practical politics). Consider the Republican Party's antebellum position on questions of constitutional interpretation involving slavery. The most basic principle in the Republican firmament decreed that human bondage violated the Declaration of Independence and the law of nature.\textsuperscript{34} Yet Republicans simultaneously acknowledged that the Constitution protected slavery. Republicans in 1860 reaffirmed the

\textsuperscript{32} On this point, McConnell shares company with Bruce Ackerman, whose "constitutional dualism" is a variant of originalism. See Ackerman, We the People, supra note 30, at 12-13, 192, 265 (prioritizing disinterested principle over self-interested expediency). For criticism of Ackerman on this point, see Michael J. Klarman, Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments, 44 Stan. L. Rev. 759, 765 (1992). Nor is it obvious how a utilitarian, such as John Hart Ely, can defend this prioritization of principle over prejudice. See Brest, supra note 30, at 1102-04 (noting that the distinction between disadvantaging a group for good reasons, such as morality, and for bad reasons, such as "prejudice," is not a utilitarian distinction).

\textsuperscript{33} Perhaps the most famous of these is Alexander M. Bickel, The Least Dangerous Branch 23-28 (1962) (suggesting that courts have a comparative advantage over legislatures in identifying and enforcing principles).

party's conviction that the Constitution barred Congress from interfering with slavery in the states and required nonslaveholding states to refrain from interfering with fugitive slave renditions.\textsuperscript{35} Republicans thus appreciated that constitutional interpretation required the tempering of principle with politics or prejudice. Indeed, given that the document drafted by the Philadelphia Convention of 1787 was riven with such pragmatic compromises, it is difficult to understand how constitutional interpretation ever can avoid being "contaminated" by pragmatic considerations.\textsuperscript{36} It seems odd to insist on principled interpretations of constitutional provisions that were drafted and ratified in response to practical political concerns.

McConnell's insistence upon a principled interpretation of the Fourteenth Amendment seems especially incongruous given that the Amendment's core provisions are best understood as Republican responses to political exigencies having little to do with constitutional principle. Sections Two and Three of the Fourteenth Amendment, which dominated the drafting and ratification debates, were the centerpiece of the Republicans' effort to solidify their political control of the national government and to frustrate the ambitions of unreconstructed rebels. Section Two sought to pressure Southern states into enfranchising the freedmen by threatening to reduce their representation in Congress if they did not do so; the black population of most Southern states was sufficient in itself to establish the Republican Party (for whom everyone expected the freedmen to vote) as a significant political force.


\textsuperscript{36} One thinks, for example, of the small-state power grab that produced the Senate or the Southern states' walkout threats which produced the various slavery guarantees in the Constitution. On the former, see, e.g., Jack N. Rakove, \textit{The Great Compromise: Ideas, Interests, and the Politics of Constitution Making}, 44 Wm. & Mary Q. 424, 441-48, 452-53 (1987). On the latter, see, e.g., Paul Finkelman, Slavery and the Constitutional Convention: Making a Covenant with Death, \textit{in Beyond Confederation: Origins of the Constitution and American National Identity} 188, 196-207, 210-20 (Richard Beeman, Stephen Botein & Edward C. Carter, II, eds., 1987). For further discussion of these and other illustrations of the political compromises that pervade the original Constitution, see Klarman, supra note 32, at 778-85.
in the South. Section Three sought to exclude the Southern slave-oacity from political power by temporarily barring former Confederate leaders from state and national office. With regard to those provisions of the Fourteenth Amendment that were contemporaneously deemed most important, then, I find it difficult to understand what it means to speak of a principled interpretation.37

Not even Section One of the Fourteenth Amendment—the Section that preoccupies most modern constitutional scholarship and Professor McConnell—can be readily understood to derive from pristine principle. The Republicans who drafted the Fourteenth Amendment early in 1866 had an eye on that autumn’s congressional elections. The party needed to retain a two-thirds majority in both Houses of Congress to override potential vetoes by President Johnson, who already had obstructed passage of the Freedmen’s Bureau and Civil Rights Acts. As a consequence of the defeat of black suffrage referenda in several Northern states the preceding year, Republicans sensed that the Northern electorate was not yet prepared to enfranchise blacks. Although some of the more radical Republicans would have pressed on regardless, the requisite supermajority for extending the proposed constitutional Amendment to cover black political rights was lacking. Thus Section One was consistently defended in public debate—both in Congress and in the constituencies—as a guarantee of civil, not political or social, rights. Even those Republicans strongly supportive of black suffrage conceded that the Fourteenth Amendment did not protect it. It is difficult to escape the conclusion that the scope of Section One was limited in deference to the prejudices of Northern voters. What sense does it make to insist on a principled interpretation of a constitutional provision crafted to accommodate voters’ prejudices?38

Yet even if one concedes to McConnell his prioritization of principle over prejudice, he dismisses too readily the possibility of formulating principled interpretations of the Fourteenth Amendment

37 On Sections Two and Three of the Fourteenth Amendment, see, e.g., 1 Charles Fairman, Reconstruction and Reunion, 1864-88, at 1261-65, 1283-90 (1971); Foner, supra note 7, at 251-54; Bond, supra note 25, at 438-41.
38 For this paragraph, see Fairman, supra note 37, at 1261-65; Foner, supra note 7, at 260-61; Andrew Kull, The Color-Blind Constitution ch. 5 (1992); Maltz, supra note 20, at 79-92; Bond, supra note 25; Fishel, supra note 18, at 8-18.
that tolerate school segregation. McConnell does allow the possibility of one such principled justification for school segregation—that the Fourteenth Amendment’s drafters may not have deemed public education, still in its relative infancy in much of the country in 1866, to be on a par with ancient (and natural) rights such as contract, property and court access.\(^{39}\) There exists another principled distinction between school integration and the civil rights protected by the 1866 Civil Rights Act, which all contemporaries agreed the Fourteenth Amendment was designed, at a minimum, to constitutionalize. Following Herbert Wechsler, one might argue that a ban on state-mandated racial discrimination with regard to contractual or property rights rarely would coerce individuals into undesired associations. The Fourteenth Amendment clearly bans discriminatory state interference with the contractual rights of blacks, for example, but does not require particular individuals to contract with parties they disfavor. Yet a ban on public school segregation is likely to coerce precisely this sort of undesired association, particularly given the late nineteenth century’s relatively low population densities (meaning a lot of single school communities) and relatively desegregated housing patterns (meaning little de facto segregation).\(^{40}\) Professor Wechsler was unable to derive a principled justification for privileging forced association over forced nonassociation. It is true that these principles distinguishing school integration from the rights enumerated in the 1866 Civil Rights Act—that public education was not sufficiently well established in 1866 to constitute a civil right and that the state generally should avoid coercing undesired associations—typically do not resonate for today’s generation. That hardly seems relevant, though,

\(^{39}\) McConnell concedes this possibility, but attempts to circumvent it by insisting that the category of civil rights possesses “a degree of contingency,” which allows for growth over time. McConnell, supra note 2, at 1103-04. Thus McConnell, much like Chief Justice Earl Warren, ultimately justifies Brown on the ground that the nature of public education changed dramatically between the late 1860s and the twentieth century. For criticism of McConnell’s use of this argument, see infra Part II.A.

\(^{40}\) See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 33-34 (1959); see also Cong. Globe, 42nd Cong., 2nd Sess., app. at 26-27 (Feb. 6, 1872) (statement of Sen. Thurman) (arguing that the schools provision denies people “the liberty to choose their own associates . . . in the school”); id. at 217 (Apr. 13, 1872) (statement of Rep. McHenry) (making similar point).
to the question of whether these distinctions count as “principled” from the perspective of 1866-68.

Finally, even if McConnell is right that principle should trump expediency and that segregation cannot be reconciled with principle, he fails to consider the possibility that Republican support for the 1875 CRA was as much attributable to political expediency as to principled commitment to racial equality. Because McConnell assumes that Republican support for the CRA represented principled constitutional interpretation, he tells us little about the political context surrounding the law’s enactment. One may grant that Charles Sumner, the principal force behind the introduction of the civil rights bill in the Senate, was motivated primarily by a humanitarian commitment to racial justice.\(^{41}\) The Democratic opposition, however, constantly denigrated Republican support for the bill as a ploy to placate the party’s black constituents.\(^{42}\) And there is reason to believe that Republican support for the civil rights bill was motivated, in significant part, by the perceived need to bolster the party’s position with Southern blacks. Congressional Republicans from the South were more likely to support the bill than were those from the North.\(^{43}\) Moreover, as Reconstruction proceeded through the early 1870s, Southern blacks became more assertive of their rights within the Republican party. It was only in 1872 that the first blacks were elected to executive office in Florida and

\(^{41}\) On the humanitarian motivations of Sumner and other former abolitionists, see Valone, supra note 23, at 17, 102; James M. McPherson, Abolitionists and the Civil Rights Act of 1875, 52 J. Am. Hist. 493, 500-01 (1965). Even Sumner, though, appealed to fellow Republicans partially in terms of the importance of retaining the black vote. See Valone, supra note 23, at 20-21.

\(^{42}\) See, e.g., Valone, supra note 23, at 42 (quoting Sen. Thurman); id. at 57 (quoting Sen. Saulsbury); 2 Cong. Rec. 4172 (May 22, 1874) (statement of Sen. Sargent of California); Gillette, supra note 25, at 274 (quoting Democratic newspapers); Price, supra note 16, at 131 (same). See also 2 Cong. Record 4168-69 (May 22, 1874) (statement of Republican Senator Stewart of Nevada) (asserting that he would not surrender to the black vote by supporting school integration).

\(^{43}\) See Valone, supra note 23, at 104 (noting that most Southern Republicans in the House in 1875 were still voting to retain the schools provision). See also Alfred Avins, De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875, 38 Miss. L.J. 179, 231 (1967) (noting that Senator Boutwell’s explicitly integrationist amendment garnered support only from four Deep South Republican senators). Senator Alcorn of Mississippi candidly conceded that he supported the civil rights bill only because his black constituents demanded it of him. See 2 Cong. Rec. app. at 307 (May 22, 1874).
Arkansas, in 1873 that Mississippi sent the first of its two black senators to Congress, and in 1875 that the number of black House members peaked at eight. The state public accommodations laws enacted by Florida, Louisiana and Mississippi in 1873 probably also illustrate greater black aggressiveness within the Republican Party. With more Southern states undergoing "redemption" by white Democrats, and Southern blacks becoming increasingly assertive of their rights within the Republican Party, national Republican leaders may have concluded that passage of a federal civil rights bill was a political imperative. Political correspondents of Republican congressional leaders such as James Garfield and Ben Butler warned that Southern blacks were expecting the Republicans to produce a civil rights bill and that the party would be "dead" if it did not meet those expectations. On McConnell's own principle/prejudice dichotomy, this evidence suggests that Republican support for the 1875 CRA cannot be understood simply as principled constitutional interpretation.

B. The Voice of the People or of Their Congressmen?

McConnell redeployed this principle/prejudice distinction to overcome a second major obstacle to his originalist defense of Brown. The elections of 1874 dealt the Republicans one of the worst party defeats in American history. Not only was a Republican House majority of over 100 converted into a deficit of 60, but the Republicans suffered gubernatorial and legislative defeats in Northern

44 On these points see Foner, supra note 7, at 537-39.
45 See Valone, supra note 23, at 94 (quoting this correspondence). See also Gerber, Black Ohio, supra note 17, at 187 (suggesting that Ohio's black leaders became increasingly impatient with the Republican Party after Sumner's civil rights bill failed to pass in the early 1870s notwithstanding commanding Republican majorities in Congress); Gillette, supra note 25, at 261.
46 Numerous historians have emphasized the Republicans' desire to reward black voters as an explanation for the civil rights bill. See Gillette, supra note 25, at 202-03, 261; Leslie H. Fishel, Jr., The Negro in Northern Politics, 1870-1900, 42 Miss. Valley Hist. Rev. 466, 471 (1955) (stating that the 1875 CRA "reflected more a determined Republican effort to maintain its [sic] supremacy in the South than an egalitarian gesture of good will and acceptance of a minority group"); Price, supra note 16, at 131; William P. Vaughn, Separate and Unequal: The Civil Rights Act of 1875 and Defeat of the School Integration Clause, 48 Sw. Sci. Q. 146, 147 (1967); Valone, supra note 23, at 66-67, 102-03.
states that previously had been reliably Republican. Interpreting election results to confer mandates on particular issues is always a tricky business, given that voters choosing candidates are selecting among baskets of policy positions. Nonetheless, it seems undeniable that the civil rights bill was an important issue in the 1874 congressional elections and that it did the Republicans no good (at least in particular sections of the nation). Many Republicans themselves, including President Grant, explicitly drew this lesson in election postmortems.

Especially in the Southern upcountry, Democrats effectively used the threat of the “social equality” bill to pry marginal white voters from the Republican fold. In Alabama, where upcountry whites held the balance of power, Democrats in the 1874 gubernatorial election made “nigger or no nigger” the principal issue in the campaign and focused special attention on the schools provision of the civil rights bill. The Republicans’ unsuccessful gubernatorial candidate in Tennessee attributed his defeat that year to thousands of East Tennessee Unionist voters “swearing... that they would never again vote with a party which supported the coeducation of the races.” In the Georgia hill country, the civil rights bill “became an effective tool for beating down Republican opposition,” as whites “reacted hysterically” to this “new and serious

47 See Foner, supra note 7, at 523; Gillette, supra note 25, at 211, 246-47; Avins, supra note 43, at 235-36.
48 I have previously noted some of these difficulties in my criticism of Bruce Ackerman’s theory of “critical elections.” See Klarman, supra note 32, at 770-71.
49 On whether the civil rights bill was an important, or the predominant, issue in the 1874 congressional elections, compare Foner, supra note 7, at 523 (arguing that the economic depression was probably the dominant issue) with Gillette, supra note 25, at 213-14, 216-17, 256 (treating the civil rights bill as the dominant issue) and Avins, supra note 43, at 236 (noting that the civil rights bill was a big issue, which paid “handsome dividends” for the Democrats). In other work McConnell has treated the 1874 election as “a referendum on the nation’s continued commitment to civil rights.” Michael W. McConnell, The Forgotten Constitutional Moment, 11 Const. Commentary 115, 124 (1994).
50 See Gillette, supra note 25, at 241, 242, 256-57; Price, supra note 16, at 132; Vaughn, supra note 46, at 149-50; Valone, supra note 23, at 66. McConnell’s reliance on the statements of a handful of Republicans who attributed their disastrous electoral showing to insufficient ardor on civil rights is unpersuasive. McConnell, supra note 2, at 1108-09. It is unsurprising that supporters of the schools provision such as Ben Butler were unwilling to concede that their fervor for the civil rights bill had cost the party at the polls.
51 Quoted in Foner, supra note 7, at 552; see Gillette, supra note 25, at 218.
52 Quoted in Foner, supra note 7, at 550; see Gillette, supra note 25, at 220-21.
threat to the southern social system"; one observer opined that the civil rights bill had "killed the Republican Party" in Georgia. In the lower North as well, the civil rights bill apparently was a major factor in the Republicans' electoral debacle, especially in Ohio and Indiana, which had significant black populations in their Southern counties and pervasive school segregation.

Whether the civil rights bill was a large or a small issue in the 1874 congressional election, the verdict of the People plainly differed from that of their congressmen. Thus McConnell needs an argument for privileging congressional support for a measure over popular opposition as probative evidence of a constitutional provision's original meaning. After all, the final verdict on ratification of constitutional amendments is reserved to state legislatures, which seem to sit roughly half way between the People and their national representatives (both in terms of proximity to constituents—size of electoral districts, length of terms, and directness of election—and in terms of the state legislature's historically direct role in constituting the national legislature). McConnell deals with the 1874 election results by reiterating his distinction between prejudice and principle. People expressing their anti-integration preferences at the polls voice their prejudices; representatives expressing their pro-integration sentiments in Congress engage in "conscientious reflection on the demands of the new constitutional order." This argument founders on all of the shoals enumerated in Part I.A.

C. Changing Constitutional Values

McConnell's use of congressional debates from the 1870s as probative evidence of the original understanding of a constitutional amendment drafted in 1866 is problematic for an obvious reason: it neglects the possibility that values changed in the interim. McConnell is inconsistently attentive to the possibility that constitutional

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53 Wingo, supra note 23, at 22-25; see id. at 151.
54 See Gillette, supra note 25, at 241-43, 256.
55 McConnell offers an alternative justification for privileging congressional attitudes toward the civil rights bill over those of constituents expressed at the polls: he argues that the Fourteenth Amendment was, more than most amendments, "a congressional creation." McConnell, supra note 2, at 1109. I criticize this argument in Part II.B.
56 McConnell, supra note 2, at 1109.
values shift over time. Thus he rightly urges us not to regard the Supreme Court’s invalidation of the 1875 CRA in the Civil Rights Cases as dispositive on the original understanding of the Fourteenth Amendment, because opinion as to federal enforcement of civil rights guarantees may have shifted dramatically between 1866-68 and 1883.\footnote{Id. at 1088-89.} Yet McConnell pays relatively little heed to the possibility of a similarly dramatic opinion shift, though in the opposite direction, as to the desirability of school integration between 1866-68 and 1875.

There exists abundant evidence to believe that such a shift was taking place. School desegregation, which in most of the North was anathema at the time of the Fourteenth Amendment’s ratification, had been largely effectuated (at least in formal legal enactment) by the 1880s. Since the 1875 Act chronologically bisected the period between the Fourteenth Amendment’s passage and the culmination of the Northern trend toward school desegregation, it seems clear that Northern opinion in 1875 was more favorable toward school desegregation than it had been in 1866-68.\footnote{This dramatic shift in Northern attitudes toward school desegregation in the final decades of the nineteenth century is a fascinating phenomenon, which remains largely unexplored in the legal scholarship. The best studies I have encountered are by history graduate students: Fishel, supra note 12, and Ment, supra note 13. The most thorough study of this era’s court decisions adjudicating school segregation issues is Kousser, supra note 14. An important step toward filling this void in the legal literature is taken in Davison M. Douglas, The Limits of Law: School Segregation in the Pre-Brown North (September 1995) (unpublished manuscript, on file with the Virginia Law Review Association), which came into my possession too late for me to make use of in this Response.} Thus

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congressional debates on the 1875 CRA seem unreliable evidence as to what congressmen thought the Fourteenth Amendment meant when they passed it in 1866.

Nor is this point inconsistent with the one made in the preceding section—that the 1874 congressional elections evinced a lack of

Republican Parties (especially in the period between 1874 and 1894); this was especially true as blacks, by around 1880, increasingly asserted their independence from the party of emancipation, and thus their votes were perceived to be available to the “highest bidder.” Third, as it became clear that the Midwestern black population explosion of the 1860s was not repeating itself in succeeding decades, Northern whites became less resistant to school integration in a demographic context of (by twentieth century urban standards) relatively minute black populations.

It may be worth noting as well that the school situation in most Northern states was far more complicated than the mere existence or nonexistence of a desegregation law might suggest. Prior to enactment of such a law, it was not unusual to find particular localities that already had integrated their schools—for example, Albany and Buffalo in New York State during the early 1870s, Cleveland and Chicago in the antebellum period, and most Massachusetts cities and towns other than Boston prior to the Massachusetts legislation of 1855. Similarly, after enactment of a school desegregation law, it was not unusual to find particular localities continuing to maintain their segregated schools—for example, Philadelphia after the passage of Pennsylvania’s antisegregation law in 1881, some Cincinnati schools as well as those of small southern Ohio towns such as Xenia and Chillicothe after passage of that state’s antisegregation law in 1887, and southern New Jersey cities such as Camden, Trenton and Atlantic City after passage of that state’s 1881 antisegregation law. Geographic variation within states, regardless of the formal law, plainly was the rule with regard to school segregation practices in the late nineteenth-century North. Moreover, it was generally those communities with the largest black populations which proved most resistant to desegregation—for example, New York City and Brooklyn, as compared with Albany and Buffalo, New York, or Cincinnati and Springfield, as compared with Cleveland and Columbus, Ohio. Furthermore, legislation formally requiring school desegregation almost invariably followed a substantial voluntary abandonment of segregation practices at the local level. That is, to some undetermined extent, formal antisegregation law followed substantive antisegregation practice and then remained largely unenforced against outliers.

These interpretations of the Northern school integration phenomenon are my own, though they are heavily dependent upon my reading of the following sources: Gerber, Black Ohio, supra note 17, at 41, 45, 56-57, 190-244; Grossman, supra note 18, ch. 3; Kousser, supra note 14; Thornbrough, supra note 17, at 259-61, 288-346; Homel, supra note 12; Bridges, supra note 17, at 95-108; Fishel, supra note 18; Gerber, Education, Expediency, and Ideology, supra note 17; Hendrick, supra note 17; Mabee, supra note 16; Price, supra note 16; Fishel, supra note 12, chs. 4-5, 7; Ment, supra note 13, chs. 1-4. On black population growth in the Midwestern states, see Thornbrough, supra note 17, at 206; Bridges, supra note 17, at 84 (noting that Illinois's black population grew by 270% during the War years); Gerber, Black Ohio, supra note 17, at 26, 41 (noting that Ohio's black population grew by 72% during the 1860s, and only by 26% in the 1870s and 9% in the 1880s). For net black migration from the South to the North by decade from 1870 to 1930, see Cohen, supra note 23, at 93.
public support for school desegregation. It is perfectly conceivable that Northern public support for school desegregation was growing in the 1870s but had yet to reach majority status in particular states. California, New Jersey, Ohio and Pennsylvania did not pass school desegregation legislation until the 1880s. It is possible that substantially more public (and congressional) support existed for school desegregation in 1874-75 than had ten years earlier, but still not enough to convert the schools provision of the civil rights bill into an electoral asset.

McConnell’s response to the possibility of values changing over time is problematic. He argues that while “Reconstructionist fervor” for civil rights increased between 1866 and 1870, “there is reason to believe that it cooled considerably in the years after 1870.”\(^59\) Thus, McConnell treats shifting attitudes toward civil rights issues as essentially a wash—becoming more radical during the first half of Reconstruction and more conservative during the second. He seems willing to assume that net attitudes toward federally-mandated school desegregation in 1874 were approximately what they would have been in 1866.

While one cannot show definitively that McConnell is wrong on this point, it seems likely that he is. To see why, it is useful to introduce two separate distinctions: that between federal military and legislative intervention and that between the underlying substantive right and federal enforcement of it. As to the first distinction, the only instances of federal intervention for which we can be certain that Northerners were losing their enthusiasm by the middle 1870s were military. These were the army expeditions required to bolster Southern Republican regimes against what President Grant called “these annual autumnal outbreaks in the South”—violent Democratic campaigns to redeem the Southern states from Reconstruction rule.\(^60\) In early 1875 the Grant administration was stung by criticism for its use of federal troops to prevent Louisiana Democrats from assuming contested seats in the state legislature.\(^61\) The best illustration of growing Northern weariness with military Reconstruction is, however, the conundrum facing the Grant

\(^{59}\) McConnell, supra note 2, at 1106.

\(^{60}\) Foner, supra note 7, at 560 (quoting letter from Ulysses S. Grant to Edwards Pierrepont, Attorney General (Sept. 13, 1875)); Gillette, supra note 25, at 157.

\(^{61}\) See Foner, supra note 7, at 554; Gillette, supra note 25, at 121-31.
administration later in 1875. With Mississippi Democrats intent upon redeeming their state by whatever measures necessary, including wholesale murder, the administration in the autumn of 1875 debated whether to authorize military intervention in support of the state’s Republican government. Grant and his Cabinet calculated quite explicitly the tradeoff between preserving Republican rule in Mississippi and risking the alienation of Ohio voters who were electing a governor that fall and might desert to the Democratic Party in protest against yet another Republican military intervention in a Southern election. Because Ohio was deemed to be a crucial state for the Republicans, especially with the 1876 presidential contest just around the corner, Mississippi was abandoned to the Democrats (and Rutherford B. Hayes squeaked through in the Ohio gubernatorial contest).

That many Northerners lost their ardor for military intervention in Southern elections says little about their attitude toward federal civil rights legislation, which carried neither the anti-democratic implications nor the substantial financial costs of the former. Yet it is possible that McConnell is right, and that Northern support for federal civil rights legislation was also waning over time, as Northerners increasingly turned their attention to national reconciliation and to matters having little to do with race. We do know, for example, 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.

Yet McConnell fails to consider the possibility 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—desegregation of schools, public accommodations and common carriers. Clearly

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63 See Foner, supra note 7, at 586-87.
64 See Foner, supra note 7, at 577 (quoting Grant’s private statement to his Cabinet); Gillette, supra note 25, at 214-15.
65 Again, I emphasize that this statement is not inconsistent with my earlier claim that the Northern public repudiated the schools provision at the 1874 congressional elections. To say that Northern support for school desegregation was growing is not to say that it had reached majority status by 1874. Indeed, the civil rights bill seems to have played the largest role in congressional races in those lower North states where statutory school
Northern support for these rights grew substantially in the post Civil War decade(s). Not only did Northern states move increasingly toward school integration laws in the 1870s and 1880s, but almost every one of them responded to the Supreme Court’s invalidation of the 1875 CRA in the Civil Rights Cases by enacting their own public accommodations laws.\(^6\) It is, to repeat, impossible to measure the countervailing effects of rising support for substantive rights and (possibly) diminishing support for a federal enforcement mechanism. Yet McConnell’s intimation that Congress would have been as likely to enact the schools provision in 1866 as in 1874 is plausible only if rising Northern disaffection with federal legislation outweighed growing popular support for the substantive rights being legislated. The fact that Congress was willing (on McConnell’s calculations) to desegregate the nation’s schools in 1874 but was unwilling to desegregate the public schools in the District of Columbia during the late 1860s—a step that should have been easier for Congress to take, given the absence of federalism considerations because of Congress’s plenary authority over the District—seems compelling evidence that support for federally mandated school desegregation increased over time.\(^7\)

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segregation persisted the longest. See Gillette, supra note 25, at 241-43 (describing contemporary accounts of the detrimental effect the civil rights bill had on Republican fortunes in the 1874 congressional races in Ohio and Indiana); id. at 256 (concluding that in the lower North the civil rights bill “helped the Democrats greatly, especially in the states that had both a black population and school segregation”).

\(^6\) See Kousser, supra note 14, at 51 n.77; Thornbrough, supra note 17, at 259 n.7; Fishel, supra note 12, at 433 n.268. The most thorough treatment of the enactment of these laws is in Grossman, supra note 18, ch. 3 and Fishel, supra note 12, at 372-87.

Of course these state public accommodations laws were often no more rigorously enforced than were state school integration laws, owing to some combination of inadequate penalties, the burden of private enforcement, the unwillingness of blacks to force themselves into places where they were not wanted, the inability of most blacks to finance lawsuits, and the fondness of courts for parsimonious interpretations of these statutes’ scope. See, e.g., Gerber, Black Ohio, supra note 17, at 49 (Ohio); Thornbrough, supra note 17, at 260-61, 264, 392 (Indiana); Fishel, supra note 12, at 4-5, 382 (calling these laws difficult to enforce and “more of a sop than a profession of equality for colored people”). I briefly consider the question of the 1875 CRA’s enforcement below. See infra notes 120-22 and accompanying text.

\(^7\) See Alfred H. Kelly, The Congressional Controversy over School Segregation, 1867-1875, 64 Am. Hist. Rev. 537 (1959); Maltz, supra note 7, at 616. See also Justice Robert Jackson, Conference Notes, Segregation Cases (Dec. 12, 1952) (Library of Congress, Jackson Papers, Box 184, case file: segregation cases) (photocopy on file with the Virginia Law Review Association) (Chief Justice Fred Vinson) (“Congress pass[ed] no statute [to
Nor can McConnell respond, as he implicitly does, that Republican proponents of the schools provision were engaging in acts of constitutional interpretation, not policy formation, and that constitutional meaning does not change over time. 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. Thus, McConnell seems right to argue that the congressional debates on the civil rights bill should be seen as indicative of Congress's understanding of the Fourteenth Amendment. But this hardly answers the argument that values change over time. One of the most notorious lessons of American constitutional history is that constitutional language is sufficiently indeterminate and the desire to claim that one's position is grounded in the Constitution is sufficiently strong, that clever judges and statesmen are able to transform almost any policy position that commands substantial public support into a (winning) constitutional argument. Given the malleability of the

\footnote{8} See McConnell, supra note 2, at 990-92, 1110-17. But cf. Maltz, supra note 7, at 625 & n.117 (noting that some supporters of the nondiscriminatory jury service provision of the 1875 CRA explicitly argued that Congress's Section Five powers extended beyond the scope of Section One rights).

\footnote{69} A few examples should demonstrate the point. In the 1850s, almost every leading policy position on the question of congressional power over slavery in the federal territories was constitutionalized. By 1860 most Southerners had convinced themselves that the Constitution sanctioned a right of secession. Around the turn of the century, conservatives won their battle to convert the Due Process Clause into a constraint on government redistribution of wealth. During the 1960s politically liberal positions on school prayer, pornography, legislative malapportionment, criminal procedure rights and governmental regulation of contraceptive use were suddenly constitutionalized. And under the Rehnquist Court's putative "strict constructionism," the Constitution has miraculously come to pose obstacles to affirmative action, minority voting districts, regulatory takings, state regulation of hate speech, and so forth. On the slavery-in-the-territories issue, see Fehrenbacher, supra note 35, ch. 6; Robert R. Russel, Constitutional Doctrines with Regard to Slavery in the Territories, 32 J. S. Hist. 466 (1966). On the constitutional right of secession, see Jesse Carpenter, The South as a Conscious Minority, 1789-1861, at 200-13 (1930); Potter, supra note 35, at 479-84. On the constitutionalization of laissez-faire, see Arnold Paul, Conservative Crisis and the Rule of Law (1960); Benjamin R. Twiss, Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court (1942). The leading Warren Court cases include Miranda v. Arizona, 384 U.S. 436 (1966); Griswold v. Connecticut, 381 U.S. 479 (1965); Engel v. Vitale, 370 U.S. 421 (1962); Baker v. Carr, 369 U.S. 186 (1962); Roth v. United States, 354 U.S. 476 (1957). The
constitutional text and the rapidity of the shift in Northern attitudes toward school integration, one cannot treat Republican congressmen's constitutional interpretations of 1874 as reliable evidence of what their understanding would have been in 1866.

Relatively, I disagree with McConnell's claim that the strong correlation between a particular congressmen's disposition toward the Fourteenth Amendment in 1866 and his vote on the civil rights bill in the 1870s is "highly suggestive."70 This correlation probably establishes only that the same sort of person was likely to approve the two measures in their respective times, not that those who supported the Fourteenth Amendment in 1866 would have understood it then to bar school segregation. To use McConnell's own analogy, many of the people who in 1964 supported the Civil Rights Act endorsed affirmative action policies in the early 1970s. But to suggest that these people would have understood the Civil Rights Act in 1964 to mandate or even to permit affirmative action does not follow as a matter of logic and is almost certainly wrong as a matter of fact.71

American constitutional history is replete with examples of constitutional values shifting dramatically over short periods of time. One thinks, for example, of changing attitudes within the space of a decade toward the free speech rights infringed by a compulsory flag salute, the racial equality values impaired by a white primary, or the privacy interests impinged by an abortion regulation.72 In the aftermath of the Civil War, perhaps the most dislocating event


70 McConnell, supra note 2, at 1096; see id. at 1054-56, 1062, 1085.


in the nation’s history, it is problematic to treat pro-integration sentiments expressed by congressmen in 1872-74 as probative of how they would have resolved the school segregation issue in 1866.

D. Level of Congressional Support for School Desegregation

Even evaluated on its own terms, McConnell’s argument fails because he overstates the extent of congressional support for school desegregation in the 1870s. 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 (a practice that was still prevalent in the South and not uncommon in the Midwest), rather than to require integration. McConnell is right that most Republican supporters of the schools provision who expressed an opinion on the matter favored integration.73 But some of them quite explicitly did not.74 And others 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.75

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I should emphasize that these changes cannot be dismissed simply as consequences of changing Court composition. Even conservative Nixon appointees such as Powell and Blackmun supported the Roe decision. See John Calvin Jeffries, Jr., Justice Lewis F. Powell, Jr. 350-52 (1994) (suggesting that Justice Powell and his colleagues in Roe were endeavoring to anticipate the future trend in abortion regulation based on their perception that abortion restrictions were undergoing liberalization). With regard to the flag salute cases, the Court’s three most liberal justices simply changed their minds in the period between Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) and Barnette. See Jones v. Opelika, 316 U.S. 584, 623-24 (1942) (Black, J., with Douglas and Murphy, JJ., dissenting).

73 See McConnell, supra note 2, at 1006-14, 1069-78.

74 See, e.g., 2 Cong. Rec. 4082 (May 20, 1874) (statement of Sen. Pratt of Indiana) (denying that the civil rights bill would require integration except in rural districts where maintenance of separate schools would be impractical); id. app. at 305 (May 22, 1874) (statement of Sen. Alcorn of Mississippi) (“I am not in favor of mixing [schools]; and I contend that this bill does not mix them.”). In response to Senator Frelighysen’s claim that the schools provision afforded blacks the right to attend formerly white schools and thus did not require more explicitly desegregationist language, Senator Boutwell expressed doubt: “That is exactly what we do not know. Some Senators say that it does; some Senators that it does not. I have my doubts.” 2 Cong. Rec. 4168 (May 22, 1874). Since Democratic Senators objected to the schools provision partly because they understood it to require school desegregation, Boutwell must have been referring to the views of fellow Republicans when he insisted that some of his colleagues denied that the bill barred segregation.

75 See, e.g., 2 Cong. Rec. 426 (Jan. 6, 1873) (statement of Congressman Stowell of Virginia); 2 id. at 565-66 (Jan. 10, 1874) (statement of Rep. Cain of South Carolina); 2 id. at 4785 (June 9, 1874) (statement of Rep. Rapier of Alabama).
One must not forget that the language of the civil rights bill was "full and equal enjoyment," not "desegregation" or "integration." Republicans knew how to draft more explicit antisegregation language when they wished to do so. For example, the state constitutions of reconstructed Louisiana and South Carolina contained unambiguous prohibitions on school segregation. Republicans also were aware that courts already had interpreted state constitutional language similar to "full and equal enjoyment" to permit segregation. Thus the "full and equal enjoyment" phraseology probably was understood to be ambiguous on the integration question. Indeed, this formulation may have been approved precisely because of its ambiguity, which permitted Radical and Conservative Republicans to defend different interpretations of the statutory language before their constituents. Indeed, perhaps we should have been surprised had the Republicans not favored ambiguity on this issue, given how many of the party's senators who supported the schools provision represented states that still segregated their schools. For example, Senator Morton of Indiana, whose state did not bar school segregation until after World War II, resolutely refused to commit himself in congressional debate on the question of whether "full and equal enjoyment" precluded segregation.

McConnell places great weight on the Senate's rejection of an amendment explicitly permitting segregation. But he dismisses as a mere "clarification" amendment, which would not have altered

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76 The relevant language of these state constitutions is quoted in McConnell, supra note 2, at 964. Indeed, as McConnell notes, the first draft of Sumner's civil rights bill was more clearly desegregationist than the version that was ultimately enacted. See id. at 987-88.

77 See Cory v. Carter, 48 Ind. 327, 334-44 (1874) (interpreting state constitutional language, "equally open to all," to permit segregation).

78 Cf. Alexander M. Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 59-65 (1955) (suggesting an analogous explanation for the decision to use general language in Section One of the Fourteenth Amendment). McConnell responds that members of both Houses said that while the text was ambiguous, the intention to prohibit segregation was clear. McConnell, supra note 2, at 1072-73 & nn. 619-20. Yet all of these statements were by the bill's opponents and thus are notoriously unreliable evidence of what the bill's supporters intended it to accomplish.

79 See 2 Cong. Rec. app. at 359-61 (May 21, 1874); see also Gillette, supra note 25, at 238 (noting that Ohio Senator John Sherman during the 1874 congressional campaign endorsed separate but equal schools in localities with significant black populations).

80 See McConnell, supra note 2, at 1077-78, 1098-99, 1102.
the meaning of the civil rights bill, an unsuccessful proposal to change "full and equal enjoyment of ... common schools" to "... [of] every common school" (thus plainly barring a dual school system).  

81 Id. at 1071-72 (internal quotations omitted).


83 McConnell has another numbers problem to confront. Even if he is right that the civil rights bill with the schools provision intact did at one point enjoy majority support in both houses of Congress (and failed to pass the House only because its procedural rules effectively required the existence of a supermajority for passage), he does not claim that school integration enjoyed support by the two-thirds supermajorities necessary for passage of a constitutional amendment. In trying to meet this difficulty, McConnell inadvertently undermines the force of his own argument. He claims that what matters is not whether two-thirds of both Houses supported school desegregation in 1874, but rather whether the necessary two-thirds had committed themselves in 1866 to a principle, the logical consequences of which included school desegregation. McConnell, supra note 2, at 1099-1100. This argument, while logically coherent, seems to render superfluous the bulk of McConnell's article, which consists of a close examination of the 1875 Act debates. Either these congressional debates are evidence of what the Fourteenth Amendment meant or they are not. If they are, then it is relevant that more than one-third believed that the Fourteenth Amendment permitted school segregation. If they are not, then it is irrelevant that many congressmen (McConnell says a majority) believed the opposite.

Moreover, if McConnell's focus is on the principle embedded in the Constitution in 1866-68, rather than on the light shed on that principle by the 1875 Act debates, then the novelty of his argument disappears. Many commentators already have argued that the original understanding of the Fourteenth Amendment, interpreted at an appropriately high level of generality, supports the result in Brown. McConnell's claim to originality is his
Because congressional Democrats had unanimously opposed the Fourteenth Amendment, McConnell suggests that their subsequent opposition to the schools provision sheds no light on the Amendment's meaning. Democratic opposition to school desegregation is not probative evidence of the Fourteenth Amendment's original understanding, McConnell argues, because it was not based "on a genuine interest in faithful enforcement of the Fourteenth Amendment" but rather constituted a "rearguard action by Southern conservatives who had supported slavery [and] opposed Reconstruction."  

While McConnell's discounting of the interpretive statements of hostile Democrats seems well-founded, he fails to apply an equally suspicious scrutiny to the interpretive views of the more egalitarian Republicans. Yet Democrats and Republicans possessed precisely the same post-enactment incentive to misstate the original understanding of the Fourteenth Amendment. Democrats hostile to racial equality obviously preferred the narrowest possible reading of the Amendment. Those Republicans most committed to racial equality had an equally strong incentive to exaggerate the Amendment's scope; notwithstanding explicit denials by Republican leaders during the ratification debates that the Amendment accomplished broad egalitarian purposes. Post-enactment legislative history is of dubious relevance generally for precisely this reason—legislative proponents face a very different incentive in describing their understanding of a particular provision when it is being debated pre-enactment (read it narrowly to win the endorsement of legislators at the margin) and when it is being interpreted post-enactment (read it as broadly as necessary to accomplish one's objectives). For this reason, McConnell's reliance on pro-integration statements by congressional Republicans in the 1870s almost certainly overstates the extent of support in 1866-68 for an integrationist interpretation of the Fourteenth Amendment.

argument that, understood at the level of specific practices, the Framers intended the Fourteenth Amendment to bar school segregation. Thus, in his anxiety to solve his numbers problem—that supermajorities never supported the schools provision—McConnell risks undermining the significance of his contribution.

84 McConnell, supra note 2, at 1066-67; see id. at 986, 1048-49, 1095, 1132-33.
II. PROBLEMS WITH ORIGINALISM

Originalism as a theory of constitutional interpretation is rife with problems, which have been amply rehearsed in the literature. In attempting to justify Brown on originalist grounds, McConnell unintentionally illuminates several of these difficulties. I shall limit myself here to three of originalism's principal problems: (1) the antidemocratic nature of binding future generations to the constitutional values enshrined at a single fortuitous moment in time; (2) the problem of determining whose intentions should govern—those of the drafters or of the ratifiers—and of ascertaining what their intentions were; and (3) the difficulty of defending a focus on one out of many possible levels of abstraction at which to interpret the original intent. All three problems plague McConnell's originalist defense of Brown.

A. The Dead Hand Problem

Originalist theories of constitutional interpretation are beset by the dead hand problem. No originalist thinker of whom I am aware has convincingly explained why the present generation should be ruled from the grave. There are two separate difficul-

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It seems that originalism is most defensible in comparative terms. Originalists have offered no persuasive reason why today's People should be governed by the constitutional values of a generation long dead and gone (and which, in any event, inhabited a radically different intellectual, political, social and cultural world). Yet originalists might respond that at least those values of yesteryear were once specifically embraced by the People (through the constitutional ratification or amendment process) and thus are preferable to the manufactured values of today's unelected, remotely accountable judiciary. See, e.g., Richard S. Kay, Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses, 82 Nw. U. L. Rev. 226, 284-92 (1988) (defending originalism on this sort of comparative ground). Understood in this comparative way—as an alternative to other constitutional theories that authorize relatively unfettered judicial value creation—originalism seems less impoverished. Yet even viewed this way, it is not clear why originalism should be deemed superior to the competing alternatives. Rather, what we are left with seems to be a wash—the values of yesterday's People (as reflected by the possibly wiser, but also intellectually blinkered, Framers) as against the values of
ties here. First is the problem of fortuity: under originalism, the constitutional values that happen to be in place at the time an amendment is ratified extend their sovereignty into the future (pending achievement of the elusive supermajorities necessary to amend the Constitution). Second, justifying intergenerational binding is especially difficult when the issue to be resolved implicates attitudes and values that have shifted dramatically over time.

McConnell's own evidence demonstrates how fortuitous the consequences of constitutional originalism can be. Had the magic moment for the Fourteenth Amendment been the middle 1880s rather than the middle 1860s, the case for constitutionally mandating school desegregation would have been far stronger, at least in the North (though, concededly, perhaps not in the South). Since originalism enshrines for all time the school segregation attitudes of 1866-68, however, McConnell's originalist defense of Brown can draw no sustenance from the subsequent liberalization of Northern opinion.87

Suppose, though, that we concede McConnell's claim that the original understanding of the Fourteenth Amendment precludes school segregation. The constitutional originalist still bears the burden of explaining why a constitutional value embedded at one point in time should bind a subsequent generation facing totally different circumstances. Consider along these lines the problem of demographic change. Northern states manifesting support for school integration, whether it be in 1866-68 as McConnell argues or in the 1870s and 1880s as I have suggested, did so against the backdrop of minuscule black populations. The largest black percentage population of any Northern state in 1870 was 3.3%, in New Jersey; for most Northern states the figure was closer to 1-2%.88 As Democratic opponents of the schools provision were fond of

87 For discussion of that liberalization, see supra Part I.C.
88 See Grossman, supra note 18, at 99; Fishel, supra note 12, at 513 tbl. 1.
pointing out, Northern Republican congressmen supporting integration represented states where blacks were “as hard to find as needles in the haystack.”89 Only in the context of tiny black populations, combined with a perception (by the 1870s and 1880s) that those populations were unlikely to expand significantly in the near future, did Northern states commit themselves to school desegregation. Even then, communities with the largest black population concentrations were often informally permitted to continue their segregative practices.90 As the Northern black population began to grow more rapidly in the 1890s and 1900s and then exploded with the commencement of the Great Migration during World War I, public opinion became noticeably more resistant to school integration. Many Northern communities that had enjoyed integrated education for decades now sought to reintroduce racial segregation into their schools.91 Apparently the Northern commitment to school integration had been dependent upon a particular set of demographic facts. One must wonder why a constitutional value apparently contingent upon one demographic set of facts should bind a subsequent generation confronted by very different circumstances.

McConnell does recognize this problem, which we might label the “contingency of the moment.” Indeed, at one point he tries to conscript it for his own purposes. One obstacle confronting McConnell’s originalist defense of Brown is the ultimate deletion of the schools provision from the 1875 CRA, which raises the pos-

89 Valone, supra note 23, at 73 (quoting a Virginia congressman); see also id. at 57-58 (quoting Senator Saulsbury of Delaware).
90 See sources cited supra in note 58.
91 On the reintroduction of segregation into Northern schools, see, e.g., Michael W. Homel, Down from Equality: Black Chicagans and the Public Schools 1920-1941, at 34, 41-43 (1984) (Chicago); Meier & Rudwick, supra note 7, ch. 13 (Springfield, Ohio); id. at 310 (Wichita, Kansas and Oxford, Pennsylvania); id. at 313 tbl. 1 (fourteen small Northern and Western cities in the 1920s and 1930s): Thornbrough, supra note 17, at 332 (Indianapolis); Homel, supra note 12, at 241-42 (Harlem, Chicago, Springfield, Dayton, Gary, and Indianapolis); Kousser, supra note 17, at 226 (Kansas City, Kansas); August Meier & Elliott M. Rudwick, Early Boycotts of Segregated Schools: The Alton, Illinois Case, 1897-1908, 36 J. of Negro Educ. 394 (1967); August Meier & Elliott M. Rudwick, Early Boycotts of Segregated Schools: The East Orange, New Jersey, Experience, 1899-1906, 4 Hist. of Educ. Q. 22 (1967). It bears emphasis that these sources all describe episodes of de jure segregative action by school boards, not simply de facto segregation resulting from increasingly segregated housing patterns. Both types of segregation ultimately were common in the North.
sibility (unfortunate for McConnell) that a congressional majority did not deem public education to be one of the “civil rights” protected against racial discrimination by the Fourteenth Amendment. 92 McConnell responds that even if some Republicans in 1874-75 did not regard public education as a civil right, his defense of Brown survives because the original understanding of the civil rights concept introduced “a degree of contingency.” 93 Thus McConnell argues that the Fourteenth Amendment’s Framers intended to protect civil rights generally, not just public education specifically, against racial discrimination. Even if public education was not sufficiently well entrenched in 1866-68 to constitute a civil right, McConnell concludes, it clearly was by the turn of the century, and thus Brown rests on a secure footing.

McConnell’s embrace of this argument risks undermining the novelty of his contribution. Many other scholars have endeavored to justify Brown on originalist grounds by elevating the level of generality at which to interpret the Framers’ intentions (a technique that, if pursued with sufficient vigor, collapses the distinction between originalism and other, supposedly less constrained, interpretive theories). 94 McConnell’s claim to originality lies in his

92 We have already seen how McConnell deals with an alternative explanation for this excision: prejudice. See supra note 29 and accompanying text.
93 McConnell, supra note 2, at 1103-04.
94 See, e.g., Robert Bork, The Tempting of America: The Political Seduction of the Law 81-82 (1990) (arguing that the Fourteenth Amendment’s Framers sought to guarantee equality, but simply failed to appreciate that in practice “segregation rarely if ever produced equality”); William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 63 (1988) (“The debates on the Fourteenth Amendment were ... about high politics and fundamental principles ... [and] did not reduce the vague, open-ended, and sometimes clashing principles used by the debaters to precise, carefully bounded legal doctrine.”); Bickel, supra note 78, at 59-65 (suggesting that Moderate and Radical Republicans may have compromised on indeterminate equality language to enable each to defend their support for the Amendment to constituents of differing levels of egalitarian commitment); Walter E. Dellinger, III, School Segregation and Professor Avins’ History: A Defense of Brown v. Board of Education, 38 Miss. L.J. 248, 251-52 (1967) (embracing Bickel’s argument). For criticism of Bickel’s position, see Raoul Berger, Government by Judiciary 102-10 (1977).

I am not suggesting that the level-of-generalities argument is wrong. Indeed, I think it is right and that originalists have offered no persuasive response to it. See Klarman, supra note 83, at 770 & n.107 (noting originalist failure to deal with problem of “interpretive intentions”). My points here are only (1) that the originality of McConnell’s argument lies elsewhere and (2) that his willingness to shift levels of generality on some interpretive issues but not others is difficult to defend.
argument that, at the level of specific social practices, the Framers of the Fourteenth Amendment intended to bar school segregation.

Yet embrace of the “contingency” argument not only threatens the novelty of McConnell’s defense of Brown; it also carries logical implications that one may doubt McConnell wishes to endorse. First, if the contingency argument can justify Brown on originalist grounds, so can it validate most of post-Brown equal protection jurisprudence (for which I doubt McConnell has equal enthusiasm). Specifically, if the notion of “civil rights” possesses “a degree of contingency,” and thus is subject to change over time, why is the same not true for the notion of “protected groups,” whose civil rights the Fourteenth Amendment shelters from inequality? Of course the Amendment itself speaks not of “blacks” or of “racial minorities,” but rather of “persons” and of “citizens.” Thus, for example, the same argument that would authorize expanding civil rights to include public education would justify expanding protected groups to include women, aliens, gays, etc.95

Similarly, one must wonder why the concept of “civil rights” is contingent but the notion of “inequality” is not. Even if McConnell is correct that most Republicans in 1874-75 believed that segregation constituted inequality, by the end of the century many did not. Republicans dominated the Court that decided Plessy, and they controlled many of the Northern school boards that around this time were reintroducing segregation to the public schools.96

Finally, even McConnell’s originalist defense of Brown does not enable him to justify Court decisions such as Strauder v. West Virginia97 and Loving v. Virginia.98 McConnell accepts the conventional view that the Framers of the Fourteenth Amendment

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95 See, e.g., Frontiero v. Richardson, 411 U.S. 677, 685-86 (1973) (analogizing sex discrimination to race discrimination on the grounds that both frequently are grounded in outmoded stereotypical judgments based on immutable characteristics); Graham v. Richardson, 403 U.S. 365, 372 (1971) (noting that aliens “are a prime example of a ‘discrete and insular’ minority”); Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 Harv. L. Rev. 1285, 1299-1305 (1985).

96 On the Republican Party’s changing attitudes toward civil rights around this time, see Lewis L. Gould, The Presidency of Theodore Roosevelt 23, 118-22, 236-44 (1991); Stanley P. Hirshson, Farewell to the Bloody Shirt: Northern Republicans and the Southern Negro, 1877-1893 (1962).

97 100 U.S. 303 (1879).

98 388 U.S. 1 (1967).
distinguished civil from political and social rights, and barred racial discrimination only with regard to the former. Jury service, like voting, was plainly deemed at the time to constitute a political right and interracial marriage a social one.99 Must an originalist like McConnell thus believe that the Constitution even today permits the state to bar racial minorities from jury service and to forbid interracial marriage? Likewise, McConnell's originalist interpretation of the Fourteenth Amendment would apparently permit the state to draw racial distinctions in all areas of life not qualifying as civil rights—e.g., access to public golf courses, swimming pools, etc. 100 Thus even if McConnell has saved Brown for originalists, much else of consequence has eluded his grasp.

B. Whose Intentions Count—Drafters or Ratifiers?

Any originalist interpretive theory must take a position on whose intentions count. Because McConnell's originalist defense of Brown has difficulty accommodating the 1874 congressional election results (which seem to indicate popular opposition to the civil rights bill), he is impelled to argue that the key to the Fourteenth Amendment's original understanding lies in congressional, rather than popular, intentions. McConnell offers no general theory as to why an originalist should ascribe greater weight to the intentions of an amendment's drafters than to those of its ratifiers (or to either's constituents). Indeed such a theory seems indefensible, since it would render superfluous the ratification requirement of Article V. James Madison, a seemingly unsurpassed authority on the meaning of the Constitution, insisted that the relevant origi-

99 McConnell, supra note 2, at 1024-25. On the Republican trifurcation of rights into political, civil and social, and their ascription of jury service to the political category and interracial marriage to the social, see Alfred Avins, The Fourteenth Amendment and Jury Discrimination: The Original Understanding, 27 Fed. B.J. 257 (1967); Alfred Avins, Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent, 52 Va. L. Rev. 1224 (1966); Bickel, supra note 78; Bond, supra note 25, at 444-54, 461-63; Maltz, Civil Rights Act, supra note 7, at 624-25.

100 See Mayor of Baltimore City v. Dawson, 350 U.S. 877 (1955) (per curiam); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam). In other words, the modern Court's presumptive rule against racial classifications defies justification on originalist grounds. For the historical development of that rule, as well as the argument that the justices' reluctance to embrace it was partially a result of their originalist commitment to a hierarchy of protected rights, see Michael Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 226-45 (1991).
nal understanding was that of the state ratifying conventions, not of the Philadelphia drafters.\textsuperscript{101} Unfortunately for an originalist approach to the Fourteenth Amendment, one authoritative source of original understanding—the ratifying state legislatures—is also a source concerning which little information is available, because of the general absence of extensive recorded debates.

Rather than offering a general theory to justify his focus on the congressional understanding, McConnell argues that the Fourteenth Amendment specifically was, "far more than other amendments, . . . a congressional creation," for which congressional interpretation is therefore especially illuminating.\textsuperscript{102} Unlike other constitutional amendments which flow upwards from the states—such as women's suffrage or direct election of senators\textsuperscript{103}—the Fourteenth Amendment plainly issued downwards from Congress. McConnell's argument has some force, but it ignores the fact that congressional drafting of the Fourteenth Amendment was constrained by the Republicans' felt need to accommodate the racism of their constituents.\textsuperscript{104} Congressional Republicans in 1866 thought it imperative to maintain the requisite supermajorities to override prospective presidential vetoes of Reconstruction legislation. They were convinced that this would be impossible if they imposed black suffrage (not to mention school integration) on their unwilling constituents prior to the 1866 congressional elections. Thus, while the Fourteenth Amendment was initiated by Congress, not the states, its scope was heavily influenced by the racial attitudes of Northern voters—the same people who apparently

\textsuperscript{101} See Drew R. McCoy, The Last of the Fathers: James Madison and the Republican Legacy 75-76 (1989). Some important recent constitutional law scholarship, though prepared to jettison the formal requirements of Article V, has evinced no similar willingness to dispense with any popular ratification component. See Ackerman, We the People, supra note 30, at 48-49, 268, 285-88 ("critical elections"); Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. Chi. L. Rev. 1043 (1988) (popular referendum).

\textsuperscript{102} McConnell, supra note 2, at 1109.

\textsuperscript{103} For a fascinating discussion of the passage of these amendments, which had to be initiated by the states owing to the congressional self-entrenchment problem, see Kris W. Kobach, Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments, 103 Yale L.J. 1971 (1994).

\textsuperscript{104} For the rest of this paragraph, see supra note 38 and accompanying text.
expressed disapproval of the civil rights bill in the 1874 congressional elections.105

McConnell’s focus upon congressional, rather than state legislative or popular, understandings of the Fourteenth Amendment is problematic for another reason as well: the national Republican Party during Reconstruction was not averse to ignoring constituent sentiment when necessary to promote the interests of the party. This seemingly peculiar phenomenon is well illustrated in the adoption of the Fifteenth Amendment.106 Though most congressional Republicans had come to endorse black suffrage by 1865-66, the Northern electorate continued to show resistance. In 1865 black suffrage proposals were rejected in popular referenda in three upper North states—Minnesota, Wisconsin, and Connecticut. If even these states, possessed of the smallest black populations and the most progressive racial mores, continued to reject black suffrage, one can imagine how hostile opinion in the lower North must have been. In 1867 congressional Republicans, after witnessing the former Confederate states all but unanimously reject ratification of the Fourteenth Amendment, determined to reconstruct those governments through the imposition of black suffrage; voting requirements in Northern states were unaffected by the Reconstruction Act.107 Elections in the fall of 1867 witnessed the defeat of black suffrage referenda in several additional Northern states as well as dramatic Democratic victories in crucial states such as New York and Ohio. While there were other issues at stake in these elections, racial questions raised by Reconstruction were prepon-

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105 McConnell also argues that it makes little sense to focus upon the original understanding of the ratifiers of the Fourteenth Amendment (the state legislatures), given that the Southern states were coerced into ratifying, as a price of regaining congressional representation. See McConnell, supra note 2, at 1109. This point is persuasive, but limited in its scope; it does not justify ignoring the understanding of Northern state legislatures, who were not coerced into ratifying and whose views (or at least those of their constituents) had heavily influenced the drafting of the Amendment.

106 This account is drawn from Foner, supra note 7, at 223, 269-80, 314-15, 343; Gillette, supra note 25, at 4-20; Gillette, supra note 18, ch. 1; Maltz, supra note 20, at 131-45; Robert D. Sawrey, Dubious Victory: The Reconstruction Debate in Ohio 110-17, 130-31 (1992); Thornbrough, supra note 17, at 239-46; Fishel, supra note 18; Fishel, supra note 12, ch. 2.

107 Since blacks were majorities of the population in three Southern states, and forty percent or more of the population in five additional states, enfranchising blacks would by itself guarantee significant support for the Republican Party in the South. On black percentage populations in the Reconstruction South, see Foner, supra note 7, at 294.
derant, and observers from both parties drew the lesson that black suffrage remained a losing issue for Republicans in the North. Consequently, the national Republican Party platform of 1868, while reaffirming the Reconstruction Act's imposition of black suffrage on the South, disavowed any intention to deprive Northern states of control over their own voter qualifications—that is, the Republicans repudiated the notion of a constitutional amendment to guarantee racially impartial suffrage on a national basis.¹⁰⁸

The results of the 1868 presidential election were too close for Republican comfort. Ulysses S. Grant, the preeminent Union war hero, won just 53% of the total popular vote and less than half of the votes cast by white Americans. With most of the former Confederate states already readmitted to the Union, Southern black suffrage was now secured only by a combination of repealable state law, congressional readmission conditions widely thought to be unconstitutional,¹⁰⁹ and whatever force Section Two of the Fourteenth Amendment might exert should Democrats ever regain control of one house of Congress. Against this backdrop, Republicans apparently determined that a constitutional amendment guaranteeing black suffrage against Southern backsliding was politically imperative.¹¹⁰ Thus, in plain defiance of the platform upon which they had recently conducted a presidential campaign, and in clear

¹⁰⁸ Republican Party Platform of 1868, § 2, reprinted in National Party Platforms, supra note 34, at 39 (declaring that "the question of suffrage in all the loyal States properly belongs to the people of those States").

¹⁰⁹ Congress imposed conditions on the readmission of most of the former Confederate states, including a pledge not to restrict the suffrage on racial grounds. Even many Republicans doubted the constitutionality of these conditions. See Maltz, supra note 20, at 138-40.

¹¹⁰ Historians have disagreed over the principal motivation behind the Fifteenth Amendment. Gillette argued, in a controversial book, that the Amendment's principal purpose was the enfranchisement of Northern blacks, who it was hoped would represent the margin of victory for Republicans in several closely contested states. Gillette, supra note 18. The Coxes criticized this argument, insisting that the Republicans' dominant motivation was humanitarian. See LaWanda Cox & John Cox, Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography, 33 J. S. Hist. 303 (1967). I am most persuaded by a third view: Republicans became convinced that black suffrage in the South, first imposed under the Reconstruction Act, must be constitutionally entrenched to safeguard against backsliding once the former Confederate states had been readmitted to the Union. Republicans concluded that the constitutionalization of different voter qualification rules for the North and South, in an effort to accommodate the racist preferences of Northern constituents, was simply too hypocritical. Thus Northern Republicans were required to endure black suffrage for the
contravention of the wishes of a majority of citizens in most Northern states, Republicans rammed the Fifteenth Amendment through Congress and the requisite number of state legislatures, usually by straight party votes.\textsuperscript{111} So much for the notion of congressional agents accurately reflecting the preferences of We the People.

Enactment of the 1875 CRA was quite similar. The civil rights bill was a significant issue in the 1874 congressional elections, which constituted a massive repudiation of the Republican Party. As with black suffrage in the late 1860s, the party once again apparently had ventured out ahead of its constituents on a civil rights issue. Nevertheless, in the ensuing lame duck session of Congress, the Republicans persisted in passing a pared-down version of the civil rights bill; a majority of the House members voting for the 1875 CRA were lame ducks.\textsuperscript{112} Many Northern Republican newspapers highlighted for their readers the excision of the bill’s most controversial provision from the final Act—the schools clause—thus indicating their perception that Republican Senators in 1874 had exceeded the bounds of their constituents’ racial toleration by supporting school integration.\textsuperscript{113} With regard to civil rights issues during Reconstruction, then, the Republican Party apparently was willing on more than one occasion to elevate national party advantage over the preferences of its Northern constituents.\textsuperscript{114} Is it McConnell’s view that when congressmen differ from their constituents on a matter bearing on constitutional inter-

\textsuperscript{111}On ratification of the Fifteenth Amendment, see Gillette, supra note 18, chs. 3–8.

\textsuperscript{112}See Valone, supra note 23, at 81. I remain agnostic on the question of whether removal of the schools provision brought the 1875 Act into alignment with the views of the Republican Party’s Northern constituents or whether the Act remained more progressive than were the racial attitudes of the marginal Republican voter.

\textsuperscript{113}See Valone, supra note 23, at 104. See also Gerber, Black Ohio, supra note 17, at 48 (noting that even Republican newspapers seemed embarrassed by the 1875 CRA and spent most of their efforts denying that it would be enforced and suggesting that eventually it would be declared unconstitutional); Fishel, supra note 12, at 294 (quoting The Nation’s observation that Northern Republican newspapers showed “a languid and perfunctory interest” in the passage of the 1875 CRA).

\textsuperscript{114}For the view that the 1875 CRA was a Republican Party reward to its loyal (mostly Southern) black supporters, see supra notes 42–45 and accompanying text. Cf. Ment, supra note 13, at 286 (concluding that, at the state level, school integration legislation resulted from Republican politicians allowing “national interests and commitments to override local attitudes”).
interpretation, it is the views of the People's agents rather than of the People themselves which control?

My argument that Republican congressmen sometimes ignored constituent sentiment is not inconsistent with my earlier claim that Republican drafting of the Fourteenth Amendment "was constrained by the Republicans' felt need to accommodate the racism of their constituents." See supra text accompanying note 104. Obviously some constituent sentiment is of such high intensity that it can be ignored only at considerable electoral risk. In 1866, Northern hostility to black voting was such an example, and the Fourteenth Amendment was drafted to accommodate Northern racism. By 1868-69, when Republicans decided to ram through the Fifteenth Amendment notwithstanding opposition from some Northern constituents, three things had changed. First, Northern opposition to black voting may have mildly dissipated in the interim, as evidenced by the Minnesota and Iowa referenda approving black voting in 1868 (the first voter referenda approval of black suffrage in any state in the postwar period). Second, and more importantly, Republican Party leaders formed a new appreciation after the 1868 presidential election of the extent to which the party's electoral prospects were dependent on Southern black support. Thus party leaders probably calculated that Northern losses resulting from white voter hostility toward the Fifteenth Amendment would be outweighed by a boost to the party's Southern prospects, provided by constitutional protection for black voting. Third, Republicans probably judged that the safest time for ignoring voter sentiment was just after, rather than just before, an election. The Fifteenth Amendment was approved by Congress just months after the 1868 presidential election; the Fourteenth Amendment was approved just months before the 1866 congressional elections.

As to Republican willingness to discount hostile constituent sentiment on the schools provision in 1874, there are a number of possible explanations. First, unlike with black suffrage, no Northern referenda had taken place on school segregation; thus appraising constituent sentiment was largely a matter of guesswork, leaving greater room for error. Perhaps fewer Republicans would have supported the schools provision had they fully appreciated the damage it might do to Republican prospects in the 1874 congressional elections. Second, those Northern Republicans representing constituencies most resistant to school desegregation may have hoped that they could hide behind the ambiguous "full and equal enjoyment" language of the civil rights bill, which left open the possibility of a segregationist interpretation (as compared, for example, with the clarity of the Fifteenth Amendment, which unambiguously nullified Northern suffrage laws excluding black voters). Third, by 1874 it was clear to Republicans that their only solid electoral base in the South was the black vote; the relatively few whites who had supported Republicans in the early postbellum period generally were deserting the party by this time. Thus party leaders may have concluded that (increasingly assertive) Southern black voters had to be pacified with civil rights legislation even at the risk of alienating the few remaining Southern whites in the party. Were it not for the rampant ballot fraud and intimidation that partially nullified the Southern black vote in 1874 and 1876, this tradeoff might well have been worthwhile for the Republican Party.

To reiterate the main point, the fact that Republican congressmen accommodated their constituents' racism when drafting the Fourteenth Amendment does not negate the possibility that on other occasions they discounted constituent sentiment in pursuit of their own ideological or partisan objectives.
C. Levels of Generality

Originalists must confront the difficulty of choosing and defending a particular level of generality at which to describe the original understanding of a constitutional provision.\textsuperscript{115} We have already witnessed McConnell wrestling with this problem when he argues that the Framers of the Fourteenth Amendment meant to forbid discrimination with regard to "civil rights" generally, rather than with regard to public education specifically. But the level-of-generality problem also arises in a slightly different form, to which McConnell does not even allude. It is plausible, perhaps even probable, that Republican proponents of the 1875 CRA were more intent upon eliminating racial distinctions from formal legal enactments than upon actually desegregating any schools, public accommodations, and so forth.\textsuperscript{116} At the state level, Southern blacks had

\textsuperscript{115}See, e.g., Brest, supra note 30, at 1090-92; Dworkin, supra note 85, at 488-97. One subset of this level-of-generality problem is the so-called "interpretive intentions" issue. That is, what were the intentions of the framers of a constitutional provision with regard to how that provision should be interpreted? Conceivably, the Framers preferred some mode of constitutional interpretation other than originalism. See Klarman, supra note 85, at 770 n.107 (collecting sources noting this interpretive intentions problem); see also H. Jefferson Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985) (arguing that the Framers of the original Constitution anticipated that their handiwork would be interpreted in accord with its express language, not their unexpressed intentions). Interpretation of constitutional traditions raises precisely this same level of generalities problem. See Klarman, supra note 85, at 771 n.109 (collecting sources). Compare Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (contending that the scope of a right should be defined at "the most specific level at which a relevant tradition . . . can be identified") with Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057 (1990) (quoting this portion of Michael H. and criticizing its implication "that any other method [of analysis] is arbitrary").

\textsuperscript{116}See Foner, supra note 7, at 556 (calling the 1875 CRA "more a broad assertion of principle than a blueprint for further coercive action by the federal government"); Gillette, supra note 25, at 271 (stating that "the widely understood assumption that the measure would never operate effectively was the reason the bill had passed"); Bertram Wyatt-Brown, The Civil Rights Act of 1875, 18 W. Pol. Q. 763, 775 (1965) (calling the 1875 Act "a travesty of racial justice, because neither the white public nor its representatives expected or wanted the Act's enforcement"); cf. Fishel, supra note 12, at 500 (noting that the obvious nonenforcement of Northern states' public accommodations laws "indicated that the North was content just to have the laws in the statute books"). Leaders of local school desegregation campaigns during this period frequently insisted that their objective was to end formal state-mandated segregation rather than to achieve actual integration. See, e.g., Ment, supra note 13, at 3, 89, 149. Cf. Valone, supra note 23, at 54-55 (noting Senator Pease's observation in the debates on the 1875 CRA that what Mississippi blacks sought was elimination of racial distinctions from law, rather than actual integration of the schools).
insisted that constitutions drafted under the Reconstruction Act contain no explicit racial distinctions, while they accepted (sometimes grudgingly and sometimes not) the perpetuation of segregative practices in the public schools.\(^{117}\) Congressional Republicans supporting the schools provision in 1874 plainly were aware—if only because their Southern black colleagues repeatedly told them so—that constitutional and statutory bans on school segregation in South Carolina and Louisiana had been all but universally ignored in practice.\(^{118}\) To only a slightly lesser extent, the same was true of Southern state public accommodations laws.\(^{119}\)

Did Republican congressmen have any reason to believe that a federal statutory ban on segregation in schools or public accommodations was more likely to be enforced? Probably not. Indeed, abundant contemporaneous evidence suggests the opposite. Apparently, most observers doubted that the 1875 CRA would have significant practical ramifications for a combination of reasons: blacks would lack the financial resources to bring lawsuits; social and economic coercion would discourage litigation; blacks would be disinclined to force themselves into places where they were unwelcome; and courts probably would invalidate the law on constitutional grounds.\(^{120}\) These predictions were confirmed in the deed, as the 1875 Act was “rather lightly enforced,”\(^{121}\) and many

\(^{117}\) See Foner, supra note 7, at 321-22; see also id. at 371-72 (making a similar point with regard to black attitudes toward Southern states’ public accommodation laws); Somers, supra note 7, at 23 (making similar point regarding the support of New Orleans’ blacks for civil rights laws).

\(^{118}\) 3 Cong. Rec., 43rd Cong., 2d Sess. 945 (Feb. 3, 1875) (statement of Rep. Lynch of Mississippi); see Gillette, supra note 25, at 272.

\(^{119}\) Foner, supra note 7, at 371-72; see also Fischer, supra note 7, at 69 (New Orleans public accommodations law of 1869); id. at 85 (1873 Louisiana public accommodations law); Somers, supra note 7, at 25 (same); The Origins of Segregation, supra note 7, at 15 (1870 Mississippi public accommodations law); id. at 40 (1868 South Carolina law).

\(^{120}\) See, e.g., Gerber, Black Ohio, supra note 17, at 47-48; Gillette, supra note 25, at 275 (reporting contemporary expectations regarding the bill’s nonenforcement); Thornbrough, supra note 17, at 257-58 (noting that the 1875 CRA attracted little attention among Indiana blacks, who expected the law to have little practical effect); Valone, supra note 23, at 89-94 (quoting several contemporaneous newspaper predictions that the bill would be practically unenforceable).

\(^{121}\) Valone, supra note 23, at 105; see also Fisher, supra note 7, at 82-83 (calling enforcement of the 1875 CRA “token” in New Orleans and nonexistent in rural Louisiana).
historians have described it as a “dead letter” by the time the Supreme Court interred it in the Civil Rights Cases in 1883.\textsuperscript{122}

Thus it seems plausible that Republicans supported the schools provision, and perhaps the entire civil rights bill, primarily for symbolic reasons. Neither their desire to reward loyal black voters nor their ideological commitment to eliminating racial distinctions from law necessarily translated into a determination to achieve real world desegregation. If many Republican supporters of the schools provision in the civil rights bill expected no actual desegregation to result, what are the implications for McConnell’s originalist defense of Brown? While the justices who decided Brown anticipated massive Southern resistance to its implementation in the short term,\textsuperscript{123} they certainly expected the ruling ultimately to desegregate Southern schools; the Court did not intend Brown to be a purely symbolic statement.\textsuperscript{124} It is not clear, though, that such a ruling, intended to achieve real world consequences, can derive much support from an original understanding that may have been limited to symbolic support for race neutrality.

III. \textit{Brown}, Constitutional Theory, and the Problem of Ahistoricism

It is not surprising that Professor McConnell undertook his originalist defense of Brown. As he states in his introduction, any constitutional theory unable to accommodate Brown “is seriously discredited.”\textsuperscript{125} Because public attitudes toward state-mandated

\begin{footnotesize}
\textsuperscript{122} Foner, supra note 7, at 556 (calling the Act a “dead letter”); Gillette, supra note 25, at 279 (same); Wright, supra note 7, at 56-59 (same); Bridges, supra note 17, at 102 (citing a Republican newspaper declaring that the law for years had “been practically a dead-letter”); Fishel, supra note 12, at 373 (noting the \textit{New York Tribune}'s description of the law as “a dead letter”).


\textsuperscript{125} McConnell, supra note 2, at 952. For others making a similar point, see, e.g., Bork, supra note 94, at 77 (stating that “any theory that seeks acceptance must, as a matter of psychological fact, if not of logical necessity, account for the result in Brown”); Jeffries,
racial discrimination and segregation have undergone such revolutionary transformation in the last generation,\textsuperscript{126} nobody today cares to be portrayed as a defender of the practices that Brown invalidated. While, conceptually, it is possible to criticize Brown as a matter of constitutional theory without simultaneously endorsing the white supremacist beliefs that underlay the institution of school segregation, in practice this separation has not been so easily accomplished.\textsuperscript{127} The implications of this point are limited neither to originalists, nor to the broader category of politically conservative constitutional theorists. A liberal constitutionalist such as Bruce Ackerman, whose “constitutional dualism” seeks to justify a good deal more Warren Court activism than does McConnell’s brand of originalism, has also gone to great lengths to justify Brown.\textsuperscript{128} Even John Hart Ely’s famous effort to defend the prejudice prong of the Carolene Products footnote\textsuperscript{129} can be understood primarily as an attempt to justify Brown.\textsuperscript{130}

\textsuperscript{126} For appropriate qualification of this statement, see Michael J. Klarman, \textit{Brown}, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7, 11-13 & nn.12-13 (1994).

\textsuperscript{127} I think it was possible to accomplish this in the 1950s. See, e.g., Learned Hand, The Bill of Rights 55 (1958) (“I have never been able to understand on what basis it \textit{Brown} does or can rest except as a \textit{coup de main}.’’); Wechsler, supra note 40, at 32-34 (criticizing the Court in \textit{Brown} for its failure to justify its result on any “neutral principle”). That such questioning of \textit{Brown} is no longer acceptable today is illustrated by recent vituperative criticism of Wechsler, which was largely absent when his article first appeared. Compare Gary Peller, Neutral Principles in the 1950s, 21 U. Mich. J.L. Ref. 561 (1988) with Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421 (1960) and Louis H. Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959).

\textsuperscript{128} See Ackerman, We the People, supra note 30, at 146-50 (defending \textit{Brown} on the ground that the New Deal “constitutional moment’s” validation of activist government undermined the laissez-faire premises of \textit{Plessy v. Ferguson}).

\textsuperscript{129} United States v. Carolene Products, Co., 304 U.S. 144, 152 n.4 (1938).

\textsuperscript{130} Ely, supra note 30, ch. 6; see Klarman, supra note 85, at 788. I have argued elsewhere that the access prong of political process theory standing alone can justify \textit{Brown}. See id. at 788-812.
Nonetheless, defending Brown arguably has been of greater urgency for conservative constitutional theorists than for liberals. The explanation seems straightforward. First, political conservatives today espouse a variety of public policy positions that are contrary to those embraced by a majority of African Americans—for example, with regard to affirmative action, disparate impact rules, welfare policy, and so forth. Thus, fairly or not, conservatives are susceptible to the charge of racial insensitivity or even racism. Second, that susceptibility is compounded by the fact that in 1954 it was, generally speaking, conservatives who criticized the Brown decision—on grounds of federalism, originalism, the inability of law to coerce social change, etc.\(^1\)

Thus it is perfectly understandable, if unfortunate, that conservatives have felt compelled to adjust/distort their constitutional theories to accommodate Brown. Robert Bork is perhaps the most famous exemplar of this phenomenon, though other conservatives have also succumbed to this temptation.\(^2\) That a conservative

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\(^1\) For example, President Eisenhower refused to endorse Brown publicly and criticized it extensively in private. See 2 Stephen E. Ambrose, Eisenhower: The President 190-91, 327-28 (1984); Robert F. Burk, The Eisenhower Administration and Black Civil Rights 144, 165-66, 192 (1984). Within the Court, generally speaking, the more liberal justices found Brown an easier issue than did the conservatives. Compare Douglas Conference Notes, Brown v. Board of Educ. (Dec. 13, 1952) (Library of Congress, Douglas Papers, Box 1149, case file: segregation cases) (photocopy on file with the Virginia Law Review Association) (statement of Justice Black) (declaring that the intention of segregation laws was “to discriminate because of color,” while the “basic purpose” of the Fourteenth Amendment was “protection of the negro against discrimination”) and id. (statement of Justice William O. Douglas) (declaring that “segregation is an easy problem—no classifications on the basis of race can be made”) (emphasis added) with id. (statement of Justice Felix Frankfurter) (wondering how Justice Black could “know the purpose of the 14th amendment” and declaring that he [Frankfurter] had “read all of its history and he cannot say it meant to abolish segregation”); Jackson Draft Concurrence, supra note 124, at 5 (“Layman as well as lawyer must query how it is that the Constitution this morning forbids what for three-quarters of a century it has tolerated or approved.”).

\(^2\) Bork, supra note 94, at 76, 81-82 (arguing that the Framers of the Fourteenth Amendment intended to guarantee equality and simply failed to appreciate, as a practical matter, that segregated facilities could not be equal); see also Robert F. Nagel, Constitutional Cultures: The Mentality and Consequences of Judicial Review 5 (1989) (defending Brown on the basis of “a body of common experience” demonstrating that “racial exclusion unmistakably involved acute insult and profound political injustice”); Lino A. Graglia, Remarks at Roundtable Discussion of the Judiciary Act of 1789 (Feb. 10, 1989), in 14 Nova L. Rev. 269, 273-74 (1989); Harrison, supra note 125, at 1462 (defending Brown on the ground that public schools, financed by general taxation, constitute a privilege of citizenship, protected against abridgement by the Fourteenth Amendment).
commentator like McConnell should offer a new and invigorated originalist defense of Brown is thus entirely predictable.

Yet most of the recent theoretical justifications for Brown, whether liberal or conservative, are no more convincing than is McConnell's.\textsuperscript{133} It is unfortunate that constitutional theorists have felt so compelled to make the effort. The perceived exigency of justifying Brown represents, I believe, one manifestation of the beleaguerment of constitutional theory by ahistoricism—that is, the failure to understand the past contextually.

In 1995 Brown seems unambiguously right, if anything is right. For a constitutional theory to be unable to justify such a normatively compelling result seems fatal. Yet Brown in 1954 was not seen to be so obviously correct. Contemporaneous opinion polls revealed the country to be divided roughly in half on the segregation issue;\textsuperscript{134} archival evidence shows the justices deciding Brown to have been terribly conflicted;\textsuperscript{135} and the President of the United States privately deemed the decision to have been a grave mistake. For a particular constitutional theory to be unable to justify a decision that was contemporaneously so controversial seems far less devastating than its inability to accommodate a result that is universally applauded.

But see Avins, supra note 43, at 246 (calling Brown "an unwarranted exercise of non-existent authority").

\textsuperscript{133} For criticism of Ackerman, see Klarman, supra note 32, at 786-88. For criticism of Bork, see Posner, supra note 125, at 1374-76. For criticism of Ely, see, e.g., Paul Brest, The Substance of Process, 42 Ohio St. L.J. 131 (1981); Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063 (1980). For criticism of Klarman, see Daniel R. Ortiz, Pursuing a Perfect Politics: The Allure and Failure of Process Theory, 77 Va. L. Rev. 721, 729-30 n.32 (1991). Unsurprisingly, I have yet to be convinced that my effort to defend Brown on quasi-access grounds is doomed to failure. For a preliminary response to Professor Ortiz's criticism, see Klarman, supra note 85, at 814 n.297.

\textsuperscript{134} See Klarman, supra note 85, at 817 n.309 (citing contemporaneous opinion surveys).

\textsuperscript{135} For conflicting interpretations of the archival evidence, compare Tushnet, supra note 123, ch. 13 (arguing that the justices in their conference discussions of Brown were simply "talking through their concerns about what they knew they were going to do"), with Michael J. Klarman, Civil Rights Law: Who Made It and How Much Did It Matter?, 83 Geo. L.J. 433, 436-46 (1994) (suggesting that the justices in Brown were initially "deeply divided"). See also Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality chs. 23-25 (1975) (providing a detailed review of the justices' internal debate on Brown). Tushnet's determination to portray Brown as an easy decision for the justices may be another manifestation of our ahistorical failure to recapture the decisionmaking context of 1954.
This perceived exigency to justify *Brown* is not the only consequence of approaching constitutional theory ahistorically. Just as we seem reluctant to acknowledge that *Brown* in its time was a genuinely controversial decision, so do we seem unwilling to accept the converse—that certain rulings that are universally condemned today were quite uncontroversial in their time and probably were not realistically subject to contrary resolution. Much as the felt imperative to justify *Brown* has distorted normative constitutional theory, the perceived exigency to discredit decisions such as *Plessy* has distorted positive constitutional theory, by inflating our evaluation of the Court’s capacity to protect minority rights from majoritarian oppression.

Scholarly treatments of *Plessy* and *Korematsu v. United States*\(^\text{136}\) are perhaps the most notorious examples of our resistance to understanding within their historical context past decisions whose values are universally repudiated today. An historicist approach would regard such decisions as regrettable, but essentially inevitable, given the background social and political context within which the Court necessarily functions.\(^\text{137}\) Most modern constitutional

\(^{136}\) 324 U.S. 214 (1944).

\(^{137}\) I elaborate this argument and briefly describe the background context of *Plessy* and *Korematsu* in Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. (forthcoming Feb. 1996). I do not mean to suggest that all commentators have succumbed to ahistorical temptations. Some constitutional historians have accurately portrayed *Plessy* as an inevitable product of its times. See, e.g., James W. Ely, Jr., The Chief Justiceship of Melville W. Fuller 1888-1910, at 155 (1995) (noting that most criticism of *Plessy* "fails to consider the political and moral realities that severely restricted the Court in dealing with race relations"); Charles A. Lofgren, The Plessy Case: A Legal-Historical Interpretation 4 (1987) ("[S]imply condemning the decision promotes an understanding neither of it nor of America in the late nineteenth century."); William M. Wieck, Liberty Under Law: The Supreme Court in American Life 104 (1988) ("*Plessy v. Ferguson* seems perverse to a modern reader, but it must be understood in the context of its era.").

Any claim that particular Court decisions were "inevitable" raises complex questions of historical determinism which cannot be adequately addressed here. I limit myself to two points. First, I doubt that many commentators would insist that any Court decision is within the realm of possibility at any particular point in time. I am aware of no commentator who would contend, for example, that the Court plausibly might have constitutionally protected abortion rights or gay rights in the first half of the twentieth century (any more than it might plausibly defend animal rights under the Fourteenth Amendment today). Thus the question of determinism clearly is one of degree rather than of kind—how contrary to prevalent norms must a ruling be before it surpasses the bounds of possibility?
commentators, however, have portrayed these decisions as unfortunate "mistakes," which realistically could have been averted had the justices simply displayed a little greater wisdom, fortitude or good faith. Yet it is implausible to believe that either *Plessy* or *Korematsu* (at least at a time when the war's result was genuinely in doubt) could have come out the other way, given the background context of the decisions and the limited counter-majoritarian inclinations and capacities of the justices. No Court decision in American history has been *that* counter-majoritarian.

Misdescribing the Court's past failures to protect the civil rights and civil liberties that are so valued today as avoidable "mistakes," rather than as inevitable byproducts of very different political and social milieus, enables us to sustain the myth of the Court as

Second, I do not believe that the simple fact that *Plessy* and *Korematsu* generated dissents establishes that they might realistically have come out the other way. It is not terribly surprising that a public policy (leaving to state resolution the question of mandatory segregation on common carriers) supported by 80-90% of the public commands support from only 80-90% of the justices (*Plessy* was a seven-to-one decision).

*Korematsu*, of course, was a closer decision (six-to-three), but the actual vote is misleading for several reasons. First, one never knows for sure whether dissenters would have stuck to their guns had actual responsibility for determining an outcome been at stake. Second, Justice Robert Jackson made clear in his dissenting opinion that he was not about to enjoin the military from enforcing its evacuation order (he only refused to lend judicial assistance to a criminal prosecution of resisters). Third, and most importantly, the decision in *Korematsu* was announced in December 1944, when the outcome of the war was no longer seriously in doubt and the military itself had conceded the lack of necessity for the continued exclusion of Japanese-Americans from the West Coast. I suspect that had the evacuation order reached the Court earlier in the war, the justices would have unanimously rejected the constitutional challenge. Cf. Hirabayashi v. United States, 320 U.S. 81 (1943) (rejecting unanimously a constitutional challenge to the less intrusive curfew restrictions imposed upon Japanese-Americans).


139 See Klarman, supra note 137 (manuscript Parts I & III) (redescribing some of the leading exemplars of the civil rights and civil liberties revolutions as involving only marginally counter-majoritarian contributions).
"countermajoritarian hero."\textsuperscript{140} The myth can survive only if obvious counterexamples are dismissed as contingent mistakes rather than understood, more realistically, as the Court’s inevitable capitulations to dominant social norms.

Moreover, just as we write off the Court’s many past failures to protect civil rights and civil liberties as aberrant exceptions, so do we exaggerate the countermajoritarian nature of the Court’s actual interventions. The culprit, once again, is our failure to approach the subject with adequate sensitivity to historical context.

Constitutional scholars have paid exceedingly little attention to the historical forces—political, social, economic, ideological, cultural—that rendered possible the twentieth-century civil rights and civil liberties revolution. By essentially ignoring the forces that rendered possible the Court’s interventions, constitutional scholars and judges have ascribed undue responsibility for the legal changes to the Court.\textsuperscript{141} Thus, to take just one prevalent example, legal scholars have overwhelmingly portrayed Brown as the principal cause of the civil rights revolution, rather than seeing the decision itself as the product of deep social and political forces impelling the nation gradually but ineluctably toward greater racial equality—forces such as the Great Migration, the increasing urbanization of the black population, the decline of Southern agriculture, the increasing potency of the Northern black vote, the burgeoning black middle class, increasing black literacy rates, the egalitarian ideology of World War II, the Cold War imperative for racial change, and the growing social and economic integration of the

\textsuperscript{140} See id. (manuscript Parts I-II) (describing and criticizing the myth of the Court as "countermajoritarian hero" and offering some explanations as to why this myth has survived in spite of the abundant evidence contravening it).

\textsuperscript{141} See, e.g., Chambers v. Florida, 309 U.S. 227, 241 (1940) (Black, J.) (declaring that courts stand "as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement"); Michael J. Perry, Noninterpretive Review in Human Rights Cases: A Functional Justification, 56 N.Y.U. L. Rev. 278, 299 (1981) (defending judicial review on the ground that without it, there would be no basis for objecting "to laws authorizing torture, establishing slavery, or even instituting another Holocaust"); For numerous additional examples, see Klarman, supra note 137 (manuscript at 1-3 & nn.1-13). Judges, of course, have an obvious incentive to invest in this myth. Constitutional scholars, one would like to think, have an incentive to get the facts right.
nation.\textsuperscript{142} This scholarly neglect of background historical forces has produced a widespread conviction that the Court has played, and can continue to play, a more fundamental role in safeguarding civil rights and civil liberties than is plausibly the case.\textsuperscript{143}

Constitutional theory—both normative and positive—would thus benefit from a substantial dose of historicism. Resisting the natural tendency to think about the past ahistorically would permit an end to the demand that all constitutional theories be able to justify Brown—a decision that resisted easy justification on the basis of the traditional sources of constitutional interpretation\textsuperscript{144} (and that was plainly indefensible on narrow originalist terms).\textsuperscript{145} Further, an historicist approach to constitutional law would permit an end to the pretense that the Court realistically could have invalidated racial segregation at a time when the nation overwhelmingly sympathized with the practice; protected the free expression rights of political radicals at a time when they were widely deemed to pose a genuine threat to the nation’s well-being; or mandated a strong separation of church and state at a time when the country continued to operate under an informal Protestant establish-

\textsuperscript{142} For scholarly exaggerations of Brown’s importance, see Klarman, supra note 137 (manuscript at 23-24 & nn. 88-91) (listing numerous examples). I have discussed these historical forces at some length in Klarman, supra note 126, at 13-75.

\textsuperscript{143} The number of exceptions to this generalization is slowly rising in the area of race relations, though many of the leading contributors are not academic lawyers. See Doug McAdam, Political Process and the Development of Black Insurgency ch. 5 (1982); Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? ch. 4 (1991); see also Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61 (1988) (noting the connection between the Cold War and civil rights advancement). In areas such as free speech, separation of church and state, and criminal procedure, though, the legal scholarship is almost entirely devoid of the relevant social and political history. For an initial effort at filling this void, see Klarman, supra note 137 (manuscript Part III).

\textsuperscript{144} As Justice Jackson candidly admitted, in an unpublished draft concurrence:

Convenient as it would be to reach an opposite conclusion, I simply cannot find in the conventional material of constitutional interpretation any justification for saying that in maintaining segregated schools any state or the District of Columbia can be judicially decreed, up to the date of this decision, to have violated the fourteenth amendment.

Jackson Draft Concurrence, supra note 124, at 10.

\textsuperscript{145} See supra Part I; see also Douglas Conference Notes, supra note 131 (statement of Justice Jackson) ("[N]othing in the history of the 14th amendment says this [school segregation] is unconstitutional.").
ment. To approach constitutional theory ahistorically is to ensure that it be done badly; we can do better.

\footnote{146 See Klarman, supra note 137 (manuscript Part III).}